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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF WATERSHED MANAGEMENT

Water Quality Management Planning

Readoption with Amendments: N.J.A.C. 7:15

Adopted New Rules: N.J.A.C. 7:15-1.6, 1.7, 3.10, 5.24, 5.25 and 5.26

Adopted Repeals and New Rules: N.J.A.C. 7:15-5.1, 5.2, 5.13, 5.14, 6 and 8

Adopted Repeals: N.J.A.C. 7:15-4.5, 5.5, 5.7, 5.9 through 5.12, 5.21 and 7

Proposed: May 21, 2007 39 N.J.R. 1870(a)

Adopted: May, 21, 2008 by Lisa P. Jackson,
Commissioner, Department of Environmental
Protection

Filed: , 2008 as R. ,with substantive and technical changes not requiring additional public notice and comment (See N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 13:1D-1 et seq., 13:19-1 et seq., 13:20-1 et seq., 23:2A-1 et seq., 40:55D 93-99, 58:1A-1 et seq., 58:10A-1 et seq., 58:11A-1 et seq., 58:16A-50 et seq., 58:11-23 et seq., and 58:29-1 et seq.

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DEP Docket Number: 10-07-04/527

Effective Date:

Expiration Date:

The Department of Environmental Protection (Department) is readopting the Water Quality Management Planning rules, N.J.A.C. 7:15, with amendments, repeals and new rules. The proposal was published on May 21, 2007. The comment period was originally scheduled to close on July 20, 2007. Due to the complexity of the proposal and in response to public requests for additional time to view the proposal, the comment period was extended from July 20, 2007 to August 20, 2007 (see 39 N.J.R. 2583(b)).

Summary of Hearing Officer's Recommendation and Agency Response:

Three public hearings were held on June 8, 2007, at 1:00 P.M., at the Atlantic County Library in Galloway Township, New Jersey; June 11, 2007, at 1:00 P.M., at the Lewis Morris County Park and Cultural Center in Morris Township, New Jersey; and June 15, 2007, at 1:00 P.M., at the Department's Public Hearing Room, Trenton, New Jersey. Barbara Greenhalgh-Weidman, Supervising Environmental Specialist in the Division of Watershed Management was the hearing officer for the first and third hearings. Barbara Hirst, Bureau Chief in the Division of Watershed Management was the hearing officer for the second hearing. Forty-two people attended the three

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hearings and 15 made public comments. The hearing officers recommended that the proposal be adopted as proposed/ with amendments not requiring additional notice.

The hearing record is available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs

Attn: DEP Docket No. 10-07-04/527

New Jersey Department of Environmental Protection

401 East State Street, 4th Floor

P.O. Box 402

Trenton, New Jersey, 08625-0402.

Summary of Public Comments and Agency Responses

The Department accepted comments on the proposal through August 20, 2007. Eighty-nine people provided individual written and/or oral comments. Comments were also received that while directed to this rulemaking docket, were actually on proposed amendments to the Surface Water Quality Standards, N.J.A.C. 7:9B, DEP Docket No. 11-07-04/557, which were proposed in the same issue of the New Jersey Register as this rulemaking. Accordingly, comments on the proposed Surface Water Quality Standards have been docketed as comments on that proposal and are addressed in the adoption of that rulemaking in the June 16, 2008 issue of the New Jersey Register (40 N.J.R.). The following individuals provided written and /or oral comments on the proposal:

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1. Amidon, Tom. Omni Environmental LLC on behalf of Montgomery Township

2. Beckley, John. County of Hunterdon Department of Health

3. Berg, Gina. Water Resource Coordinator for Burlington County

4. Bongiovanni, Robert N. Executive Director, Pequannock, Lincoln Park and Fairfield Sewerage Authority (Two Bridges SA)

5. Brake, Dianne R. President, PlanSmart NJ (formerly Regional Planning Partnership)

6. Brogan, David H. Vice President, Environmental Policy, New Jersey Business and Industry Association

7. Brown, Kieran A. PSEG Services Corporation

8. Byer, David. Staff Attorney, Clean Ocean Action

9. Bzik, Robert. Director of Planning, Somerset County Planning Board

10. Carluccio, Tracy. Deputy Director, Delaware Riverkeeper

11. Chrystie, Paul. Coalition for Affordable Housing & the Environment

12. Coffey, Jennifer. Director of Watershed Management for Stony Brook-Millstone Watershed Association

13. D'Amico, John. Former State Senator, Former Monmouth County Freeholder

14. Dech, David K. Planning Director, County of Warren Planning Department

15. Decker, George. Chairman, Pompton Lakes Borough Municipal Utilities Authority

16. DeGerolamo, David R. Director of Corporate Development, Aqua New Jersey, Inc.

17. Dillingham, Tim. Executive Director, American Littoral Society

18. Dressel, Jr., William G. Executive Director, New Jersey State League of Municipalities

19. Dziamara, Sue. Director, Hunterdon County Planning Department

20. Egenton, Michael A. Vice President of Environment and Transportation, The New Jersey

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State Chamber of Commerce

21. Ellis, Albert S. Mayor, Borough of Watchung

22. Fair, Abigail. Association of New Jersey Environmental Commissions

23. Fittz, Joan. Executive Director, New Jersey Manufactured Housing Association

24. Frey, Wilma. Highlands Project Manager for New Jersey Conservation Foundation

25. Galletta, Dan. Manager of Ole Hansen and Sons, Inc.

26. George-Cheniara, Elizabeth. New Jersey Builders Association

27. Gigliotti, Chris. Village Homes & Properties, LLC.

28. Goldschlag, Bonnie. Assistant Director of Planning, Monmouth County Planning Department

29. Grasso, Jarrod C. Vice President of Government Affairs, New Jersey Association of REALTORS®

30. Green, Elkins. Director, New Jersey Department of Transportation

31. Guida, Christopher. Executive Director, Warren County (Pequest River) Municipal Utilities Authority

32. Gulbinsky, Ellen. Executive Director, Association of Environmental Authorities

33. Hampton, Steven W. Deputy County Administrator for the Cape May County Board of Chosen Freeholders

34. Higgins, Andrew J. Vice President and Chief Engineer for Applied Water Management, Inc.

35. Ho, Edward K. P. Executive Director, Rockaway Valley Regional Sewerage Authority

36. Hoffmann, Carol S.

37. Hubbs, George. Chairman, Elk Township Municipal Utilities Authority

38. Kaiser, Leonard R. Executive Director, Bergen County Utilities Authority

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39. Kennedy, Susan. Policy Advocate for American Littoral Society

40. Koza, Mary Beth. Director, Environment, Health & Safety, Bristol-Myers Squibb Company

41. Kozinski, Jane. Saul Ewing Attorneys at Law on behalf of Avandale Investments, LLC

42. Kozinski, Jane. Saul Ewing Attorneys at Law on behalf of Sydney and Alan Krupnick

43. Kozinski, Jane. Saul Ewing Attorneys at Law on behalf of Quick Chek Corporation

44. Kozinski, Jane. Saul Ewing Attorneys at Law on behalf of SJM Properties

45. Kozinski, Jane. Saul Ewing Attorneys at Law on behalf of Flynn Tucker LLC

46. Kricun, Andrew. Deputy Executive Director/Chief Engineer, Camden County Municipal Utilities Authority

47. Kron, Kurt F. For the Montvale Community Association

48. La Place, Michael. Planning Director, County of Passaic Planning Department

49. LeMense, Julia A. Staff Attorney, Rutgers Environmental Law Clinic on behalf of Susan Kraham, New Jersey Audubon Society; Jeff Tittel, New Jersey Chapter Sierra Club; David Pringle, New Jersey Environmental Federation; Doug O'Malley, Environment New Jersey; Alison Mitchell, New Jersey Conservation Foundation; and Julia Somers, New Jersey Highlands Coalition

50. Leonik, Diane. Cape May County Municipal Utilities Authority

51. Lewis, Donna M. Planning Director, County of Mercer Division of Planning

52. Marsh, Ed.

53. McCarthy, Suzanne. On behalf of the Delaware Valley Regional Planning Commission, Tri-County Water Quality Management Planning Board

54. McGuinness, Michael G. Executive Director, National Association of Industrial and Office

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Properties, New Jersey Chapter

55. McKeon, David. Planning Director for Ocean County

56. Minervini, William P.

57. Mittman, Christine. Director of Planning, D.R. Horton, Inc.

58. Nieuwenhuis, Richard E. President, New Jersey Farm Bureau

59. Nogaki, Jane. New Jersey Environmental Federation

60. Norkis, Charles M. Executive Director, Cape May County Municipal Utilities Authority

61. O'Keefe, Patrick. New Jersey Builders Association

62. Ober, John. Chairman, Township of Pilesgrove Planning Board

63. Paretti, Diane. West Milford Township Municipal Utilities Authority

64. Pisauro, Jr., Michael L. Frascella & Pisauro, LLC for New Jersey Environmental Lobby

65. Pringle, David. Campaign Director for New Jersey Environmental Federation

66. Purcell, Monique. Director, New Jersey Department of Agriculture, Division of Agriculture & Natural Resources

67. Rattner, Steven. Chairman, Musconetcong Sewerage Authority

68. Ruby, Patricia. Conservation Program Manager, Upper Raritan Watershed Association

69. Russo, Anthony. Director of Regulatory Affairs, Chemistry Council of New Jersey

70. Sachau, Barbara.

71. Samson, Jennifer. Principal Scientist, Clean Ocean Action

72. Shapella, Ron. Mayor, West Amwell Township

73. Smith, Bruce D. Executive Director, Hackettstown Municipal Utilities Authority

74. Smith, Marianne. Township Manager, Hardyston Township

75. Snyder, Eric K. Planning Director, County of Sussex, Division of Planning

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76. Somers, Julia M. Executive Director, New Jersey Highlands Coalition

77. Spinelli, Benjamin L. Executive Director, New Jersey Department of Community Affairs, Office of Smart Growth

78. Sturm, Chris. Senior Director of State Policy, New Jersey Future

79. Tittel, Jeff. Director, New Jersey Sierra Club

80. van Rossum, Maya K. the Delaware Riverkeeper

81. Ververides, George M. Director, County of Middlesex Department of Planning

82. Waltman, Jim. Stony Brook-Millstone Watershed Association. Also from Fred Akers, Great Egg Harbor Watershed Association; Rich Bizub, Pinelands Preservation Alliance; Willie deCamp, Jr., Save Barnegat Bay; Joan Fischer, Great Swamp Watershed Association; Alan Godber, Lawrence Brook Watershed Partnership; Susan Kraham, New Jersey Audubon Society; Ross Kusher, Pequannock River Coalition; Debbie Lord, Pompeston Creek Watershed Association; Nancy Merritt, Salem County Watershed Task Force; Alison Mitchell, New Jersey Conservation Foundation; Robin O'Hearn, Skylands CLEAN Inc.; Barbara Rich, Rancocas Creek Conservancy; Steve Taylor, Manasquan River Watershed Association; and David Wheeler, Edison Wetlands Association

83. Wengrowski, Ed.

84. Wengrowski, Edward. Wastewater Management Coordinator, The Pinelands Commission

85. Westergaard, Richard. Acting Assistant Director, Gloucester County Department of Public Works – Planning Division

86. Wolfe, Bill. Director, New Jersey Public Employees for Environmental Responsibility

87. Wynne, Michael C. Executive Director, Hanover Sewerage Authority

88. Zabihach, Raymond. Planning Board Director, County of Morris

89. Zipf, Cindy. Executive Director, Clean Ocean Action

The timely submitted comments and the Department's responses are summarized below. The number(s) in parentheses after each comment correspond to the respective commenter(s) identified above.

1. COMMENT: These rules are long overdue. This is the sixth attempt in 15 years to update these rules. All have failed. Most attempts to change the rules were opposed because while updating the rules is critical, earlier rule proposals would have allowed 300,000 to 400,000 additional acres to be developed and additional billions of gallons of sewage to be discharged to the State's waterways without appropriate environmental reviews.

The issue of wastewater treatment and the placement of sewer lines determines where development goes in New Jersey. Sprawl vs. real smart growth is definitely the issue here. Whether drinking water supplies are polluted and depleted or protected will rest on these rules, and whether endangered species and habitats have been preserved. (59)

2. COMMENT: While working to get an adequate set of rules for more than a dozen years, that the long over-due Water Quality Management Planning rules have finally been proposed by the Department of Environmental Protection should be applauded. The protection of threatened and endangered species, the protection of Category One stream buffers, finally regulating development on septic systems, connecting sewer service areas to the availability of drinking water, having a target ground water standard of two mg/liter (mg/L) of nitrates, and finally

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having a septic rule in place are all extremely positive steps in the right direction for the protection of water quality in New Jersey. (65, 79)

3. COMMENT: These are very strong rules that are appreciated and supported with particular emphasis on the way in which they relate to the nitrate standard and also taking into consideration the landscape project. (12)

4. COMMENT: These rules, more than anything else, will determine the impact of development on water quality and water quantity. Deciding where sewers go has a major effect on land use decisions and, therefore, New Jersey's waters. The WQMP rules will, both directly and indirectly, determine how much development will take place and where, how much water will be polluted, and how much water will be protected, making them more significant in terms of their impact on the State of New Jersey than virtually any other rule or rule proposal. (79)

5. COMMENT: Previous efforts to update these rules failed. Some proposals were never formally made while others were opposed due to grandfathering an additional three or four thousand acres of additional development on sewers and a billion gallons of sewage in waterways without appropriate environmental reviews. Many sewer service areas and sewage treatment plants are beyond antiquated because they were built before 1972 when the Clean Water Act was first passed. They were never updated and environmental reviews were never properly done for them.

This proposal is critical and long overdue. It has taken fifteen years to update these antiquated rules. These rules are critical because the development of roads, sewers, and wastewater systems dictate where growth goes, and these rules can dictate whether it's sprawl or smart growth, whether drinking water supplies will be depleted, protected or polluted, and much more. The proposal is still in review, but so far it is clear that when these rules apply, they will be much better than the existing rules and all of the past proposals. (65)

6. COMMENT: These rules should proceed as proposed, finally providing an integrated plan focusing on water quality and wastewater management. The restoration, enhancement, maintenance and improvement of our waters, coastal and freshwater, are critical and crucial because every resident in the State depends upon the quality of water for their drinking, sustenance, fishing, and especially in coastal areas, for recreation and tourism. These rules, to the extent that they help restore, enhance and maintain the chemical, physical and biological integrity of the State's surface waters will move us in the right direction, protect public health and insure that these assets are present for all New Jerseyans, not just for this generation, but for future generations. The proposed amendments that require watershed management as an integral part of local wastewater planning should be supported. (13)

7. COMMENT: The intent of the rule proposal is applauded. It promotes regional planning and will significantly improve protection of the State's critical resources, especially as it addresses both water quality and supply issues. (68)

8. COMMENT: The Department's efforts to protect water supplies and water quality in New Jersey by issuing the WQMP rule proposal is commended. (7)

9. COMMENT: The proposed Water quality Management Planning rules are a long overdue modernization and vast improvement over the existing rule. The rationale and pressing need for revision of the existing rule was expressed well. The Department's effort to match in quality and effectiveness New Jersey's watershed planning program with other State and Federal environmental programs and laws, making it possible for New Jersey to meet the mandated goals of the Clean Water Act, is appreciated. With this rule proposal, New Jersey comes further along towards maintaining and restoring the health of New Jersey's waters and related ecosystems than any other State in the Delaware River Basin. Considering the substantial impairments and pollution problems New Jersey and the Delaware River Watershed face, this is a welcome and urgently needed effort. (10, 80)

RESPONSE TO COMMENTS 1 THROUGH 9: The Department concurs that sound water resource planning is essential to ensure that the mandate to restore, enhance, and protect the quality of New Jersey's natural environment, as well as to ensuring equitable and beneficial uses of the State's waters. New Jersey's surface and ground waters are a finite resource that belong to each and every resident, held in trust and managed by the State of New Jersey. Long-term protection of this resource is imperative to the health, welfare, and quality of life for all residents of New Jersey (human and non-human alike). Clean and plentiful water is essential to support human needs including drinking water, agricultural production, fisheries, recreation and industry. Clean and plentiful water is also essential to the maintenance, migration and propagation of fish

and wildlife resources and the maintenance of a healthy, balanced and sustainable ecosystem, which is also critical to the human condition. This rule contains key provisions that will enhance the Department's ability to plan holistically to accomplish this mandate and provide a sound basis for permit decisions.

10. COMMENT: The housing boom in the past decades, for the first time, is straining the environmental resources of rural areas. If this plan moves forward, will it most importantly protect current residents in addition to planning for future development? (36)

RESPONSE: The Department recognizes that water resource planning needs to concern itself both with future development as well as existing development in order to achieve its mandate. Future development must be carefully managed so as to ensure that existing water resource concerns are not exacerbated. However, many water resource concerns have evolved as the result of the cumulative effects of development and land uses that exist today. Provisions of the rule are intended to address water resource issues that affect existing residents, such as the development of TMDLs where surface waters are found to be impaired. Implementation of TMDLs, or watershed restoration plans, will improve water quality where it has been degraded by existing discharges and land use practices. In addition, requiring that sustainable water supply is identified for planned future development will ensure that existing residents continue to enjoy a reliable water supply. In short, the protections built into the amended rules seek to assure that future development is only done in a manner that assures that environmental resources are preserved and improved both for current and future residents of the State.

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11. COMMENT: The rules support the spirit of the Water Quality Planning Act by demonstrating a holistic approach to water quality planning through consideration of the source and fate of water, from water supply planning to wastewater treatment, including the beneficial reuse of wastewater. The expressed need for capacity-based planning, that emphasizes water as a natural resource and an integral component of New Jersey's economy, supports a more rational approach to water quality. This factual information establishes a sound basis for water quality planning and provides future opportunities for innovative site design. (51)

RESPONSE: The Department acknowledges this comment in support of the rules.

12. COMMENT: The rule proposal is very detailed. A lot of work and effort has gone into the rule proposal which needs to be acknowledged. It is not an easy task that the Department has undertaken and the intentions are definitely admirable. (55)

13. COMMENT: The proposed rule offers an end to the many years of layering amendments to outdated plans, and in turn, begins to address the vision for water quality protection, as outlined in the Clean Water Act. Congratulations are offered to those who labored so hard and so long to produce the rules. (5)

14. COMMENT: Commendations to the Department for its efforts in the WQMP rule proposal. The Department's intent to protect New Jersey's water supplies and water quality, to streamline the water quality planning approval process and to facilitate Department outreach and coordination of WMP review is supported. (40)

15. COMMENT: The Department is applauded for its hard work in preparing these proposed rules. The proposed changes will bring the WQMP rules into alignment with existing regulations such as those adopted under the Stormwater Management Act, the Flood Hazard Area Control Act, and the Wetlands Protection Act; embrace and codify the importance of the Landscape Project; and finally provide habitat protection for threatened & endangered species in New Jersey. (82)

16. COMMENT: The New Jersey Department of Environmental Protection should be lauded for its efforts at protecting New Jersey's water supplies and water quality through this planning effort. The proposal is comprehensive and very aggressive in terms of the development and approval of water quality management plans. (7, 20, 69)

RESPONSE TO COMMENTS 12 THROUGH 16: The Department acknowledges the support and commendations expressed with regard to the Department's efforts to comprehensively revise the Water Quality Management Planning rules.

17. COMMENT: The rule proposal is very long and complicated but there are some parts of the rule that are definitely an improvement over the existing rules. One of the main provisions in the rule is that wastewater planning entities must do wastewater management plans. Under the new rule, if a wastewater management plan is not updated or submitted within a nine month period after passage of the rule, then their sewer service areas will be revoked. Another positive is the new rule requires that sewer service areas avoid environmentally sensitive areas, coastal

planning areas and other special restricted areas as part of the wastewater management plan while the current rule contains no standard for where sewer service areas are delineated. The inclusion of the two milligram per liter nitrate standard is a definite improvement and entities are required to comply with the NJPDES stormwater rules and riparian zones will be protected to a certain extent. Under the old rule, there were no nitrate, stormwater or riparian zone standards. (39)

18. COMMENT: The rule proposal offers a comprehensive and innovative approach to address the Department's concerns with difficulties with WMP preparation, Department WMP review time frames, WMP agencies lacking authority to adjust sewer service areas and land use zoning, lack of WMP compliance mechanisms, State Plan integration, lack of clear standards for approval of WMPs and that the impacts of individual subsurface sewage disposal systems were not addressed. (78)

19. COMMENT: It is very positive that the proposed rule provides for a better coordination among various divisions with in the Department then before. (53)

RESPONSE TO COMMENTS 17 THROUGH 19: The Department acknowledges these comments in support of the rules.

20. COMMENT: Overall the rule's impact is still being evaluated, but it is good that the rule is moving forward. It is clear that it is at the least better than the status quo, but being less bad is

not good enough. Improvements still need to be made, as it is still unclear whether this is actually the solution or just making a bad situation look better. (65)

RESPONSE: The Department acknowledges the commenter's concerns. The rules seek to ensure that future development is only done in a manner that assures that environmental resources are preserved and improved both for current and future residents of the State. The Department will evaluate the outcome of these rules after they are implemented, and offer amendments in the future to improve their effectiveness.

21. COMMENT: The rule proposal should be withdrawn. The infrastructure and process necessary to implement the program as proposed is not in place. While planning on the State level is an integral part of resolving the housing crisis, the plan must be one that can be implemented to achieve the objectives as established by statue, regulation and court decision. Low cost housing cannot be developed where there are excessive development costs with no certainty of outcome. The additional taxes necessary to raise the funds and the need for existing commitments to be repaid by fewer people will place an unacceptable increased tax burden on both the owners through increased property taxes and the tenants. Any planning process must be one that can be understood and followed by the regulated community with clear direction on form and content of the requirements. (23)

RESPONSE: The Department believes the revised wastewater management planning process includes clearer direction, a more simplified process and a more predictable outcome than the previous planning framework. Environmental standards at N.J.A.C. 7:15-5.25 make clear the

basis for review and approval of plans. To aid plan development, the Department is providing draft revisions of sewer service areas as required by the rule. These draft revisions are then being checked by the counties and their member municipalities to ensure that projects recently built or approved are not inadvertently removed from sewer service areas. Once the final sewer service area delineation has been agreed upon, most of the build-out analyses have been designed so they can be accomplished using available GIS coverages. The Department has developed a model builder application that it is making available to the counties wherein GIS data layers, including parcel data, zoning data, environmental constraints, sewer service areas, HUC 11 watershed boundaries, public water supply areas, and municipal boundaries, are fed into the model and the model performs the proper manipulation of these spatial data layers to provide a build-out that can be sorted by municipality, sewage treatment plant, water purveyor, development type, HUC 11 or any combination of the above. In addition, the Department is providing a basic wastewater management plan shell document that includes all of the standard language required in a wastewater management plan and which includes prompts for additional specific data where needed. The Department has also prepared model ordinances to assist municipalities in complying with requirements at N.J.A.C. 7:15-5.25(g). Further, the Department believes it is appropriately prepared to fully implement the rule. In advance of rule adoption, Department staff have been working with counties in the development of satisfactory WMPs. Finally, financial assistance has been offered to counties to help offset the cost of plan development.

The commenter also questions the value of wastewater management plans to local governments. The rule will aid local governments in identifying natural resource and environmental

infrastructure constraints so that local planning and zoning can be adapted as needed and scarce infrastructure prioritized to aid in attainment of affordable housing and other development that will effectively meet the needs of the citizens of the State. In addition the rule is careful to include municipal planning considerations in addition to environmental protection considerations. Ultimately the designation of a sewer service area in a wastewater management plan prepared under these rules will assure the development community that four important considerations have been satisfied: 1) the area has minimal environmental sensitivity, 2) the area is an area where the municipality wants growth to occur, 3) wastewater treatment capacity exists to support the development and 4) water supply exists to support the development. As a result, the Department believes this rule will encourage development to occur in the desired locations and not create an additional tax burden or act as a deterrent to appropriate development.

22. COMMENT: The Department needs to appreciate that businesses discharge their wastewater either through a permit with the local municipal utilities authority (indirect discharger) or through a NJPDES permit with the Department (direct discharger to surface and/or ground water). Businesses also have Treatment Works Approvals (TWAs) as well as water allocation permits issued by the Department, which according to this rule proposal, must all be incorporated into a planning area's WMP/WQMP.

The Department needs to incorporate language into the rule proposal which assures that industrial operations will not be adversely impacted. This rule proposal will in essence add a regulatory layer onto an already complex and time-consuming regulatory process. Industry needs certainty, flexibility and a clear understanding of what will be required should a company

want to locate to New Jersey or expand operations. Unfortunately, the rule proposal does nothing to assuage a recurring concern raised by industry that the regulatory process needs to be streamlined in order to attract new business to New Jersey. This rule should be withdrawn or amended to address these business concerns. (7, 20, 69)

RESPONSE: The Federal Clean Water Act has included a requirement for a continuing planning process for more than three decades. The continuing planning process has been and continues to be set forth in the Water Quality Management Planning rule, N.J.A.C. 7:15. The requirement that all Department permits or approvals must be consistent with adopted WQM plans was established through the Water Quality Planning Act, N.J.S.A. 58:11A-10, effective April 25, 1977. The intent of this amended rule is to ensure that wastewater management plans are completed and updated through the planning process. The amended rule is designed to streamline the planning process and set clear standards for updating plans through WMPs and for determining if projects are consistent with the plans. Where plans are developed consistent with the now clear standards, fundamental issues of environmental infrastructure capacity and availability will have been characterized and assessed relative to the environmental build-out condition of each planning area. Updated wastewater management plans should include future development and redevelopment plans making them consistent with the areawide water quality management plan, such that site specific amendments by the industrial community are not necessary. Even where an expansion or new development is proposed that was not anticipated by the wastewater management plan, an updated wastewater management plan will allow instant recognition of whether wastewater treatment capacity could be an impediment to those plans. This will serve to inform prospective developers early in the project development process to

make more efficient and effective investment decisions. The Department has also allowed increases in flow and load from existing industrial treatment works where no change in service area or discharge type is proposed to proceed as a revision under N.J.A.C. 7:15-3.5(b)4. rather than requiring the more labor intensive amendment procedure of N.J.A.C. 7:15-3.4.

23. COMMENT: Given the complexity of having counties become the WMP agencies, only those portions of the rule that relate to municipal creation of "preliminary" WMPs in the nine months that this rule allows should be adopted. The preliminary WMPs should be based on a basic build-out, excluding public open space and environmentally sensitive areas. This would give counties and the Department some time and flexibility to establish a regional context for the final municipal WMP submissions, and would then allow municipalities the opportunity to adjust their preliminary WMP for consistency with the county, regional plan to establish the "final" WMPs. A staggered process such as this would enable towns to complete the complex environmental analyses needed. (22, 76)

RESPONSE: The Department believes that designation of counties as the primary WMP agency will provide greater efficiency, consistency and a regional perspective in WMP development. With counties as the WMP agencies, there will be fewer WMP agencies, and it will be possible for the Department to work more closely with the planning entity and assist in the development of a satisfactory plan. In addition, counties are already responsible for developing or reviewing components of a WMP, such as county master plans, and are well positioned to integrate all the information necessary to update a WMP. The Department believes that the timeframe allotted for completion of the county WMPs is appropriate given the GIS basis for most of the analyses,

the tools provided by the Department for completion of key elements of the plans and the technical and financial assistance the Department has made available. It is important to note that seven counties were WMP agencies under the previous rule. Further, the Department has been working with several counties in advance of rule adoption to help achieve the rule objectives. The Department recognizes that the first round of WMPs will have room for improvement, but this is by design. WMPs are intended to be updated every six years. The built in schedule for update of WMPs allows for better information or new or improved management strategies to be integrated in plans over time. The Department did consider the option of designating municipalities as the WMP agencies. This would result in the already unmanageable number of 166 WMP agencies increasing to 566, magnifying the inefficiencies with respect to WMP development and adoption. The rule does envision that each municipality will need to prepare its chapters to give to the county. If the county is unable to act within the timeframe necessary, the municipality can seek to move forward on its own.

Comment Period Extension

24. COMMENT: The Department should extend the comment period for the Water Quality Management Planning (WQMP) rules proposal beyond the current deadline of July 20, 2007. The availability of the courtesy copy of this rule proposal on the Department website is appreciated, however, as experience indicates, the courtesy copy, while informative, is not fully reliable as subtle but significant changes may be made before the proposal appears in the May 21, 2007, *New Jersey Register*. The WQMP rule proposal calls for significant substantive and procedural changes, effectively revamping the framework of water quality planning and its regulatory program. There are several other pending rule proposals and adoptions that the

Department has acknowledged are related to this proposal. (*See* N.J.A.C. 7:15-1.2). In order to allow the public to assess the interplay between the newly proposed and pending changes, the Department should extend the public comment period on the WQMP rule proposal to 60 days after the adoption of the Flood Hazard Area Control Act rules. An extension would also permit interested parties a meaningful opportunity to review and submit fully informed comments. (61)

25. COMMENT: The Department should extend the comment period. Balanced policies that ensure that New Jersey's natural environment remains protected while its economy stays strong and competitive with other states are supported. A sixty-day comment period is insufficient for a proposal of the complexity and magnitude, as it will have far-reaching impacts on growth, development, and redevelopment in New Jersey. The comment period should be extended by sixty days to September 18, 2007. (54)

26. COMMENT: The comment period for the proposed Water Quality Management Planning rules should be extended an additional sixty days from July 20, 2007 to October 20, 2007. The rule proposal is extensive and detailed. It will take additional time and labor to fully comprehend and comment on this critical proposal. Because of the importance of the planning process and the long-term financial effects, it would be counterproductive not to give proper attention to the new proposal. In addition to the 60-day time period being tight, there are two major holidays within the sixty-day timeframe as well as the most popular vacation weeks of the summer. Some organizations do their work by committee and the present scheduling makes it difficult to meet in a timely fashion to build consensus on the collective comments. It would be

in the best interest of the ratepayers of New Jersey to provide ample time to carefully review and comment on the new WQMP proposal. (32)

27. COMMENT: The Department should extend the comment period for the Water Quality Management Planning rules proposal beyond the July 20, 2007 deadline at least a month to enable appropriate responses. For many proposals, providing two months might be ample time to review and comment on regulatory issues such as this. However, because of the comprehensive nature of the proposal and the length of it, more than the two-month time frame allotted is needed to carefully read, consider and prepare written comments on the proposal. (50)

28. COMMENT: The comment period for the proposed rules should be extended because of the scope of scale of the proposed changes. (37)

29. COMMENT: This exceedingly complicated 239 single-spaced page proposal was published on May 21, 2007, with a comment period closing on August 20, 2007. In light of the proposal's magnitude and reach, this was an extremely short period provided for review. (18)

RESPONSE TO COMMENTS 24 THROUGH 29: In response to requests to extend the period of time available for public review and comment on the rule, the Department extended the comment period an additional 31 days until Monday August 20, 2007. The notice of the extension appeared in the New Jersey Register at 39 N.J.R. 2583(b), on the Department's website and in six newspapers. The Department believes that the extended comment period provided adequate opportunity for review and comment on the proposal and does not believe that

extension beyond the 90-day time period provided would be likely to raise issues or provide new information, data or findings that were not previously raised or provided during the extended comment period.

30. COMMENT: The thirty day extension on the rule proposal comment period is appreciated. (69)

RESPONSE: The Department acknowledges the commenter's support of the comment period extension provided.

Rulemaking Process

31. COMMENT: The proposed format of the rule proposal should be changed. As written, the rule proposal requires the reader to refer to both the rule proposal as well as the current rules where there are "no changes" indicated. The Department should make publicly available a consolidated proposal of both proposed amendments and unamended sections. This approach would produce a more efficacious document, which would enable the public to more easily review and provide better-informed commentary on the rule proposal. (61)

32. COMMENT: The Department should change the format in which rule proposals are made to include not only the proposed changes to the rule text, but to also include all existing text which is not proposed to be changed for a comprehensive package. (86)

RESPONSE TO COMMENTS 31 AND 32: The Rules for Agency Rulemaking, N.J.A.C. 1:30, dictate how the rule is made available through the rulemaking process. These rules require the Department to publish the rules in the manner in which they were published. The existing rule text is readily available officially from LexisNexis and unofficially on the Department's website.

33. COMMENT: The proposed public hearing schedule for the rule proposal should be changed. The three public hearings should be re-scheduled to occur later in the comment period because they are scheduled to occur within three weeks after official publication. (61)

34. COMMENT: There has been inadequate public notice of the June 11, 2007 public hearing and the timing of the hearing during the day makes it difficult for the public to participate. Only four members of the public are in attendance at the start of this hearing. Some of the most contentious public issues in New Jersey where effective democracy is functioning relate to proposed wastewater and sewering as these are highly controversial public issues and are generally very well-attended at the municipal level. The Department should consider changing how they conduct public outreach and notification and how they solicit public hearings for a major set of rules like these that impact everybody in the State, the entire environment of the State and the drinking water supply of the State. (86)

35. COMMENT: This is a massive set of rules and since the hearing has been scheduled fairly early in the comment period, there has not been enough time to review this proposal thoroughly. More comments will be provided by the close of the comment period. (24)

RESPONSE TO COMMENTS 33 THROUGH 35: The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq., and its implementing regulations at N.J.A.C. 1:30, govern the public's opportunity to be heard regarding a rulemaking proposal. The APA only requires a public hearing on a proposed rulemaking if the agency is requested to do so by a Legislative Committee, a State agency, or a county, local or municipal governmental entity or if sufficient public interest is shown. As one commenter noted, issues regarding wastewater, sewering, the entire environment of the State and the State's drinking water supply impact everyone and the Department believed there would be sufficient public interest in this rulemaking. Therefore, not one, but three public hearings were scheduled at three different locations throughout New Jersey at the time of rule proposal in an attempt to make attendance at a hearing as convenient as possible for those who wished to offer their comments in this manner. Based upon past experience, the Department did not believe that evening public hearings were necessary to supply ample opportunities for the public to provide oral comments. Due to a lower than expected turn out of individuals wishing to testify and participants at the public hearings, the Department will certainly consider holding any subsequent public hearings regarding this rule in the evening. However, the Department believes that the public hearings that were held, in conjunction with the 90-day period provided for the submission of written comment on the proposal, provided adequate opportunity for comment on the proposal.

Regarding the adequacy of the public notification process for public hearings, N.J.A.C. 1:30-5.5(b) requires the Department to provide at least 15 days notice of the public hearing in the New Jersey Register. Timely notice of the three public hearings held on June 8, 11 and 15, 2007 was provided in the May 21, 2007 New Jersey Register (39 N.J.R. 1870(a)). Additionally on April

23, 2007, the Department's official rule-making website, www.nj.gov/dep/rules/notices.html, provided details about the rule proposal and the dates and times of scheduled public hearings and the comment period. The Department also published legal advertisements in the following seven newspapers that covered a broad representation of the State: the Asbury Park Press, Atlantic City Press, Bergen Record, Courier Post – Cherry Hill, Star Ledger, Today's Sunbeam and the Trenton Times; and provided fax notifications to news media maintaining a press office in the State House Complex. The Department believes it adequately provided public notification regarding the public hearings.

36. COMMENT: Opportunities provided to interact with the Department in the rule making process in meetings with planning groups, the public information session in June 2006 and the Clean Water Council annual public hearing in October 2006 which was conducted specifically on the WQMP rule proposal are supported. (78)

RESPONSE: The Department acknowledges the commenter's support of the Departments efforts to supply opportunities for public outreach and input prior to proposing this rule.

37. COMMENT: The proposed rule changes were not widely publicized and are too important to be "rushed" into effect. They have been written in very legalistic terms rather than in plain language. Municipal governing bodies and authorities throughout the State must be provided with a detailed explanation of the proposed rule changes that affect them. (15, 21, 67)

38. COMMENT: The proposed rule taken as a whole is over-reaching, arbitrary and being adopted without much awareness among thousands of affected stakeholders, local governments and longstanding economic interests. (58)

RESPONSE TO COMMENTS 37 AND 38: As described in the Response to Comments 33 through 35, the Department believes there has been sufficient notification and opportunity to comment on the rule. In addition, the Department has engaged in extensive outreach efforts to inform the public about the rule provisions. For example, the Department made presentations on the proposed rule at various conferences (Atlantic Builders Conference (4/19/2007), The County Planners Association (4/20/1007), The New Jersey Water Environment Association Conference (5/2-5/3 2007), New Jersey Chemistry Council (6/27/07), NJ Business and Industry (6/27/07), New Jersey Law Institute (7/10/07)). The Department also made presentations to several groups of counties in 2007, including Monmouth, Cumberland, Cape May, Bergen, Middlesex, Gloucester, Somerset, Mercer, Morris, Hunterdon, Sussex, Warren and Camden. The Department held three WQMP Rule seminars in Gloucester County (6/21/07), Mercer County (6/28/07),and in Morris County (7/9/07). Finally, in June of 2007 public hearings were held on the rule proposal at three locations: the Southern Region (6/8/07), the Northern Region on (6/11/07), and the Central Region of the state (6/15/2007)

39. COMMENT: The public notice of July 16, 2007 in *The Record* (Hackensack) regarding an extension of the comment period to August 20, 2007 on amended water quality management planning rules does not suggest that considerations will be given to comment from non-experts.

Government at all levels should actually have an interest in those it purports to serve, even though the silence at the county level indicates that this may not be the case. (47)

RESPONSE: Comments from all sectors of the public, including subject matter experts and non-experts, is always invited and welcome on any proposal. The Department gives full consideration to all comments received in formulating its final decision on any proposal.

40. COMMENT: The Department began meeting with affected entities and advocacy groups in June 2006, yet the New Jersey Department of Agriculture was not apprised of the proposed rules' direction until January of 2007. (66)

RESPONSE: The Department conducted significant outreach prior to proposing the rule. The outreach effort necessarily occurred over time and involved different stakeholders at different points in time. Discussions with Department of Agriculture occurred well in advance of rule proposal.

41. COMMENT: The Department should continue a dialogue with all stakeholders addressing the concerns raised before issuing a final rule. (7)

RESPONSE: The Department has continued to reach out to affected public sectors, including presentations to New Jersey Water Resources Association (3/14/08), The County Planners Association (3/28/2008), The New Jersey Society of Municipal Engineers (4/2/08), The NJBA Atlantic Builders Association Conference (4/16/08), and The New Jersey Water Environment

Association Conference (4/30/08). The Department has also been working directly with Atlantic, Bergen, Camden, Cape May, Gloucester, Monmouth, Middlesex, Somerset and Sussex counties on development of wastewater management plans.

Implementation

More DEP staff needed

42. COMMENT: The rule proposal does not address how the Department staff can manage/review 21 wastewater management plans divided into 566 chapters. (3)

43. COMMENT: Is the Department staffing adequate to provide the review necessary? (59)

44. COMMENT: It is extremely important that the Department staff the WQMP program in order to insure its success. The present level of staff in the WQMP program is insufficient to perform the daunting task of approving 21 county plans within nine months on enactment of the rule. Enough staff should be provided, even if it means reallocating others to the program, to insure its success. One of the main failings of the past program was insufficient staff to follow through with timely reviews of reports and data. This failing has caused local governments to expend millions of ratepayer dollars in a wasteful manner as they prepared reports that became stale and were never reviewed, rejected or approved. While State officials made many unfair and inaccurate comments in the press about plans that were not updated by local agencies, the updated reports sat on desks in Department's headquarters unread. This can not be allowed to occur again. The public and the environment deserve better. (18, 32)

45. COMMENT: The Department has stated that a significant increase in its staffing is needed to implement the proposed rules. If the Department does not provide this additional staffing, the current backlog situation will only continue under the new rule. The Department should address how implementation of the proposed rules would be affected if the required staffing is not provided. (87)

46. COMMENT: Concern exists with respect to the subsequent processing of WMPs once they reach the State level. There is no information that suggests the Department has been provided with additional resources or staffing to review the plans. The adoption of the proposed rules without a rational basis for implementation must not proceed. (23)

47. COMMENT: The Department is encouraged to increase its staff to produce the data needed to support consistent plans and a quick-turnaround time for reviewing plans, as well as to provide for technical assistance to the counties' planning staff. (5)

48. COMMENT: It is essential that provision be made within the proposed rules to guarantee that at least one Department staff member be assigned to each county to assist with the WMP creation. (88)

49. COMMENT: To ensure successful rule implementation, adequate resources, including time (for example, reasonable deadlines), money, and technical assistance must be made available to both county government and the Division of Watershed Management. Financial resources are needed to allow both counties and the Department to add staff and/or consultants. (78)

50. COMMENT: The thought that the reduction in the number of plans will increase and improve coordination and reduce review time is wishful thinking. The complexity of the plans will increase and there will be greater potential for long lead times before the WMP is approved. Municipalities will have less ability to control their own destiny since the outstanding issues affecting one area of the county would undoubtedly hold up approval of the entire WMP. (62)

RESPONSE TO COMMENTS 42 THROUGH 50: The Department understands/recognizes the need for it to be adequately staffed in order for these rules to be implemented successfully. The Department, therefore, will shift staff resources to support a quick-turnaround time for reviewing plans, as well as to provide for technical assistance to the counties' planning staff . Further, development of the required wastewater management plans has been simplified so that most of the tasks are accomplished using GIS coverages and tools, including a model to accomplish the build-out analysis. In addition, the Department is working with counties to pilot the development of wastewater management plans that conform with the rule and will provide the preliminary sewer service area delineation that conforms with N.J.A.C. 7:15-5.24 to any municipality or county upon request. The Department believes that the design of the adopted rule as well as the steps taken to facilitate implementation will result in significant compliance with the requirement to develop county WMPs. With reference to the concern expressed by one commenter that municipalities will have less ability to control their own destiny since the outstanding issues affecting one area of the county would undoubtedly hold up approval of the entire WMP, the county wastewater management plans are designed to ensure that the overall plan is not held up due to the inactivity of a municipality within the county, or even the county

itself. The rule at N.J.A.C. 7:15-5.14 provides that each municipality is completed as an individual chapter and that the plan can be submitted without a municipality that fails to provide the required information. Further, the rule at N.J.A.C. 7:15-5.13 allows an individual municipality to submit a plan if the county stipulates that it will not or does not perform its role in accordance with the schedule at N.J.A.C. 7:5.23. If it becomes necessary for a municipality to submit a WMP in the event of county inaction, an additional 90 days is provided from adoption of the revision designating the municipality as the WMP agency to submit the WMP for the municipality. This additional time is provided so that a municipality can compile those WMP elements that are to be provided by wastewater management agencies.

Sufficiency of staffing

51. COMMENT: There is a need to keep these plans updated and current to reflect changes and there must be a more streamlined process to update plans and improve the exchange of information and provide better coordination between county, State and local governments and other wastewater management planning agencies. Pre-existing sewer service areas need to be modified and removed from areas of known environmental sensitivities such as wetlands, C1 buffers and documented endangered species habitats. Information regarding sewage treatment plants needs to be kept updated to reflect changes in population, zoning, and flow data from the treatment plants. A lot of land does need to be removed from the existing sewer service areas. However, the inference in the new rule as to why the existing plans have not been kept up to date appears to be tied to the premise that the counties, towns and other wastewater management planning agencies have done nothing over the past ten or twenty years and that’s just not true. People need to be reminded that the actual problem is tied as much to State staffing issues and

changing administrations as much as anything else. Regardless, these plans do need to be updated and kept current, and the process that is established needs to be straightforward in order to minimize delays in doing such things. (55)

RESPONSE: The Department concurs with the commenter's assessment that wastewater management plans need to be updated, in order to provide a sound basis for decision making. The Department believes the changes made in the rule will facilitate this process by providing clear objectives based largely on GIS tools. In addition, the Department has taken a number of steps to facilitate implementation of the adopted rule, as discussed in Response to Comments 537 through 547. While in some cases the time required for processing submissions may have been affected by staffing or other issues, past problems with maintaining up to date information were primarily related to the failure of many responsible entities to submit WMPs in accordance with the schedule set forth in the previous rule. The Department believes that the lack of consequence for not developing and/or updating plans is a major reason that there has been such poor compliance with the requirement to submit WMPs and believes that the changes adopted at this time will result in WMPs that provide the necessary information that will allow fully informed decision making at all levels.

52. COMMENT: There is a significant amount of work that will be required to complete these plans under the new rules and the counties are being asked to shoulder much of the burden. The number of county employees is not increasing, but the responsibilities are, including those that were added with the new stormwater review process. The proposed grants mentioned in the rule proposal will be helpful, but they don't guarantee that new positions can be filled. (55)

53. COMMENT: There are difficulties with county staffing, which contradicts the assertion in the rule proposal that counties were selected as the primary contact because they have a unique perspective on regional issues and water resource management. (55)

54. COMMENT: The proposed regulations transfer wastewater management planning responsibility to counties. It is doubtful whether the counties will have the necessary staff or knowledge to prepare wastewater management plans on a county-wide basis. The county will have the responsibility of collecting and coordinating information from all the municipalities, some of which already have detailed plans or information and others that are largely served by septic systems and which have virtually no information. The lack of information in these areas will make it impossible for the county to prepare the WMP. (87)

55. COMMENT: The timeline for counties to submit WMPs appears extremely tight. The municipalities will be strained to submit their information to the counties who will then have to act on it. Resources such as staff planners and GIS expertise are now stretched to their limits. Further strict demands will have an impact on other programs the counties are providing for municipalities. As important as WMPs are other programs, such as Farmland Preservation, should not be affected by a stringent deadline. (36)

56. COMMENT: The Department should provide an estimate of staff time and costs to prepare, revise, or update WMPs. (85)

57. COMMENT: Nine months is not an adequate or realistic time period for many municipalities to prepare WMP mapping, especially for those that do not have GIS capability. Consultants could do the work, but there are probably insufficient numbers of consultants in New Jersey for towns to meet this requirement. (22, 76)

58. COMMENT: The proposal to turn the responsibility of preparing WQM plans over to the counties creates an enormous undertaking. Environmental regulation in New Jersey is already complex and many approved projects throughout the State have been significantly delayed by the backlog experienced by regulating agencies. Municipalities are forced to grant approval extensions to allow the applicants to continue to pursue the necessary permits from a regulatory body. While the State may anticipate that assigning the preparation of WQM plans to the counties rather than the 161 entities currently assigned will result in less time spent on review due to the sheer decrease in volume, the State may not be properly anticipating the strain this preparation may put on the counties. Many counties are not properly equipped to handle the preparation of WQM plans merely as a result of the number of municipalities that must be included. This will result in further delay for approved projects. The Department should consider whether the counties have the resources to handle the creation of a WQM plan within the allotted nine months. (29)

59. COMMENT: The transfer of responsibility to the county level does not include provisions for the infrastructure and process, including funding that will be required to implement the program at that level. No assumption can be made that the counties in the State will have the resources available or the ability to raise the necessary resources to implement the program as

envisioned. The proposed nine month grace period for the submission of updated plans will become impossible in the absence of resources on the county level. (23)

60. COMMENT: The proposed rules place unrealistic demands and expectations on counties and municipalities. Some counties are ill equipped to do WMPs; urban counties are among the least able and equipped to comply. The Department's apparent attempt to consolidate all of the Department's land use permitting through the WQMP proposal will make it impossible for any county or town to develop a WMP within the allotted time. (54)

61. COMMENT: The Department needs to promptly implement an outreach program along the lines of the Office of Smart Growth (OSG), whereby an area planner is assigned to work with each county as they move through the process. An infrastructure of support and guidance needs to be created within the Department. The need for Department sponsored training at the county and local level needs to be examined in more detail by the State. (81)

RESPONSE TO COMMENTS 52 THROUGH 61: The Department believes one of the commenters meant county preparation of WMPs, not WQMPs. The Department believes that counties have or can develop the capabilities to develop wastewater management plans within the timeframe, given the measures described in the Response to Comments 37, 38 and 41, and measures to facilitate plan development. These include changes in the rule wherein plans are largely developed through readily available GIS information, as well as tools and assistance provided by the Department. The Department is enhancing staff available to work proactively with counties to develop satisfactory plans and will provide, upon request, an initial delineation

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of eligible sewer service area. The Department has also developed a GIS model that will generate the environmental build-out information. In addition, the Department has developed , model ordinances that will meet the requirements at N.J.A.C. 7:15-5.25(g). The Department is also offering funding to counties to assist in preparation of the wastewater management plans, as described in Response to Comments 537 through 547. These implementation strategies notwithstanding, the Department will consider requests for extension of the timeframe, in accordance with N.J.A.C. 7:15-5.23(f), where there is a demonstration of good faith effort and *force majeur* or other significant causal factor for failure to meet the expected timeframe.

Guidance Documents needed

62. COMMENT: Support was expressed for the Department's efforts, the proposal in theory and the importance of water quality protection. However, an updated proposal including more realistic details, such as guidance documents, reasonable timeframes, and ongoing financial assistance to counties, should be provided. (48)

63. COMMENT: If counties are given regional responsibility, then appropriate guidance documents and reasonable funding resources and time allocations must be addressed. A detailed WMP guidance document and associated checklist is needed, as well as model ordinances. The guidance document and checklist should be available before the nine-month timeframe begins. (19)

64. COMMENT: A guidance document and/or official guidelines that clearly state what information is required by the promulgated version of the Water Quality Management Planning

rules, N.J.A.C. 7:15, needs to be developed and circulated to affected parties immediately after the rules are adopted. (81)

65. COMMENT: Since the Department is focusing on spatial analysis tools, a detailed WMP guidance tool for counties is needed. Recognizing the unique differences that exist in various areas of the State, model assumptions and factors may be appropriately standardized at the WQMP area level, but not necessarily statewide. Standards and methods for performing all of the analyses identified in the proposed rules should be defined by the Department and made available as part of the WMP guidance tool for counties. The standards and methods should be unique to and scientifically appropriate for application within each WQMP area. (9, 19)

66. COMMENT: The proposed rules will create a significant change in the WMP format, causing confusion as to what is specifically being required (i.e. in the past, the plan was determined by the sewer service areas which could contain parts of several municipalities and or counties). Now, the county WMP will have disaggregated information on a municipality by municipality basis. Thus, the proposed rules should provide more elaborate instruction on how the information is to be presented. The Stormwater permit process is a good example of how the Department provided specific templates and checklists. (88)

67. COMMENT: The Department should consider publishing a checklist of all components needed for a complete WMP and WQMP. (51)

68. COMMENT: The Department should develop a checklist for WMP completeness, accepted by the counties, along with a formal negotiation process addressing differences of opinions about how the Department's comments on the proposed county wastewater management plans are resolved. (19, 28)

69. COMMENT: The Department acknowledged that under the current regulations upwards of 90 percent of all WMPs are non-compliant and the proposal summarizes several causes of this systemic failure including some inherent in the current planning process, such as WMPs are too difficult to prepare, Department reviews take too long, and the lack of clear standards for approval. It is clear that the proposal does not address these concerns. While recognizing that WQM planning entails an array of technical, administrative and procedural matters, involving al levels of government, such planning may require a complex process and that process should be well defined and clearly described, which the proposal also fails to do.

N.J.A.C. 7:15-5.20(a) stipulates that "Wastewater management plans should be concise, using the minimum feasible narrative and mapping. All pages, tables, and figures in wastewater management plans shall be legible and numbered." The Department should apply that same standard to this proposed rule. The proposal is extremely difficult to follow with cross references back and forth throughout the document. The proposal should include flow charts for the consistency, revision, amendment and update processes, as well as for any and all other areas for Department actions. The rule should also include charts and tables of how the rule is applied. For example, there should be tables to identify all of the sections in the rule that apply to

individual subsurface sewage disposal systems (septic systems) and discharges to ground water. These should be supported by flow charts of the WQMP process.

It may be that the new process is more coherent, with the preparation of WMPs more straightforward, Department reviews more streamlined, with clear criteria governing approvals, but if so, it is hidden by the disjointed and convoluted style of rule writing. To overcome the opacity of rulemaking, the Department should clearly describe the contents, components, standards and sequence of its proposed process through the use of flow charts, time lines, content summaries, glossaries, etc. Given the relatively short period within which compliant plans must be submitted, it is essential that this type of technical assistance be available before the clock begins to run. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 62 THROUGH 69: The Department has made assistance available in multiple forms to facilitate timely completion of the required wastewater management plans. The Department is enhancing staff available to work proactively with counties to develop satisfactory plans and will provide, upon request, an initial delineation of eligible sewer service area. The Department has also developed a GIS model that will generate the environmental build-out information. A web-based model WMP has been provided to assist in organizing and presenting the required information. In addition, the Department has developed model ordinances that will meet the requirements at N.J.A.C. 7:15-5.25(g). The Department is also offering funding to counties to assist in preparation of the wastewater management plans, as described in Response to Comments 537 through 547. As a clarification to comment 99, in the rule summary, the Department identified several issues of concerns

regarding the existing rule that were raised by members of the public as part of rule development outreach. However, the Department did not attribute the failure to submit timely WMPs to these issues. Nevertheless, the Department concurs that there should be assistance provided to assist WMP agencies in preparing satisfactory WMPs.

70. COMMENT: Water quality planning involves a set of complicated natural, social and economic systems and is not easy. The proposed rules lack clear direction in how government agencies and utility authorities will work through the planning process, especially within the defined timeframe, and how current and future decisions based on the proposed data, planning methods and funding, will uphold the spirit of the Water Quality Planning Act. (51)

71. COMMENT: The proposed requirements for WMPs will be burdensome and costly, since the required information is not readily available and will require sharing among multiple government entities. The proposed rules provide no substantive or procedural guidance for addressing cross county issues. (54)

RESPONSE TO COMMENTS 70 AND 71: The Department anticipates there are several key points of coordination in developing a WMP and is providing assistance in the completion of these steps. Based on the Department's work with counties to date, in an initial step, the Department is delineating sewer service areas that conform with the rule requirements and providing these draft delineations to the counties. Counties are sharing these drafts with municipalities and sewer authorities so that revisions can be made to address data deficiencies or to reflect local priorities. Once the wastewater management alternatives for each area are agreed

upon, the county, assisted by the Department upon request, will use the GIS model builder tool developed by the Department to predict the environmental build-out condition. Specifically the GIS model builder application uses existing GIS spatial data sets to perform the environmental build-out analysis required by the rule. The model builder application will produce a build-out based on existing zoning that can be sorted by wastewater treatment facility, water supply purveyor, HUC 11, development type, municipality and any combination of the above. Upon completion of the environmental build-out and related wastewater and water supply calculations, the preliminary results will be provided to municipalities, and where there are potential capacity issues, with wastewater treatment authorities. One option is for municipalities to adjust the environmental build-out based on local knowledge not reflected in the data sets, such as locally acquired open space or other local initiatives that would result in a different development or wastewater yield than suggested by the GIS layers available. Wastewater treatment authorities will assess whether there are significant infiltration/inflow issues that need to be addressed and put together a plan to address those issues or assess the potential for expansion and upgrade needed to address any remaining capacity issues. This coordination will ensure that land use planning among all levels of government are supported by the WMP as envisioned by the continuing planning process required by the Water Quality Planning Act. Similarly, the results of the WMP will ensure that sewers are extended only in areas where growth is wanted and that the capacity to provide wastewater treatment can be made available without compromising water quality. Cooperation among the various agencies is paramount to success.

Regarding cross-county issues, it will be a Department responsibility to assist in the analysis of shared wastewater management alternatives. Where sewer service capacity issues are identified,

the Department will work with the counties, municipalities and wastewater treatment authorities to resolve any issues. This may involve evaluating capacity allocation agreements or contracts and addressing infiltration/inflow as a first step. Wastewater treatment authorities would then need to determine what expansion and upgrades are feasible given spatial constraints at the STP site or water quality constraints in the receiving water. In septic system areas, future development will be allocated locally based on loading analysis and the available undeveloped and underdeveloped land in each municipality. The Department cannot predict where these conflicts might occur but will have to work with counties municipalities and authorities to craft a plan that is tailored to each situation.

Information availability

72. COMMENT: If counties are to work with the responsibilities as proposed, there must be established protocols within the offices of the Department so that requested information is provided in a timely manner. Lack of responsiveness to county requests and submittals have been a problem under the previous wastewater process. County staff still must go to Trenton in person to obtain information on Department permit applications. This information must be made more readily available and response to data requests should be expedited. (55)

RESPONSE: Information needed to develop wastewater management plans that would be provided by the Department is available through internet access to GIS data layers and data bases that are maintained for wastewater discharge and water allocation permits. Thus, staff will not need to go to Trenton in person to obtain information on Department permit applications. The other information needed to complete the analyses is to be provided by local entities, such as

entities that operate wastewater treatment facilities, water supply purveyors and municipalities. Where responsible entities are not forthcoming, the Department is prepared to take the steps necessary, as authorized to assist WMP agencies in obtaining information from providers of wastewater and water supply infrastructure.

73. COMMENT: The policies and procedures outlined in the proposed rule are dependent on GIS, computer infrastructure, data, personnel/organizational structure, and data maintenance policies, to create information for use in decision-making on land use and water quality. GIS includes many other elements in addition to data. The rules neglect to factor in the timeframe needed to develop GIS data, including obtaining consensus on data integrity, and establish computer infrastructure and organizational strategies. In addition, the existing data sets proposed in the rules have spatial and attribute limitations. These limitations are magnified when the data is used in conjunction with traditional data sets for land use planning. The use of poor GIS data to guide decisions on sewer service area boundaries is not reasonable.

Sewer service area delineations and parcel data are developed using different data sources which result in different spatial accuracies. This can result in sewer service area boundaries cutting through parcels rather than following parcel boundaries and resulting in an extended approval process for sewer service area changes. Parcel layers have become base map standards for many counties. These data sets are also developed differently by counties, which has resulted in the misalignment of mapped parcel and county boundary lines where county boundary lines meet. (51)

74. COMMENT: Water and wastewater planning and the development of plans are data intensive endeavors. If counties are to be data repositories then adequate hardware and software infrastructure is needed for centralized data storage. In addition, adequate organizational infrastructure is needed to gather data, put it in standard formats, and provide ways to make data accessible to municipalities, wastewater treatment agencies and others. Funding is needed to improve software and hardware components to create a functional and efficient data warehouse. Physical space limitations create additional challenges in the expansion of computer infrastructure and personnel.

The Department should discuss the possibility of a central database, including hardware and software for data maintenance and access, and identify the government agency responsible for the centralized database. This will provide for data standards, including standards for map features, attribute information, and spatial data. This will allow the continuous maintenance and update of data beyond county boundaries. This is important for tracking cumulative impacts on watersheds and other related systems that extend beyond municipal and county boundaries. (51)

RESPONSE TO COMMENTS 73 AND 74: Much of the data required to develop a satisfactory WMP is required to delineate the sewer service area and to generate the environmental build-out analysis and is already available in the Department's central data base. Remaining information is to be provided by wastewater treatment entities or municipalities and is relevant only for the WMP area, so that inclusion in a central database is not necessary. Any new layers are required to meet specific data standards, as set forth at N.J.A.C. 7:15-5.20, which will ensure an acceptable level of data quality and compatibility. The Department has been working with

counties to assist them in refining sewer service areas and to generate the environmental build-out to meet the requirements of the rule. The Department will continue to assist counties in compiling the necessary data and provide technical assistance in running the model builder application developed by the Department to automate the build-out analysis. The Department is prepared to offer direct technical assistance to each county in preparing plans, to assist the counties in analyzing the results of the build-out analysis and to participate in the process of planning engineering or policy solutions to any capacity constraints. Financial assistance has also been offered to counties to address gaps that may exist in their ability to prepare a WMP, including data management and analysis.

75. COMMENT: The Department should consider creating a matrix of all respective data sets to be used in water quality planning that are related to rules associated with water quality planning in the State. All identified data sets should be uniform, both spatially and in attribution, across county boundaries. The public should have an opportunity to comment on this list of data as a part of the proposed WQMP rules. (51)

RESPONSE: Creation of a separate data set exclusively for the purpose of developing satisfactory WMPs is not practicable because the various databases and GIS layers are regularly updated in their home location. GIS data can be clipped and/or merged to the desired spatial extent and other relevant data has spatial attributes that allow application for the purpose of completing the analyses required at N.J.A.C. 7:5.24 and 5.25. In addition to tools such as the web-based WMP format, the GIS model for completion of the environmental build-out analysis and the nitrate dilution models, the Department has been and will continue to work with WMP

agencies to develop satisfactory WMPs. Any issues with the accuracy of the data sources, for example, the threatened and endangered species habitats depicted on the Landscape Project maps, will be subject to public review and comment during development of individual WMPs. The Department also welcomes any comments about data shared on its webpage at any time.

76. COMMENT: In order for the proposed rule to succeed in improving water quality, the Department should be working toward a watershed-based approach to resource planning and protection and must make data available for the planning process on existing conditions and expected standards for each watershed. This is the only way to effectively integrate the many environmental programs that fall within the Department's responsibilities. Programs can be administered at the county level for practical reasons, but should be analyzed and planned for by watershed. (5)

RESPONSE: The rule requires analysis of wastewater management and water supply needs and capacity, based on environmental build-out, as the HUC 11 watershed scale. This information must be attributed to the applicable county/municipal areas in recognition of the importance of the role of local government in land use planning and decision making. The Department has a program through which water quality standards are designated. The Surface Water Quality Standards, N.J.A.C. 7:9B, sets standards for all waters that reflect the science-based determination of objectives that comply with the Clean Water Act. Water quality standards vary based on designations such as fresh water, saline/estuarine water and Pinelands waters. The objective of this rule is to attain the applicable standards, or to maintain water quality that is better than standards in accordance with antidegradation policies in the Surface Water Quality

Standards, N.J.A.C. 7:9B, in each waterway. The Department's *Integrated Water Quality Monitoring and Assessment Report* is developed every two years and assesses the quality of the waterways relative to the standards. Where water quality is assessed to be impaired, by failing to attain the established water quality standards or support the designated uses due to the presence of pollutants, it is placed on the List of Water Quality Limited Segments, see N.J.A.C. 7:15-6, and targeted for TMDL development. A TMDL is adopted as an amendment to the applicable WQM plans, making measures identified in the implementation plan a basis for determining consistency for the purpose of Department permit decision making. The WQMP rules serve as a unifying base for these measures to maintain or improve water quality.

Pilot Project

77. COMMENT: The Department should consider implementation of the proposed rules on a pilot project scale to determine the appropriate and standardized methodology for sewer service area boundary changes and procedural process for WQMP approvals. (51)

78. COMMENT: The rule should not be adopted without significant clarifications and amendments. The rule proposes dramatic changes to wastewater planning that are not adequately understood, both in terms of their impact on redevelopment and economic growth, as well as in terms of the roles of local government, wastewater utilities and the Department. Applying the three new water-related rule proposals (WQMP, Surface Water Quality Standards/C1, and Ground Water Quality Standards/Antidegradation Policy) in a variety of "pilot" counties is critical to understand their combined impact on both environmental protection and opportunities for smart growth and redevelopment. To what extent will the combined effect

of the new rules "shut down" the State for new growth? Will the capacity-based approach result in wide scale down-zoning in places that are appropriate for more intense development? Will the criteria for sewer service areas result in appropriate changes? These questions are impossible to answer without testing the combined impact of the three new rule proposals in some real places.

The Department is presently working with Monmouth and Somerset counties on pilot implementation of the WQMP rule, which is a sound, practical approach and a critical step. Because these counties are already grappling with how to implement the rule proposal, they will best understand how it will play out "on the ground." Both counties have submitted comments on the proposal, and will be offering additional comments through the pilot process. Their concerns, and the concerns of other counties that are seriously evaluating rule implementation, must be carefully considered before the rule proposal is adopted.

The Department must also find a more urbanized county (where most development will occur as redevelopment) to pilot the rule in, so that the impact in that type of place is better understood. The rule proposal should not be adopted until the Department and the public have had a chance to evaluate both the proposed WMP planning process and the impact of the rule in the pilot counties on both environmental protection and opportunities for smart growth. (78)

RESPONSE TO COMMENTS 77 AND 78: The Department has been working with Sussex and Somerset Counties in advance of this rule adoption in order to develop appropriate tools to assist all counties in the preparation of wastewater management plans. To aid plan development, the Department is providing draft revisions of sewer service areas as required by the rule. These

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draft revisions are then being checked by the counties and their member municipalities to ensure that projects recently built or approved are not inadvertently removed from sewer service areas. Once the final sewer service area delineation has been agreed upon, most of the build-out analyses have been designed so they can be accomplished using available GIS coverages. The Department has developed a model builder application that it is making available to the counties wherein GIS data layers, including parcel data, zoning data, environmental constraints, sewer service areas, HUC 11 watershed boundaries, public water supply areas, and municipal boundaries, are fed into the model and the model performs the proper manipulation of these spatial data layers to provide a build-out that can be sorted by municipality, sewage treatment plant, water purveyor, development type, HUC 11 or any combination of the above. Through this cooperative effort many refinements were made to the model that greatly improved the accuracy of the projected build-out.

In addition, the Department is providing a basic wastewater management plan shell document that includes all of the standard language required in a wastewater management plan and which includes prompts for additional specific data where needed. The Department has also prepared model ordinances to assist municipalities in complying with requirements at N.J.A.C. 7:15-5.25(g). Finally, financial assistance has been offered to counties to help offset the cost of plan development.

The Department has also recently noticed for public comment three regional wastewater management plans in urban areas: Bergen County Utilities Authority, Hudson County and Rahway Valley, and adopted a wastewater management plan for the Passaic Valley Sewerage

Commissioners. Wastewater management planning in urbanized municipalities relies heavily on future population and employment projections rather than a build-out based on zoning. The Department agrees with the commenter that the challenges facing these areas are far different than in rural areas. In many cases planning to address issues resulting from aging infrastructure will be a significant focus of ensuring that wastewater treatment capacity exists to support redevelopment.

The Department does not believe that any advantage will be gained by further delaying the adoption of this rule. Our experience in working with urban, suburban and rural counties all leads to the same conclusion: that the Department has to become a partner in the preparation of wastewater management plans in order for this process to be successful. The Department is making that commitment to working with counties to accomplish this important task.

County liability

79. COMMENT: What is the liability to the county for accepting the responsibility to prepare and update WMPs? Will the Department provide legal assistance in case of litigation? (85)

RESPONSE: Counties are already responsible for developing, reviewing or updating components of a WMP. Further, counties already possess general land use planning authority under the County Planning Act, N.J.S.A. 40:27-2. Notably, several counties, including Sussex, Somerset, Monmouth, Ocean, Atlantic, Cape May and Cumberland are currently designated as the WMP entity for their jurisdiction, and the Department is not aware of any of these counties

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incurring new liabilities for assuming that responsibility. Based on the specifics of the issues involved, the Department will determine the need to assist a county in the event of litigation.

Enforcement

80. COMMENT: How will the rules be implemented? How well they will be enforced? Is staffing adequate to provide review necessary? (59)

81. COMMENT: When exactly will these rules apply with concern to the grandfathering and other exemptions? How aggressively will they be enforced? Will these rules be applied very often or not often enough? (65)

82. COMMENT: A key issue not addressed by the proposed rules is what enforcement mechanisms or procedures are available in the event of noncompliance with the rules? (85)

RESPONSE TO COMMENTS 80 THROUGH 82: The timeframes for wastewater management plan development set forth at N.J.A.C. 7:15-5.23 will begin upon adoption of the rule. Certain activities that were under development, nearing the decision point or recently approved will be allowed to continue to decision and/or be recognized for a specified period after the rule is adopted. Enforcement of the WQM plans will be through the consistency determination step with regard to permitting and other approvals. Further enforcement of these rules will be through N.J.A.C. 7:15-8.1(a), in which wastewater service areas will be withdrawn if a WMP is not up to date.

83. COMMENT: The proposal lacks a compliance mechanism for WMP preparation, incorporating instead "a phased approach to the withdrawal of sewer service areas to assure updated WMPs form the basis of water resource planning." In effect, this untenable approach sanctions those responsible for non-compliance while punishing those that are victims of that non-compliance: jobseekers in need of places to work and households in need of places to live.

The Department should fashion a compliance mechanism that (1) penalizes those who fail to timely discharge their responsibilities; and (2) produces, on an emergent basis, interim plans that assure that the workers of New Jersey – and their families – are not deprived jobs and housing.

The proposed rules need an enforcement mechanism to ensure the active engagement of designated WMP agencies to prepare compliant WMPs within the established schedule at N.J.A.C. 7:15-5.23. Where the agency does not act in accordance with the revised rules, the Department must itself assume the obligation to prepare a plan, on an emergent basis. (18, 42, 44, 45, 61)

RESPONSE: The current system in which amendments are allowed where a WMP is not up to date results in a failure to consider cumulative and secondary impacts. Where the overall needs and availability of environmental infrastructure is not considered, there is a greater possibility that conflicts will be encountered in addressing important needs, such as for affordable housing. The Department is actively engaged with counties to develop satisfactory WMPs in a timely fashion and expects this will limit the situations of concern to the commenter, see Response to Comments 537 through 547.

84. COMMENT: Protecting both surface water and ground water, as well as the protecting quality and quantity of water are important to a healthy well functioning environment, human health and economic growth. The proposed rules are a good first step towards these goals, but a long way from reaching those goals.

It is a sad commentary that planning agencies have not taken the steps necessary to protect the environment and that the State has not been able or willing to enforce current laws. The State is strongly urged to enforce these rules. Without enforcement at all levels of government, the best of laws are worthless and there are enough instances wherein the laws of New Jersey have been ignored. Specifically, if the planning agencies do not meet the deadline, then the sewer service area must be withdrawn without any extensions of deadlines and without further action by the State. Anything less will be an encouragement for the planning agencies to ignore the law. (64)

RESPONSE: The Department acknowledges support for the rule, however, the Department believes that there may be circumstances where good faith efforts have been made to meet the wastewater management plan completion deadlines and a date certain for completion can be identified. By working closely with WMP agencies, the Department will be aware of issues that may interfere with timely submission and will assist WMP agencies in resolving them. As a last resort, the provisions at N.J.A.C. 7:15-5.23(f) provide the flexibility to extend the submission deadline in such circumstances. Where this decision is made, it would be inefficient and ineffective to withdraw sewer service area.

Publicly track WMPs

85. COMMENT: Will there be a way to publicly track the progress of a WQMP so that the origin of any delays can be better understood? Contact information for the person(s) performing the review should be provided. The public should be able to access information regarding the status of a plan and who is responsible for that plan moving through the approval process. (6, 7)

86. COMMENT: The review process should be publicly tracked. Everyone should be able to know the status of a particular Water Quality Plan and what or who is called to action at any point in the process of developing the plan. (18, 32)

87. COMMENT: Necessary procedures to ensure that WQMPs/WMPs can be approved within a defined schedule should be provided and the status should be available via an internet website to allow for tracking of this process. If approvals are not done within the specified time, then implementation should be automatic. (16)

RESPONSE TO COMMENTS 85 THROUGH 87: The Department is and will continue to be actively engaged with counties to ensure satisfactory WMPs are developed in a timely manner, as discussed in greater detail in Response to Comments 537 through 547. Status of a WMP, in terms of submission or review, can be determined by contacting the Department, as is the current practice. While the Department strives to provide prompt reviews of submissions, there is no automatic approval provision within the rule for failing to review/approve a WMP within a specified timeframe. An automatic approval process would be inappropriate given the complexity and far reaching implications of an adopted WMP.

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Failure of other agencies to act

88. COMMENT: The private sector will face unwarranted financial burdens due to either the failure of the local government unit to update their plans, or the failure of the Department to approve those plans in an expeditious manner. There should be some mechanism, such as a waiver, to ensure that a company is not held hostage due to the actions, or inaction of others. (6, 7)

89. COMMENT: Under this proposal, there must be a mechanism in place to ensure that companies are not held hostage due to the inaction of local government units or the State. Will the Department take steps to encourage or compel local government units to complete and submit updated plans in a timely manner? (6, 7)

90. COMMENT: The WQMP rule proposal will allow county governments control over future development and can delay the process regarding WQMPs without any ramifications. (16)

RESPONSE TO COMMENTS 88 THROUGH 90: The commenters appear to support a continuation of the system under which site specific amendments were the remedy to a lack of an up to date WMP. This approach has proven to be inefficient and fails to address the cumulative impacts of the numerous site specific amendments. The Department relies on the wastewater management plan (WMP) components of the areawide WQM plans to provide a comprehensive evaluation of the cumulative effects of land use on the water resources of the State and to ensure that the WQM plans are not static. Under the previous rule, which allowed unlimited

amendments to WQM plans, the Department has experienced a high rate of noncompliance with the requirement to prepare WMPs and keep them up to date. If the WMP is not updated, the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately reflected in the plan against which the project will be measured. For example, a recent designation of Category One waters and the associated antidegradation policies with respect to point and nonpoint pollutant sources may prevent the permitting of new or expanded wastewater treatment facilities that are identified in an outdated plan, leaving areas without a suitable wastewater management alternative. Further, the lack of a comprehensive or updated WMP may lead to a greater density of development than is appropriate or sustainable in terms of water resources because the cumulative impacts of development in the WMP area have not been evaluated. The adopted rule seeks to remedy the situation by withdrawing sewer service area and disallowing amendments where plans are not up to date, with limited exceptions as set forth at N.J.A.C. 7:15-5.1(a). This may mean that some specific projects that would require an amendment in order to be consistent with the plan in effect at the time may experience a delay until the applicable plan is completed. This negative impact is small compared to the larger negative impact of continuing to make decisions without the benefit of an up to date WMP. Nevertheless, through the construction of the rule, development of tools, and providing technical and financial assistance, (discussed in greater detail in Response to Comments 537 through 547) the Department is actively engaged in ensuring that plans are developed in a timely fashion, which should minimize the impact.

Highlands

91. COMMENT: At present time, the final Highlands Regulations (Highlands Regional Master Plan) do not yet exist. Municipalities and other entities that fall within a Highlands planning area will not be able to complete the necessary analyses required for wastewater management planning until the Highlands regulations are finalized. (87)

RESPONSE: Lack of the final Highlands Regional Master Plan does not prevent development of a WMP. Consistent with the Highlands Water Protection and Planning Act Rules at N.J.A.C. 7:38-1.1(k), for both the Highlands preservation and planning areas, the Department shall approve an amendment to a Water Quality Management Plan only after receiving comment from the Highlands Council on the consistency of that amendment with the Highlands Regional Master Plan. Prior to adoption of the Highlands Regional Master Plan by the Highlands Council, the Department will continue to consult with Highlands Council on WMPs submitted in the Highlands. If the findings of the Highlands Regional Master Plan and the outcome of the conformance process would result in findings different than a WMP prepared prior to the completion of that process, the WMP can be amended. Upon adoption of the Highlands Regional Master Plan, the Department will enforce the standard at N.J.A.C. 7:38-1.1(k) with the following policies: sewer service areas located in the Highlands planning area must be consistent with the existence and delineation of the Existing Community Zone, as identified in the adopted Highlands Land Use Capability Map series; in those Highlands planning area municipalities that have chosen to "opt-in" to the Highlands Regional Master Plan, the septic density provisions of the Highlands Regional Master Plan must be met, if more stringent than required in the WQMP rule; in those Highlands planning area municipalities that have not

chosen to "opt-in" to the Highlands Regional Master Plan, the septic density standards in this rule at N.J.A.C. 7:15-5.25(e) shall apply.

Other

92. COMMENT: The incentive to participate in the implementation of these rules as proposed is a major concern and is still under evaluation. If the current rules pre-determine that because of the studies and data required, especially the landscape mapping, that virtually no growth areas will remain, then it does not appear worth the time, effort and expense to undertake those studies as the result may already be a foregone conclusion. (55)

RESPONSE: The standards for development of a wastewater management plan do not preclude growth. Rather the rules are intended to ensure that growth is compatible with natural resource and infrastructure constraints that exist within each planning area. The rule intends to eliminate significant conflicts between the Department's natural resource protection mandates and the extension of centralized sewer service, consistent with the intent of the continuing planning processes required under Section 208 of the federal Clean Water Act and reinforced through the New Jersey Water Quality Planning Act. The Department recognizes that in some parts of the State, these conflicts may be significant and total avoidance may not be possible. In these cases the Department will permit centralized sewer service areas to support center-based development that achieves resource protection objectives in the environs outside of the agreed upon center. The provision of some sort of centralized wastewater treatment would likely be required to achieve this goal. Other limitations to the extension of sewers into environmentally sensitive areas are identified under N.J.A.C. 7:15-5.24(h) to include a demonstration of adequate

wastewater capacity, and a finding that the areas included within the sewer service area are not critical to a population of threatened or endangered species the loss of which would decrease the likelihood of the survival or recovery of the species in the State. Therefore, the Department does not agree with the commenter's assertion that the rules result in a foregone conclusion that all growth areas will be eliminated.

Smart Growth

93. COMMENT: Interagency and multi-municipality efforts to develop comprehensive land use plans utilizing Smart Growth principles and values, the implementation of which will preserve natural resources, revitalize older towns, regenerate suburbs and provide a clear vision for sustainable development that promotes equity and opportunity with housing choices, transportation options, and the availability of education and services that will address the emerging needs of all residents are generally supported.

However, careful consideration should be given to each of the "10 Smart Growth Guiding Principles" to ensure that we attain each undeniable and sustainable benefit for all residents. The ninth Smart Growth Principal is to "make development decision predictable, fair, and cost effective." If this principal is compromised the overall vision for our future may not be attained.

Through interagency, municipal and civic collaboration, the proposed Department guidelines need to provide the flexibility required to protect private investment, promote environmental justice and insure that the Smart Growth values and principals are implemented in the spirit of fairness and predictability that are the basis of the New Jersey Smart Growth vision. (27)

RESPONSE: A central tenant of the water quality management planning process and its component wastewater management planning process is the integration of federal, State, regional and local land use plans. This is achieved through a continuing planning process that relies heavily on county and municipal land use planning involvement.

The Department believes that this proposal makes the wastewater management planning process more predictable, fair and cost effective. This proposal specifically identifies areas inappropriate for designation as sewer service area based on environmental sensitivity. These limitations are based on publicly available GIS data layers, thus improving the transparency of wastewater management planning decisions. Where conflicts between sewer service areas and environmentally sensitive areas cannot be avoided, the rule directly links to the State Plan Endorsement process in an effort to promote center-based development that will foster sustainable economic development in discreet compact communities, while achieving natural resource protection through reduced development pressure and intensity in the environs outside of the center boundary. The State Planning Commission is an interagency body that brings a wealth of expertise and perspectives to the process including housing, transportation, education and other services, as valued considerations sought by the commenter in addition to the environmental protection mandates of the Department.

Once approvable sewer service areas are identified, the wastewater management plan applies existing or proposed zoning to the various wastewater management areas to predict future development potential and wastewater treatment needs to support that growth. To assist

wastewater management agencies in accomplishing this task, the Department has developed a GIS based model builder application that automates the analysis based on available GIS layers including environmental constraints, parcel data, zoning data, watershed boundary, municipal boundary, wastewater service areas and public water supply service areas. The application reports results in a pivot table that can be sorted in a variety of ways allowing and assessment of wastewater demand by service area, water supply by service area, development by municipality, number of septic systems by watershed etc. These results can then be easily compared against available wastewater treatment and water supply capacity information to determine whether the proposed development can be sustained by existing infrastructure. The Department has also developed an electronic wastewater management plan template for use by the wastewater management planning agencies in compiling the final document. All of these tools are being provided to wastewater management planning agencies in an effort to promote consistency in the construction of wastewater management plans and to reduce the costs associated with plan development.

Further, reducing the number of wastewater management planning agencies from 161 to 21 by designating counties as the wastewater management planning agencies, will reduce the overall cost of wastewater management planning by sharing services and achieving economies of scale.

94. COMMENT: The proposed rules ignore the critical role environmental infrastructure capacity plays in urban revitalization. Theoretical capacity in urban and older suburban communities is largely undermined by the poor quality of the pipes in the ground. Without an

analysis of necessary steps to secure sufficient water supply and wastewater capacity in older communities, the State's goals of revitalizing these communities will remain unfulfilled.

Furthermore, future use of water and sewer capacity is allowed without consideration of whether such use advances or hinders the State's redevelopment goals. A development in an emerging suburb receives the same priority as redevelopment in an urban center. Until the proposed rules acknowledge and account for the need to offer funding and capacity priority to urban and older suburban communities, New Jersey's efforts to revitalize its cities and older towns will fail. (11)

RESPONSE: The Department supports the redevelopment and revitalization of our urban and older suburban communities. The overwhelming majority of these areas are served by centralized wastewater collection and treatment systems. The rule anticipates a simplified wastewater management planning process in these heavily urbanized communities in that future wastewater and water supply demand projections will be based entirely on population and employment projections available from the Department of Labor, or the appropriate metropolitan planning organization. This eliminates the need to perform a complex build-out analysis in these areas. Also, because these areas are included in existing sewer service areas where the collection, conveyance and treatment system exists, water quality management planning consistency is not likely to be an issue in most places, which should provide an incentive for redevelopment over a site that is not identified in a sewer service area or that has no direct existing access to sewage or water supply infrastructure.

The Department agrees with the commenter that the structural integrity of existing environmental infrastructure in older urban and suburban areas must be maintained in order to support redevelopment and revitalization of these communities. Among the results of the wastewater management planning process will be the identification of sewage treatment plants that are, or are likely to become, capacity constrained. This will force an assessment of whether there are significant inflow and infiltration problems with these systems based on seasonal or daily fluctuations in wastewater conveyed to the treatment plant. Where inflow and infiltration are significant, steps to investigate the integrity of the collection and conveyance system can be initiated and where leaking infrastructure is found, corrective action can be taken. If inflow and infiltration are not found to be significant to the capacity constraints, then planning to expand and upgrade wastewater treatment facilities to meet the future wastewater treatment needs would be indicated.

Unfortunately, the federal Water Quality Act of 1987 phased out the Construction Grants Program and required states to establish a State Revolving Fund (SRF) Loan Program. The last year in which construction grants were made for new projects in New Jersey was 1989. Under the State Revolving Fund and the Environmental Infrastructure Trust, and as part of the continuing planning process, the Department periodically develops a priority system and project priority list as the basis to award low and no interest loans from. This system, which was first developed in 1982, is constantly evolving. Historically, the state's highest priority was to upgrade primary treatment plants to achieve secondary levels, thereby significantly reducing pollutant discharges. With the elimination of primary facilities in New Jersey, the primary discharge category has been deleted from the priority system-a major milestone that signals

progress is being made under the state's financing programs. The state's highest priority wastewater needs now include combined sewer overflows (CSOs) and major pipe rehabilitation to stop discharges of raw sewage. These types of problems are frequently found in older urban areas, where pollution impacts streams and rivers near large population centers and where the cost to correct these problems is a serious concern. Priority is also placed on projects in coastal areas, where pollution impacts from outdated sewage treatment and conveyance systems can harm the shore environment and the tourism industry.

To prioritize wastewater projects under the Environmental Infrastructure Financing Program, the division uses a point system, which ranks projects based on the nature of the wastewater problem. In addition, projects discharging to surface waters receive points that reflect the existing uses of the waterway. These uses include drinking water supplies, boating, fishing, swimming, and water used for industrial or agricultural purposes. The point values reflect the relative priority of the water uses, with drinking water and recreational uses being the highest priorities. Points are also given to projects that would eliminate failing septic systems, a public health threat.

In addition, financing decisions under these programs must be consistent with the areawide water quality management plan. Therefore, as sewer service areas are revised to eliminate conflicts with the Department's other environmental protection mandates, competition for the limited available funds will be reduced making urban infrastructure rehabilitation even more competitive. In the future the Department may revise the point system to further ensure that

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priority for funding is given to urban infrastructure rehabilitation and capacity development necessary to meet the redevelopment needs of urban areas.

95. COMMENT: The proposed rules appropriately, if not entirely accurately, indicate where development is not desired. However, merely identifying where New Jersey should not grow is insufficient as a strategy for a sustainable state and what the State and its government must also do is to identify where New Jersey should grow. What impediments exist to appropriate growth in areas which should grow and what must be done to overcome those impediments? The State must take a more proactive role if it is to revitalize its cities and older suburbs. The effectiveness of these proposed rules will be undermined by the State's continuing failure to proactively identify appropriate areas for growth and to provide incentives to induce development and redevelopment in those areas. These rules may not be the appropriate venue to identify and address those issues related to the right growth in the right places. Nonetheless, the effectiveness of these rules will be undermined by the State's continuing failure to proactively identify appropriate areas for growth and incentives to induce development and redevelopment in those areas. (11)

96. COMMENT: On a regional basis and taking into account other factors, the proposed rule could potentially reduce growth opportunities within "growth" (sewered) areas, while at the same time increase sprawl in "non-growth" areas. At the same time, however, there is no way to show that the proposed rules will actually improve the protection of water supply and quality, the intended outcome of the Clean Water Act. This is not the rules intention, but it remains as a likely result of the process. Therefore, how has the Department considered the impact of this

rule on "growth" versus "non-growth" areas? Can the Department demonstrate that this rule will encourage growth in growth areas, reduce growth in "non-growth areas" and improve water quality? (5)

RESPONSE TO COMMENTS 95 AND 96: The overall purpose of the WQMP rule is to protect, maintain and restore water quality, in consideration of both existing and future development. A secondary purpose of the rule is to support a continuing planning process that integrates federal, State, regional and local land use planning, so as to achieve consistency among the various regulatory programs administered at all levels of government.

The rule provisions for sewer service area delineation at N.J.A.C. 7:15-5.24 and the standards at N.J.A.C. 7:15-5.25 were developed in recognition of the link between environmental infrastructure and the location and intensity of development that will be supported. N.J.A.C. 7:15-5.24 avoids subsidizing and encouraging high intensity development in environmentally sensitive areas, that the Department of Environmental Protection is mandated to protect, by eliminating these resources from sewer service areas. High intensity development that would be supported by centralized sewers is not compatible with protection of these natural resources. However, these are not the only considerations when integrating land use planning. This same high intensity development may also be inconsistent with other local land use planning objectives. For example, if a municipality wanted to protect a scenic resource such as a ridge line, or has an agricultural preservation area, the extension of sewers into these areas would also promote a pattern of development incompatible with these local planning objectives. Remaining

areas are, by default, suitable for high intensity development from the perspective of the physical attributes of the land and are consistent with the regional and local land use planning goals.

Beyond the land-based constraints, capacity issues relevant to future development, such as assimilative capacity of surface and ground waters, antidegradation requirements, and sustainable water supply limits, must also be considered and are addressed in the standards set forth at N.J.A.C. 7:15-5.25. Once appropriate wastewater management designations are established, an environmental build-out analysis is preformed to predict the amount of growth that will occur and to estimate the wastewater treatment and water supply capacity necessary to support that growth. The future demand can then be compared against available capacity and where capacity constraints exist a plan will be formulated to address that shortfall. This is preferable to a situation where a growth plan is established, investment is made only to later find out that insufficient environmental infrastructure capacity exists to support that growth. This will help to focus efforts to align available capacity with development objectives, including urban revitalization, redevelopment and provision of adequate affordable housing opportunities. If the wastewater management planning process works as envisioned by this rule, it will in fact identify areas suitable for growth. Essentially a designated sewer service area under this rule will tell the development community four things: 1) the area has minimal conflicts with environmentally sensitive areas; 2) the area is a place where the regional and local land use authorities want growth to occur; 3) sewage treatment capacity exists to support that growth and 4) water supply capacity exists to support that growth.

The other considerations, such as transportation, services and other social infrastructure, necessary to support livable communities are not the focus of this rule, and are more appropriately addressed through the State Planning Commission process.

The remaining standards at N.J.A.C. 7:15-5.25 regarding riparian zones, and steep slopes and stormwater management are all designed to address water quality impacts from nonpoint sources associated with future development. Riparian zones filter pollutants from runoff before they enter surface water which is critical to the protection of water quality. Steep slopes when disturbed contribute nonpoint source pollutant loads that are disproportionately higher than other areas, thus making their protection critical to maintenance of water quality. In the remainder of settings, the Department relies upon its existing stormwater management rules and best management practices to achieve water quality protection. In addition, the entirety of Subchapter 6 is devoted to the development and implementation of TMDLs for water bodies where water quality is already impaired. This is expected to result in improvement of water quality that is below standards or does not support designated uses. If all of the provisions of the rule are adhered to, the Department is confidant that water resources protection and improvement will result.

97. COMMENT: There are serious concerns about how effective this rule will be in producing its intended results. As part of the Governor's remedy to the New Jersey State budget deficit, there is an expectation that State agencies will support significant economic growth in New Jersey over the next few years. Allowing for significant in-fill development and revitalization efforts, which this proposed rule does little or nothing to support, the Governor's growth target

will require significant amounts of suburban land to be integrated and densified, and may even require some amount of Greenfield development to promote the functionality of the existing land use pattern (to promote transit over auto-dependency, for example). This proposed rule, however, seems intended to thwart these efforts. Instead, the rule seems to be written to "protect" more land from sewers and to reduce the amount of development on the land remaining in sewered areas. Years of experience have proven that this approach will hurt the State's pursuit of many goals and does little to protect natural resources. Instead, the Department will hurt the economy, impede racial integration and encourage sprawl style development of low densities (but not conservation densities).

Has the Department analyzed whether the proposed rule will provide enough land and infrastructure capacity in the right places for regional growth that will meet the Governor's targets? Has the Department analyzed whether the proposed rule will encourage growth in growth areas, discourage sprawl and improve water quality? How has this been measured and how will the results be monitored? (5)

RESPONSE: The primary intent of this rule is to protect water quality in the State, to unify land use planning among various levels of government through a continuing planning process and ensure that environmental infrastructure exists to support future development. The commenter has not cited any particular section or concept in the rule that she believes will "thwart" smart growth efforts; or to reduce the amount of development on the land remaining in sewered areas. The Department acknowledges that the rule will restrict the availability of sewers in environmentally sensitive areas that the Department is mandated to protect including: wetlands;

Category One water buffers; unique and rare ecological communities; and threatened and endangered species habitats. Providing for sewer service in these areas would encourage if not subsidize their destruction and promote a pattern of development wholly inconsistent with their protection. This rule seeks to guide development to areas appropriate for the type of dense development that may require sewer service and to promote center-based development that incidentally, would promote transit over auto-dependency.

This rule does not restrict development in areas appropriate for development or redevelopment. This rule allows for infill development, revitalization and redevelopment, in appropriate locations, consistent with local planning, so long as appropriate wastewater treatment options and sufficient treatment capacity to address planned development exists. The Department further expects that the wastewater management planning process will identify future capacity constraints in urban areas, allowing formulation of a strategy to overcome those constraints before they become a barrier that compromises redevelopment and revitalization opportunities. This will also allow all levels of government to align financial assistance priorities with urban revitalization needs.

Further, suburban and “Greenfield” areas are not restricted from development, nor are they uniformly restricted from being identified as sewer service areas. Suburban and “Greenfield” areas may be developed consistent with an appropriate wastewater treatment option with sufficient treatment capacity to address planned development. Suburban and “Greenfield” areas may be identified as sewer service area, so long as they do not contain large areas of contiguous environmentally sensitive features, which are inappropriate for the type of dense development

that would require sewer service, and provided they are consistent with local land use planning goals. Even where environmental conflicts exist, N.J.A.C. 7:15-5.24(h) provides the opportunity to include environmentally sensitive areas in a sewer service area as necessary to promote center based development and achieve environs protection outside of the center through the Plan Endorsement process. This process seeks to ensure a comprehensive planning approach is undertaken, including center-based development and appropriate environs protections, that will lead to enhanced planning and land use patterns that serve to protect natural resources and water quality.

Information concerning the existing permitted capacity of both public water supply systems and wastewater treatment plants is available on the Department's web site. The Department has not completed an analysis of the future wastewater treatment and water supply needs of the State as part of this rule making. In fact, this analysis is the heart of the wastewater management plans which are required by the rule. These plans will include a build-out projection and calculation of the future wastewater and water supply needs to sustain that development. These projections can then be compared against available capacity, and there existing capacity is not sufficient the plans will identify measures that must be implemented to ensure that those needs can and will be met.

The rule will discourage sprawl, by ensuring that sewer service is provided only in areas appropriate for growth based on environmental sensitivity and local planning objectives. The rule allows for development on septic systems in environmentally sensitive areas provided that the density of that development does not result in degradation of ground water quality below the

statewide average. The Department does not deny all wastewater treatment alternatives to any particular property or area, as this would deprive the property owner of all reasonable economic use of that property and would likely be determined a "taking" under the Fifth Amendment of the U.S. Constitution. The level of development that can be supported on septic systems is more in keeping with the conservation of those resources. The rule also allows the use of centralized wastewater systems in these areas to promote clustering of development, thereby preserving large contiguous tracts of open space. Lastly, the rule addresses water quality protection from nonpoint sources by including requirements for riparian zone and steep slope protection as these are the most important to the reduction of nonpoint source pollutant loads. The rule further reinforces the existing stormwater management requirements for development in other areas to address water quality protection.

98. COMMENT: The proposed rules are setting up a scenario that will result in windfalls for some landowners and wipeouts for other. Land acquisition and TDR programs may allow for some form of compensation, however, growth areas must be identified for TDR programs to be successful. It seems that the proposed rules are designed to stop growth altogether as opposed to promoting it in appropriate areas. (66)

RESPONSE: The rule is not designed to stop growth altogether as suggested by the commenter. The rule is intended to reduce conflicts between future sewer service areas and the environmental protection mandate of the Department. The Department believes that this proposal in consistent with the concepts and requirements of Transfer of Development Rights programs.

The rule supports local land use planning goals by integrating local land use plans into the wastewater management plans. Therefore, if one of the goals of the local land use plan is the preservation of agricultural uses, then the extension of sewers into that area to support other land uses would not be a prudent course of action. If a municipality intended to accomplish that farmland preservation through a Transfer of Development Rights program, then it would make sense to direct public sewage infrastructure and public water infrastructure to that TDR receiving area as necessary to support the increased density in the receiving area. These local planning objectives including TDR receiving areas are to be identified in the wastewater management plan. The State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq., requires that a municipality receive Plan Endorsement by the State Planning Commission prior to enactment of the adoption or amendment of any development transfer ordinance (N.J.S.A. 40:55D-140e). Any significant conflicts between the TDR receiving area and environmentally sensitive areas would be identified and remedied through this planning process (See N.J.A.C. 7:15-5.24(h). Once the boundary of the TDR receiving area is agreed upon, together with the amount of development that must be supported in that receiving area, the plan must ensure that the TDR receiving area has the support of adequate infrastructure. The environmental resources and wastewater capacity limitations must be considered during identification of TDR receiving areas as these considerations are integral to the success any TDR program. For example, the designation of a TDR receiving area for which the Department could not issue construction permits due to wetlands conflicts would be doomed to failure. Similarly, if the planned density of the TDR receiving area requires public wastewater and water supply infrastructure and that infrastructure does not exist, the TDR program could not be successful. This rule will promote a

regional understanding of the capacity of these systems, and make an assessment of available environmental infrastructure alternatives possible.

99. COMMENT: These rules create a planning and regulatory process that seems designed to prohibit or at least thwart any new development statewide. This seems to include the "agricultural development" of structures needed to add value to crops or to package or process the agricultural output of the farm. They would make it even more difficult for food processors or equipment dealers to locate in New Jersey close to what could be a steady supply of quality products. Research from the New Jersey Agricultural Experiment Station has shown that New Jersey's environmental regulations have in the past been the most important factor that food producers have moved to other states or been uninterested in locating near New Jersey farms. These rules exacerbate the situation and run counter to more than 25 years of public policy supporting farm viability created through statutes and other regulations. (58)

RESPONSE: The Water Quality Management Planning rules are not intended to thwart or prohibit development. The rules are designed to ensure that public wastewater infrastructure supports development in appropriate places based on the environmental protection mandates of the Department and the goals of local land use planning, and to ensure that wastewater treatment capacity exists to support that growth without degrading water quality.

The rules do not define "agricultural development" and as such do not treat agricultural development differently than any other development with regard to proper wastewater management and nonpoint source pollution control. Nonpoint source pollution control is

accomplished by reinforcing the existing riparian zone requirements of the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, avoiding construction on steep slopes, and implementing the Department's existing Stormwater Management Rules, N.J.A.C. 7:8. Development that does not generate wastewater, such as the construction of a barn or storage building would not be otherwise affected by the rule. The rules do not prohibit the extension of sewage infrastructure into areas that are not environmentally sensitive. Similarly, the rules do not prohibit new NJPDES regulated wastewater discharges in environmentally sensitive areas. Even in environmentally sensitive areas, new NJPDES regulated point source discharges of wastewater are permissible if the development preserves 70 percent of the land area and thus qualifies for a revision as a cluster development. Lastly, discharges less than 2,000 gallons per day that are not regulated by the NJPDES program, are permissible in accordance with local zoning once a wastewater management plan is adopted. Consequently, the rule does not bar or prevent the agricultural packaging or processing facilities from being located in close proximity to the land on which those agricultural products are produced.

100. COMMENT: The Department has the explicit statutory authority and responsibility to protect the environment which can be done through all means possible, including enlisting land use planning. However, the Department is laboring to layer multiple command-and-control style rules to achieve through permitting what could be done more effectively and efficiently through regulations based on land use planning.

The proposed rules demonstrate that the Department is trying to protect the environment by reducing the amount of development. The result, however, is likely to hurt both the State's

economy and its ability to reduce racial and economic segregation and auto-dependency and to accomplish these blows with little or no benefit to the environment.

Land use planning that encourages growth in growth areas and conservation levels of development in conservation areas, not a blanket of medium density across the State, will provide a far stronger basis, producing better environmental results, for the Department's permitting programs. In what ways has the Department considered how to use land use planning standards as part of its approach to protecting water supply and quality? What will the impacts of the proposed rule have on land use and what is the Department currently doing to ensure, as oppose to encourage, that effective changes are made to land use policy to encourage growth patterns that would protect water resources? In what ways does the Department feel it affects land use and where does it see its proper role in the land use process? (5)

RESPONSE: Foremost, this rule is a planning rule and does not create, and is not intended to create a regulatory program. Unfortunately, because wastewater management plans have not been kept current, many are based on land use planning information that is 20 to 40 years old. These plans no longer support current land use planning objectives and are not reliable in terms of ensuring that wastewater treatment capacity exists to support those current planning objectives. This has resulted in the necessity for numerous and continuous site specific and project specific amendments. The review of these site specific amendments more closely resembles a regulatory review than a planning program. The intent of the rule is to return to a viable continuing planning process as required by the federal Clean Water Act and the New

Jersey Water Quality Planning Act, by requiring require regional wastewater management planning.

The commenter oversimplifies the intent of the rule by saying the Department is intent on protecting the environment through a reduction in development density. The rule is intended to eliminate obvious conflict between sewer service areas and the Department's environmental protection mandate, including the protection of water quality, wetlands, threatened and endangered species, and rare and unique assemblages of plant and animal communities and ecosystems. The extension of sewers into these sensitive areas only serves to promote and, where public investment has been made in sewage infrastructure, subsidize the development of the very resources the Department is charged to protect. The rule also intends to support local planning objectives including, but not necessarily limited to: center based development, urban revitalization and agricultural and scenic resource protection. Once sewer service areas have been identified that support these goals, the future wastewater treatment needs of those areas are calculated, and compared against existing treatment capacity. If existing treatment capacity is insufficient to meet the planned growth, either a plan to develop additional wastewater capacity is needed or the future growth expectations must be adjusted based on the ability of the wastewater treatment systems to support that growth without jeopardizing water quality. In those areas outside of sewer service areas, individual discharges of wastewater to ground water will be the default wastewater management alternative. Similar to sewer service areas, the capacity of an area to support ground water discharges must be evaluated and growth expectations must be limited so as to protect the quality of ground water.

This proposal does not advocate "a blanket of medium density across the state", but instead, sets a limit on the density of septic units (which is translated to residential units) as a method to protect water quality. Essentially, the rule requires a calculation the sustainable development in each HUC 11 watershed based on ground water recharge available to dilute those discharges. However, the rule does not require the uniform distribution of those units by setting a minimum lot size requirement. Rather the rule allows and the Department supports a distribution of septic density that makes sense in terms of local planning. For example, smaller lot sizes may be more appropriate to an area immediately adjacent to a center or sewered area with larger lot sizes being planned in other areas of the watershed as necessary to accomplish protection of farmland, natural resources, scenic vistas or important aquifer recharge areas. The rule also includes provisions to promote clustered development, by allowing a simplified planning process for NJPDES regulated discharges that accomplish this objective (N.J.A.C. 7:15-3.5(b)4.x.), and by allowing flexibility in the establishment of sewer service areas necessary to support center based development (See N.J.A.C. 7:15-5.24(h).

The Department's role through Water Quality Management Planning is to ensure that sewage infrastructure supports development in appropriate growth areas, to ensure that the wastewater treatment capacity exists or will exist to support that growth without compromising water quality, to ensure that public sewage infrastructure does not encourage growth in areas where it would be inconsistent with federal, State, regional and local land use planning, and to ensure that wastewater management planning decisions do not cause water quality impairment either directly through point source discharges of pollutants or indirectly through nonpoint source discharges of pollutants and water supply decisions that are not sustainable.

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State Plan

101. COMMENT: The proposed rule does not address consistency with the New Jersey Development and Redevelopment Plan. (53)

RESPONSE: The intent of the continuing planning process is to integrate federal, State, regional and local land use planning into Water Quality Management Plans. The New Jersey Development and Redevelopment Plan is one of the many important land use planning documents that must be considered in the development of wastewater management plans. As part of its rule proposal, the Department prepared a Smart Growth Impact Statement as required by Executive Order No. 4 (2002). In that impact statement the Department found: Wastewater management plans will necessarily identify areas appropriate for sewer service. The rule proposal channels growth and infrastructure into areas where it is appropriate, requires protections in areas where it is not and encourages cluster development. The designation of areas for centralized sewer service limits the land supply available for intensive uses that require sewer service, and affect the location of new development for such uses by concentrating development in planned sewer service areas that have adequate sewerage capacity. The rules also allow the development of new infrastructure as necessary to support and encourage center-based development in appropriate areas. As a result the public investment associated with new infrastructure, regulation and/or restoration as well as the many other costs of sprawl development is avoided. The overall effect on development patterns in the State will be more center-based development and a reinvestment in the redevelopment of existing urban areas. These results compliment and are consistent with the State Plan."

However, the New Jersey Development and Redevelopment Plan is not the only consideration in wastewater management planning. Water Quality Management Plans must concern themselves foremost with the protection of natural resources and water quality, and the availability of wastewater and water supply capacity to support growth without impacting water quality. Therefore, the State Development and Redevelopment Plan (SDRP) cannot be considered exclusive of these other goals.

102. COMMENT: Is the current approach to water quality planning, including the configuration of planning areas, any longer rational, or even legal, given the significant changes in enacted and decided law over the three decades since the Water Quality Planning Act, N.J.S.A. 58:11-1, et seq., was adopted?

Although the Water Quality Planning Act antedates the State Planning Act, it anticipated statewide planning and directs the Department to coordinate and integrate the water quality planning process with other comprehensive planning endeavors. The State Development and Redevelopment Plan (SDRP) is the State's "coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State and its regions…." The integration of water quality planning, particularly sewerage infrastructure planning, and statewide planning would, without doubt, advance the purposes of both statues.

Executive orders direct State agencies to harmonize their spending and regulatory programs with the SDRP. But neither the State Planning Act, the related executive orders, or any other statute

endows any State agency with the authority to subordinate the "overall master plan of the State" to its functional programs. Nevertheless, more by inadvertence than design, that has happened – with ramifications for statewide planning generally and infrastructure planning (including sewerage systems) in particular.

In 2007, without public notice or opportunity for comment, the SDRP's policy map was modified to reflect the Department's regulatory scheme. The Department's changes reduced the SDRP's growth area by nearly 15 percent with no adjustment in the regions' population and employment. In other words, the Department significantly altered the distribution and density of the State's future population and employment.

A substantial portion of the changes were made by eliminating areas where sewerage extensions were planned, but not yet constructed. The Department's modifications to the SDRP policy map bear directly on current and future WQMPs/WMPs. Yet they were accomplished without satisfaction of the planning, consultation and public participation provisions of the Water Quality Planning Act. This failure was almost assuredly inadvertent, arising from the Department's goal of assuring that agency's regulations are definitively stamped on the SDRP policy map.

While the manner in which the SDRP's policy map was most recently amended illustrates the Department's predominant role in dictating the State's development and redevelopment policies, the SDRP's captive status in not new. While State agencies have been directed to "harmonize" their programs with the SDRP, they are not required to adhere to it, and the Department has not done so.

In practical terms, State, regional, and local plans are relevant only if first consistent with the Department's rules, which are not always consistent with each other. The agency of authorship – whether local, regional or State – is of not consequence unless the plan adheres to the Department's thresholds. Even where the Department administered plans are the very foundation of adopted plans (as was the case when the State Planning Commission crafted the SDRP policy map), the Department does not defer to them, and therefore, applicants cannot rely upon them.

As a practical matter, those wishing (or needing) to develop, redevelop and/or maintain improvements (i.e. structures and infrastructure) are required to comply with all of the Department's rules. It would be unreasonable to adopt plans that encourage investments in pursuit of something that cannot be permitted. It follows, then, that a plan inconsistent with the Department's rules would be unreasonable. (18, 42, 44, 45, 61)

103. COMMENT: The Department has demonstrated that, regardless of other planning and policy considerations, it has the will and the means to enforce its vision of where people should not live and work. Thus, how can all State, regional and local plans be brought into consistency with the Department's regulatory scheme?

Through the application of the Department's Landscape Mapping, the Department developed an over-lay map of the entire state depicting where it will and will not permit development. The Department then used that over-lay as the basis for "clipping" the SDRP's growth areas. Having

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taken control of delineating the SDRP's growth areas, it is now incumbent upon the Department to determine how the State's anticipated growth will fit into those areas in a manner that comports with the relevant legislation and case law. Only in this way can the Mount Laurel obligations, which rest on balanced planning for "realistic" outcomes, be vindicated.

To that end, having calibrated the SDRP's policy map, the Department must now produce water quality (and other) plans that provide <u>for</u> growth fit. Based on its mapping, the Department must allocate the SDRP's projected population and employment within the areas where the agency will permit development. It must then assess the environmental infrastructure (including wastewater treatment capacity) needed to serve those projected levels of population and jobs to the agency's standards and adopt plans that will assure the availability of those facilities to meet growth concerns.

The Department's Growth Fit plan (i.e., the clipped SDRP policy map, population/employment distributions, infrastructure schedule), after the formality of adoption by the State Planning Commission, would serve as the basis for constitutionally consistent planning by all other agencies (State, regional and local). It would result in planning that goes beyond mere conformance with one agency's rules to encompass the principles of fair housing, as demanded by the State's constitution and laws. (18, 42, 44, 45, 61)

104. COMMENT: The State Plan Map is currently being revised between the Department and State Planning Commission. The current draft assumes that large areas are environmentally sensitive without any information, but there is a procedure that allows a detailed analysis to

change the environmental restrictions. In essence, this practice requires analysis of each area which may be restricted before the area is barred from sanitary sewers. If the plan is done without analysis to prove the designation was incorrect, the wastewater management plan will then have to be amended. It should be noted that the State Plan map, if adopted, will impose restrictions without ever being subject to public comment. (87)

RESPONSE TO COMMENTS 102 THROUGH 104: All three commenters reference adjustments to the State Development and Redevelopment Plan (SDRP) that were made in response to information supplied by the Department of Environmental Protection and the manner in which those changes were made. While these comments, and indeed the process for SDRP development and adoption are outside of the purview of these rules, the Department offers the following.

The Department agrees with the commenter's point of view that an SDRP that does not eliminate serious conflicts with the Department's regulatory programs will be of little value, as the Department would be prevented from issuing permits that support that plan. The current State Plan Policy Map was adopted in 2001, and is the subject of Cross-Acceptance. As a member of the State Planning Commission, and in an effort to reduce conflicts between the Department's regulatory programs and the SDRP, the Department has provided various data sets of environmentally sensitive features to state and local agencies, as well as private sector interests, to inform and guide the Cross-Acceptance process and revisions to the State Plan Policy Map. The State Planning Commission has released a Preliminary State Plan Policy Map that includes revisions based on new information from State agencies, including data on transportation

systems and agricultural resources in addition to that supplied by the Department. This preliminary State Plan Policy Map is then subject to a cross acceptance process wherein it is reviewed by counties and municipalities and adjusted based on regional and local information and planning goals. Final revisions and recommendations regarding the State Plan Policy Map are guided by the Cross-Acceptance process and ultimately the plan must be approved by the State Planning Commission, of which the Department is but one member of seventeen. Given the broad and ambitious scope of the State Plan Policy Map, it is not possible to ensure that all environmental concerns have been addressed, nor in many cases have all of the infrastructure capacity constraints been fully identified and considered. Consequently, the Department cannot rely on the State Plan Policy Map as a basis for water quality management planning.

The more detailed analysis required to assess environmental impact and sufficiency of wastewater and water supply capacity typically takes place through the Plan Endorsement process where municipal master plans and zoning are evaluated for conformance with the objectives of the State Plan, including those surrounding natural resource protection and future infrastructure capacity. The water quality management planning rules acknowledge these more detailed assessments at N.J.A.C. 7:15-5.24(h) and allow the inclusion of environmentally sensitive features within a sewer service area to accomplish center based development provided that environs outside of the center are adequately protected. Where municipalities do not engage the Plan Endorsement process, the wastewater management planning process is designed to eliminate conflicts between sewer service areas and significant environmental features and includes an estimate of future development potential and ensures that infrastructure exists or can be developed to meet those needs. The Department agrees that the wastewater management plan

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should be directed at determining the future wastewater and water supply needs of these growth areas and should implement strategies and plans necessary to provide that capacity. However, that capacity cannot come at the expense of environmental protection. There are technological and financial limitations to meeting ever increasing wastewater treatment demands that must be considered as part of this analysis, and that must be recognized in a wastewater management plan.

The Department disagrees with the statement that it is required through executive order to harmonize its regulatory programs with the SDRP In *N.J. Builders Assoc. v. Dept. of Environ. Prot., 306 N.J. Super. 93 (App. Div. 1997),* the Appellate Division found that the State Development and Redevelopment Plan has no independent regulatory effect, and thus the Department could not use the Plan for determining regulatory compliance.

The Department has been directed by the Legislature to perform specific functions and responsibilities to protect certain of the State's resources such as its water quality and related public health impacts. The Department has and will continue to perform these functions. While the information and regulatory framework the Department has developed in performing its statutory mandate will necessarily affect activities that may have an impact upon those State resources: the Department has not and will not attempt to exercise any function not assigned to it by the Legislature.

105. COMMENT: These regulations give little consideration to the fact that many municipalities development potential has already been severely limited by The Highlands Act

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and various other Department regulations. The proposed rules could potentially prevent a proposed Village Center from receiving the increased sewer allocation that is necessary for projects to reach build-out. The higher density, village center types of development proposed for municipalities, supported by the planning principles of the State Development and Redevelopment Plan, would ultimately lead to an outcome that is contradictory to the State Planning Commission's objectives.

As the proposed WQMP rules become more complex, they are becoming more focused on the State Plan's development and redevelopment guidelines in determining sewer service allocation approvals. It is important to install infrastructure and have sewer allocation in areas that have already been deemed appropriate for growth or that are considered to be designated centers, but the fact that the Department will be relying more heavily on the State Planning Commission brings into question where municipalities should be dedicating their limited financial resources. (74)

RESPONSE: The proposed rule does recognize the Highlands Water Protection and Planning Act (N.J.S.A. 13:20) and the Highlands Regional Master Plan being prepared pursuant to that Act and promotes consistency between wastewater management plans and the Highlands Regional Master Plan (See N.J.A.C. 7:15-3.10). However, this rule cannot and does not override the requirements and authority of the Highlands Water Protection and Planning Act.

The provisions of this rule will not "prevent a proposed Village Center from receiving the increased sewer allocation that is necessary for projects to reach build-out," so long as an

appropriate wastewater treatment option and sufficient treatment capacity to address the planned development exists.

The Department supports discreet compact villages and centers as opposed to a pattern of sprawl development. The rule allows for the extension or creation of centralized wastewater infrastructure to support these development patterns, even in environmentally sensitive areas, when accompanied by adequate protection of environs located outside of the center through the Plan Endorsement process (See N.J.A.C. 7:15-5.24(h).

As noted in the Response to Comments 102 through 104, the Department agrees that wastewater management plans should predict the future wastewater management needs of growth areas and put in place a plan to meet those future needs. However, that capacity cannot come at the expense of environmental or water quality protection. There are technological and financial limitations to meeting ever increasing wastewater treatment demands that must be considered as part of this analysis, and that must be recognized in a wastewater management plan.

The commenter also questions where limited municipal financial resources should be committed. The rule designates counties as the wastewater management planning agency of choice. Therefore, where there are no apparent conflicts between local land use plans requiring sewer service and environmentally sensitive areas the Department encourages municipalities to work with and support county wastewater management plan development.

However, where there are significant conflicts between local land use plans and environmentally sensitive features the Department affords an opportunity to allow sewer service area in non-critical environmentally sensitive areas to support center based development provided that the remainder of the environmentally sensitive areas located outside of the center are adequately protected. This balance is to be accomplished through the Plan Endorsement process established under the State Planning Commission. The rule at N.J.A.C. 7:15-5.24(h) allows the county wastewater management plan to include the alignment of sewer service areas to support an Endorsed Plan that accomplishes these objectives.

106. COMMENT: In addition to protecting water quality, the WQMP rules are an integral component of State agency regulations that can implement the State Development and Redevelopment Plan. There is concern about insufficient integration with State and local land use plans. The rule proposal gives the Department unprecedented authority over land use without adequately recognizing State, county and local land use plans or allowing for adequate input from the State Planning Commission, and local and county planning boards. The authorization of the redrawing of sewer service area boundaries based primarily on environmental data ignores other critical inputs into the land use planning process, including the need for affordable housing, urban revitalization, and the presence of expensive transportation infrastructure. These issues, along with environmental constraints, are all overlaid and integrated into the State Plan (albeit at a more general scale than would be required for sewer service area delineation). By not requiring any coordination with the State Planning Commission or any analysis of major departures from State Plan planning areas, the proposed rule also fails to take advantage of the comprehensive process of State Plan Cross Acceptance, which most recently

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was interrupted to allow for the incorporation of more environmental analysis at the request of the Department.

The rule should do more to take advantage of the comprehensive and overarching framework that the State Plan provides for growth and preservation in New Jersey. Recognizing this in the rule will enable continued coordination across State agencies and between different levels of government, leading to a more efficient and effective planning process. This is not a recommendation for blanket consistency between sewer service areas and the State Plan.

The State Plan process of cross acceptance offers a model for mediating disputes between counties and the Department regarding WMPs. Failure to allow for adequate input from local government will have political ramifications that could jeopardize the rule's adoption. (78)

RESPONSE: The Legislative findings in the New Jersey Water Quality Planning Act state that "water quality is dependent on factors of topography, hydrology, population concentration, industrial and commercial development, agricultural uses, transportation and other such factors which vary among and within watersheds and other regions of the State and that pollution abatement programs should consider these natural and man-made conditions that influence water quality." (N.J.S.A. 58:11A-2.a.). "The Legislative objective of the Water Quality Planning Act is reflected in the purposes of the Water Quality Management Planning rules set forth at N.J.A.C. 7:15-1, which include to establish policies, procedures and standards which, wherever attainable, help to restore and maintain the chemical, physical and biological integrity of the waters of the State, including ground waters, and the public trust therein, to protect public health, to safeguard

fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water."

These goals are to be accomplished through a continuing planning process that integrates water quality management plans with related Federal, State, regional and local land use plans. The rule is not designed to exclude State, county, regional or municipal land participation in the process. The rule designates counties as the appropriate wastewater management planning agencies. Counties are uniquely positioned to accomplish the coordination required for wastewater management plan development not only because of their regional view, their technological capacity, and their relationship with their municipalities but also because of the significant role they play in the SDRP Cross Acceptance process.

Water Quality Management Planning requires the identification of areas that are suitable for growth due to their low environmental sensitivity and existing land use patterns and plans. Wastewater management plans then bear the burden of ensuring that adequate wastewater and water supply infrastructure exists or can be developed without negative effects on water quality sufficient to support that growth. The inverse is also true, that there are areas of the State, that due to environmental sensitivity or other legitimate local planning aspirations (such as farmland preservation), where growth should not be encouraged, supported or subsidized by the extension of public sewers. The Department is confident that where fair consideration of environmental sensitivity has been afforded through the State Plan process, consistency with the SDRP will be achieved by these rules.

107. COMMENT: The New Jersey State Plan and Smart Growth principals are good guidelines and provide a framework for the creation of compatible community plans that will meet different local needs and challenges. The Department, along with the Department of Community Affairs, the State Planning Commission and the Office of Smart Growth, need to further provide incentives and regulations that will enhance the predictability and reduce the risks for public private partnerships that are serving the underserved needs of the community. (27)

RESPONSE: The Department is unsure of the intent of the phrase "underserved needs of the community." The Department believes that rule will enhance the predictability and reduce the risks for public private partnerships. If wastewater management plans are prepared in accordance with this rule, conflicts between sewer service areas and environmentally sensitive areas will be reduced. Further, working with counties and through the counties with municipalities, sewer service areas should only be identified in those places where local land use plans and zoning direct that growth. Once appropriate sewer service areas are identified, based on environmental and local land use planning, a build-out analysis is performed to predict the future wastewater treatment and water supply capacity needed to support that development, and the plan will identify how those needs are to be met. As a result, a sewer service area in a wastewater management plan adopted under this rule will tell a prospective developer the following four things: the area has minimal environmental sensitivity, the area is a place where the local government supports growth, there is adequate wastewater treatment capacity to support the development, and there is adequate water supply to support the development. Therefore, the outcome of wastewater management plans should be greater predictability for the development community.

The Department assumes also that the commenter is suggesting that the Department should proved incentives, in the form of financial assistance to provide infrastructure in the areas designated for growth. As part of the continuing planning process, the Department periodically develops a priority system and project priority list as the basis to award low and no interest loans from the State Revolving Fund and the Environmental Infrastructure Trust. The system, which was first developed in 1982, is constantly evolving. Historically, the state's highest priority was to upgrade primary treatment plants to achieve secondary levels, thereby significantly reducing pollutant discharges. With the elimination of primary facilities in New Jersey, the primary discharge category has been deleted from the priority system-a major milestone that signals progress is being made under the state's financing programs. The state's highest priority wastewater needs now include combined sewer overflows (CSOs) and major pipe rehabilitation to stop discharges of raw sewage. These types of problems are frequently found in older urban areas, where pollution impacts streams and rivers near large population centers and where the cost to correct these problems is a serious concern. Priority is also placed on projects in coastal areas, where pollution impacts from outdated sewage treatment and conveyance systems can harm the shore environment and the tourism industry.

To prioritize wastewater projects under the Environmental Infrastructure Financing Program, the division uses a point system, which ranks projects based on the nature of the wastewater problem. In addition, projects discharging to surface waters receive points that reflect the existing uses of the waterway. These uses include drinking water supplies, boating, fishing,

swimming, and water used for industrial or agricultural purposes. The point values reflect the relative priority of the water uses, with drinking water and recreational uses being the highest priorities. Points are also given to projects that would eliminate failing septic systems, a public health threat.

In addition, financing decisions under these programs must be consistent with the areawide water quality management plan. Therefore, as sewer service areas are revised to eliminate conflicts with the Department's other environmental protection mandates, competition for the limited available funds will be reduced making urban infrastructure rehabilitation even more competitive. The Department may also consider revising its point system to afford greater priority to urban infrastructure rehabilitation and capacity development to ensure that the needs of urban redevelopment are met.

108. COMMENT: The State Plan process should use accurate and detailed data from all relevant sources including the Department as the basis for identifying growth areas and conservation areas that will meet all of the goals listed in the State Planning Act. The State Planning Commission was given this duty as its statutory responsibility. The Department can support this and meet its own mission to protect natural resources and environmental quality in these growth areas and conservation areas by creating rules that are based on appropriate planning techniques, best management practices and effective permitting standards. (5)

RESPONSE: The Department agrees with the commenter that environmental information must be an integral part of the State Plan process, and that adjustment of the State Plan Policy Map in

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response to that information reflects the intended result of the State Planning process. The State Planning Act at N.J.S.A. 52:18A-200 states that the State Development and Redevelopment Plan (SDRP) shall:

"a. Protect the natural resources and qualities of the State, including, but not limited to, agricultural development areas, fresh and saltwater wetlands, flood plains, stream corridors, aquifer recharge areas, steep slopes, areas of unique flora and fauna, and areas with scenic, historic, cultural and recreational values;

b. Promote development and redevelopment in a manner consistent with sound planning and where infrastructure can be provided at private expense or with reasonable expenditure of public funds. This should not be construed to give preferential treatment to new construction;"

The current State Plan Policy Map was adopted in 2001, and is the subject of Cross-Acceptance. As a member of the State Planning Commission, and in an effort to reduce conflicts between the Department's regulatory programs and the SDRP, the Department has provided various data sets of environmentally sensitive features to state and local agencies, as well as private sector interests, to inform and guide the Cross-Acceptance process and revisions to the State Plan Policy Map. Among these data sets were wetlands, Category One streams, Natural Heritage Priority Sites (which identify unique and rare assemblages of plant and animal communities) and threatened and endangered species habitats (from the Landscape project). These same data layers are used in this rule to delineate those areas appropriate for intense development supported by centralized sewers.

The State Planning Commission has released a Preliminary State Plan Policy Map that includes revisions based on new information from State agencies, including data on transportation systems and agricultural resources in addition to that supplied by the Department. This preliminary State Plan Policy Map is then subject to a cross acceptance process wherein it is reviewed by counties and municipalities and adjusted based on regional and local information and planning goals. Final revisions and recommendations regarding the State Plan Policy Map are guided by the Cross-Acceptance process and ultimately the plan must be approved by the State Planning Commission, of which the Department is but one member of seventeen. Given the broad and ambitious scope of the State Plan Policy Map, it is not possible to ensure that all environmental concerns have been addressed, nor in many cases have all of the infrastructure capacity constraints been fully identified and considered. Consequently, the Department cannot rely on the State Plan Policy Map exclusively as a basis for water quality management planning.

Updated wastewater management plans, prepared consistent with the provisions identified in this rule, will refine the SDRP through a necessary closer examination of environmental constraints, build-out potential and infrastructure needs to support the broad vision of the SDRP.

109. COMMENT: There are many reasons to connect wastewater management planning to comprehensive planning consistent with the State Plan. Regulations alone will not result in efficient land use patterns that necessarily protect the State's natural resources. It is critical to link the wastewater service, as well as individual subsurface sewage disposal system treatment to sound, comprehensive planning through the Plan Endorsement process. Absent this planning,

the result will be the continuation of the sprawl development pattern so prevalent throughout the State today. (77)

RESPONSE: The Department appreciates the commenter's support for linking this proposal to the Plan Endorsement process, pursuant to N.J.A.C. 7:15-5.24(h). The rule discourages sprawl, by ensuring that sewer service is provided only in areas appropriate for growth based on environmental sensitivity and local planning objectives. The rule allows for development on septic systems in environmentally sensitive areas provided that the density of that development does not result in degradation of ground water quality below the statewide average. The Department does not deny all wastewater treatment alternatives to any particular property or area, as this would deprive the property owner of all reasonable economic use of that property and would likely be determined a "taking" under the Fifth Amendment of the U.S. Constitution. The level of development that can be supported on septic systems is more in keeping with the conservation of those resources. The rule also allows the use of centralized wastewater systems in these areas to promote clustering of development, thereby preserving large contiguous tracts of open space.

However, New Jersey is a "home rule" state and the power for land use planning and zoning rests with municipal governments under the Municipal Land Use Law (N.J.S.A. 40:55D). The Department acknowledges that in places where municipalities elect not to submit to the Plan Endorsement process or plan properly a "sprawl development pattern" is a possible outcome.

"No Growth"

110. COMMENT: Further regulation in the State will hinder development and have a negative effect on property values and the economy. Development of real property within New Jersey continues to be limited by the Department and the State's regulatory scheme. The designation of the Highlands and the Pinelands created large land areas where development is no longer permitted. The strict regulations protecting the wetlands and the proposed regulations governing the expansion of Category One waters further restrict the amount of available, buildable land. While the Department's responsibility to protect the State's natural resources is recognized, further regulation will negatively affect the residents of the State. Plans need to be in place to ensure that a large section of the population does not continue to be priced out of the State. By decreasing the available space for building, we run the risk of forcing housing prices to rise by lowering the supply of available residential units. (29)

RESPONSE: The Department disagrees with the statement that development is no longer permitted in the Highlands, Pinelands, wetlands and along Category One waters. In each of these cases a regulatory program has been established which regulates the amount of development and the types of development that can be constructed consistent with the protection of those resources. There is no outright prohibition against all development in any of these areas. In both the Pinelands and the Highlands there is established, or soon to be established, a comprehensive plan to address resource protection and appropriate development. In the Pinelands, Regional Growth Areas are established where development is to be focused, supported by regional infrastructure. The intent of these areas is to relieve the development pressure from more sensitive parts of the region. There is a Pinelands Development Credit system whereby land owners in the preservation and protection areas were to be compensated as

development in the Regional Growth Areas was realized. Thus growth was not prohibited, but rather shifted to areas deemed appropriate by the Pinelands Comprehensive Management Plan.

It should also be noted that this rule does not establish a new regulatory program. Water quality management plans have been required by the federal Clean Water Act since 1972. These rules have since 1989 required the submission and regular six year updates of wastewater management plans to fulfill the federal and State requirements of a continuing planning process. Unfortunately, these requirements have gone unmet. This rule reassigns responsibility for these plans to counties, and sets forth the required elements of those plans.

This rule does not exclude any area from being built upon. The rule does ensure that wastewater infrastructure is only extended to areas appropriate to that intensity of development based on environmental sensitivity and regional and local land use planning. The rule further requires planning to demonstrate that the capacity to treat wastewater and that the water supply needed to sustain that growth either exists or can be provided when needed. In areas where centralized wastewater treatment is not provided the rule requires that development on septic systems be supported without degrading ground water quality.

While the Department acknowledges that its regulations affect where development may occur consistent with the protection of natural resources and water quality, the Department believes that the commenter overestimates the degree of influence these regulations have on the housing market. The Department believes that in a free market society, external market forces including the availability of credit, and state of the, international, national and regional economy are far

more significant factors in establishing housing prices. This is evidenced by the significant increase in housing prices during the 1990s and early 2000s, followed by the recent decline in housing prices when environmental regulations have not been relaxed.

COAH

111. COMMENT: The Department should withdraw the proposal and replace it with rules that reflect the "balance" mandated by the State Planning Act in fulfillment of the State's obligations flowing from the *Mount Laurel* Doctrine.

All levels of government in New Jersey have a constitutional obligation with respect to housing, and there is no question on the role of state planning in the fulfillment of those obligations. To implement the State's constitutional obligations, the Legislature adopted the Fair Housing Act, N.J.S.A. 52:27D-301, et seq., which "incorporates what will be a comprehensive rational plan for the development of this state, authorized by the Legislature and the Governor for this purpose (*viz.*, the State Planning Act, N.J.S.A. 52:18A-196, et seq.). The Fair Housing Act provides a statutory methodology for the distribution of the statewide need for affordable housing. Per the Supreme Court: "That provision, when read together with this new State planning act, L. 1985, c. 395, contemplates the use of a statewide plan that will indicate where development and redevelopment is to take place or is to be encouraged, and where it is to be limited, including the appropriate kinds of development." (103 N.J. 1, 32 (1986))

The SDRP is to be the tool that State, county and local governments – as well as other public and private sector interests – will use in assessing suitable locations for infrastructure, housing, economic growth and conservation.

There are no exemptions from the *Mount Laurel* Doctrine. There are no exceptions from the State Planning Act's preeminence among plans governing land use in New Jersey. Having a "constitutional dimension" it cannot be subordinated to programmatic plans. As the vehicle for achieving balance among equally important, interrelated policy objectives, the *SDRP "is the overall master plan of the State"* (103 N.J. 1, 32 (1986)) (Emphasis supplied) and it cannot be relegated to the back seat to an agency's functional plan.

Nevertheless, in the WQMP rule proposal, the Department second-guesses and dismisses the duly adopted SDRP because "former renditions of the State Plan Policy Map include conflicts with the Department's environmental protection and conservation planning." The Department has not documented that such a conflict exists, but if it did, it would be incumbent upon the Department to change its plans to comport with the Statewide umbrella of the SDRP.

The hierarchy of planning is not a theoretical nicety, but rather a constitutional necessity. The State Planning process is the vehicle for determining where growth will occur and assuring attainment of the *goal* of *Mount Laurel*: the satisfaction of the statewide need for affordable housing. It is through the State Planning Process – "a cooperative planning process that involves the full participation of State, county, and local governments" (N.J.S.A. 52:18A-196(e)) – that the balancing of priorities will result in the provision of the realistic opportunity for the

construction of modest income housing. As a member of the State Planning Commission, the Department has ample opportunity to participate in the balancing act. Once the SDRP is adopted, as the current one was in March 2001, the Department has a constitutional obligation to abide by it and to implement it. The Department cannot ignore the SDRP. Accordingly, the proposed WQMP rules should be withdrawn and the Department should undertake rulemaking that will implement the State's "master plan," the SDRP. (18, 42, 44, 45, 61)

112. COMMENT: Municipalities must achieve compliance with their constitutional affordable housing obligations under the *Mt. Laurel* doctrine. The proposed regulations do not appear to recognize the vested rights of inclusionary developments and make no mention at all of the preeminence of Scarce Resource Orders for such things as land and sewer capacity. In order to reconcile the proposed rules with the constitutional obligations annunciated by the New Jersey Supreme Court, the provision should be amended. The rule should specifically exempt out inclusionary developments and also recognize the preeminence of Scarce Resource Orders. In the absence of these changes, the rules fail to recognize the constitutional obligations of each municipality. (57)

RESPONSE TO COMMENTS 111 AND 112: The Department of Environmental Protection is ever mindful of the Constitutional obligation to provide realistic housing opportunities for low and moderate income families. However, the Department does not believe that this obligation must be satisfied at the expense of environmental protection, and thus the amount of affordable housing ascribed to any particular municipality must be set in proportion to its realistic growth potential. This is supported by the Supreme Court Decision known as Mount Laurel II wherein

the Court determined that to the extent that comprehensive plans for management and control of environmentally sensitive areas, prepared by Division of Coastal Resources, Bureau of Coastal Planning and Development, Department of Environmental Protection, and Pinelands Commission, permit or encourage growth, fair share obligation of municipalities' land use regulations to promote realistic opportunity for low and moderate income housing may attach. (92 N.J. 158 (1983)).

The rule is intended to eliminate obvious conflict between sewer service areas and the Department's environmental protection mandate, including the protection of water quality, wetlands, threatened and endangered species, and rare and unique assemblages of plant and animal communities and ecosystems. The designation of these sites for affordable housing, where the Department of Environmental Protection would not be able to issue permits for development, should not be considered a realistic opportunity for meeting the Constitutional obligation for affordable housing. These limitations are also recognized in the rules proposed by the New Jersey Council on Affordable Housing (COAH) at N.J.A.C. 5:94-3.13 and N.J.A.C. 5:94-5.2.

The wastewater management plans required under this rule must necessarily conduct a build-out analysis and assess the adequacy of water supply and wastewater treatment to meet the needs of the projected development. Where these needs cannot be satisfied, the projected growth is not sustainable and will likely never be realized. Again growth share projections of the affordable housing obligation for any particular municipality must recognize these limitations.

Note that because the majority of wastewater management plans have not been kept current, they are often based on information that is 20 to 30 years old. Presently, COAH would have difficulty in determining where water or sewer infrastructure is, or could become, a limiting factor in meeting affordable housing obligations. Updating these plans will afford COAH better information upon which to base future affordable housing obligations and will identify any areas where infrastructure is now, or could become, a constraint to meeting the Constitutional affordable housing obligation. This would enable COAH to ensure that municipal plans have fairly considered capacity constraints in preparing its affordable housing plan, and that where these constraints have not been fairly considered, COAH may either withhold certification or issue a scarce resource determination as it deems appropriate. The Department stands ready to assist COAH in the interpretation of these plans and to formulate solutions where wastewater and water supply constraints may impede the accomplishment of the affordable housing mandate.

The Department notes that even where environmentally sensitive resources are so prevalent within a municipality, these rules allow centralized sewer service to be established to promote center based development that has been approved through the Plan Endorsement process and includes enhanced resource protection in environs outside of the center (See N.J.A.C. 7:15-5.24(h)). The Department is confident that these rules will not preclude affordable housing opportunities, but rather, the wastewater management plans required will assist COAH in ensuring that those Constitutional obligations are met.

With regard to the commenters' position concerning the preeminence of the SDRP, similar to affordable housing, the Department does not believe that water quality management planning

and the goals of the SDRP are mutually exclusive. The Legislative findings in the New Jersey Water Quality Planning Act state the "water quality is dependent on factors of topography, hydrology, population concentration, industrial and commercial development, agricultural uses, transportation and other such factors which vary among and within watersheds and other regions of the State and that pollution abatement programs should consider these natural and man-made conditions that influence water quality." (N.J.S.A. 58:11A-2.a.). The Legislative objective defined in that same section of the Water Quality Management Planning rules is to establish policies, procedures and standards which, wherever attainable, help to restore and maintain the chemical, physical and biological integrity of the waters of the State, including ground waters, and the public trust therein, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water.

These goals are to be accomplished through a continuing planning process that integrates water quality management plans with related Federal, State, regional and local land use plans. The rule is not designed to exclude State, county, regional or municipal land participation in the process. The rule designates counties as the appropriate wastewater management planning agencies. Counties are uniquely positioned to accomplish the coordination required for wastewater management plan development not only because of their regional view, their technological capacity, and their relationship with their municipalities but also because of the significant role they play in the SDRP Cross Acceptance process.

Water Quality Management Planning requires the identification of areas that are suitable for growth due to their low environmental sensitivity and existing land use patterns and plans. Wastewater management plans then bear the burden of ensuring that adequate wastewater and water supply infrastructure exists or can be developed without negative effects on water quality sufficient to support that growth. The inverse is also true, that there are areas of the State, that due to environmental sensitivity or other legitimate local planning aspirations (such as farmland preservation), where growth should not be encouraged, supported or subsidized by the extension of public sewers. The Department is confident that where fair consideration of environmental sensitivity has been afforded through the State Plan process, consistency with the SDRP will be achieved by these rules. To ensure that municipalities don't use this rule to delay or abrogate their responsibilities to provide for affordable housing the Department intends to propose an amendment to this rule that will allow inclusionary affordable housing development to proceed absent an up to date WMP.

Low cost housing

113. COMMENT: The ability of the manufactured housing industry to continue to develop low cost housing will be thwarted by the proposed rule. Low cost housing will not be developed where the development costs are excessive. Nor will low cost housing be developed where there is a multi-year process with no certainty of the outcome. There is an acute need in this State for affordable housing without reliance on government subsidies. This proposed rule will only further increase the need while impeding the solutions. (23)

RESPONSE: The Department does not believe that low cost housing will be thwarted by this rule. The rule is intended to eliminate obvious conflict between sewer service areas and the Department's environmental protection mandate, including the protection of water quality, wetlands, threatened and endangered species, and rare and unique assemblages of plant and animal communities and ecosystems. The extension of sewers into these sensitive areas only serves to promote and, where public investment has been made in sewage infrastructure, subsidize the development of the very resources the Department is charged to protect. The rule also intends to support local planning objectives including, but not necessarily limited to: center based development, urban revitalization and agricultural and scenic resource protection. Once sewer service areas have been identified that support these goals, the future wastewater treatment needs of those areas are calculated, and compared against existing treatment capacity. If existing treatment capacity is insufficient to meet the planned growth, either a plan to develop additional wastewater capacity is needed or the future growth expectations must be adjusted based on the ability of the wastewater treatment systems to support that growth without jeopardizing water quality. Essentially a sewer service area in an update wastewater management plan will assure a prospective developer that the area has minimal environmental sensitivity, is a place where the local government wants growth to occur, has wastewater capacity and has water supply capacity.

In those areas outside of sewer service areas, individual discharges of wastewater to ground water will be the default wastewater management alternative. Similar to sewer service areas, the capacity of an area to support ground water discharges must be evaluated and growth expectations must be limited so as to protect the quality of ground water.

This proposal does not require standard large sized lots outside of sewer service areas but instead, sets a limit on the number of septic units that can be supported within a watershed as a method to protect water quality. Essentially, the rule requires a calculation the sustainable development in each HUC 11 watershed based on ground water recharge available to dilute those discharges. However, the rule does not require the uniform distribution of those units by setting a minimum lot size requirement. Rather the rule allows, and the Department supports, a distribution of septic density that makes sense in terms of local planning. For example, smaller lot sizes may be more appropriate to an area immediately adjacent to a center or sewered area with larger lot sizes being planned in other areas of the watershed as necessary to accomplish protection of farmland, natural resources, scenic vistas or important aquifer recharge areas. Once build-out in accordance with local zoning has been demonstrated to be within the HUC 11 dilution capacity, development in accordance with that zoning is consistent with the water quality management plan.

The rule also includes provisions to promote "clustered development," by allowing a simplified planning process for NJPDES regulated discharges that accomplish this objective (N.J.A.C. 7:15-3.5(b)4.x.), and by allowing flexibility in the establishment of sewer service areas necessary to support center based development that has gone through the Plan Endorsement process (See N.J.A.C. 7:15-5.24(h).

In summary, wastewater management plans will help identify areas where resource constraints would be difficult to overcome compared to areas that have minimal or no resource constraints,

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and ensure that environmental infrastructure capacity exists to support affordable housing in those areas.

Creates Sprawl

114. COMMENT: For every positive in the rules, there seems to be a negative that sends the rules in the wrong direction. Whole sections of these rules need to be rewritten. These sections are opposed not only because they are bad planning, but also because they will add more pollution and more sprawl, negatively impacting New Jersey's waterways. (79)

RESPONSE: The Department believes that this proposal is a sound and thorough management and planning process that will result in increased protections to the State's environmental resources, including water quality, and will result in more comprehensive planning at a local level.

115. COMMENT: These rules will drastically change municipal planning and zoning, risking a disruption in land use planning. They may discourage more efficient and equitable planning tools such as TDR and cluster or lot-size averaging forms of new development. The rules being set forth here for septic systems, for both those under the WMPs distributed through the counties on HUC11 basis or those septic systems installed under exemption, will result in precisely the scatter-shot, small-scale development that takes the best farmland out of agricultural use at an accelerated rate and produces sprawl. (58)

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RESPONSE: The effect of the rule on municipal zoning cannot be determined at this point in time. The rule is intended to reduce conflicts between future sewer service areas and the environmental protection mandate of the Department. Where these environmental concerns have been considered in the identification of growth areas and sewer service areas, required adjustments, if any, should be minor. However, the Department is aware of places where conflicts between environmental constraints and sewer service areas do exist and have not been resolved largely due to the failure to maintain updated wastewater management plans. The Department compared existing adopted sewer service areas with the environmental features identified in N.J.A.C. 7:15-5.24, and found that approximately 316,000 acres of the 1,960,000 acres of adopted sewer service area encompass areas determined to be inappropriate for sewer service area based on this rule. In these areas, some change to municipal zoning may be required.

The commenter also seems to misinterpret the rule provisions regarding septic system density in that the commenter says that the rule will discourage TDR, clustering and lot size averaging. The rule essentially determines the carrying capacity of a HUC 11 watershed in setting a gross number of new septic systems that can be placed within that watershed without degrading water quality. The existing zoning of that same geographic area of analysis can then be applied to the vacant land within that watershed to determine the future number of septic systems that would be built under existing zoning in that watershed. If the zoning yields a number of new septic systems equal to, or less than, the calculated carrying capacity then compliance with the septic density has been affirmatively demonstrated. The rule does not require that future septic systems be distributed uniformly throughout the watershed such as by requiring a minimum lot size to

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meet the ground water antidegradation standard on a site-by-site basis. Thus flexibility exists under the rule to alter the sizes of lots in a manner that makes sense from a land use planning perspective, such as providing for smaller lots near centers and larger lots as you move farther away.

This rule is also consistent with the concepts and requirements of Transfer of Development Rights and cluster development programs. In fact the Department supports these concepts as they result in a more environmentally protective pattern of development by preserving large contiguous tracts of land.

The rule at N.J.A.C. 7:15-5.24(h) allows for the establishment of sewer service areas even where there are conflicts with environmentally sensitive features through the Plan Endorsement process, provided that the area to be served does not contain any habitat critical to a local population of threatened or endangered species, adequately protects environs outside of the area to be served and has identified an wastewater treatment alternative adequate to meet the needs of the area to be served. The State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq., requires that a municipality receive Plan Endorsement by the State Planning Commission prior to enactment of the adoption or amendment of any development transfer ordinance (N.J.S.A. 40:55D-140e). Therefore, any approved TDR receiving area can be considered under N.J.A.C. 7:15-5.24(h) for identification as a sewer service area supported by a centralized wastewater treatment plant.

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Similarly, the Department has included at N.J.A.C. 7:15-3.5(b)4x a revision category for clustered development, defined in the rule as any development that results in 70 percent of the land area being permanently restricted from future development. A revision reduces the administrative burden placed on the applicant. An applicant may take advantage of this revision regardless of whether the relevant wastewater management plan is in compliance with the schedule at N.J.A.C. 7:15-5.23. The rule removes any obstacles to clustered development and has offered this simplified process as an incentive.

116. COMMENT: The rule needs to provide more flexibility in allowing communal wastewater treatment systems for hamlet and village type developments and additional sewer service areas for town and regional centers that accommodate a community or region's growth. Additionally, the rule should give specific consideration to Transfer of Development Rights receiving areas. (77)

RESPONSE: The rule does not prohibit communal wastewater treatment systems for hamlet and village type developments, which can and should be planned and proposed as part of a wastewater management plan. Where hamlets and villages do not conflict with environmentally sensitive features the hamlet or village can be included within a sewer service area provided that a wastewater management and water supply alternative with adequate capacity is identified. Even where conflicts between villages and hamlets and environmentally sensitive resources cannot be completely avoided, sewer service areas can be established where these areas have been identified as centers through the State Plan Endorsement process, and the Department has determined that the center does not encompass any habitats critical to a local population of

threatened or endangered species that would threaten their recovery potential, that environs outside of the center are adequately protected and that a wastewater and water supply alternative is identified with adequate capacity to support the center. Because a transfer of development rights (TDR) program must receive Plan Endorsement from the State Planning Commission, per N.J.S.A. 40:55D-137 et seq., TDR receiving areas are similarly eligible for sewer service area designation subject to these same requirements at N.J.A.C. 7:15-5.25(h).

117. COMMENT: The proposed lower nitrate dilution standard is likely to lead to down zoning so the rule should provide for mitigation of sprawl and the expansion of infrastructure to serve lower density development. (68)

RESPONSE: The nitrate dilution standard may result in a need to downzone in certain areas where the density of septic systems allowed by current zoning will exceed the available dilution capacity within a watershed. However, the rule does not require a uniform distribution of allowable development on septic systems within a watershed. The rule essentially determines the carrying capacity of a HUC 11 watershed in setting a gross number of new septic systems that can be placed within that watershed without degrading water quality. The existing zoning of that same geographic area of analysis can then be applied to the vacant land within that watershed to determine the future number of septic systems that would be built under existing zoning in that watershed. If the zoning yields a number of new septic systems equal to, or less than, the calculated carrying capacity then compliance with the septic density has been affirmatively demonstrated. The rule does not require that future septic systems be distributed uniformly throughout the watershed such as by requiring a minimum lot size to meet the ground

water antidegradation standard on a site-by-site basis. Thus flexibility exists under the rule to alter the sizes of lots in a manner that makes sense from a land use planning perspective, such as providing for smaller lots near centers and larger lots as you move farther away. The Department acknowledges that there are practical limits to how small a lot served by on-site well and septic can be when considering design requirements for septic systems and separation requirements between the disposal field and the well. Where a municipality determines to reduce the sizes of lots beyond these limits, the need for a sewer service area would be indicated. Where that sewer service area would conflict with environmentally sensitive areas, an allowance is made at N.J.A.C. 7:15-5.24(h) provided that the municipality has received Plan Endorsement from the State Planning Commission, that the area to be included in the sewer service area does not include any habitat determined critical to the survival of a local population or recovery potential of threatened and endangered species and provides adequate protection of resources outside of the sewer service area.

Beyond these circumstances, the Department does not believe it appropriate to designate low density development areas as sewer service areas. Providing public sewers and drinking public drinking water to low density development would not be the most cost effective means of providing for the wastewater management and water supply needs of that development if it can reasonably be met on-site. The resulting inefficient use of infrastructure would only serve to support sprawling development that the commenter seeks to avoid and would be costly to maintain when considering the length of collection and distribution system and the population served. Among its many purposes, this rule is intended to eliminate these inefficiencies and the public financial burden they cause.

118. COMMENT: While it is understood that local zoning should be a reflection of environmental capacity, including nitrate dilution, there is a concern about the ultimate effect of the proposed capacity based zoning. Down zoning will be the easiest choice for municipalities to choose but by itself, may not necessarily result in resource protection. Rather, it will create sprawl on larger lots. This land use strategy is still land consumption and disrupts the integrity of natural systems and agricultural viability. Down zoning has landowner equity repercussions that impede the viability of the State's agricultural land stewards. This approach contradicts the State Plan policy of encouraging development in compact centers in the State's rural and environmentally sensitive areas. More directly linking the wastewater management planning process to Plan Endorsement would ensure that communities integrate sound land use practices that respect the character of the community and will not induce further sprawl. (77)

RESPONSE: This proposal sets a limit on the density of septic units (which is translated to residential units) as a method to protect water quality. Therefore, the nitrate dilution standard may result in a need to downzone in certain areas where the density of septic systems allowed by current zoning will exceed the available dilution capacity within a HUC 11 watershed. However, the rule does not require a uniform distribution of allowable development on septic systems within a watershed. The rule essentially determines the carrying capacity of a HUC 11 watershed in setting a gross number of new septic systems that can be placed within that watershed without degrading water quality. The existing zoning of that same geographic area of analysis can then be applied to the vacant land within that watershed to determine the future number of septic systems that would be built under existing zoning in that watershed. If the

zoning yields a number of new septic systems equal to, or less than, the calculated carrying capacity then compliance with the septic density has been affirmatively demonstrated. The rule does not require that future septic systems be distributed uniformly throughout the watershed such as by requiring a minimum lot size to meet the ground water antidegradation standard on a site-by-site basis. Thus flexibility exists under the rule to alter the sizes of lots in a manner that makes sense from a land use planning perspective, such as providing for smaller lots near centers and larger lots as you move farther away.

The Department supports the commenter's objective of providing for development in compact centers and reducing the development pressure and conserving resources outside of those centers, but has limited statutory authority to require center based development. The rule intends to remove the incentive for development provided by sewer service in environmentally sensitive areas thereby improving the consistency between wastewater management plans and the Department's environmental protection mandates. However, the Department does not deny all wastewater management alternatives in these areas as that would constitute a "taking" of property. The Department can and does establish the amount of development that can be supported on septic systems without degrading water quality in the manner described above, but the ultimate authority for land use planning and zoning rests with the municipalities under the Municipal Land Use Law (N.J.S.A. 40:55D). Therefore, the Department cannot dictate the pattern of development allowed by those municipal authorities, provided that the development does not exceed the capacity to treat wastewater in a manner that won't degrade water quality and the capacity to provide drinking water supply. Where a municipality seeks approval for sewer service in an environmentally sensitive area, the rule only allows consideration of that

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sewer service area if the municipality has been Plan Endorsed by the State Planning Commission and the endorsed plan meets the requirements at N.J.A.C. 7:15-5.24(h).

119. COMMENT: The efforts to transfer the amount of land in sewer service areas to septic service areas, may protect land from sewers but not from development. It will instead encourage sprawl and reduce water quality. Preliminary analysis of this rule suggests that the new sewer service boundaries will be smaller, perhaps significantly smaller than the current ones. Given that the allowed density in the septic portions will be lower than the sewered portions, a large amount of housing will then be eliminated from potential production, with no offsets to encourage housing development within sewered areas. Given that there are land use plans, best management practices and other tools available, has the Department considered how to protect water resources at the same time as meeting appropriate levels of development in appropriate places? Has the Department ensured that this rule will not prevent housing from being built to meet the needs of New Jersey's future workforce and produce affordable housing in areas that have already allowed job growth? (5)

RESPONSE: The primary intent of this rule is to protect water quality in the State, to unify land use planning among various levels of government through a continuing planning process and ensure that environmental infrastructure exists to support future development. If the sewer service areas based on this proposal result in smaller service areas, it indicates that environmental features were inappropriately addressed previously, or capacity to support development within these service areas does not exist. The Department acknowledges that the rule will restrict the availability of sewers in environmentally sensitive areas that the Department

is mandated to protect including: wetlands; Category One water buffers; unique and rare ecological communities; and threatened and endangered species habitats. Providing for sewer service in these areas would encourage if not subsidize their destruction and promote a pattern of development wholly inconsistent with their protection. This rule seeks to guide development to areas appropriate for the type of dense development that may require sewer service and to promote center-based development that protects the balance of environmental resources located outside of the defined center through the Plan Endorsement process.

This rule does not restrict development in areas appropriate for development or redevelopment. This rule allows for infill development, revitalization and redevelopment, in appropriate locations, consistent with local planning, so long as appropriate wastewater treatment options and sufficient treatment capacity to address planned development exists. The Department further expects that the wastewater management planning process will identify future capacity constraints in urban areas, allowing formulation of a strategy to overcome those constraints before they become a barrier that compromises redevelopment and revitalization opportunities. This will also allow all levels of government to align financial assistance priorities with urban revitalization needs. The Department believes that redevelopment opportunities in conjunction with appropriately designated centers can provide for the necessary housing and job opportunities needed to keep New Jersey's economic future strong, while continuing to protect the environment and water quality.

However, the ultimate authority for land use planning and zoning rests with the municipalities under the Municipal Land Use Law (N.J.S.A. 40:55D). Therefore, the Department cannot

dictate the pattern of development allowed by those municipal authorities, provided that the development allowed by local zoning does not exceed the capacity to treat wastewater in a manner that won't degrade water quality and the capacity to provide drinking water supply.

The rule is designed to protect water quality by accurately predicting the wastewater treatment capacity needed to support future growth (see N.J.A.C. 7:15-5.25). This information regarding future discharge volumes can be compared against the assimilative capacity of receiving waters and an estimate of the water quality based effluent limits can be determined as required to protect water quality. Wastewater treatment facilities can then plan necessary upgrades and facilities to meet these needs.

The remaining standards at N.J.A.C. 7:15-5.25 regarding riparian zones, and steep slopes and stormwater management are all designed to address water quality impacts from nonpoint sources associated with future development. Riparian zones filter pollutants from runoff before they enter surface water which is critical to the protection of water quality. Steep slopes when disturbed contribute nonpoint source pollutant loads that are disproportionately higher than other areas, thus making their protection critical to maintenance of water quality. In the remainder of settings, the Department relies upon its existing stormwater management rules and best management practices to achieve water quality protection. In addition, the entirety of subchapter 6 is devoted to the development and implementation of TMDLs for water bodies where water quality is already impaired. This is expected to result in improvement of water quality that is below standards or does not support designated uses. If all of the provisions of the rule are

adhered to, the Department is confidant that water resources protection and improvement will result.

120. COMMENT: Using the USGS model and using it in HUC 11s instead of getting a septic standard that is going to be protective of both public health and the environment is getting a rationalization for the same exact land use patterns that are happening now. When you run those numbers even with a two milligram standard you are getting five and six acre lots and that's sprawl. (65, 79)

121. COMMENT: The septic system nitrate dilution standard as proposed under N.J.A.C. 7:15-5.25(e), will likely result in encouraging residential density of around 4-7 acres per unit in many non-sewered communities. Residential density at 4-7 acres per unit essentially guarantees that the total price of a home will be unaffordable to the median worker in New Jersey. It will also result in fragmenting habitats and producing polluting levels of impervious surface within areas that should be protected better than the proposed standard. Research in the Pinelands suggests a maximum density about 3.5 acres or more per unit to protect watersheds, but permitting in the Pinelands is based on a land use plan that has significant density variations and this standard does not create blanket standard of 3.5 acre unit across the region. (5)

RESPONSE TO COMMENTS 120 AND 121: This proposal does not advocate "a blanket of medium density across the state," but instead, sets a limit on the density of septic units (which is translated to residential units) as a method to protect water quality. The rule essentially determines the carrying capacity of a HUC 11 watershed in setting a gross number of new septic

systems that can be placed within that watershed without degrading water quality. The existing zoning of that same geographic area of analysis can then be applied to the vacant land within that watershed to determine the future number of septic systems that would be built under existing zoning in that watershed. If the zoning yields a number of new septic systems equal to, or less than, the calculated carrying capacity then compliance with the septic density has been affirmatively demonstrated. The rule does not require that future septic systems be distributed uniformly throughout the watershed such as by requiring a minimum lot size to meet the ground water antidegradation standard on a site-by-site basis. Thus flexibility exists under the rule to alter the sizes of lots in a manner that makes sense from a land use planning perspective, such as providing for smaller lots near centers and larger lots as you move farther away. The Department expects that municipalities will use this flexibility for establishing an overall zoning plan as part of their master plan that protects ground water quality on a watershed basis, while establishing different zoning appropriate to the neighborhoods and master plan vision for that municipality. However, this authority and discretion is reserved to municipalities under the Municipal Land Use Law (N.J.S.A. 40:55D) and the Department cannot dictate local zoning practices.

The Department acknowledges that there are practical limits to how small a lot served by on-site well and septic can be when considering design requirements for septic systems and separation requirements between the disposal field and the well. Where a municipality determines to reduce the sizes of lots beyond these limits, the need for a sewer service area would be indicated. Where that sewer service area would conflict with environmentally sensitive areas, an allowance is made at N.J.A.C. 7:15-5.24(h) provided that the municipality has received Plan Endorsement

from the State Planning Commission, that the area to be included in the sewer service area does not include any habitat determined critical to the survival of a local population or recovery potential of threatened and endangered species and provides adequate protection of resources outside of the sewer service area.

122. COMMENT: How can the Department show that the proposed rule will not hinder the Governor's pledge to build 100,000 homes in next 10 years that are affordable to the median worker? Is the Department expecting the layering of the proposed rules to protect resources, requiring a Threatened and Endangered Species rule to reduce development in septic areas even further? Why not recognize that the land use implications of these proposed rules more directly and propose rules that will encourage development in growth areas that can improve existing conditions and restrict development to real conservation levels in areas outside of growth areas? (5)

RESPONSE: This rule does not restrict development in areas appropriate for development or redevelopment. This rule allows for infill development, revitalization and redevelopment, in appropriate locations, consistent with local planning, so long as appropriate wastewater treatment options and sufficient treatment capacity to address planned development exists. The Department further expects that the wastewater management planning process will identify future capacity constraints in urban areas, allowing formulation of a strategy to overcome those constraints before they become a barrier that compromises redevelopment and revitalization opportunities. This will also allow all levels of government to align financial assistance priorities with urban revitalization needs. The Department believes that redevelopment

opportunities in conjunction with appropriately designated centers can provide for the necessary housing and job opportunities needed to keep New Jersey's economic future strong, while continuing to protect the environment and water quality.

Outside of sewer service areas, the rule requires that the allowable development on septic systems not exceed the capacity of the HUC 11 watershed to dilute those wastewater discharges to achieve the average background nitrate concentration of two milligrams per liter. The rule does not require that minimum lot sizes be employed to achieve this standard on every property in the watershed. Rather the rule requires an assessment of the zoning within the watershed to ensure that, on balance, ground water quality in the watershed is maintained. By allowing certain exceptions to the delineation of sewer service areas where Plan Endorsement has been achieved and providing flexibility in the distribution of septic support development within a watershed the rule is careful not to prevent sensible land use planning aimed at preventing sprawl. However, achieving these results requires that municipalities, who are empowered to zone under the Municipal Land Use Law, exercise the discretion afforded to them by this rule.

The Department is not as part of this rule making establishing a regulatory program aimed at protecting threatened or endangered species habitats. The Department has a mandate to protect threatened and endangered species. This rule seeks to advance that mandate by eliminating conflicts between sewer service areas and threatened and endangered species habitats, as the extension of sewers into these areas would serve to encourage the destruction of these habitats.

Beneficial Reuse

123. COMMENT: The introduction of the concept of beneficial re-use in the proposed rule is supported. (5)

124. COMMENT: The Department's Beneficial Reuse Program Objective "[t]o help preserve the highest quality water and reduce the export of freshwater out of basins in support of meeting water supply needs and natural resource protection" should generally be commended. However, the rule proposal raises several concerns.

The Department should adopt a clear and explicit Vision Statement that clarifies the Department's Program Objective and the advantages of RWBR. The Department includes ambiguous language in its introduction to the proposed changes that could allow for negative impacts to the environment. For example, using RWBR should not encourage and allow for new development into areas once limited by an inadequate water supply. Rather, RWBR projects should seek to prevent further depletion of existing sources while supplying current demands. A Vision Statement would further clarify this objective, encompassing a goal to restore and enhance New Jersey's watersheds and to protect the aquatic integrity of New Jersey's ground water, surface water, and wetland habitats for future generations. In following the Vision, the RWBR Program should seek ways to eliminate salt-water intrusion, sustain adequate levels of drinking water, and maintain historic levels of water in bays, creeks, and wetlands. The following Vision Statement is recommended: "Beneficial reuse of wastewater will restore, improve, and protect the aquatic integrity of New Jersey's ground water, surface water, and wetland habitats; it will efficiently and effectively conserve water, reduce saltwater intrusion, and sustain a healthy supply of ground water."

Such a Vision Statement will also ensure that utilization of a RWBR project will not violate proposed N.J.A.C. 7:15-3.5(b)4, which requires the Department to determine "that no significant individual or cumulative impacts will occur to environmentally sensitive areas or other natural resources (such as water supplies) due to the proposed WQM plan revision (individually or in combination with past revisions in the area)…." (8, 71, 89)

RESPONSE TO COMMENTS 123 AND 124: The adoption of a "Vision Statement" with regard to RWBR is a project that has been under development within the Department for some time. The Department's RWBR task force is made up of volunteers that work in various programs, while maintaining their full time work load. Since the group works with no dedicated funding or staffing, it is often difficult to finalize many of these types of developmental tasks in a timely manner. However many of the concepts discussed by these commenters are examined during the evaluation of feasibility, RWBR is intended as a tool by which the State manages water supply issues and initiatives. These comments will be forwarded to the RWBR task force for consideration in the development of the "Vision Statement". It is also noted that representatives of the commenter's organization, Clean Ocean Action, have met with and discussed many policy issues directly with the RWBR task force.

125. COMMENT: The encouragement of water conservation and the analysis for beneficial reuse is very good. However, water conservation and reuse should not be a reason to increase capacity. There should not be trade-offs for water conserved or water reused. It should not be an excuse to increase allocation when water supplies are critically short. (59)

126. COMMENT: 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. (86)

127. COMMENT: Water reuse is a loophole that will allow for more development and undermine the protection of clean water. Water reuse is not designed to protect or conserve water supplies, but to come up with sources of water for more development. Secondary impacts from water reuse will include more nutrient loadings to both ground and surface waters and an excuse for development. (79)

RESPONSE TO COMMENTS 125 THROUGH 127: The practice of RWBR is not wastewater disposal and does not provide for any additional capacity to be added to a wastewater treatment facility. All facilities must account for a permitted mechanism to discharge 100 percent of the incoming flow to the collection system. If a credit were to be given to quantities of RWBR distributed, the facility would be hydraulically overloaded during times when RWBR is not feasible, such as in the case of irrigation activities which are seasonal, or when a facility utilizing RWBR closes or otherwise reduces its need for RWBR source water. Therefore, regardless of the concerns listed above, the Department does not allow additional flows to a treatment facility that does not have permitted disposal capacity for all wastewater flows entering the system as identified in a NJPDES discharge permit that is consistent with the applicable WQMP. If a

facility wanted to increase capacity to expand its service area or otherwise accept additional flows from more development, an amendment to the WQMP and expansion of the NJPDES discharge permit would be required for additional wastewater disposal.

128. COMMENT: There are concerns about the use of reused water. The semantic term of "beneficial" is not supported. What is beneficial maybe to the engineers and developers is not necessarily beneficial to society and the environment in general. Water reuse is just a potential loophole to allow additional development in areas that may not be able to support that development. How clean is the water to be reused, given pharmacologicals in drinking water and high levels of nutrients? Water supplies in this country, where they do a lot of reuse, use gray sink water and don't use black water from sewers. Even in the areas where they use gray water, there seems to be a buildup of high levels of nutrients in the ground water. Las Vegas is a good example as they do a lot of water reuse and nitrates have build up to 21 mg/L in the City of Las Vegas water supply. There are concerns that nutrients from water reuse could build up here too. (65, 79)

RESPONSE: This rule establishes when RWBR feasibility studies are required by the WQMP process and how RWBR projects are addressed in a WQMP. The physical implementation of RWBR is addressed in the NJPDES rules at N.J.A.C. 7:14A in a rule proposal published in the New Jersey Register on March 17, 2008 at 40 N.J.R. 1478(a). Most of the states that account for the largest quantities of RWBR reclaim both blackwater and greywater. The presence of pharmacological compounds in the existing drinking water supplies is an existing problem being researched on a national level. The Department continues to monitor that research. However,

implementing RWBR serves to reduce the impacts of emerging contaminants by further removing those pollutants through higher level treatment processes, as opposed to where those pollutants are currently discharged. Most surface discharge permittees that discharge below the head of tide are typically secondary treatment facilities. Many RWBR applications that impact the environment need to achieve much higher levels of treatment in order to meet the requirements for those types of RWBR activities, thereby increasing levels of treatment and reducing those levels of pollutants entering the environment. Additionally, nutrients that are already present in drinking water or RWBR are reduced through crop uptake when land applied for irrigation. Applications for irrigating with RWBR must either meet ground water quality standards for nitrogen and other nutrient parameters prior to reuse or demonstrate that the proposed levels of nutrients will be removed by the crops the RWBR is used to irrigate, often resulting in reducing the amount of chemical fertilizers being used.

A review of the Las Vegas Valley Water District's annual reports regarding nitrate levels in the drinking water shows levels less than 1.0 parts per million. Further, an estimated 90 percent of that water supply comes from surface waters and the remaining comes from deep aquifers. Most RWBR projects in that area do not involve deep injection of reclaimed water or direct surface water discharges that would negatively impact those water supplies as the result of implementing RWBR. The commenter's information is not consistent with the Department's research and additional information as to where that data was found would be helpful to review the matter further. However, based upon where the water supply is derived, it does not appear that the shallow aquifer system where RWBR would have an impact on the nitrates present in the drinking water system, could be the source of those levels of nitrate contamination.

A number of studies were reviewed with relation to private homeowner wells and nitrate contamination in Nevada and New Mexico. In each of those studies, in the few instances where nitrate contamination was observed, RWBR sources of nitrate contamination was ruled out and related to farming practices (typically animal husbandry or animal feed crops) at or near the residences in question or as the result of ammonium perchlorate contamination from certain aerospace, munitions and pyrotechnic industries.

129. COMMENT: Reuse is being looked at in the wrong way, because depending on the situation, reuse isn't automatically good. A golf course should be able to reuse its water, but that's a false choice especially if it's looked at before that golf course exists, and whether or not it should exist in the first place is the question. The best use of water is not to use it in the first place if it is not necessary, and the rules fail to reflect that. (65)

RESPONSE: The Department supports the conservation and protection of water supplies and encourages RWBR where appropriate. RWBR provides for options regarding the management of the State's water resources to allow for the use of RWBR when potable water is not necessary, but RWBR proposals must be evaluated with respect to the overall impact to the water resources affected. The Department will make determinations regarding when and where allocation of water resources can be allowed through water allocation permit decisions.

130. COMMENT: There is concern about the substances in wastewater that treatment works must control as required by the Department's "Technical Manual for Reclaimed Water for

Beneficial Reuse", which is incorporated by reference into the proposed rules. The Department is commended for including metals and toxic chemicals established in the USEPA's "Guidelines for Water Reuse" (Guidelines for Water Reuse, EPA/625/R-04/108 (Sept. 2004)). However, the EPA has recognized endocrine disrupters in wastewater as a problem in this same document. Therefore, the Department should set standards for or address emerging contaminants and endocrine disrupting chemicals. How does the Department plan on dealing with emerging contaminants as new information comes forth? How does the Department plan to identify, monitor, and potentially regulate endocrine disrupters? (8, 71, 89)

RESPONSE: Emerging contaminants are a concern the Department is facing with regard to all water issues. The Department is monitoring the EPA and national discussions on this topic. However, evidence has shown these emerging contaminants to be already present in our drinking water supplies and surface waters due to, in part, wastewater discharges to the environment. By using RWBR, which is often treated to a higher level than wastewater effluent, the RWBR would contain lower levels of contaminants than the effluents already being discharged directly to surface waters and some processes have been shown to be beneficial in removing these contaminants. Additionally, research needs to be conducted with regard to the levels of these contaminants in the existing potable water supplies being used. The Department will continue to monitor the national level discussions to determine the appropriate methods to sample and analyze for these contaminants, the proper way to establish potable water and wastewater standards for those contaminants, as well as the appropriate methods to treat wastewater and potable water for these contaminants.

131. COMMENT: Information is needed as to the procedures the Department will follow when reviewing a proposed RWBR plan that is not within one of the four types currently considered (Type 1 – Public Access Systems, Type 2 – Restricted Access and non Edible Crop Systems, Type 3 – Agricultural Edible Crop Systems, and Type 4 (Industrial Systems, Maintenance Operations, and Construction). What will be the process for the case-by-case determination? Will the Department allow for public comment? (8, 71, 89)

RESPONSE: The WQMP rule is limited to identifying RWBR activities and requiring feasibility studies, and requiring RWBR only in those circumstances when a new or expanded wastewater discharger can minimize additional impacts to streams through the implementation of RWBR projects. Part of determining the feasibility of RWBR projects is the determination of the NJPDES permitting requirements for the proposed RWBR activity. Since the Department requires compliance with the Technical Manual for Reclaimed Water for Beneficial Reuse, any proposed RWBR activity that falls outside of the four listed categories would have to be evaluated on a case by case basis. As the commenter correctly anticipates, other uses might be possible. The Department would be primarily concerned with the protection of public health and the environment with respect to the proposed activity. While it is not possible to anticipate all types of applications that may be made in the future, the Department's analysis of each application would include analysis of the likelihood of public contact in the area of application, the level of treatment proposed and the potential impact to the environment. The Department would anticipate public participation will be required when public access is a concern. This could include reaching out in a public forum, such as a municipal planning board meeting, to determine any issues or concern that the town officials and public have regarding the potential

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RWBR activity. Public comment would also be provided through the NJPDES permit issuance process, should the activity be determined to be feasible.

Water Quality Management Planning rules

Subchapter 1. General Provisions

132. COMMENT: An independent legal review should be conducted to ensure that these proposed rules do not go beyond "Legislative Intent." (15, 21, 67)

133. COMMENT: The proposed regulations are not wastewater planning, but are simply land use planning. As such, these proposed regulations are outside the scope of the Department's authority under the Water Pollution Control Act and the Water Quality Planning Act. (41-45)

134. COMMENT: The legal authority of the Department in adopting rules that virtually create a statewide zoning authority is challenged. At the very least, the rule should be held in abeyance until additional public hearings take place to explain the purpose, scope, and impact to the general public. Legislative oversight is also clearly warranted in this instance. (58)

RESPONSE TO COMMENTS 132 THROUGH 134: The Water Quality Management Planning rules implement the legislative intent of the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.; the Department's enabling legislation, N.J.S.A 13:1D-1 et seq.; the Highlands Water Protection and Planning Act, 13:20-1 et seq.; the Endangered and Nongame Species Conservation Act, N.J.S.A 23:2A-1 et seq.; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.; theWatershed Protection and

Management Act, 58:29-1 et seq.; Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.; the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.; the Stormwater Management Act, N.J.S.A. 40:55D-93 through 99; the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq. By analyzing all the environmental impacts of wastewater planning on public health and the environment, the Water Quality Management Planning rules establish a comprehensive approach to wastewater management planning that assures that wastewater treatment is present to adequately treat flow from current and future development, that development is not planned at a level that with have deleterious impacts on public health or the environment, and that a sustainable drinking water supply exists both now and in the future. The Water Quality Management Planning rules, while being an important component in determining appropriate sustainable land use, are not zoning ordinances nor do they dictate zoning. Instead, the Water Quality Management Planning rules establish criteria, which must be satisfied to assure that public health and the environment are protected. Using these standards, it remains the responsibility of the local municipality to determine how their community is best planned. While it is true that environmental standards will necessarily place some limits on what can be done at the local level, rather that dictate that lots sizes must be uniform or any other specific formula, the rules provide that environmental standards must be met on an areawide basis leaving it to the municipality to decide if it wants to assure the environmental/public health standard is met by zoning for uniform lot sizes or if it wants to provide for more dense development in one portion of the area while offsetting this concentration with other more sparsely developed portions elsewhere in the area. Indeed, the rules allow for and encourage the use of mechanisms such as clustered development to allow the municipality to determine zoning consistent with the objectives of that municipality.

135. COMMENT: Although there is a need to plan and protect water resources, this proposal goes far beyond those goals, is grounded on questionable assumptions and unreasonably intrudes on the local planning and zoning process. While the current process enables local officials to blend competing societal objectives, the proposed rules empower the Department with authority to restrict future growth and development throughout the entire State, through implementation of overly complex requirements. The Department's attempt to circumvent constitutional and statutory limitations on counties' lack of direct zoning authority is objectionable. Zoning limitations for counties were imposed for good and sufficient reasons and this provision exceeds the Department's authority. (18)

RESPONSE: The commenter is referred to Response to Comments 132 through 134 regarding the legislative authority for the Water Quality Management Planning rules. The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2.a.). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A.

58:11A-5.) that accomplish this objective. These areawide plans are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5.a.) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5.e.).

As partially evidenced by these statutes, the Legislature gave the Department a wide array of power to address water quality and water quantity, in addition to other environmental protection concerns including, but not limited to, the protection of threatened and endangered species, and the conservation of natural resources with due regard for the ecology of the varied areas of the State (N.J.S.A. 13:1D-9). In exercising that power, the Department is authorized to address the broad scope of environmental concerns expressed by the Legislature in those enactments in these comprehensive water quality planning rules (See I/M/O/ Stormwater Rules, 384 N.J. Super. 451 cert. den. 188 N.J. 489, 2006). The Department disagrees with the commenter that these rules reach beyond that authority granted by the Legislature.

Further, the Department disagrees with the commenter that these rules unreasonably intrude upon local planning and zoning authority and empower the Department with authority to restrict future growth and development throughout the entire State.

The overall purpose of the WQMP rule is to protect, maintain and restore water quality, in consideration of both existing and future development. A secondary purpose of the rule is to support a continuing planning process that integrates federal, State, regional and local land use

planning, so as to achieve consistency among the various regulatory programs administered at all levels of government.

The rule provisions for sewer service area delineation at N.J.A.C. 7:15-5.24 and the standards at N.J.A.C. 7:15-5.25 were developed in recognition of the link between environmental infrastructure and the location and intensity of development that will be supported. N.J.A.C. 7:15-5.24 avoids subsidizing and encouraging high intensity development in environmentally sensitive areas, that the Department of Environmental Protection is mandated to protect, by eliminating these resources from sewer service areas. High intensity development that would be supported by centralized sewers is not compatible with protection of these natural resources. However, these are not the only considerations when integrating land use planning. This same high intensity development may also be inconsistent with other local land use planning objectives. For example, if a municipality wanted to protect a scenic resource such as a ridge line, or has an agricultural preservation area, the extension of sewers into these areas would also promote a pattern of development incompatible with these local planning objectives. Remaining areas are, by default, suitable for high intensity development from the perspective of the physical attributes of the land and are consistent with the regional and local land use planning goals.

Beyond the land-based constraints, capacity issues relevant to future development, such as assimilative capacity of surface and ground waters, antidegradation requirements, and sustainable water supply limits, must also be considered and are addressed in the standards set forth at N.J.A.C. 7:15-5.25. Once appropriate wastewater management designations are established, an environmental build-out analysis is preformed to predict the amount of growth that will occur and to estimate the wastewater treatment and water supply capacity necessary to

support that growth. The future demand can then be compared against available capacity and where capacity constraints exist a plan will be formulated to address that shortfall. This is preferable to a situation where a growth plan is established, investment is made only to later find out that insufficient environmental infrastructure capacity exists to support that growth. This will help to focus efforts to align available capacity with development objectives, including urban revitalization, redevelopment and provision of adequate affordable housing opportunities.

The rules prevent the extension of sewer service into environmentally sensitive areas that the Department is mandated to protect and requires that local land use planning and zoning recognize wastewater treatment and water supply capacity constraints as required by Article 3 and Article 6 of the Municipal Land Use Law (N.J.S.A. 40:55D-28b and N.J.S.A. 40:55D-38b(3)). The rule does not determine the mix of land uses nor the intensity of land uses other than to require that those designations be made in recognition of these capacity constraints so as to avoid future water quality impacts. Even in areas not designated for sewer service, the rule establishes the capacity to support development on septic systems based on dilution using a watershed approach. The rule does not establish minimum lot sizes or prescribe the density of development that may occur on septic systems. It merely requires that the ultimate number of septic systems to be constructed in a watershed not exceed the dilution capacity necessary to protect water quality. The distribution of that capacity throughout the watershed is left to local discretion.

136. COMMENT: N.J.A.C. 7:15-1.1(a)11 and N.J.A.C. 7:15-2.3(a)6 recognize county freeholders as having Water Quality Management planning powers. County freeholders should

not be allowed to have these powers because it's inappropriate to have counties doing the planning since constitutionally they do not have land use planning powers in New Jersey, municipalities do. There needs to be a link between environmental protection and planning and municipal planning and zoning and assigning that planning power to a county freeholder board when municipalities have the land use powers makes this difficult. This section should be withdrawn. (86)

137. COMMENT: The rule can proceed to adoption and could still stand, but with deletion of the exemptions, loopholes and weaknesses. County planning provisions, delegating or putting counties as designated planning entities and giving them planning powers should be deleted upon adoption. (86)

138. COMMENT: Counties do not have effective implementation authority for land use planning or similar implementation techniques. The coordination that is being contemplated between zoning and wastewater management planning under the proposed rule will not be effective since despite the reference to the County Planning Enabling Act the county's land use authority in New Jersey is very limited. (62)

139. COMMENT: New Jersey is a home rule state with municipalities having most of the control over local issues and counties being relatively powerless. While reducing the number of wastewater planning agencies to a more efficient number is long overdue, giving the responsibility to the counties without any effort to give them more statutory power and larger budgets is a recipe for disaster. (58)

140. COMMENT: The idea of removing water quality planning authority from sewage authorities is strongly supported because they are not planners and are in the business of growing the authorities. However, counties should not be designated as the planning entity. Having water quality planning done at the municipal level with strong Department oversight, where there is direct political and environmental accountability, would better protect our waters. The more local the decision-making is, the more susceptible the decision makers are to listen to the public. The more detached decision makers are, the more they are in the business of promoting sewers and development, and the less likely they are to look at the impacts to the environment of their citizens. Having the local government as a planning entity doing wastewater planning with oversight is much preferable to the counties who aren't accountable to anybody. However, counties are better than the sewer departments. (65, 79)

141. COMMENT: In many cases, municipalities are far ahead of their counties in the quality and timeliness of wastewater planning through use of paid consultants. They know best their own needs in this regard and should be able to get direct assistance from the Department in both expert advice and funding to prepare and update WMPs. Guidance on developing a regional approach can be provided by the Department on a watershed basis and through funding for regional plans based on watershed delineation rather than political subdivision lines. Instead of giving this duty to the counties, the Department should establish a similar program to the regional stormwater plan program found in N.J.A.C. 7:8, make it a priority funding element, and encourage municipalities to approach wastewater planning on a watershed basis. The allowance

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of a municipality to alternatively be assigned this responsibility is not adequate; the duty should go first to the municipality. (10, 80)

142. COMMENT: Only entities that are capable of developing and implementing wastewater management plans should become designated planning entities, such as towns and regional planning entities such as the Highlands Council. The delegation of wastewater management planning powers to counties, wastewater authorities, or any entity that has a conflict of interest or lacks land use powers is opposed. Wastewater management plans must be based upon and implement land use decisions. (86)

RESPONSE TO COMMENTS 136 THROUGH 142: As discussed in more detail in Response to Comment 79, counties have the authority, and in many cases, the experience to function as WMP agencies. Further, the Department did consider municipalities as the primary option for WMP agency designation, but, as discussed in Response to Comments 528 and 572, this option would lead to a further proliferation of WMP agencies and hinder the ability of the Department to work closely with each WMP agency to develop a satisfactory WMP. That is not to say that they are endowed with land use regulation authority that is held by municipalities as a result of WQMP rules. Instead, the responsibilities of municipalities at N.J.A.C. 7:15-5.8 recognize that municipalities have the authority and responsibility to make the zoning decisions needed to develop a satisfactory WMP.

N.J.A.C. 7:15-1.1

143. COMMENT: The scope of the water quality management policies and procedures in N.J.A.C. 7:15-1.1 must be expanded to address coordination of WQMP and WMP planning with the State Planning Act and SDRP; the State Fair Housing Act and COAH's Substantive and Procedural Rule Requirements; Municipal Land Use Law and Municipal Master Plans; and County Planning Enabling Legislation and County Master Plans. (9, 19)

144. COMMENT: The rule proposes that new WMPs be consistent with additional environmentally oriented legislation (e.g. Coastal Area Facility Review Act and the Endangered and Nongame Species Conservation Act). However, other regional planning initiatives, such as the Fair Housing Act, were not included. The rules should use a balanced approach to regional planning, recognizing the need for such realities as economic growth and the fact that while it may be in the general interest of the environment to exclude sewer service in certain locations, thereby hoping to exclude development, it might be more environmentally sound to allow for sewer service to protect the environment when development is inevitable. (19, 28)

145. COMMENT: The rule should require WMPs to be consistent with the State Planning Act and the Fair Housing Act in addition to the environmentally oriented statues used. (78)

RESPONSE TO COMMENTS 143 THROUGH 145: The purpose of N.J.A.C. 7:15-1.1 is to list the major functions of the rule as set forth in the Water Quality Planning Act. These purposes include establishing policies and procedures regarding "Coordination of WQM planning with Coastal Zone, Hackensack Meadowlands, Highlands and Pinelands programs and municipal zoning" and "Mechanisms to resolve conflicts among State agencies, designated planning

agencies, applicants, and other parties affected by this chapter." These purposes adequately capture the suggested additions to the purposes of the WQMP rule.

The Department is charged with improving, enhancing, and protecting the quality of New Jersey's natural environment, as well as to ensuring equitable and beneficial uses of the State's waters. Today's problems require more creative and comprehensive solutions - solutions that take into account not only today's needs, but result in a sustainable water resource to meet the needs of future generations. As the implementing rules of the Water Quality Planning Act, the primary objective of this rule is to maintain, and where attainable, restore the chemical, physical and biological integrity of the surface and ground water resources of the State. Accordingly, the rules prescribe water quality management policies, procedures and standards which protect public health; safeguard fish, aquatic life, and scenic and ecological values; and enhance domestic, municipal, recreational, industrial and other uses of water. A sustainable economy must conserve environmental quality, while taking into account the economic and social costs and benefits of development. Sustainable development calls for comprehensive planning through an inclusive public process that involves citizens, businesses, scientists, government agencies and other stakeholders. WMPs developed in accordance with the rule will identify the wastewater management and water supply needs and the overall means to address them under the environmental build-out condition. Balance is achieved as municipalities make land use decisions informed by the WMP and local planning objectives, mindful also of obligations under the Fair Housing Act.

146. COMMENT: N.J.A.C. 7:15-1.1(a) must be amended to cite only the statutes that are related to wastewater management planning; and to clearly articulate how wastewater management planning furthers the purposes of each cited statute.

The Department refers inappropriately to eleven statutes as the basis for the proposed water quality management policies and procedures. The mere mention of a statute does not give the Department the authority to control other programs. Further, if the Department proceeds to combine all other regulatory programs within the Water Quality Management Planning rules, then the Department must revise its current regulatory scheme that allocates permitting responsibility to other Departmental Divisions. (18, 42, 44, 45, 61)

RESPONSE: The Legislature gave the Department a wide array of power to address water quality and water quantity planning in the statutes cited as authority for these rules. In exercising that power, the Department is authorized to address the broad scope of environmental concerns expressed by the Legislature in those enactments in these comprehensive water quality planning rules. See, I/M/O Stormwater rules, 384 N.J.Super. 451 cert. den. 188 N.J. 489 (2006). Further, the fact that the Department has promulgated these comprehensive water quality planning rules does not negate or alter the Department's ability to address other, specific concerns, such as wastewater discharge control, in its other regulatory programs.

147. COMMENT: Support was expressed for the inclusion of regional stormwater plans in Water Quality Management Plans at N.J.A.C. 7:15-1.1(a)6. Funding of these regional plans is key to the implementation of New Jersey’s Stormwater Rule, N.J.A.C. 7:8. (10, 80)

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RESPONSE: The Department acknowledges support of this provision which identified regional stormwater management plans as a type of amendment to areawide WQM plans. Regional stormwater management plans are allowed, but not required under the Stormwater Management rule, N.J.A.C. 7:8. They are intended to provide an opportunity for development, implementation and maintenance of a plan specific to the stormwater management needs of a defined drainage area, as an alternative to the Statewide performance standards. The Department has provided funding for such plans through the Clean Water Act Section 319 nonpoint source pollution grant program and the New Jersey Corporate Business Tax has and will continue to offer funds as available and as consistent with established funding eligibility and priority for the development of regional stormwater management plans.

148. COMMENT: N.J.A.C. 7:15-1.1(a)1 through 10, which requires wastewater management planning coordination with other planning programs, municipal zoning and the withdrawal of sewer service areas where wastewater management plans are not current is supported. (10, 80)

RESPONSE: The Department acknowledges this comment in support for these provisions of the rule.

149. COMMENT: The requirement at N.J.A.C. 7:15-1.1(a)7 that the Highlands program coordinate wastewater management planning in the Highlands, as is already the case for the Coastal Zone, Hackensack Meadowlands and Pinelands programs, is supported as is including coordination of municipal zoning into this paragraph. However, as most WQM plans are not

readily available, this provision will be almost impossible to implement in accordance with requirements for the Continuing Planning Process. (22, 76)

150. COMMENT: Areawide WQM plans should be made available for public review via the Department's website. A comprehensive database of all amendments to each areawide WQM plan should be maintained by the Department and made available to the public via the Department' s website on an ongoing basis. A process and schedule for updating areawide WQM plans appears necessary and appropriate in order to assure that WQM plans are in a condition that facilitates consistency determinations in a timely and efficient manner, as well supports the review and approval of proposed WQM plan amendments or revisions. (9, 19)

RESPONSE TO COMMENTS 149 AND 150: The Department acknowledges support for requiring coordination with the Highlands rules and plans in development of wastewater management plans. Regarding availability of WQM plans, the degree to which the originally adopted WQM plans are available is not certain, but they do exist in hardcopy and are available both at the Department and, where applicable, with the Designated Planning Agency. As stated by the commenters, these plans have been significantly modified over the years through the development of wastewater management plans and specific amendments to the WQM plans, some of which were provided in digital format, while others were not. Recognizing the need to make key elements of the WQM plans more accessible, the sewer service areas identified in the WQM plans have been consolidated into a GIS coverage and that coverage was adopted into each of the twelve areawide Water Quality Management Plans on October 11, 2006 (38 N.J.R. 4756). The coverage is maintained and updated regularly as new revisions and amendments are

adopted and the most recent version is available on the Department's website at http://www.nj.gov/dep/watershedmgt/rules.htm. As WMPs are developed under this rule, the goal is that the electronic format will be consistently used and the plans will be readily accessible to guide decision making, both the Department and locally. As plans created in an electronic format are completed, they will be made available on the Department's website.

151. COMMENT: Conflicts in planning requirements may arise in specific planning regions such as the Pinelands, the Delaware River Basin, and the Highlands, etc. How and by whom will these conflicts be mediated? The enacting statutes of these planning areas provide for veto power by these planning commissions and the Department. While many can say no, who says yes? What happens if each agency exercises a veto? (18, 32)

RESPONSE: Under the previous rule, the Department worked closely with sister agencies to develop WMPs and amendments that were mutually satisfactory. With creation of the Highlands Preservation and Planning areas, the Highlands Council has been added to the list of agencies with which the Department will coordinate. As in the past, the Department will continue to coordinate closely with sister agencies, but will retain the final decision making authority with respect to WQMP modifications.

152. COMMENT: The Department should provide the statutory authority for N.J.A.C. 7:15-1.1(a)13 to establish "the process for identifying water bodies on the List of Water Quality Limited Segment and establishing total maximum daily loads." (18, 42, 44, 45, 61)

RESPONSE: The Federal Clean Water Act (33 U.S.C. 1251 et seq.) and the Water Quality Planning Act (N.J.S.A. 58.11A) require the Department to establish surface water quality standards (Section 303 (c) of the Clean Water Act, 33 U.S.C. §§ 1251 et seq. and N.J.SA. 58.11A-7b), list waters that do not conform to those standards on the List of Water Quality Limited Segments (also known as the 303(d) list), (Section 303(d) of the Clean Water Act (33 U.S.C. § 1313(d)) and N.J.S.A. 58:11-7c (1)), and to develop TMDLs for the listed waters (Section 303(d) of the Federal Clean Water Act (33 § U.S.C. 1313(d)) and N.J.S.A. 58:11A - 7c (2)).

153. COMMENT: Support was expressed for N.J.A.C. 7:15-1.1(a)13 which requires inclusion of water quality limited segments and the establishment of TMDLs through this rulemaking and for N.J.A.C. 7:15-1.1(a)14 which requires the consideration of environmentally sensitive areas in the designation of wastewater service areas. (10, 80)

RESPONSE: The Department acknowledges the support of these provisions.

154. COMMENT: The Department should provide the statutory authority for N.J.A.C. 7:15-1.1(a)14 to establish “designation of appropriate wastewater service areas in consideration of environmentally sensitive areas.” (18, 42, 44, 45, 61)

RESPONSE: The legislative authority for the Water Quality Management Planning rules, as described in Response to Comments 132 through 134, and including the purposes stated at N.J.A.C. 7:15-1.1(a)14, include the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; the

Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.; the Department's enabling legislation, N.J.S.A 13:1D-1 et seq.; the Highlands Water Protection and Planning Act, 13:20-1 et seq.; the Endangered and Nongame Species Conservation Act, N.J.S.A 23:2A-1 et seq.; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.; theWatershed Protection and Management Act, 58:29-1 et seq.; Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.; the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.; the Stormwater Management Act, N.J.S.A. 40:55D-93 through 99; the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq.

N.J.A.C. 7:15-1.3

155. COMMENT: Although the antidegradation policy is not expressly addressed in N.J.A.C. 7:15-1.3, it is at the core of any effort by the states and the Federal government to restore, protect and maintain water quality. Certain aspects of the proposed rule trigger the Department's antidegradation review obligations, but no antidegradation review is required under the proposed rule. In Ciba-Geigy, the New Jersey Supreme Court specifically discussed the issue of allowing the lowering of water quality based on a balancing of other social interests as a component of an antidegradation analysis. The Department must first engage in this thorough analysis before any action is taken under the proposed rule upon adoption that may in any way diminish water quality. (49)

RESPONSE: Under Ciba-Geigy, New Jersey is required to adopt a statewide antidegradation policy that is included in the Surface and Ground Water Quality Standards. The SWQS and GWQS contain antidegradation policies, which the WQMP rules support and implement by

requiring an antidegradation analysis at N.J.A.C. 7:15-5.25(d)3 that conforms with the requirements at N.J.A.C. 7:9B-1.9.

156. COMMENT: Proposed N.J.A.C. 7:15-1.3 is too broad and must be revised or deleted. N.J.A.C. 7:15-1.3(a)1 must be amended to cite only the statutes that are necessary for the Department to implement the Water Quality Management Planning rules. (18, 42, 44, 45, 61)

RESPONSE: The Legislature gave the Department a wide array of power to address water quality and water quantity planning in the statutes cited as authority for these rules. In exercising that power, the Department is authorized to address the broad scope of environmental concerns expressed by the Legislature in those enactments in these comprehensive water quality planning rules. See, I/M/O Stormwater rules, 384 N.J.Super. 451 cert. den. 188 N.J. 489 (2006).

157. COMMENT: N.J.A.C. 7:15-1.3(a)2 must be amended to exclude the redundant "standards" as there are other Departmental permitting programs to address enforcement of standards. (18, 42, 44, 45, 61)

RESPONSE: It is appropriate for this rule to contain standards associated with achieving the objectives of the authorizing statutes. Such standards provide notice to the regulated public to help them determine if projects or activities are in compliance with the rule. The fact that other DEP regulations contain standards on related matter does not make the standards set forth in this rule redundant. See, I/M/O Stormwater rules, 384 N.J. Super. 451 cert. den. 188 N.J. 489 (2006) The standards referred to at N.J.A.C. 7:15-1.3(a)2 are those for determining whether the

provisions of the WQMP rules are met. It is appropriate for any rule to contain standards related to achieving the objective of that rule. This is the best way to ensure that there is a transparent process by which the regulated public can determine if projects or activities are in compliance with the rule. However, the standards needed to assess conformance with the WQMP rules do not supersede nor are rendered unnecessary by the existence of standards in rules that are related to the objectives of those rules.

158. COMMENT: N.J.A.C. 7:15-1.3(a)14, which includes the rule purpose of encouraging development of comprehensive regional wastewater management planning is supported. However, the rule does not seem to include a description of the requirements for regional plans. (22, 76)

RESPONSE: The rule section that was cited, N.J.A.C. 7:15-1.3(a)14, does not refer to another sort of wastewater management plan. The amendment to this section deletes the phrase "sewerage facilities" and replaces it with "wastewater management planning" to correct what had been perceived as categorical support for regional treatment facilities over any other sort, without consideration of secondary impacts, such as interbasin transfer. This change was made to clarify that one of the purposes of this chapter is to encourage the broad wastewater management planning principle that planning should encompass a regional perspective, not just to articulate generalized support for regional sewerage facilities.

N.J.A.C. 7:15-1.5

159. COMMENT: Proposed amendments that bring definitions into consistency with definitions in other updated Department rules are supported. (10, 80)

RESPONSE: The Department believes that working toward consistency between rule definitions, where there isn't a need for differing definitions to serve the differing needs of the different programs, will create less confusion for the public and regulated community and acknowledges the commenters' support.

160. COMMENT: The rules use various terms in the proposal which need definitions including: amendments; areawide Water Quality Management plan; consistency determination; designated area; designated planning agency; domestic treatment works; industrial treatment works; non-designated area; plan amendment (amendments); revision (revisions); significant modification(s); site-specific pollution control plan; treatment works; wastewater management plan; and water quality based effluent limit(ation)s. (85)

RESPONSE: Existing N.J.A.C. 7:15-1.5 includes definitions for all of the terms listed by the commenter. No changes were proposed to any of these definitions so the text of these changes did not appear in the rule proposal. However, the re-adopted rule contains definitions for these terms.

161. COMMENT: The rules use various terms in the proposal which need definitions including: average domestic flow, consistency determination review and consistency review; consistent;

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formal consistency determination review; inconsistent; Pinelands Area; Pinelands National Reserve; regional stormwater management plan, and sewer connection ban. (85)

RESPONSE: While existing N.J.A.C. 7:15 does not contain definitions in N.J.A.C. 7:15-1.5 for the terms the commenter lists above, each of these terms is defined within the text of the rule document where the term is used. When terms are used in specific sections or even an occasional subchapter of a rule, but are not used extensively throughout the rule document, the terms are frequently cross-referenced to other rules or defined within the section where the term is used instead of in the definitions section of the overall rule document. As such, "average domestic flow" is described at N.J.A.C. 7:15-5.18(f). "Consistency determination review," "consistency review," "consistent," "formal consistency determination review," and "inconsistent" are defined or described in N.J.A.C. 7:15-3.1 and 3.2. Pinelands Area and Pinelands National Reserve are defined by cross-reference at N.J.A.C. 7:15-3.7. Regional stormwater management plan is defined by cross-reference at N.J.A.C. 7:15-3.4(b)5, while sewer connection ban is defined by cross-reference at N.J.A.C. 7:15-3.4(l)2. Since these terms are already defined or cross-referenced to other rules in the rule text, these terms were not added to N.J.A.C. 7:15-1.5.

162. COMMENT: The rules use various terms in the proposal which need definitions including: average planning flow; build-out; consistency; dams - Class I, II, III; de-designated; environmental build-out analysis; margin of safety; measurable change; Natural Resources Management Plan; nitrate dilution standard; nitrate planning standard; population estimates; population projections; reserve capacity; septic management plan; significant indirect users; soil-

bioengineering; total committed flow; wastewater management plan amendment, wastewater management plan revision, wastewater management plan update; and water service area. (85)

RESPONSE: While adopted N.J.A.C. 7:15 does not contain definitions in N.J.A.C. 7:15-1.5 for the terms the commenter listed above, except for the term "wastewater management plan update" which is already defined at adopted N.J.A.C. 7:15-1.5, each of these terms is defined within the text of the rule document where the term is used or the terms are cross-referenced to other rules in the section where the term is used instead of appearing in the definitions section of the overall rule document. As such, "average planning flow" is described at N.J.A.C. 7:15-5.18(d)8 and (e)3. "Build-out" and "environmental build-out analysis" are described at N.J.A.C. 7:15-5.25(c). "Consistency," when related to a "consistency determination" is defined or described in N.J.A.C. 7:15-3.1 and 3.2, while elsewhere "consistency" means agreement among the parts of a complex whole, as defined in any general dictionary of the term. Class I, II, and III dams are defined by cross-reference to the Dam Safety Standards, N.J.A.C. 7:20, at N.J.A.C. 7:15-3.1(b)18. The term "de-designated" is used at N.J.A.C. 7:15-3.4(e) to refer to a circumstance in which a designated agency, a defined term, losses that designation. The term is self explanatory and requires no definition. The term "margin of safety" is described at N.J.A.C. 7:15-6.3(b)5iii while the term "reserve capacity" is described at N.J.A.C. 7:15-6.3(b)5iv. The term "measurable change" is used at N.J.A.C. 7:15-5.25(d)3 with respect to the antidegradation analysis where there is a cross-reference to the Surface Water Quality Standards, in which this term is defined. The term "Natural Resources Management Plan" is cross referenced to plans developed by the Natural Resources Conservation Service at N.J.A.C. 7:15-3.5(b)4x(3). At N.J.A.C. 7:15-3.5(b)4vi the phrase "nitrate dilution standard" was used incorrectly in place of the correct term "nitrate

planning standard" and will be corrected on adoption to "nitrate planning standard." N.J.A.C. 7:15-3.5(b)4vi refers to N.J.A.C. 7:15-5.25(h)2, in which the correct term is used. The term "nitrate planning standard" is adequately defined at N.J.A.C. 7:15-5.25(e). The terms "population estimates" and "population projections" are used to describe estimates or projections of future populations and acceptable sources for this information are codified at N.J.A.C. 7:15-5.25(d)1ii, thus no further definition is necessary. A "septic management plan" is merely a demonstration that areas to be served by individual subsurface sewage disposal systems are subject to a local mandatory maintenance program, such as an ordinance, as required and described at N.J.A.C. 7:15-5.25(e)3, making a separate definition unnecessary. The term "significant indirect users" is defined by cross-reference to the NJPDES rules, N.J.A.C. 7:14A-1.2, at N.J.A.C. 7:15- 4.3(a)1, while "soil-bioengineering" is defined by cross-reference to the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, at N.J.A.C. 7:15-3.1(b)16. The term "total committed flow" was used incorrectly at N.J.A.C. 7:15- 5.6(a)6 and the word "total" is deleted upon adoption. The corrected term "committed flow" is already defined at N.J.A.C. 7:15-1.5. Also, while the terms "wastewater management plan amendment" and "wastewater management plan revision" are not specifically defined, the terms "amendment" and "revision" are defined at N.J.A.C. 7:15-1.5 and N.J.A.C. 7:15-5 describes wastewater management plans in detail, therefore, the Department does not think it is necessary to provide separate definitions for these terms. Finally, the term "water service area" is defined by cross reference to N.J.A.C. 7:10-11.5(c)6 at N.J.A.C. 7:15-5.17(a)15. For the reasons stated above, these terms were not added to N.J.A.C. 7:15-1.5.

163. COMMENT: The rules use various terms in the proposal which need definitions including: activity; additional measures; alteration of the sewer service area; center based development; employment projections; endorsed plan; extraordinary hardship; legally enforceable guarantees; mapping revision; maximum extent feasible; modify; Pinelands Commission; planned future development; pollutant load; pollutants of concern; pollution control technologies; project; public water supply service area; regional water supply plans; repeal; revised amendment; septage management areas; State Planning Commission; soil characteristics, features, types; stream corridor restoration plan; stream bank stabilization plan; total flow; total flow projection; treatment works service area; water quality targets; and watershed restoration plans. (85)

RESPONSE: The Department does not believe it is necessary to include definitions of the above listed terms for the reasons set forth below. The terms “activities” and “project” are used widely throughout this rule. However, the terms merely reflect actions or development requiring Department permits, thus the terms are used in their common usage, making definition unnecessary. The term “additional measures” is used once at N.J.A.C. 7:15-5.25(g)7 and this term as used is self explanatory because the reference is to “additional measures” as specified in an adopted TMDL or watershed restoration plan. The TMDL or watershed restoration plan would specify the additional measures. The term “alteration of the sewer service area” is only used at N.J.A.C. 7:15-3.4(l) and is self explanatory as alteration of a sewer service area is any change to the sewer service area. The terms “center based development,” “endorsed plan” and “State Planning Commission” are used at N.J.A.C. 7:15-5.24(h) and these terms are linked to the State Development and Redevelopment Plan and approvals granted by the State Planning Commission thus the definitions can be found in the State Plan and are not repeated here.

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"Employment projections" is information to be provided in accordance with N.J.A.C 7:15-5.8(a)4 and is intended to be used in support of wastewater flow projections in urbanized municipalities. No definition is provided because the term is self explanatory. "Extraordinary hardship" is used at N.J.A.C. 7:15-5.25(g)3 and 6 and N.J.A.C 7:15-5.25(h)5 with respect to allowed exceptions to the standards for protecting riparian buffers and steep slopes. The Department terms are self explanatory in their context and provided examples of circumstances that might constitute an extraordinary hardship in the rule summary. For example, there could be aspects of shape or orientation peculiar to the property. The extraordinary hardship provision could allow pedestrian access to a stream in a homeowner's back yard or to build ancillary structures such as deck or pool where there is no alternative outside the riparian zone. Or, it could be an economic hardship that would prevent a minimum economically viable use of the property based upon reasonable investment unless encroachment on a steep slope or riparian buffer is allowed. This would allow construction of a single family home on a property that is wholly contained within the riparian zone or steep slope.

The term "legally enforceable guarantees" is used in the existing rule at N.J.A.C. 7:15-5.19(b) and the Department believes this term is self explanatory. The term "mapping revision" is used at N.J.A.C. 7:15-5.24(f)1 and is one possible finding with respect to the U. S. Environmental Protection Agency Environmentally Sensitive Area grant condition, which prohibits the extension of sewers into environmentally sensitive areas. Mapping revisions and waivers are defined and determinations made by EPA, thus no definition in this rule is necessary. The terms "maximum extent feasible" and "pollution control technologies" are used at existing N.J.A.C. 2.3(a)6 to describe the Department's responsibilities to act as a resource for DPAs and county

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planning boards and to provide them with technical assistance and information on BMPs and "pollution control technologies." The Department believes these terms are self explanatory and no further definition is required. The term "modify" does not appear within the rule text, therefore does not require definition. The Department does not believe it is necessary to define the term "Pinelands Commission" as this agency has been in existence since 1978 and is commonly known by the general public.

The term "planned future development" is self explanatory as this is development planned for the future. The term "pollutant load" is used at N.J.A.C. 7:15-5.25(d)3 and N.J.A.C. 7:15-6. The term is self explanatory in the context used and its meaning is clear based on the Federal regulations incorporated by reference for TMDLs at 40 CFR 130.7(c) and (e). The term "pollutants of concern" does not appear within the rule text, therefore does not require definition. A "public water supply service area" is the area serviced by a "public water supply." Since the term "public water supply" is defined, the Department does not believe it is necessary to separately define the areas serviced by these facilities. The term "regional water supply plans" is used at N.J.A.C. 7:15-5.25(f) and (h). It refers to any plan approved by the Department that addresses regional water supply issues, such as those that have been developed or are under development as an outcome of the New Jersey Water Supply Plan, and is self explanatory. The term "repeal" does not appear within the rule text, therefore does not require definition. However under the Rules for Agency Rulemaking at N.J.A.C. 1:30-1.2, the term "repeal" is used to describe a rulemaking proceeding to declare a rule as void, the effect of which is to terminate the legal effect of such a rule prospectively only. Under this proposal, portions of the previously adopted rule were repealed

The term "revised amendment" appears at N.J.A.C. 7:15-3.4(g)2ii and merely means a change to the WQM plan amendment application. The Department does not believe this term needs to be defined. The term "septage management area" is used once in the existing rule at N.J.A.C. 7:15-3.4(k) to denote one of the types of information that is included within amendments to areawide WQM plans from water quality management planning related documentation in 201 Facilities Plans approved by the Department and USEPA after May 31, 1975. As this is the only use of the term in these rules and it relates to a document that is not prepared under these rules, the Department does not believe the term needs to be defined. The terms "soil characteristics," "soil features," and "soil types" are all used in relationship to the Habitat Suitability Determination at N.J.A.C. 7:15-5.26, which references the U.S. Department of Agriculture (U.S.D.A.) Natural Resources Conservation Service as the source for this information and where definitions can be found. The term "stream corridor restoration plan" does not appear within the rule text, therefore does not require definition. The term "stream bank stabilization plan" appears at N.J.A.C. 7:15-5.25(h)5iii and "watershed restoration plan" appears at N.J.A.C. 7:15-5.25(g). A stream bank stabilization plan would be a plan intended to stabilize a stream bank, while a watershed restoration plan would be a watershed restoration plan developed in accordance with EPA's Nonpoint Source Program and Grants Guidelines for States and Territories, available at http://www.epa.gov/fedrgstr/EPA-WATER/2003/October/Day-23/w26755.htm, as stated in the rule proposal summary. Such a plan would be developed with the objective of restoring a watershed to a condition that attains water quality standards. These terms are self explanatory and require no further definition. The terms "total flow" and "total flow projection" refer to a sum of flows, which the Department believes are self explanatory terms that do not require a

definition. The term "treatment works service area" does not appear within the rule text, therefore does not require definition. Finally, the term "water quality target" appears only at N.J.A.C. 7:15- 6.3(b)2. There it is defined as the water quality objective for a TMDL. The rule proposal summary provided the explanation that the water quality target may be the numeric or non-numeric (that is, narrative) standards that are not being attained or a target that reflects a water quality target better than the standards. The target may also be expressed in terms of attaining specific designated uses. The target is typically the numeric water quality standard for the pollutant of concern. In some cases, the standards allow development of site specific criteria.

Acid Producing Soils

164. COMMENT: The Department proposes a new definition for "acid producing soils" that is used in proposed N.J.A.C. 7:15-5.25(g)2ii(4), which requires a 150 foot riparian zone for areas containing acid producing soils. Both the definition and the referenced section should not be adopted, as it is inappropriate to place buffers on this type of soil through these rules. The current rules provide detailed measures to prevent impacts from acid soils and no justification is set forth for a 150 foot buffer other than to further restrict development. (18, 42, 44, 45, 61)

RESPONSE: The riparian zones outlined in the rule are identical to those established in the Flood Hazard Area Control Act rules, N.J.A.C. 7:13, which were effective November 5, 2007 (see 39 N.J.R. 4573(a)). These rules apply a 150-foot riparian zone along streams containing acid producing deposits in order to prevent the degradation of water quality and the riparian zone due to exposure to acid. For consistency, it is appropriate to include areas containing acid producing soils as a category that warrants a 150-foot riparian zone through these rules. A

discussion detailing the justification of the riparian zones can be found in summary of this rule at 39 N.J.R. 1908 and in the summary of the Flood Hazard Area Control Act rule at 38 N.J.R. 3971.

Actual Flow

165. COMMENT: The proposed amendments to the Water Quality Management Planning rules contain conflicting and inconsistent definitions of wastewater flow including those for actual flow and design flow for facilities that discharge to surface waters and ground waters. These inconsistencies appear to originate from the inconsistencies in the current regulations where planning has been conducted on the basis of annual average flow, and the Capacity Assurance Program is based upon a consecutive three month flow without a clear definition of the appropriate three month period and the treatment plant flow limitation contained in the NJPDES permit which is generally defined as either maximum monthly flow or annual average or both. The Department should develop consistent definitions for actual flow and a consistent basis for projection of future flows from proposed facilities. (4, 35, 73)

RESPONSE: The proposed amendments to the WQMP rules define "actual flow" consistent with N.J.A.C. 7:14A, the Pollutant Discharge Elimination System rules, where the requirements for the Capacity Assurance Program and NJPDES permits are codified. Therefore, there is no longer any inconsistency with regard to this definition. The term "design flow" is not used in the WQMP planning rules. However, the Department has required the projection of "planning flows" to be based on the projected flow criteria at N.J.A.C. 7:14A-23.3 or 7:9a-7.4, which is consistent with the definition of "design flow" in N.J.A.C. 7:14A.

166. COMMENT: The Department proposes to amend the definition of "actual flow." As the Water Quality Management Planning rules is a planning rule, the actual flow should be based on longer-term data (for example, yearly average rather than as proposed based on a "period of three consecutive calendar months"). (18, 42, 44, 45, 61)

RESPONSE: The proposed amendments to the term "actual flow" were only related to including industrial treatment works in the definition to be consistent with how this term is defined in the NJPDES rules at N.J.A.C. 7:14A-1.2. The Department believes it is appropriate for the WQMP and NJPDES rules to calculate "actual flow" in the same manner to facilitate the determination of consistency for decision making.

167. COMMENT: The proposed definition of "actual flow" will address past difficulties with inconsistencies between the "permitted flow" and the "planning flow" and is supported. (38)

RESPONSE: The Department acknowledges the commenter's support of this clarification.

Applicant

168. COMMENT: The Department correctly notes the necessity of proposing a new definition for "applicant," as the term is used extensively in the rule. However, the term should be revised to specify which type of "approval," rather than generally stating "for an approval pursuant to this chapter." (18, 42, 44, 45, 61)

RESPONSE: As the commenters noted, the term "applicant" is used extensively in the rule and depending on the type of application, the "applicant" can vary. The Department believes the rule is clear on who can be an applicant for each type of approval and does not believe providing a definition which lists all possible approvals is necessary.

Areawide WQM plan

169. COMMENT: The definition of "areawide plan" or "areawide WQM plan" should clearly state the plan's contents, and the role of the designated planning agency versus the Department in terms of Plan development. All interested parties need to clearly understand the genesis of this type of plan, and the information that it should contain, as well as which entity, the State or the county, should have ultimate responsibility for developing such a plan. (81)

RESPONSE: The content of the areawide WQM plan is described in the Water Quality Planning Act at N.J.S.A. 58:11A-5. Additionally, the relationship between the Statewide, areawide and county Water Quality Management Plans is described at N.J.A.C. 7:15-2.2. The role of the Department and the designated planning agency is described in N.J.A.C. 7:15-2.3 and 2.4 respectively. Addition of this information to the definition of areawide plan would not further clarify the plan's contents or the role of the designated planning agency versus the Department in terms of Plan development.

Best Management Practices

170. COMMENT: The definition of "Best Management Practice (BMP)" in N.J.A.C. 7:15-1.5 should include the term "eliminate pollution" because it is fundamental to the Clean Water Act.

Also, there is a change in the text in which it is suggested that an "agency" selects a BMP. The term "agency" is broad, including private entities, so it should be clarified who selects the BMP. It should be a Department power. (86)

RESPONSE: The definition of "Best Management Practices" has been revised to be consistent with N.J.A.C. 7:14A, the Pollutant Discharge Elimination System rules. The definition as written encompasses the concept of eliminating pollution wherein it is stated that "Best Management Practices (BMPs)" means "…practices to prevent or reduce the pollution" and "…to reduce or eliminate the introduction of pollutants…" It is not necessary to further amend this definition to stress the intent to eliminate pollution. Identification of agencies as having the role of selecting an appropriate BMP to meet its nonpoint source control needs does not suggest that the Department would relinquish its approval role where BMPs are proposed as part of a permit application.

Clustering

171. COMMENT: The term "clustering" needs to be added to N.J.A.C. 7:15-1.5. (53)

172. COMMENT: The term "clustered residential development" should be defined. (85)

RESPONSE TO COMMENTS 171 AND 172: The term "clustering" does not appear within the rule text, therefore does not require definition. The term "clustered residential development" is described at N.J.A.C. 7:15-3.5(b)4x, the only place where the term is used in the rule, therefore it is not necessary to repeat a definition in N.J.A.C. 7:15-1.5. As indicated at N.J.A.C. 7:15-

3.5(b)4x , "clustered residential development" is an area where an applicant ensures that a minimum of 70 percent of a residential development property is permanently restricted from development, subject to a conservation restriction prepared in accordance with N.J.A.C. 7:15-1.7, and provided conditions are met related to the nitrate level that must be met in septic areas, the avoidance of environmentally sensitive areas, and implementation of BMPs on agricultural areas that remain in the deed restricted area.

Committed flow

173. COMMENT: The proposed definition of "committed flow" will help clarify the status of sewer extensions already under review and is supported. (38)

RESPONSE: The Department acknowledges the commenter's support of this clarification.

174. COMMENT: There is a typographical error in the first sentence of the proposed new definition for "committed flow." The "or" should be "of". (18, 42, 44, 45, 61)

RESPONSE: The Department thanks the commenters for pointing out this typographical error. The "or" has been corrected to "of."

Composite zoning

175. COMMENT: The proposed definition of "composite zoning" needs to be revised to clearly allow the historic practice of county planners when creating a composite zone, which is to define a range of parcel sizes with a somewhat arbitrary mean to be used as the typical value for the

composite zone, rather than the weighted average as proposed. The generation of weighted averages is a laborious process which is not warranted in planning documents on the county scale. (38)

176. COMMENT: The definition of "composite zoning" needs to be refined such that the entity responsible for the development of wastewater management plan is provided with enough information to feel confident that the methodology that a county and/or municipality use will be approved. The current definition does not indicate the degree of refinement necessary for residential zones. It states only that "under composite zoning, residential zones that would allow a similar density of units would be consolidated into a single zone with an intermediate density of units to represent all of the similar zones." (81)

RESPONSE TO COMMENTS 175 AND 176: Recognizing that no one approach would address all of the potential sets of circumstances throughout the State, the definition of composite zoning is purposely flexible to allow the county or municipality to formulate composites that make sense given the range of zones that apply in the planning area for which they are responsible. The Department is planning to work closely with the WMP agencies to ensure that satisfactory WMPs are developed in a timely fashion. Therefore, the WMP agency's proposed approach to composite zoning, or to exercise the option to use zoning directly without composites, should be part of the discussion during WMP development to ensure satisfactory WMPs are developed effectively and efficiently.

177. COMMENT: There is a new definition of "composite zoning" in N.J.A.C. 7:15-1.5. Is this term used in the Municipal Land Use Law? The definition itself, how the term is used in the rule, and the need for the term is unclear and should be clarified. (86)

RESPONSE: As explained in the summary for the rule proposal, composite zoning is a compilation of various similarly zoned areas into a single representative zoning designation, which is allowed to be used in the environmental build-out analysis as an acceptable simplification of the calculation of zoning yield. It is not required that composite zoning be used; the WMP agency may elect to use actual zoning yields in the environmental build-out analysis. Under composite zoning, residential zones that would allow a similar density of units would be consolidated into a single zone with an intermediate density of units that represents a weighted average of similar zones. This allows a simplification of the build-out calculation with minimal loss of accuracy where a municipality has a large number of individual zoning designations for residential, commercial, and other land use types, each of which allows a range of development intensity depending on such factors as availability of sewer service or use of a clustering option. Composite zoning or municipal zoning is a required submittal item at N.J.A.C. 7:15-5.17 and is used as part of the environmental build-out analysis at N.J.A.C. 7:15-5.25. There are inherent uncertainties as to how individual development projects will proceed, because of peculiarities of the land such as the shape of the parcel, or access and infrastructure issues that make a precise determination of build-out yield impossible. A good approximation of the development yield of undeveloped and underdeveloped lands is sufficient to inform the analyses required at N.J.A.C. 7:15-5.25. Therefore, grouping of various similar zoning types in a composite of the component types will allow for a sufficient level of detail that can be efficiently

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and effectively used in the GIS-based build-out model. An example of a composite zoning approach follows: A municipality's residential zones that allow 10,000, 15,000 and 20,000 square foot lots can be grouped as one intermediate, or composite, zone based on an area-weighted average of the contributing zones. In the above example, if there were 400 acres of 10,000 square foot zone, 500 acres of the 15,000 square foot zone and 800 acres of the 20,000 square foot zone, the 10,000 square foot zone would be 24 percent of the total 1,700 acres for the three zones, the 15,000 sq ft zone would represent 29 percent of the total and the 20,000 square foot zone would represent 47 percent of the total. By multiplying the percent by area of each zone allowance, the weighted average lot size for the contributing zones is determined: (24 percent × 10,000) + (29 percent × 15,000) + (47 percent × 20,000) = 16,150 square feet is the composite zone for the 1,700 acres.

178. COMMENT: As proposed, the use of the new definition for "composite zoning" would infringe on local zoning powers. The proposal does not provide for the public notice procedures under the MLUL. If the Department determines to use composite zoning, it must provide a statewide methodology to standardize the process of consolidating zoning districts and in order to be valid, such a methodology must enable independent parties to replicate the results. (18, 42, 44, 45, 61)

RESPONSE: As described in the Response to Comment 177, use of composite zoning is an allowable option to simplify the environmental build-out analysis, but is not required. The composite zones identified for the purpose of the environmental build-out do not become actual building zones and, therefore, have no relevance with respect to the MLUL or existing zoning.

As described in the Response to Comments 175 and 176, a single approach to selecting the make up of the composites will not be appropriate for the whole State and flexibility has been provided for each county/municipality to formulate composite ranges based on the existing zones in the planning areas. However, the formulation of the composites created for the analysis would need to be identified in the WMP and would be subject to public review along with the WMP as a whole.

Conservation design

179. COMMENT: The term "conservation design" needs to be added to N.J.A.C. 7:15-1.5. (53)

RESPONSE: The term "conservation design" does not appear within the rule text, therefore does not require definition.

Conservation restriction

180. COMMENT: The definition of "conservation restriction" includes the term "loam," a term that has multiple common meanings. In some contexts, the term loam is used to refer to "topsoil"; in other contexts, it is a USDA defined soil textural classification with precisely defined sand, silt and clay percentages. It appears to be used in this context to forbid the excavation or removal of topsoil. It should either be defined in the rule or removed as it appears to be redundant since the same paragraph precludes the removal and excavation of "soil." (84)

RESPONSE: The Department used the definition of “conservation restriction” found in the New Jersey Conservation Restriction and Historic Preservation Restriction Act at N.J.S.A. 13:8B-2 except for two minor modifications. Particularly, the statutory definition was amended by removal of the phrase "interest in land less than fee simple absolute, stated in the form of a right" from the first paragraph and the addition of a provision to allow for existing agricultural uses to continue. Items one through seven of the definition are the same as the statute and in the Department’s Coastal Zone Management rules and Coastal Permit Program rules.

The Department believes the term “conservation restriction” should continue to be defined consistently with other Department rules and the Act, with the exceptions noted above. The term loam is in common use as both a distinct soil textural class and as an indistinct but desirable soil type, such as topsoil. In either case, it is redundant with the broader term “soil” which also appears in the string of materials that cannot be removed. However, the list is multiply redundant in this respect, in that peat could also be interpreted as soil. This redundancy is to ensure that there will be no question that the mineral substrate in the conserved area can not be removed, no matter how it might be characterized by commonly used nouns.

181. COMMENT: At proposed N.J.A.C. 7:15-1.5, the definition for “conservation restriction” limits or forbids certain activities, including some common agricultural activities. It should be clarified that for conservation restrictions on lands for continuing agricultural purposes, those activities are allowed. (66)

RESPONSE: The definition of "conservation restriction" clearly makes provision for continuing agricultural uses to be allowed within conservation restriction areas, thus if the agricultural practice is already occurring, the agricultural activity will not be prohibited under the conservation restriction. The Department does not believe that further clarification of this point is necessary.

County water quality management plan

182. COMMENT: The definition of "county water quality management plan" "means a county plan prepared by a county planning board pursuant to Section 5 of the Water Quality Planning Act." A more expansive definition of this plan and how it relates to a county wastewater management plan is needed. The interrelationship between the two plans and the responsibility for developing them needs to be clearly stated. (81)

RESPONSE: The Water Quality Planning Act at N.J.S.A. 58:11A-5 provides that every county planning board may conduct a countywide waste treatment management planning process and prepare a county water quality management plan, which shall be consistent with the areawide WQM plan or plans. The content of a county water quality management plan is not specified, but is required to be consistent with the areawide WQM plans. To date, no county has ever expressed an interest in preparing such a county water quality management plan. The Department believes it is extremely unlikely that any county would opt to prepare a separate county water quality management plan, in addition to the county WMP, and, thus, did not provide more information about these plans or describe how they would relate to WMPs.

There are 12 existing areawide WQM plans that cover the whole State. These plans were developed by designated planning agencies and where no agency was designated, the Department in the 1970's. Thus, the WQMP rule does not provide any requirements for development of areawide WQM plans, as they already exist. The new county WMPs, which are required by the rule, will contain much of the same information as the original 12 areawide WQM plans, but will not replace them in their entirety, thus WMPs are, and remain, amendments to areawide WQM plans. However, the new 21 county WMPs will provide updated information in a more useful form, thus changing the original outdated areawide WQM plan documents. County boards of chosen freeholders are given the responsibility to develop county WMPs at N.J.A.C. 7:15-5.4. The Department anticipates WMPs will be developed by their respective planning departments or consultants. The rule also described the roles of the Department at N.J.A.C. 7:15-2.3 and designated planning agencies at N.J.A.C. 7:15-2.4, thus no changes to the rule are necessary.

Designated use

183. COMMENT: The definition of "designated use" in N.J.A.C. 7:15-1.5 should include the Ground Water Quality Standards because there are designated uses that need to be protected under the Ground Water Quality Standards that are not in the designated use definition in the Surface Water Quality Standards. (86)

RESPONSE: The Department's intention, as indicated in the summary at 39 N.J.R. 1875, is to assure that the definition of "designated uses" in this rule is consistent with the term as defined in the Surface Water Quality Standards, N.J.A.C. 7:9B. This is because the relevance of designated

uses, as used in the rule, relates to surface waters, not ground waters. The term is used at N.J.A.C. 7:15-3.5(b)4viii(2) as part of the evaluation criteria to determine if a "reclaimed water for beneficial reuse" project in a non-tidal watershed can qualify for a WQM plan revision, instead of an amendment. To qualify as a revision, the RWBR project must demonstrate that there will be no adverse effects on any downstream designated use as a result of the project. In addition, the term is used in proposed N.J.A.C. 7:15-6 with respect to defining segments that should be placed on the List of Water Quality Limited Segments for which a total maximum daily load is expected to be needed. Where designated uses are not met in a segment due to a specific pollutant, a segment should be placed on the List of Water Quality Limited Segments. The List of Water Quality Limited Segments and TMDLs apply only to surface waters.

Endangered Species

184. COMMENT: The proposed definition of "endangered species" refers only to species of wildlife, and does not include plant life. Although the summary portion of the proposed rules state that plant species that have been identified and mapped on the Department's Natural Heritage Priority Sites database, and that their habitats will be identified and protected like endangered wildlife species, the Rules themselves do not say this. This definition should be amended to incorporate the Department's stated intent to protect endangered plant species. (17)

185. COMMENT: This proposed definition of "endangered species" refers only to endangered species of wildlife and does not include plants. This definition should be expanded to include plants listed on both the Federal and State lists. Reference that plant species "have been identified and mapped on the Department Natural Heritage Priority Sites database" affords

inadequate and insufficient protection and incorrectly regulates plants to a lower level of protection. Plants form the foundation of biodiversity, and therefore logically must be protected to the same degree as wildlife. (49)

RESPONSE TO COMMENTS 184 AND 185: The rule protects plant species that are located within Natural Heritage Priority sites, as it does endangered and threatened animal species that use habitat that is ranked 3, 4, or 5 by the Landscape Maps, by incorporating both into the composite GIS analysis that will remove certain environmentally sensitive areas from sewer service area. As such, plant species that are mapped as Natural Heritage Priority Sites are protected whether or not they are specifically noted in the definition of endangered species. Given that the WQMP rule has a planning perspective, protection of plant species that are not mapped is not feasible. These species will be afforded appropriate protection on a project specific basis through land use permitting.

Environmental build-out analysis

186. COMMENT: The Department should propose a definition for the term "environmental build-out analysis" as this is a requirement pursuant to proposed N.J.A.C. 7:15-5.25(c). (18, 42, 44, 45, 61)

RESPONSE: An environmental build-out analysis is described in great detail in N.J.A.C. 7:15-5.25(c). The Department does not believe it is necessary to additionally define the term in N.J.A.C. 7:15-1.5.

Environmentally sensitive area

187. COMMENT: Support was expressed for including endangered and threatened species in the definition of "environmentally sensitive areas." However, the definition should be expanded to include riverine and steep slopes. The rule proposal itself defines slopes over 20 percent as environmentally sensitive and includes them under N.J.A.C. 7:15-3.2(c)1viii as a possible condition making an area unsuitable for development and includes them at N.J.A.C. 7:15-5.17(a)11 as a mapping requirement. (22, 76)

188. COMMENT: 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. This change will strengthen the State's ability to protect and improve water quality. (86)

189. COMMENT: The definition of environmentally sensitive areas should include more water variables, such as surface water intakes, impervious cover, and recharge areas. (59)

190. COMMENT: There is support for the inclusion of threatened and endangered species habitat as identified through the Landscape Project, Natural Heritage Priority sites, Category One protection areas, and wetlands in the definition of "environmentally sensitive areas." However, the Department should consider adding Well Head Protection Areas (WHPA) to the definition of environmentally sensitive areas. The type and intensity of development that occurs within a

WHPA directly affects the quality and quantity of New Jersey's drinking water. Over time, sewers leak and break and when placed in WHPAs unnecessarily risk contamination of drinking water sources. Therefore, sewer service areas should not be located with in WHPAs. The Department should also add high ground water recharge areas to the definition of environmentally sensitive areas. Sewer service areas and the high percentage of impervious cover that they support are inappropriate for high aquifer recharge areas, which sustain drinking water sources for more than 25 percent of New Jersey residents. Additionally, the Department should consider amending the "environmentally sensitive areas" definition to include forest patches larger than 100 acres, as well as 300 foot buffers surrounding trout production and maintenance streams, as well as streams upstream of surface water intake points. These forest and stream features hold special ecological significance for maintaining clean water resources, maintaining biodiversity, and combating global warming. (82)

191. COMMENT: The definition of "environmentally sensitive areas" fails to identify and include specific types of areas that are known to be important to the maintenance and improvement of water quality and that are inappropriate for inclusion in sewer service areas or other wastewater disposal areas, such as steep slopes, headwater areas and contiguous forest tracks, to name a few. Also, the definition should identify and include "special areas" as defined under the Rules on Coastal Management, N.J.A.C. 7:7E. Such areas should be identified and listed in the definition. The definition should further state that environmentally sensitive areas include, but are not limited to, the types of areas listed. (17)

192. COMMENT: Additional attributes should be included in the definition of "environmentally sensitive areas," such as Well Head Protection Areas that protect areas adjacent to public and community water supply wells. Well Head Protection Areas are delineated pursuant to the Safe Drinking Water Act and the Source Water Area Protection Program in order to address the horizontal extent of ground water captured by a well pumping at a specific rate over a two-, five-, and twelve-year period. Other areas that should be designated environmentally sensitive include ground-water recharge areas mapped by the New Jersey Geological Survey (specifies "SRANK A/B") that provide for aquifer recharge, stream baseflow, and wetland occurrence; forest patches larger than 100 acres; and trout production and trout maintenance streams, as well as streams upstream of surface water intake points and 300 foot buffers around both. Without these additions, significant environmentally sensitive areas will be left unprotected. Moreover, once these attributes of environmental sensitivity are integrated into the definition, the number of patches of environmentally sensitive land that are 25 acres or more increases because the definition uses a composite approach. (49)

193. COMMENT: A weakness in the proposed WQMP rules is that while the proposal calls for mapping of steep slopes and other environmentally sensitive areas, nowhere in the rules are these steep slopes, contiguous forests, and scenic corridors actually protected. It is asked under the planning process for towns to map certain environmentally sensitive features like steep slopes, but then there is no prohibition on putting sewers into steep slope areas. There seems to be a disconnect here. Steep slopes have to be mapped but they are not regulated or protected because they are not defined as environmentally sensitive areas. Other important areas like contiguous

forests and scenic corridors are also not regulated, so there is a whole level of environmentally sensitive areas that aren't included in the definition of environmentally sensitive area. (65, 79)

RESPONSE TO COMMENTS 187 THROUGH 193: The definition of environmentally sensitive areas specifically notes four features in order to illustrate some of the types of areas that the Department will consider as environmentally sensitive, for example, in the sewer service area delineation requirements at N.J.A.C. 7:15-5.24. Threatened and endangered species habitat and riparian zones, which are listed by some of the commenters as needing to be added are already specifically listed in the definition. As recommended by one commenter, the definition does not limit the term to those areas that are listed. The Department selected this method rather than attempt to list every type of environmentally sensitive area to avoid the potential to suggest that non-listed areas were not environmentally sensitive by virtue of not being listed. Thus, the addition of more types is unnecessary. The rule allows WMP agencies to exclude other areas, including environmentally sensitive areas, from designation for sewer service, which could include the types of areas suggested by the commenters. For additional discussion regarding those environmentally sensitive areas that are considered as part of the composite geographic information systems analysis for sewer service area delineation, which are not identical to those listed in the definition, see the Response to Comments 706 and 739. It should be noted that the rule does provide protections for steep slopes through the provisions at N.J.A.C. 7:15-5.25(g).

194. COMMENT: The definition of "environmentally sensitive areas" cannot be left open ended. The words "but are not limited to" should be removed. The State does not have the power to arbitrarily add factors to the list without scientific justification and a thorough public

review. Additionally, the use of the Landscape Mapping is far reaching, proving to be full of errors, and also has never undergone any official public comment or scrutiny. The inclusion of "rare" or "Other Priority Species" in this definition is opposed. Neither the Federal nor the State endangered species statutes carry this protection to that extreme. (58)

RESPONSE: The definition of "environmentally sensitive areas" does not determine those environmentally sensitive areas that will be considered as part of the composite GIS analysis that is used to delineate the sewer service area. Rather, it is a broader term, a subset of which is listed in N.J.A.C. 7:15-5.24 to determine the sewer service area boundary. For further discussions on the use of the Landscape Maps, which were both peer reviewed and publicly notices, see Response to Comments740 through 756. It should also be noted that the term "rare" does not occur in this definition and the term "Other Priority Species" is used as a part of the official title of the Landscape Maps.

195. COMMENT: The amended definition of "environmentally sensitive areas" should specify whether this is required for only Rank 3, 4 and 5 of the Landscape Maps. The summary states that the definition "*lists specific areas mapped* as endangered or threatened wildlife species habitat," however, this is inconsistent with the proposed definition: "environmentally sensitive areas include, *but are not limited to*." The Department should use the more precise language of the summary in the definition.

Also, it is unclear what the effect would be if wetlands are mapped. The Department should specify the resultant implications where the presence of wetlands is indicative of an "environmentally sensitive area." (18, 42, 44, 45, 61)

RESPONSE: The definition of "environmentally sensitive areas" is a broad term, a subset of which is listed in the definition. The summary language for the definition of environmentally sensitive areas identifies the changes made to the definition, wherein certain areas were selected to list as examples of environmentally sensitive areas. The areas that were listed, which are areas mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened or Other Priority Species, Natural Heritage Priority Sites, wetlands and riparian zones, along with others, are identified in N.J.A.C. 7:15-5.24 as areas to be excluded when determining the sewer service area boundary. N.J.A.C. 7:15-5.24(b), states that only endangered and threatened species habitat are among the areas to be excluded from sewer service. This is the same as areas ranked 3, 4, or 5 by the Landscape Maps because areas ranked 1 or 2 are not considered endangered or threatened species habitat. For further discussions on the use of the Landscape Maps, which were both peer reviewed and publicly notices, see Response to Comments 740 through 756. In accordance with N.J.A.C. 7:15-5.24(b)4, wetlands mapped pursuant to N.J.S.A. 13:9A-1 and 13:9B-25 is to be excluded from areas designated as sewer service area. This data is available as a download on the Department's webpage http://www.nj.gov/dep/gis/listall.html titled "Wetlands."

Equivalent dwelling unit

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196. COMMENT: The definition of "equivalent dwelling unit" at N.J.A.C. 7:15-1.5 states that the assumed three-bedroom three-person residential unit is assumed to generate 500 gallons per day of wastewater or 30 pounds of nitrate per year. In N.J.A.C. 7:14A for Treatment Works, the amount of wastewater per three-bedroom residential unit is 300gpd. In N.J.A.C. 7:9A for septic systems, the amount is 350 gpd for a three-bedroom unit. Wastewater generation should be consistent throughout the Department regulations. There is no explanation for using 500 gpd. (14)

197. COMMENT: The proposed new definition of "equivalent dwelling unit" refers to the "standard residential unit upon which the nitrate dilution model is based, which is a single family home with three bedrooms and three residents … assumed to generate 500 gallons per day of wastewater or 30 pounds per year of nitrate." First, the rule proposal does not indicate the authority and basis for this assumption, nor is this found in any other Department regulations. The definition should provide this information, as it forms the basis for nitrate dilution modeling at N.J.A.C. 7:15-5.25. Second, the definition includes regulatory provisions as to the "equivalency measure" and how and when it is to be used. Provisions as to when and how the equivalency measure is to be used should be moved to the appropriate regulatory sections. Lastly, the proposal refers to 500 gallons per day of wastewater in this definition, but later refers to 300 gallons per day, which is a confusing discrepancy that should be clarified. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 196 AND 197: The term "equivalent dwelling unit" is used at N.J.A.C. 7:15-5.25 for the evaluation of future development relative to the nitrate planning

standard in ground water of two mg/L. Because it is used in multiple locations, it is appropriate to include this term among the definitions. The concept of an equivalent dwelling unit was developed in order to equate the typical residential dwelling unit to non-residential types of development. This approach allows a simple way to determine conformance of various development types with the overall HUC 11 nitrate loading analysis, which produces a result in terms of residential dwelling units. A three bedroom house with three persons per dwelling unit was selected as typical because based on the most recent 2000 US Census, the average household size in New Jersey is 2.68, which the Department rounded up to three. Further, as detailed in the rule summary for N.J.A.C. 7:15-5.25(e)1iii, the majority of homes constructed outside of Metropolitan Statistical Areas (MSAs) that are most representative of areas in New Jersey served by ISSDSs contain three-bedrooms. This data can be accessed online at http://www.census.gov/const/www/ under *Characteristics of New Housing*. Because this standard is applied with respect to ISSDSs, the flow figures from the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A-7.4, were used. According to the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A-7.4, the wastewater flow associated with a three bedroom house is 500 gallons per day (200 gpd for the first bedroom and 150 gpd for each additional bedroom). Assuming 3 persons yields a load of 30 pounds of nitrate per year, based on the assumption of 3 persons per dwelling unit and that each person produces 10 pounds of nitrate per year. The volume of 300 gallons per day is used in the definition of infill at N.J.A.C. 7:15-1.5 to specify how flow volumes are to be calculated for the purpose of determining conformance with the flow limit allowed for infill connection as described at N.J.A.C. 7:15-8.1(b)1. The volume also represents that associated with a single residential unit but is different than the 500 gallons per day discussed above, because it is

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derived from the Department's rules for estimating future flows to sewers at the NJPDES rules, N.J.A.C. 7:14A-23.3.

The Department agrees there should be consistency among rules and used the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A-7.4, with respect to ISSDSs and the NJPDES rules, N.J.A.C. 7:14A, with respect to wastewater treatment provided by facilities subject to NJPDES rules, generally those with collection of waste and conveyance to and treatment at a remote facility. The flow specifications between these two rules differ, however, because of the need to incorporate additional conservative assumptions when discharging to an on site, underground tank compared to a discharge to collection lines that will convey wastewater to a treatment facility, which offers flow attenuation, is subject to close monitoring and is not subject to the decrease in efficiency experienced with a homeowner maintained system. Consistent with the premise to rely on the NJPDES (N.J.A.C. 7:14A) flow specifications when conveyance/treatment facilities are utilized for treatment, to determine the number of dwelling units equal to the flow thresholds relevant to this type of treatment, the flow of 300 gpd was used for a single family home in accordance with the NJPDES rules, N.J.A.C. 7:14A-23.3.

198. COMMENT: Wastewater generation per capita is beyond any reasonable evidence. N.J.A.C. 7:15-1.5 provides planning flows of 165 gallons per day per person, or approximately 220 percent of the typical value of 75 gallons per capita per day generated. The equivalent dwelling unit calculation is only 225 gallons per day per unit not the 495 proposed here. Even the staggeringly conservative Highlands standard promulgated by the Department utilizes 75

gallons per person per day. This is a reasonable and consistent value and should be substituted for the 165 figure. (75)

RESPONSE: The Department assumes the commenter derived the value of 165 gallons per person per day from the flow of 500 gallons per day per dwelling unit and an assumption of 3 persons per dwelling unit numbers used in the definition of an equivalent dwelling unit. The value of 500 gallons per day per unit is only used in determining the number of equivalent dwelling units under the analysis at N.J.A.C. 7:15-5.25(e). It is not used for estimating flow for wastewater treatment facilities that are regulated under NJPDES. The value of 500 gallons per day is the minimum flow assumption required at N.J.A.C. 7:9A-7.4 for a 3 bedroom house. As explained in Response to Comments 196 and 197 , it is necessary to plan for a conservative flow contribution when septic systems are the method of wastewater management, but where NJPDES regulated wastewater treatment methods are used, alternative flow numbers apply. As supported by the commenter, at N.J.A.C. 7:15-5.18(f), the Department uses 75 gallons per day per capita as the projected planning flow with respect to NJPDES regulated wastewater treatment facilities where future specific residential dwelling types are unknown.

Existing water quality

199. COMMENT: There is no definition for existing water quality in the rules and there needs to be because existing water quality is the underlying baseline against which all planning should be done and against which the antidegradation policies are enforced. How existing water quality is defined has regulatory implications. The rules do not address how the antidegradation policies are reflected in the planning process. The definition of existing water quality should be based

upon what is actually present in the water body based upon four quarter of sampling. Existing water quality should not include future projected permitted wasteload allocations from point sources or future projected runoff from nonpoint source pollution from approved sewer service areas or wastewater service areas. If this definition can not legally be added on adoption, then it should be proposed or re-proposed as applicable. (86)

RESPONSE: An antidegradation analysis is required for a new or expanded NJPDES facility. The Department proposed to codify in the SWQS the implementation of the existing antidegradation policies in 2005 (see 37 N.J.R. 3480(a)). As indicated in the proposal, all applicants for new or expanded point source discharges are required to perform an alternatives analysis to determine whether an alternative is available that will prevent a calculable change in water quality. The applicant is expected to consider feasible modifications to existing and proposed systems, enhanced/alternative treatment technologies and relocation/connection to another treatment plant. If the Department agrees that there is no feasible alternative to the proposed surface water discharge, the Department may require the applicant to initiate a water quality study. The objective is to avoid authorizing more loading to the waterbody where ever feasible. However, where the Department determines that a water quality study is necessary to determine "existing water quality," projected future impact associated with unrealized pollutants are not factored into the calculation. Four quarterly samples are insufficient to characterize existing water quality. The number of samples needed to characterize existing water quality depends on the specific pollutant. In general, the NJPDES program requires a minimum of 20 samples collected over the critical condition, usually summer low flow when the impact from the

discharge is expected to be most severe. For these reasons, the Department does not agree that a definition of existing water quality is necessary.

Highlands planning area, Highlands preservation area, and Highlands Region

200. COMMENT: The definitions of "Highlands planning area," "Highlands preservation area," and "Highlands Region," should be modified to acknowledge that in addition to the municipalities identified in the Highlands Water Protection and Planning Act, three additional municipalities were included in the State Development and Redevelopment Plan Highlands Special Resource Area, all in Sussex County: Andover Borough, Andover Township and Lafayette Township. The State Plan recommended the entire Highlands Region for special protection and did not distinguish between the preservation and planning areas. This division is a fiction, not based on science and was a compromise devised to secure the support of Highlands county freeholders, who lobbied the Highlands Task Force with this proposal.

These definitions should also extend to the zones in the (Draft) Regional Master Plan (RMP): the Protection Zone, Conservation Zone and Community Development Zone. At a minimum, the Protection Zone, which in the Draft RMP comprises 65 percent of the Highlands Region, should receive protections equivalent to those in the Preservation Area. The definitions should further consider including the rest of the Highlands Region from an ecosystem perspective, as opposed to limiting the protections to an area defined by arbitrary geopolitical boundaries. (49)

RESPONSE: The Highlands Water Protection and Planning Act established the "Highlands Region" at N.J.S.A. 13:20-7. The Water Quality Management Planning rules cannot redefine the

boundaries contained therein. It would be inappropriate for the WQMP rule to treat as Highlands areas any areas that are not statutorily designated as such in the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-7, or to treat areas in the Highlands Planning Area as if they were in the Highlands Preservation Areas. Therefore, no change in the definitions are needed to reflect recommendations in the State Plan.

Impervious surface

201. COMMENT: The definition for "impervious surface" should not include porous paving, paver blocks, and gravel as this is inconsistent with the definition in the stormwater regulations. Defining the above terms as "disturbed land" would be more accurate. (22, 76)

RESPONSE: This definition of "impervious surface" is taken directly from the Highlands Water Protection and Planning Act rules (N.J.A.C 7:38) in an effort to be consistent with that rule and other Department planning rules that regulate land use. The Stormwater Management rules, N.J.A.C. 7:8, are regulatory requirements that govern the stormwater quantity, quality and recharge development standards for State, municipal, and regional stormwater management requirements, plans and ordinances. Under the Stormwater Management rules, gravel is not considered an impervious surface since an impervious surface by definition does not provide any ground water recharge. The New Jersey Geological Survey Groundwater Recharge Methodology recognizes the ability for gravel to contribute some recharge. Therefore, the Stormwater Management rules consider areas that use porous pavement and paver blocks as permeable, under N.J.A.C. 7:8-5.2(d), allowing for exemptions for specific linear development projects. However, for the purposes to establishing the trigger for the stormwater management

rules, porous paving, permeable concrete and interlocking concrete pavers are recognized as impervious since these measures do not reduce runoff volume into a stormwater BMP; rather, they directly convey all of the volume to a subsurface infiltration BMP.

"Disturbed land" has never been defined in any Department rule, however, "disturbance" is defined in Highlands Water Protection and Planning Act rule and in this proposed rule and both rules include "impervious surfaces" in the definition. Placement of [those things] would be considered disturbance under the Stormwater Rule as well.

202. COMMENT: There is support for the proposed addition of the definition of "impervious surface." (38)

203. COMMENT: The definition of "impervious surface" is an improvement because of its consistency with the Highlands Water Protection and Planning Act. (49)

204. COMMENT: The definition for "impervious surface" is more accurate and descriptive than the definition in N.J.A.C. 7:8, specifically because gravel is correctly included as is the inclusion of any "…material that has made the surface resistant to infiltration by water." Therefore, this definition is supported. (10, 80)

RESPONSE TO COMMENTS 202 THROUGH 204: The Department acknowledges the commenters' support of this definition.

205. COMMENT: The definition of "impervious surface" includes any structure, surface, or improvement that reduces or prevents absorption of stormwater. This would include lawn areas and other land treatments that while reducing absorption as compared to the existing condition, would not meet the definition of impervious areas provided in Technical Release 55, Urban Hydrology for Small Watersheds. This definition should be modified to be consistent with TR55. (84)

206. COMMENT: This one size fits all definition of "impervious surface" will eliminate any incentive for replacement of true impervious materials with more porous alternative materials that would allow some infiltration. Some alteration of this definition to encourage greater use of more porous materials in construction is recommended. (88)

RESPONSE TO COMMENTS 205 AND 206: The use of the term "impervious" is for planning purposes under these rules and is utilized as a surrogate for impacts of general development. The use "impervious" serves to identify areas where redevelopment is allowed, and the broad use of this term encourages redevelopment. The Department recognizes, however, that stormwater computations under the Stormwater Management rules, N.J.A.C. 7:8, are based on the runoff characteristics and not the generalized impacts utilized for planning purposes. In the context of compliance with the Stormwater rules, the runoff characteristics are of paramount importance. The Natural Resources Conservation Service (NRCS) methodologies for runoff computations are cited in the Stormwater Management rules. Any use of those computations would necessarily follow the NRCS guidance for their use, including the NRCS TR55 – Urban Hydrology for Small Watersheds publication. The Department believes that the use of alternative surfaces and

more permeable surfaces for runoff reduction is sufficiently encouraged by the Stormwater Management rules through the requirements for use of nonstructural strategies and the numerical performance standards.

Infill area

207. COMMENT: The proposed definition of an "infill area" needs to be revised to allow for flows of up to 8,000 gallons per day provided the total acreage is less than 10 acres. This is more consistent with circumstances occurring in developed municipalities, and will allow planners and reviewers to focus their efforts on more significant projects by not having to process smaller, more routine projects. (38)

RESPONSE: The Department limited the volume of wastewater generated between existing improved lots to 2,000 gallons per day or less in "infill areas" to minimize the potential for unintended environmental impacts through either nonpoint source pollution, water supply stress, or the alteration of significant undisturbed blocks of habitat. This rule requires all new development associated with wastewater discharges of greater than 2,000 gpd, including residential developments totaling six or more dwelling units and expansions of existing facilities that have not previously assessed environmental impacts, to assess the impacts associated with that development through a new or updated wastewater management plan. It is not the Departments intent to review several small proposals, but to review a comprehensive wastewater management plan once that will assess the environmental impacts of all future development in accordance with the plan. Infill development with wastewater volume in excess of the cumulative total of 2,000 gallons per day would involve the construction of sizable commercial

development or more than five houses and has the potential to have more significant environmental impacts including, but not limited to: nonpoint source pollution, modification of hydrology in receiving waters, depletive and consumptive water uses, and modification or destruction of environmentally sensitive areas. The potential for significant impacts from development with wastewater flow in excess of 2,000 gallons per day warrants an assessment of the cumulative impact through the wastewater management planning process, to prevent a greater density of development than is appropriate or sustainable in terms of water resources because the cumulative impacts of development in the WMP area have not been evaluated.

208. COMMENT: The definition of "infill area" provides for the use of 300 gallons per day (gpd) when calculating the wastewater flow from single family development. This appears to be inconsistent with the 500 gpd that is used for dwelling units throughout the rule. It should be noted however, that 300 gpd is closer to reality. (84)

RESPONSE: "Infill area" is solely related to development connecting to existing public sewer infrastructure and as such, the wastewater flow projection for a single family residential development under the Pollutant Discharge Elimination System rules for Treatment Works Approvals at N.J.A.C. 7:14A-23.3, or 300 gpd, is used. A standard residential unit upon which the nitrate dilution model is based for individual subsurface sewage disposal systems, not sewer connections, is assumed to generate 500 gpd of wastewater. The rules used and the wastewater flow projections vary depending on if the wastewater is discharged to surface or ground water, or if development is for a single family residence or more regional in nature. Thus, the 300 gpd residential unit discharging to a regional sewer system and the 500 gpd equivalent per dwelling

unit discharging to a septic system, can not be compared as if they are based on equivalent premises..

Further, the commenter expressed an opinion that 300 gpd was a more realistic wastewater flow projection for a single residence than 500 gpd. As stated in the Response to Comments 175 and 176, the rules that affect quantification of proposed discharge volumes as they pertain to ground water discharges are found in the Standards for Individual Subsurface Disposal Systems at N.J.A.C. 7:9A-7.4. The minimum volume for a residential dwelling generating ground water discharges begins at 350 gpd. However, that volume is based on a 1-or-2 bedroom dwelling. For a 3-bedroom (or more) single-detached dwelling or apartment proposed for ground water discharges, the volume increases incrementally by150 gpd for each additional bedroom. Accordingly, for a 3-bedroom dwelling or apartment the total is 500 gpd. The Department believes the existing requirements for projecting future wastewater flows are appropriate and that the planning and permitting rules should be consistent in this regard.

Intermittent Stream

209. COMMENT: The definition of “intermittent stream” should be revised to allow for a site-specific demonstration of the presence of an intermittent stream without the bed and bank present. The definition of “intermittent stream” in N.J.A.C. 7:15-1.5 is a more restrictive definition than in the Stormwater Management rules by requiring a “bed and bank”. The Stormwater Management rules are more flexible and allow a site-specific determination to be made as whether an intermittent stream exists in a field. A site-specific field demonstration to

show the existence of the resource must be allowed. If the resource is there, it becomes an existing use that must be protected. (86)

RESPONSE: The Department is proposing a definition for the term "intermittent stream" to help define which streams are subject to riparian zones. The riparian zones mirror the riparian zones in the Flood Hazard Area Control Act (FHACA) Rules, N.J.A.C. 7:13. Since the FHACA rules regulate site specific development the requirement for a site specific demonstration of the presence of an intermittent stream without the bed and bank is appropriate. This rule, however, is a planning rule that requires that local government adopt ordinances on a broader scale to protect riparian zones consistent with goals of the FHACA rules. Site by site analysis is not likely to be feasible for a local government developing an ordinance and therefore it is expected that existing Department Geographic Information Systems data, such as the Department's hydrography layer will be used to generate a map of riparian zones. While this layer contains detailed and useful data it may not include streams without a bed and bank. It should also be noted that the ordinances required by this rule do not replace existing Department rules and therefore intermittent streams without a bed or bank that are currently regulated by other Department rules (i.e. FHACA rules, Freshwater Wetlands Protection Act rules at N.J.A.C 7:7A and Highlands Water Protection and Planning Act rules at N.J.A.C 7:38) will continue to be regulated. Thus, no further clarification of this definition is required.

210. COMMENT: The definition of "intermittent streams" should specifically exclude man-made drainage channels like farm ditches. (58)

RESPONSE: The Department finds that many existing farm ditches are channelized former natural watercourses that have been altered at a time when such alteration was legal. As such, these ditches drain to streams and impact the water quality within the watershed. Due to the altered nature of these watercourses and the nature and intensity of the adjacent agricultural land use, they have a potential for negative water quality impacts and protections such as buffers are essential to the restoration and protection of water quality. Furthermore, many such ditches are regulated under other Department rules such as the Flood Hazard Area Control Act rules, N.J.A.C. 7:13. These areas can also be important linkages between forested, emergent wetland systems and surface waters, that provide corridors and habitat for endangered and threatened species, and therefore they warrant protection through this and other Department rules. Given the importance of these areas in maintaining and improving water quality, and providing habitat, their exclusion for the definition of intermittent streams would be inappropriate.

211. COMMENT: Support was expressed for defining "intermittent streams" so that they may be protected. (10, 80)

RESPONSE: The Department acknowledges the commenter's support.

Landscape Maps

212. COMMENT: The definition of "Landscape Maps" at N.J.A.C. 7:15-1.5 uses the term "documented occurrences." It is unclear what a valid documented occurrence is. The definition states that one "documented occurrence" is enough to establish a habitat area. This implies that if someone "documents" a certain species passing through an area, that area could be assigned a

regulatory constraining landscape ranking of 3, 4, or 5. This is of concern because the landscape mapping is being incorporated into regulation, presumed to be valid and reliable, without being subject to a full public review and comment process. The metadata for the Landscape Maps on the Department website does not warrant the accuracy of the data and provides disclaimers. The wastewater rules are being used to promote the agenda to protect habitats instead of proposing a separate set of habitat protection rules that would be subject to public comment. For this reason, the Landscape Mapping should not be used as a valid and reliable source for regulatory purposes. (14)

RESPONSE: The protection of endangered and threatened species habitat is consistent with the Department's mandate to protect the State's natural resources and is already incorporated in many Department regulations. As such, it is entirely appropriate and consistent that this rule limit the extension of sewer service to these areas, because the density of development that requires sewers is inconsistent with protection of threatened and endangered species. Documented occurrences are used to develop the Landscape maps. A detailed discussion of the process by which such occurrences is incorporated into the Landscape maps is included in the Landscape Project report which is available at http://www.nj.gov/dep/fgw/ensp/landscape/lp_report.pdf. All such occurrences are verified by Department staff. It should also be noted that the method used in developing the Landscape Project maps was both peer-reviewed and publicly noticed. In recognizing that the Landscape Project maps represent a snapshot in time and that subsequent legal alterations to the landscape may have occurred that affect the suitability of species habitat, the rule at N.J.A.C. 7:15-5.26, does establish a Habitat Suitability Determination. This determination provides agencies the ability to rebut the presumption of habitat in an area where it

can be demonstrated that the area, through legal alteration, is no longer suitable habitat for the relevant endangered or threatened species.

213. COMMENT: The proposed new definition for "Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife" or "Landscape Maps" does not specify that only habitats with a Rank of 3, 4 or 5 are of concern, but causes confusion with the inclusion of discussion of all the habitat Ranks. The definition should be amended to include the following clarifying statement taken from the summary: "Under this chapter, water quality planning decisions will be based on Landscape Maps that identify endangered and threatened species habitat with a Rank of 3, 4 or 5." (18, 42, 44, 45, 61)

214. COMMENT: The required "Landscape Maps" include not only endangered and threatened species but also that of "other priority wildlife as Rank 3, 4 and 5." The Department should substantiate its authority to regulate other priority wildlife for wastewater management planning. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 213 AND 214: The Department's "Landscape Maps" include habitat for endangered, threatened and other priority wildlife with Ranks of 1 through 5. Therefore, it would be inappropriate to alter the definition of the maps themselves. At N.J.A.C. 7:15-5.24(b), the rule clearly states that only endangered and threatened species habitat, which is the same as areas ranked 3, 4, or 5 by the Landscape Maps (areas ranked 1 or 2 are not considered endangered or threatened species habitat) should be used in the composite GIS analysis that delineates the sewer service area boundary. No further clarification of the

definition is necessary. Finally, this rule does not regulate other priority wildlife. For further discussions on the use of the Landscape Maps, which were both peer reviewed and publicly noticed, see Response to Comments 740 through 756.

215. COMMENT: Support was expressed for defining "Landscape Maps" so these valuable tools can become part of the process when WQMPs and WMPs are being developed, which is essential. (10, 80)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

Linear development

216. COMMENT: The definition of "linear development" should not include private driveways. Private driveways are not linear development. (86)

217. COMMENT: The definition for "linear development" should not include "drives" as a basis for a waiver unless there is a clarification that only "public drives" are included, not drives for private, residential use. (22, 76)

218. COMMENT: Private driveways do not belong on the list of linear developments. The linear development list includes private drives, railroads, roads, and public utilities. Private drives do not belong in this list because they are private and basically are site-specific while all the other uses are public, such as utilities or roads, not site-specific and are related to a much larger plan. (24)

219. COMMENT: The characterization of a land use as being "linear development" is significant because, pursuant to proposed N.J.A.C. 7:15-5.25(g)6 and (h)5, such development may be excepted from the riparian buffer and steep slope requirements. The definition of this term as proposed includes land uses such as roads, drives, railroads, infrastructure, transmission lines and rights-of-way. Although several of the land use types described in the definition of linear development are intended to benefit the public (such as transmission lines, railroads and/or require alignments that generally cannot accommodate sharp turns to avoid short stretches of steep slopes), drives and private rights-of way should not be included in the definition as they are site specific and benefit only the individual landowner or developer and should not be excepted from the riparian buffer and steep slope requirements. (17, 49)

RESPONSE TO COMMENTS 216 THROUGH 219: Development in riparian buffers and steep sloped areas can only proceed when an applicant is able to demonstrate that there is no alternative to placing linear development in those areas. For instance, for a development proposal with multiple structures, the definition does provide for the minimum number of access roads or drives necessary for emergency vehicle access and exit.. However, the rule does not allow for a private drive to each structure, which could not be justified as the only alternative. A private drive would be allowable to ensure access to a single structure proposal if there is no feasible alternative to placement of the structure and the driveway that would avoid encroachment.

Natural Heritage Priority Sites

220. COMMENT: Support was expressed for defining "Natural Heritage Priority Sites" so these valuable tools can become part of the process when WQMPs and WMPs are being developed, which is essential. (10, 80)

RESPONSE: The Department acknowledges the commenter's support of this rule provision.

Nonpoint Source

221. COMMENT: The definition of "nonpoint source" should not include "or may contribute to water pollution." If there is no contribution, it is not a source at all and should not be lumped in with any other source. (58)

RESPONSE: The previous definition was very broad and nonspecific, providing only that a nonpoint source is a contributing factor to water pollution that cannot be traced to a specific discernible confined and discrete conveyance. The Department changed the definition of "nonpoint source" to establish a more detailed definition that is consistent with the NJPDES rules, N.J.A.C. 7:14A. Because nonpoint sources are often intermittent and driven by precipitation events, the phrase "may contribute" is appropriate so that it is not incorrectly interpreted that a nonpoint source must contribute to water pollution at all times to be considered a source of a pollutant.

Permitted flow

222. COMMENT: The proposed definition of "permitted flow" needs to be revised to clarify the meaning of "maximum allowable flow," as "the maximum month design treatment capacity

of the Domestic Treatment Works (DTW) in a Treatment Works Approval (TWA)." The definition should also clarify that the permitted flow is based on average day or month. (38)

RESPONSE: The Department proposed this new definition of "permitted flow" consistent with the definition in the NJPDES rules, N.J.A.C. 7:14A. Permitted flow is the allowable flow number as contained in a NJPDES permit or TWA, whichever is most stringent. The basis for determining a facility specific allowable flow is determined through the NJPDES or TWA permitting process. Permitted flow is not determined by the design capacity of the treatment works or the average flow at a treatment works, although these factors may be considered in the determination. When issuing a NJPDES permit, the Department examines the allowable flow as determined in the applicable WQMP, the most recent TWA, the dilution, ambient and other water quality studies upon which the NJPDES limits were calculated, as well as impacts to antidegradation. Compliance with a permitted flow is determined by the maximum average monthly discharge, or as contained in the applicable NJDPES permit. Therefore, no changes were made to the definition of "permitted flow."

Planning flow

223. COMMENT: The proposed definition of "planning flow" needs to be revised to clearly indicate that for existing service areas or treatment works, the "planning flow" includes the existing flow as defined in N.J.A.C. 7:15-5.25(d) and that it should <u>not</u> be used to determine the "permitted flow." The reason for including the "existing flow" in the "planning flow" is evident. The "planning flow" as defined in the rules is inconsistent with how permit limits are set, the "permitted flows" are defined, and the design criteria set. Usually permit limits, the "permitted

flow" and design criteria are set so that the facility can satisfy permit conditions during extreme influent loadings (usually the maximum month) and represent the average conditions for that extreme period. "Planning flow" as defined does not account for the widely accepted variations in loadings that need to be recognized in the discharge permit if violations are to be avoided. (38)

RESPONSE: The Department believes the definition of "planning flow," which requires daily flow that is estimated or anticipated to be contributed by wastewater generating facilities for its service area would clearly include existing flows, as currently measured and reported in Discharge Monitoring Reports to the Department and as described in N.J.A.C. 7:15-5.25(d), as well any wastewater flows projected to be generated within the service area of the wastewater treatment facility. The rule requires flows from future development to be calculated in accordance with the flow numbers in the NJPDES rules and to be expressed as in NJPDES permits (30-day average) to facilitate comparison for determining consistency. . NJPDES permits may also establish additional effluent limits for other timeframes such as peak influent flow periods. Planning flow projections based on N.J.A.C. 7:14A-23.3 include allowances for normal inflow and infiltration (I/I). Often peak influent flows are related to excessive I/I problems in the collection system. The Department does not believe it is appropriate to encourage the expansion of wastewater treatment facilities to accommodate problems of excessive I/I; rather wastewater treatment plant expansions should be based on actual wastewater management needs as established through an environmental build-out analysis. Therefore, no changes were made to the definition of "planning flow."

Point Source

224. COMMENT: The inclusion of landfill leachate collection systems as possible "point sources" of pollution is supported, because this is the route pollution takes in many such instances. (10, 80)

RESPONSE: The Department acknowledges the commenter's support of this rule provision which makes the definition of "point source" consistent with that used in the Surface Water Quality Standards, N.J.A.C. 7:9B.

Reclaimed water for beneficial reuse

225. COMMENT: The definition of "reclaimed water" should include an exclusion for food crops. Any reclaimed water use should be prohibited from use on food crops. This should be clearly expressed and included within the rule definition, so nobody thinks you can use reclaimed water on a food crop in New Jersey. Everybody agrees that reclaimed water should not be used on food crops and this is the current policy in New Jersey. If this is not the policy in New Jersey, clarify that on adoption. (86)

RESPONSE: The Department has established in its Technical Manual for Reclaimed Water for Beneficial Reuse the requirements for projects involving reclaimed water applications involving food crops that are incorporated into New Jersey Pollutant Discharge Elimination System (NJPDES) permits, issued pursuant to N.J.A.C. 7:14A, to wastewater treatment facilities authorized to reclaim water. There is no other mechanism under which RWBR activities can be authorized. This rulemaking establishes how RWBR activities are made consistent with regional

Water Quality Management Plans and requires Reuse Feasibility Studies as part of applications to construct new or expand existing wastewater discharge facilities to minimize wastewater discharges to Waters of the State. The requirements in the technical manual are instituted through NJPDES permits that are based on EPA guidelines and programs instituted in other states, such as Florida and California, where reclaimed water is currently used in farming practices, including food crops. While there are currently no reclaimed water activities involving food crops in New Jersey, the Department has determined that it is not appropriate to exclude this activity as a viable option.

226. COMMENT: Support was expressed for the inclusion of a definition for "reclaimed water for beneficial use" or "RWBR," which encourages the re-use of water that is subject to NJPDES standards. This approach is highly beneficial for water resource conservation and watershed stewardship, provided the applicable NJPDES standards are carefully reviewed and the re-use is compatible with the water quality of the reclaimed water. (10, 80)

RESPONSE: The Department acknowledges the commenter's support of the RWBR program.

Restricted access reclaimed water for beneficial reuse

227. COMMENT: There is support for the new definition of the term "restricted access reclaimed water for beneficial reuse" and the associated requirements. Provided the secondary treatment requirements established in a NJPDES permit are complied with, such reclaimed water can be used for a variety of non-potable uses including sewer jetting, street cleaning as well as other uses. (82)

RESPONSE: The Department acknowledges the commenter's support of the RWBR program.

228. COMMENT: The proposed rule affords opportunities for the beneficial reuse of wastewater under restricted access circumstances. The rule specifies that "restricted access reclaimed water for beneficial reuse" shall require at least *secondary treatment* and that permitted uses include sewer jetting, street cleaning, and dust control. "Secondary treatment" should be specifically defined (for example, a typical, but not exclusive, definition would be 85 percent removal of BOD and TSS, or 30 mg/L BOD and TSS, but does not include disinfection). At a minimum, disinfection of treated wastewater should be required for street cleaning, storm sewer jetting, and dust control to preclude the introduction of sewage borne pathogens to the environment. (84)

RESPONSE: This definition is consistent with the proposed description of restricted access RWBR in the proposed readoption with amendments of the NJPDES rules proposed in the New Jersey Register on March 17, 2008 at 40 N.J.R. 1478(a) in the proposed N.J.A.C. 7:14A-2.15(a)1. Secondary treatment is defined by the United States Environmental Protection Agency (USEPA) at 40 CFR 133.102 and is instituted through NJPDES permits issued pursuant to N.J.A.C.7:14A. This WQMP rule does not establish numeric standards for discharges or RWBR activities. Standards for discharges are established through the Surface Water Quality Standards (N.J.A.C.7:9B), Ground Water Quality Standards (N.J.A.C.7:9C), USEPA guidelines, and Department Technical Manuals, and implemented through the NJPDES permitting program. RWBR activities are authorized only through NJPDES permits. This rule establishes how

RWBR activities are addressed in areawide Water Quality Management plans and requires the evaluation of RWBR feasibility for new or expanded wastewater dischargers. Part of that evaluation is the need for consistency with NJPDES permitting requirements. If an application for a new or expanded discharge demonstrates that RWBR is feasible, those RWBR activities will be required to be implemented through the NJPDES permit. Specific comments on NJPDES permits that allow RWBR should be directed to the Department during the public comment period on those individual permits. However, RWBR requirements in NJPDES permits are established in a manner that is consistent with the USEPA guidelines published at EPA 625/R-04/108.

229. COMMENT: The inclusion of "restricted access reclaimed water for beneficial use" provides protection for the public, but should golf course irrigation be considered a use that is highly restricted? The use of water by golf courses is far too consumptive and depletive to be allocated anything other than recycled water. (10, 80)

RESPONSE: Golf course irrigation is not considered a restricted access application of RWBR, but rather a public access application. The Department supports the maximum possible use of reclaimed water in the appropriate circumstances, including golf courses. However, the actual determination as to whether irrigation of a particular site will be with potable water or reclaimed water is made through the water allocation permitting process, through which the feasibility of RWBR in a particular circumstance will be determined.

Riparian Zone

230. COMMENT: Support was expressed for including intermittent streams up to and including their point of origin, such as seeps and springs, in the definition of "riparian zone." However, "riparian zones" should not be restricted to the Department's GIS hydrography coverage to identify these surface waters. The definition should explicitly provide for identification from other more detailed sources. (22, 76)

RESPONSE: The Department acknowledges the support expressed in the comment. The definition of riparian zone was developed to be consistent with the definition of these protected areas under the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13 Riparian zones are relevant in the environmental build-out analyses at N.J.A.C. 7:15-5.25(c), as well as the subject of a required municipal ordinance for nonpoint source pollution control at N.J.A.C. 7:15-5.25(g). For the environmental build-out analysis, which is a broad planning level analysis, the level of detail afforded by the GIS hydrography coverage is sufficient to generate the information needed to inform the wastewater management and water supply needs analyses at N.J.A.C 7:15-5.25(d) and (f). The Department's recently released Hydrography GIS data is a significant improvement over older data and depicts 50 percent more watercourses than the previous iteration of the maps due to improved imagery. The Department believes that this layer represents the best available data that can be used for such an analysis. Riparian zone protection through the municipal ordinance will be applied on a more site specific basis through municipal project review. For the purpose of the municipal ordinance, the riparian zone as defined represents the minimum area that must be subject to the required municipal ordinance. However, if a municipality has data that has more detailed mapping of riparian zones consistent with the definition, it is not

precluded from using it. The ability of a WMP agency to be more stringent than the established standards is already provided at N.J.A.C. 7:15-5.25(a).

Statewide Water Quality Management Plan

231. COMMENT: The definition of "Statewide Water Quality Management Plan" or "Statewide WQM Plan" (formerly known as the Statewide Water Quality Management Program Plan) should be expanded to differentiate between the Statewide Water Quality Management Plan and the county water quality management plan. (81)

RESPONSE: The Statewide Water Quality Management Plan and the WQMP rules contain the written provisions of the continuing planning process which direct and coordinate water quality management planning and implementation activities for the entire State and serve as the guide for areawide WQM planning. The areawide WQM plans are part of the Statewide WQMP and provide the basis by which the Department and designated planning agencies conduct selected water quality management planning activities for a particular "area." As discussed at Response to Comment 182, the Water Quality Planning Act at N.J.S.A. 58:11A-5 provides that every county planning board may conduct a countywide waste treatment management planning process and prepare a county water quality management plan, which shall be consistent with the areawide WQM plan or plans. Since these county prepared county water quality management plans would provide information that was duplicative of the areawide WQM plan and would in reality contain all of the elements of an areawide WQM plan, to date, no county has ever expressed an interest in preparing such a county water quality management plan. A county water quality management plan, if developed and adopted, would be part of the Statewide WQMP.

The relationship between the "Statewide Water Quality Management Plan" and the "county water quality management plan" is described at N.J.A.C. 7:15-2.3(e) and there is no need to expand the definition to include this information.

Steep slopes

232. COMMENT: Support was expressed for the definition of "steep slopes" as any slope equal to or greater than 20 percent as measured over any minimum run of 10 feet. (10, 80)

RESPONSE: The Department acknowledges support for this provision of the rule.

233. COMMENT: At N.J.A.C. 7:15-5.17, steep slopes are mapped at 20 percent or greater. The proposal claims that mapping steep slopes at 20 percent or greater is consistent with the Highlands Act, which is not true. The Highlands Act specifically says that slopes between 10 and 20 percent are moderate and the Department should develop erosion and stability standards for slopes between 10 and 20 percent. The Department should go back and look at this standard, read the Highlands Act and incorporate something to deal with moderate slopes between 10 and 20 percent which have adverse environmental effects. (86)

234. COMMENT: Another loophole that should be deleted concerns steep slopes. Remove the numeric standard of 20 percent or greater and interpret slope though guidance so that slopes less than 20 percent can also be protected. Use the Highlands Act, which directs the Department to develop standards for slopes from ten to 20 percent. The standard can't be reduced to slopes from ten to 20 percent on adoption because it would be a substantive change so get guidance

from your attorneys and find a way to keep the provision in there but just take out the 20 percent or greater numeric value. (86)

235. COMMENT: The proposed restriction of development on steep slopes of over 20 percent slope is a very minimal protection. There should be a much more subtle and comprehensive policy on steep slope protection in this rule proposal. Most authorities, including the Natural Resources Conservation Service, document a range of protections starting at 10 percent. The Natural Resources Conservation Service also points out that even at two percent with erosive soil there can be significant erosion. The Department has the expertise to be able to make these sorts of distinctions. (24)

236. COMMENT: The proposed definition of "steep slope" is limited to "any slope equal to or greater than 20 percent as measured over any minimum run of 10 feet." However, slopes of less than 20 percent should be afforded some protection as well. Natural Resource Conservation Service standards urge the protection of slopes greater than 10 percent and point out that there can be severe erosion on slopes much less than 20 percent and even as little as two percent depending upon the type of soil involved and its erosive tendencies. The proposed definition is inadequate in that it is entirely dependent upon a hard and fast number and fails to recognize that it is the relationship between the degree of slope and the soil type that is critical to determining the potential environmental impact. (17, 49)

RESPONSE TO COMMENTS 233 THROUGH 236: In determining the protective standards adopted in the Highlands Preservation Area, the Department researched many published studies

and peer-reviewed data, and also assessed comprehensive datasets from both the Department's monitoring programs and the USGS/NWIS database. Most often, such efforts resulted in a range of scientifically defensible values, such as in the case of determining a representative background concentration for nitrate for mixed land uses. Due to the critical water supply resource the Highlands Water Protection and Planning Act (HWPPA) was passed to protect, the Department selected more conservative environmental performance standards for the Highlands preservation area. In seeking to establish a standard for steep slope protection that would be applied outside of the Highlands Preservation area, the Department researched numerous sources for recommendations regarding the protection of steep slopes and found a wide range of thresholds based on multiple considerations. While the Department did find sources citing slopes as low as 10 percent could be vulnerable in some circumstances, a higher threshold was more commonly supported for a regional standard. The Department, therefore, determined to select 20 percent as the threshold of steep slope warranting protection from disturbance, with limited exceptions. This is the same threshold of steep slope that receives the greatest protection under the HWPPA rule. The commenter is correct in that the HWPPA rule does mandate the creation of standards for development on slopes exhibiting a grade of between 10 percent and 20 percent in the preservation area. The Department recognizes that disturbance of lower thresholds of steep slopes can also contribute to nonpoint source pollution in the rest of the State, but believes the variability in other contributing factors, such as soil type and proximity to a watercourse, make establishing standards for these lower thresholds a matter that is best left to local governments. Therefore, outside the Highlands Preservation Area, the Department is deferring to municipalities and/or WMP agencies to determine if standards more restrictive than established in this rule should be applied.

237. COMMENT: The proposed definition of "steep slope" needs to be revised to include slopes measured over a minimum run of 100 feet. Runs less than 100 feet long cannot be mapped at 1:24,000. Although workable in ordinances, shorter runs capture too many small features for planning purposes. A shorter run leads to the same "shotgun" pattern that has caused the proposal of a 25 acre minimum aggregation of environmental features for planning purposes. Also, a "steep slope" GIS dataset is not currently available from the Department. (38)

RESPONSE: Protection of steep slopes is to be addressed within each municipality by ordinance, in accordance with N.J.A.C. 7:15-5.25(g) and not by a quantified exclusion from sewer service areas such as exists for riparian corridors and Natural Heritage Priority Sites. This will entail review of individual projects at the municipal level based on site plans, which are typically developed at the scale identified in the definition. The Department is modifying upon adoption the requirement at N.J.A.C. 7:15-5.17(a)11 to specify that steep slope mapping is a required mapped feature only if available, as it was not the Department's intention to require WMP agencies to map the WMP area at the scale specified in the definition. Therefore, no change in the definition of steep slopes is required.

238. COMMENT: The definition of "steep slope" is too restrictive and does not take current construction practices into account. Site design and soil erosion and control principals need to be considered in devising a definition that is in line with current development practices. (81)

RESPONSE: It is unclear what the commenter means with reference to "current construction practices" and "site design and soil erosion control principles." If it pertains to the mapping requirements at N.J.A.C. 7:15-5.17(a)8, the Department acknowledges in Response to Comment 237 that determination of 2-foot contours on a 10-foot run scale is not yet available as a GIS-based data layer, and so this language will be modified. If the commenter is referring to current construction practices in the Standards for Soil Erosion and Sediment Control, the Department believes these practices help to alleviate construction phase impacts but do not address the long term implications of disturbing steep slopes.

Suitable Habitat

239. COMMENT: The proposed definition of “suitable habitat” is too broad. As proposed, a suitable habitat means a “habitat featuring ecological characteristics that may provide for the breeding, feeding, resting or sheltering of any threatened and/or endangered species”. It further provides that “ecological characteristics may include, but are not limited to, seasonal wetland or dry land”, etc. This definition is so broad that it would include habitats that presently do not and may not ever support threatened and endangered animal species.

Specifically, the word “featuring” is vague and subject to multiple interpretations. The proposed definition is also objectionable because the phrase “may provide for” expands this definition to include any area that hypothetically might provide for the breading, feeding, etc. of T&E. The regulated community requires – and is entitled to – more certainty than this. The definition of “suitable habitat” should not be based on what might happen, but on current site conditions and

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sound scientific analysis of current site conditions. Further, the definition of "ecological characteristics" is equally overbroad (they "*may* include, *but are not limited to*…").

A definition this broad does not afford the regulated community with sufficient guidance as to what characteristics the Department will evaluate or find relevant in its analysis, and gives the Department unlimited discretion to apply any number and type of criteria in its habitat analysis. The regulated community requires more certainty in these definitions. The following changes are recommended:

"Suitable habitat" means habitat [featuring] with ecological characteristics that [may provide for] facilitate the breeding, feeding, resting or sheltering of any threatened and/or endangered animal species. Ecological characteristics [may include, but are not limited to,] means seasonal wetland or dry land, roost sites, nesting grounds, spawning sites, feeding sites, vegetative community size, age, structure, or diversity; waterway or pond water quality, size, or substrate; and soil types or hydrologic characteristics. (42, 44, 45)

RESPONSE: Suitable habitat is a term used with respect to mapping requirements at N.J.A.C. 7:15-5.17, delineation of sewer service areas under the provisions of N.J.A.C. 7:15-5.24 and at N.J.A.C. 7:15-5.26, which sets forth the requirements for a habitat suitability determination. However, as noted in the rule, the Department presumes that the habitat ranked 3, 4, or 5 by the Landscape Maps, which were developed using documented occurrences of endangered and threatened species, is suitable habitat, unless a Habitat Suitability Determination (HSD) application presents information to indicate otherwise. While the definition of "suitable habitat"

explains the information that is considered for the development of the Landscape Maps, and in general in determining suitability in the context of a Habitat Suitability Determination, it does not directly inform the delineation of sewer service area and is not otherwise used for site by site analysis. In the context of the HSD further detail, beyond that in the definition, the information that will be considered during the review is provided at N.J.A.C. 7:15-5.26. As such, the definition is not too broad, adequate guidance as to what is considered suitable habitat is provided and no further clarification is necessary.

For additional information regarding the Landscape Project, see http://www.nj.gov/dep/fgw/ensp/landscape/lp_report.pdf.

Total maximum daily load

240. COMMENT: Why were changes made to the definition of "TMDL," total maximum daily load? A TMDL is required to have an allocation for reserved capacity to serve future growth. If reserved capacity is not identified, then it has to be included in the TMDL allocation somewhere. If reserved capacity is zero, then zero must be identified. Reserved capacity allocation needs to be identified and included as part of the definition of a TMDL. Also, why was the term "formally established under" deleted? (86)

RESPONSE: The definition was modified to provide clarity and consistency between the State and Federal description of a TMDL. The process information contained in the previous definition was omitted as not relevant. The process for proposing, establishing and adopting a TMDL is still contained in the rule at N.J.A.C. 7:15-6. The commenter's statement that a reserve

capacity is required is incorrect. Reserve capacity is an optional reservation of some of the allocable load to allow for future development. It is appropriate where additional load from future development is expected to be delivered to the receiving water under study. Where an area is fully developed a reserve capacity would be unnecessary and, if established, could result in additional costs for treatment improvements that are not needed to attain surface water quality standards.

241. COMMENT: The definition of "TMDL" is supported as proposed. (38)

RESPONSE: The Department acknowledges this comment in support of the rules.

Tributary

242. COMMENT: A definition of "tributary" should be provided in the definition section, particularly as it relates to the nonpoint source analysis that would be required pursuant to the proposed rule. (81)

RESPONSE: In the adopted rules, the word "tributary" is used in its usual and customary manner to mean a stream or other surface water that contributes flow to another body of water. Therefore, the Department does not believe it is necessary to add a definition for this term.

Undeveloped and underdeveloped areas

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243. COMMENT: The proposed new definition for "undeveloped and underdeveloped areas" contains a typographical error where "manor" should be spelled as "manner." (18, 42, 44, 45, 61)

RESPONSE: The Department thanks the commenters for pointing out this typographical error. The word "manor" has been changed to "manner."

Urban lands

244. COMMENT: What is the definition of "urban lands"? (54)

RESPONSE: Although "urban lands" is not a defined term in N.J.A.C. 7:15-1.5, the term is used in the definition of "urbanized municipalities," which are areas where 90 percent of the municipality's land area appears as "urban lands" designated in the New Jersey Department of Environmental Protection's 1995/97 and 2002 Land Use/Land Cover geographical information systems database as amended and updated, available as a digital data download from the Department at www.state.nj.us/dep/gis. This data layer is based on Level I of the Anderson Classification System (Anderson et al, 1976, modified by the New Jersey Department of Environmental Protection, 1999), which describes the lands categorized as urban. Level I urban land includes categories such as Residential, Commercial and Service, Industrial, Transportation, Communication and Utilities, Industrial and Commercial Complexes, Mixed Urban or Built-up, and Recreational. Included with each of the preceding land uses are associated lands, buildings, parking lots, access roads, and other appurtenances, unless these are specifically excluded. Therefore, a separate definition of urban lands was not needed in this rule.

Urbanized Municipalities

245. COMMENT: The proposed definition of "urbanized municipalities" needs to be revised to clarify that wetlands and open waters are excluded from the calculation of percent developed. (38)

246. COMMENT: The definition of "urbanized municipalities" at N.J.A.C. 7:15-1.5 includes those municipalities where 90 percent of their land area appears as "urban lands" in the 2002 Land Use/Land Cover maps. This definition will rule out municipalities where there may be both urbanized and rural areas. (14)

247. COMMENT: Based upon the proposed definition of "urbanized municipalities" only two municipalities in Middlesex County would be defined as urban, Dunellen and Milltown. Under the proposed 90 percent cutoff for urban designation, municipalities such as New Brunswick, Perth Amboy, and Carteret would be classified as "non-urban" municipalities, even though it is quite clear that these and other municipalities are urban in terms of level of density and infrastructure. The 90 percent cutoff for urban designation should be lowered to 80 percent and certain undeveloped acreages, like wetlands and preserved public open space, should be eliminated from the calculation. (81)

248. COMMENT: The proposed definition for "urbanized municipalities" should be amended as there is no basis for designating municipalities as "urbanized" solely on a determination that 90 percent of their land area appears as "Urban Lands" in the Department's 1995/97 and 2002

Land Use/Land Cover Data. The Department should explain the rationale for relying solely on the "90 percent" criterion, which yields anomalous results. A sample list of urbanized municipalities was compiled based on GIS data and using only the 90 percent criterion, which determined that Jersey City, Bayonne, Perth Amboy, Camden, New Brunswick and Atlantic City are not urbanized, but Medford Lakes is. If correct, that would not be reasonable. (18, 42, 44, 45, 61)

249. COMMENT: As defined at N.J.A.C. 7:15-1.5 "urbanized municipalities" are those municipalities that contain 90 percent or more of urbanized area as per the Department's 2002 Land Use/Land Cover GIS file. The number is too high and misleading. There are many towns that have significant amounts of preserved open space/parks/farms, right-of-ways, wetlands, etc. that on the surface would appear to be developable land, which in reality are not. In order to more accurately capture those towns that are "urban centers" this definition should be modified to state 80 percent and a slightly more detailed methodology should be included to allow WMP entities the ability to better identify towns that require a build-out analysis versus those that do not. (88)

250. COMMENT: The threshold of urbanization should be set at 75 or 80 percent instead of the proposed 90 percent since the character of municipalities is essentially determined by the time 75 or 80 percent of the land has been developed. The 90 percent threshold more closely approximates the complete development of a municipality. (38)

251. COMMENT: The method proposed to determine "urbanized municipalities" results in municipal characterizations that are not consistent with the State Plan planning areas. For example, a designated urban center located in a Planning Area 1, because it contains many areas classified as barren land when employing the Land Use/Land Cover data, results in the urban center being classified in the WQMP rules as a "non-urbanized municipality". The Department should reconsider the method used to determine "urbanized municipalities." (51)

RESPONSE TO COMMENTS 245 THROUGH 251: The Department is modifying upon adoption the definition of "urbanized municipality" to recognize that the 90 percent urbanized should be assessed relative to the developable land in the municipality. Thus, areas such as water and permanently preserved open space, for example, would not be included as developable.

252. COMMENT: The rule proposal does not include a list of "urbanized municipalities." In order to meaningfully comment on how municipalities would be differently impacted by the proposed rules, a list of the referenced "urbanized municipalities" should be supplied by the Department. (26)

253. COMMENT: The Department should identify the urbanized communities that it is currently serving so that there is no question as to which communities must conduct a build-out analysis and meet the other additional requirements of the proposed regulations. (4, 35, 73)

254. COMMENT: The Department should provide in the rule proposal a list of these "urbanized municipalities" so that interested parties can assess and comment on how "urbanized municipalities" would be impacted by the proposed rules and the statewide implications of those impacts, as such a list is unavailable from the State or the Department. The Department should produce this list of municipalities after it develops and publishes a more realistic definition. (18, 42, 44, 45, 61)

255. COMMENT: The term "urbanized municipalities," under N.J.A.C. 7:15 1.5, is a helpful addition to the definitions. The proposed rule mentions where to find maps of these urbanized municipalities, but it would be more expeditious if a list of the municipalities could be created for quick reference and published on the Department's web site. (18, 32)

256. COMMENT: The Department should list the current 90 urban municipalities. These areas should include and be based on transportation nodes and centers. (54)

RESPONSE TO COMMENTS 252 THROUGH 256: The Department agrees that it would be helpful to provide a list of urbanized municipalities to make clear which municipalities must estimate future wastewater flows for a 20-year period and which must conduct an environmental build-out analysis. Because such a list will change over time as more municipalities become "urbanized" the Department will not include a list of urbanized municipalities within the rule text, but has included herein a list of municipalities that currently meet the definition of urbanized. This list will also be posted and updated on the Department's website at http://www.nj.gov/dep/watershedmgt/rules.htm. Regarding the suggestion that urbanized

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municipalities should include and be based on transportation nodes and centers, because these areas do not coincide with municipal boundaries, it is inappropriate to use this basis for defining a municipality as urbanized or not urbanized.

Urbanized Municipalities as of May 21, 2008

County	Municipality
Atlantic	Atlantic City
Atlantic	Brigantine City
Atlantic	Linwood City
Atlantic	Northfield City
Atlantic	Pleasantville City
Atlantic	Somers Point City
Atlantic	Ventnor City
Atlantic	Longport Boro
Atlantic	Margate City
Bergen	Bergenfield Borough
Bergen	Bogota Borough
Bergen	Carlstadt Borough
Bergen	Cliffside Park Borough
Bergen	Cresskill Borough
Bergen	Dumont Borough
Bergen	East Rutherford Borough
Bergen	Edgewater Borough
Bergen	Elmwood Park Borough
Bergen	Englewood City
Bergen	Fair Lawn Borough
Bergen	Fairview Borough
Bergen	Fort Lee Borough
Bergen	Garfield City
Bergen	Glen Rock Borough
Bergen	Hackensack City
Bergen	Hasbrouck Heights Borough
Bergen	Hillsdale Borough
Bergen	Little Ferry Borough
Bergen	Lodi Borough
Bergen	Maywood Borough
Bergen	Midland Park Borough
Bergen	Moonachie Borough

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County	Municipality
Bergen	New Milford Borough
Bergen	Northvale Borough
Bergen	Oradell Borough
Bergen	Palisades Park Borough
Bergen	Paramus Borough
Bergen	Park Ridge Borough
Bergen	Ridgefield Borough
Bergen	Ridgewood Village
Bergen	River Edge Borough
Bergen	Rochelle Park Township
Bergen	Rutherford Borough
Bergen	Saddle Brook Township
Bergen	South Hackensack Township
Bergen	Teaneck Township
Bergen	Teterboro Borough
Bergen	Waldwick Borough
Bergen	Wallington Borough
Bergen	Westwood Borough
Bergen	Wood-Ridge Borough
Burlington	Beverly City Total
Burlington	Maple Shade Township Total
Burlington	Medford Lakes Borough Total
Burlington	Riverside Township Total
Burlington	Riverton Borough Total
Burlington	Willingboro Township Total
Camden	Audubon Borough
Camden	Audubon Park Borough
Camden	Bellmawr Borough
Camden	Brooklawn Borough
Camden	Camden City*
Camden	Cherry Hill Township
Camden	Collingswood Borough
Camden	Gloucester City
Camden	Haddon Heights Borough
Camden	Haddon Township
Camden	Haddonfield Borough
Camden	Laurel Springs Borough
Camden	Magnolia Borough
Camden	Merchantville Borough
Camden	Mount Ephraim Borough
Camden	Oaklyn Borough
Camden	Pennsauken Township
Camden	Stratford Borough
Camden	Woodlynne Borough

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County	Municipality
Cape May	Avalon Boro
Cape May	Cape May City
Cape May	Cape May Point Boro
Cape May	Ocean City
Cape May	Sea Isle City
Cape May	Stone Harbor
Cape May	West Cape Map Boro
Cape May	West Wildwood Boro
Cape May	Wildwood Crest Boro
Cape May	North Wildwood City
Essex	Belleville Township
Essex	Bloomfield Township
Essex	Caldwell Borough
Essex	City of Orange Township
Essex	East Orange City
Essex	Fairfield Township
Essex	Glen Ridge Borough
Essex	Irvington Township
Essex	Montclair Township
Essex	Newark City
Essex	Nutley Township
Essex	South Orange Village Township
Gloucester	Paulsboro Borough
Gloucester	Westville Borough
Gloucester	Woodbury City
Hudson	Bayonne City
Hudson	East Newark Borough
Hudson	Guttenberg Town
Hudson	Harrison Town
Hudson	Hoboken City
Hudson	Jersey City
Hudson	North Bergen Township
Hudson	Union City
Hudson	Weehawken Township
Hudson	West New York Town
Hunterdon	Flemington Borough
Mercer	Hightstown Borough
Mercer	Pennington Borough
Mercer	Princeton Borough
Mercer	Trenton City
Middlesex	Carteret Borough
Middlesex	Dunellen Borough
Middlesex	Edison Township
Middlesex	Jamesburg Borough

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County	Municipality
Middlesex	Metuchen Borough
Middlesex	Middlesex Borough
Middlesex	Milltown Borough
Middlesex	New Brunswick City
Middlesex	Perth Amboy City
Middlesex	South Plainfield Borough
Middlesex	South River Borough
Middlesex	Spotswood Borough
Monmouth	Allenhurst Borough
Monmouth	Asbury Park City
Monmouth	Avon-by-the-Sea Borough
Monmouth	Belmar Borough
Monmouth	Bradley Beach Borough
Monmouth	Brielle Borough
Monmouth	Deal Borough
Monmouth	Fair Haven Borough
Monmouth	Farmingdale Borough
Monmouth	Freehold Borough
Monmouth	Interlaken Borough
Monmouth	Keansburg Borough
Monmouth	Keyport Borough
Monmouth	Lake Como Borough
Monmouth	Little Silver Borough
Monmouth	Loch Arbour Village
Monmouth	Long Branch City
Monmouth	Manasquan Borough
Monmouth	Monmouth Beach Borough
Monmouth	Neptune City Borough
Monmouth	Red Bank Borough
Monmouth	Rumson Boro
Monmouth	Sea Bright Boro
Monmouth	Sea Girt Borough
Monmouth	Shrewsbury Borough
Monmouth	Shrewsbury Township
Monmouth	Spring Lake Borough
Monmouth	Spring Lake Heights Borough
Monmouth	Union Beach Borough
Monmouth	West Long Branch Borough
Morris	Chatham Borough
Morris	East Hanover Township
Morris	Victory Gardens Borough
Ocean	Barnegat Light Boro
Ocean	Bay Head Boro
Ocean	Beach Haven Boro

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County	Municipality
Ocean	Brick Twp
Ocean	Harvey Cedars Boro
Ocean	Island Heights Boro
Ocean	Lavalette Boro
Ocean	Long Beach Twp
Ocean	Mantoloking Boro
Ocean	Ocean Gate Boro
Ocean	Pine Beach Boro
Ocean	Point Pleasant Beach Boro
Ocean	Point Pleasant Boro
Ocean	Seaside Heights Boro
Ocean	Seaside Park Boro
Ocean	Ship Bottom Boro
Ocean	Surf City Boro
Passaic	Clifton City
Passaic	Passaic City
Passaic	Paterson City
Salem	Penns Grove Borough
Somerset	Bound Brook Borough
Somerset	Manville Borough
Somerset	North Plainfield Borough
Somerset	Somerville Borough
Somerset	South Bound Brook Borough
Sussex	Walpack Township
Union	Clark Township
Union	Cranford Township
Union	Elizabeth City
Union	Fanwood Borough
Union	Garwood Borough
Union	Hillside Township
Union	Kenilworth Borough
Union	Linden City
Union	Plainfield City
Union	Rahway City
Union	Roselle Borough
Union	Roselle Park Borough
Union	Union Township
Union	Westfield Town
Union	Winfield Township

Wastewater

257. COMMENT: The proposed definition of "wastewater" is extraordinarily broad in scope and not adequately coordinated with other Department regulations, such as, N.J.A.C. 7:14A. This will lead to misinterpretations and unintended consequences. The qualifier "discharged or collected into wastewater facilities" is essential. The proposed definition appears circular with reference to the definition of "wastewater facilities." For example, septage or residuals discharged directly into the solids handling facilities at a wastewater treatment plant could be defined as "wastewater" under the proposed definition. (38)

RESPONSE: The term "wastewater" is broad in scope to ensure that it captures all liquid wastes and residues including those discharges from individual subsurface sewage disposal systems associated with residential, commercial and industrial discharges of concern which are intended to be addressed by the wastewater management planning provisions of this rule. Both residuals and septage delivered to a wastewater treatment facility should be considered as "wastewater" for the purposes of this rule because they need to be assessed in terms of the capacity that must be committed to treatment of these wastes when calculating available capacity an N.J.A.C. 7:15-5.25(d). The term "wastewater" is not defined in the NJPDES rules, N.J.A.C. 7:14A and so no opportunities for misinterpretation are expected to result. "Wastewater facilities" that do not generate planning flows, will not be impacted by defining the terms in this manner.

Wastewater facilities

258. COMMENT: The proposed definition of "wastewater facilities" is extraordinarily broad in scope and not adequately coordinated with other Department regulations, such as N.J.A.C. 7:14A. This will lead to misinterpretations and unintended consequences. Facilities that receive

reclaimed wastewater or wastewater residuals, regardless of how thoroughly treated for human contact, appear to be included under the proposed definition which is contrary to the beneficial reuse initiatives. (38)

RESPONSE: The term "wastewater facilities" is broad in scope to ensure that it captures all facilities that handle wastewater including those discharges from individual subsurface sewage disposal systems associated with residential, commercial and industrial discharges of concern which are intended to be addressed by the wastewater management planning provisions of this rule. The term "wastewater facilities" is not defined in the NJPDES rules, N.J.A.C. 7:14A, and although used more broadly in this rule, the Department does not believe this will lead to misinterpretations and unintended consequences. The use of this term in the WQMP rules does not cause facilities not change the scope of what are "wastewater facilities" for the purpose of regulation under the NJPDES rules.

Wastewater service area

259. COMMENT: The proposed definition for "wastewater service area" should be further clarified. The reference to wastewater facilities with planning flows of less than 20,000 gallons per day and also to wastewater facilities with planning flows of less than 2,000 gallons per day causes confusion. (18, 42, 44, 45, 61)

RESPONSE: Under the rules in effect prior to the amendments adopted at this time, when developing wastewater management plans, descriptions and maps of future wastewater service areas were to include the three categories of wastewater service areas included within the

proposed definition of "wastewater service area" adopted at this time. These three areas are sewer service area, general service area approved for wastewater facilities with planning flows of less than 20,000 gallons per day (gpd) which discharge to ground water, and general service area for wastewater facilities with planning flows of less than 2,000 gallons per day (gpd) which discharge to ground water. In defining "wastewater service area" to include all three categories of wastewater service area, the Department is clarifying that all three categories of service area are wastewater service areas. Therefore, no changes to the definition will be made. Under the adopted amendments, the general service area approved for wastewater facilities with planning flows of less than 20,000 gallons per day (gpd) which discharge to ground water will eventually disappear as this category is no longer allowed to be established or reestablished as part of a new or updated WMP (see N.J.A.C. 7:15-5.2(f)). When this category of wastewater service area is no longer applicable, the Department will amend the definition to eliminate this category.

N.J.A.C. 7:15-1.7

260. COMMENT: At N.J.A.C. 7:15-1.7, it is strongly encouraged that in a cluster scenario, should the remaining portion be restricted for agricultural use, then the restrictions should follow the guidelines established and administered by the State Agricultural Development Committee through the Farmland Preservation Program. (58)

RESPONSE: The Department discussed this comment with the Natural Resources Conservation Service (NRCS) and learned that a "Conservation Plan" is the umbrella term that would cover any type of farm conservation plan that would be needed on a site and thus, the NRCS does not develop "Conservation Management Plans" or "Natural Resources Management Plans." Thus,

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the Department is correcting the language at N.J.A.C. 7:15-3.5(b)4x(3) by amending this provision on adoption to read "Existing agricultural land uses allowed to continue on the restricted portion are required to implement Best Management Practices by implementing the findings of a Conservation Plan developed by the Natural Resources Conservation Service."

The rule at N.J.A.C. 7:15-3.5(b)4x(3) specifies that, under the cluster scenario, existing agricultural land uses allowed to continue on the restricted portion are required to implement Best Management Practices by implementing the findings of a Conservation Plan developed by the Natural Resources Conservation Service. Such a plan is developed and tailored to consider the unique issues relevant to the specific site, its natural resources and the agricultural practices on that site. The Department's experience to date is that the NRCS Conservation plans are more protective than the guidelines established and administered by the State Agricultural Development Committee through the Farmland Preservation Program. The Department believes that requiring such plans is the appropriate level of environmental protection to apply.

It should be noted that the Natural Resources Conservation Service (NRCS) will develop a Conservation Plan at no cost to the farmer. Additionally, NRCS administers the conservation programs made available under the Farm Security and Rural Investment Act of 2002 (Farm Bill). The Farm Bill programs offer cost-sharing for implementation of practices. The Department anticipates that in practice the agreement between the developer and the farmer to acquire the right to place the conservation restriction would include an agreement that any cost would be borne by the developer or that the price for obtaining the farmer's property rights reflected by the

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conservation restriction would include an amount to fund the implementation of these Conservation Plans.

261. COMMENT: N.J.A.C. 7:15-1.7(c) states that the "Department shall not grant any approval under this chapter until the applicant has provided to the Department proof that a conservation restriction complying with this section has been recorded…" The Department should clarify whether all or, if not all, which approvals require a conservation restriction. For example, where would conservation restrictions be required and by whom? Would county plans be authorized to require conservation restrictions? Conservation restrictions should only be required by the Department on site-specific amendments. (18, 42, 44, 45, 61)

RESPONSE: The only approvals required to have a conservation restriction under these rules are revisions under N.J.A.C. 7:15-3.5(b)4x, which are allowed for clustered residential development where a minimum of 70 percent of the property is deed restricted from development through the conservation restriction. Any person or agency can be the applicant for a revision and that person or agency would then be responsible to obtain the conservation restriction. The Department believes these requirements are clear. However, other types of amendment approvals are not prohibited from having conservation restrictions and the rule makes provisions for WMP planning agencies or municipalities to incorporate more protective standards into their WMPs or WMP updates. Thus, WMP agencies could require conservation restrictions on portions of their WMP proposal. For example, there could be areas where a county or municipality is proposing clustered residential development as part of their wastewater management solution in their proposal and it would make sense to process these proposals as

part of the comprehensive WMP package instead of processing separate amendments, if applicable, or revisions, after the WMP is adopted. Thus, for these types of proposals, WMP agencies may require conservation restrictions.

262. COMMENT: The requirement at N.J.A.C. 7:15-1.7 that conservation restrictions be provided is supported. However, at N.J.A.C. 7:15-1.7(c), it should be required that copies of the restriction be provided to the applicable municipal clerk, not just the county clerk. In this way, towns can keep track of the restrictions and will be enabled to help with enforcement. (22, 76)

RESPONSE: As deeds are filed with the county, therefore the county clerk is the appropriate entity with which to file deed restrictions. Municipalities will be notified and asked to consent on any application for amendment to the areawide water quality management plan and county wastewater management plan affecting a land area within its boundaries. If a municipality should request a copy of any conservation restriction required through a plan amendment, the Department will gladly furnish a copy to the municipal official making such a request.

N.J.A.C. 7:15-2 Planning Requirements

263. COMMENT: The Water Quality Planning Act requires the Department to "establish a continuing planning process which will…incorporate water quality management plans into a comprehensive and cohesive Statewide program directed toward the achievement of water quality objectives." (N.J.S.A. 58:11A-2(b)) This duty is further amplified in the assignment of responsibility for a continuing planning process where the statewide implementation strategy shall include "an inventory and ranking of needs, in order of priority, for the construction of

municipal waste treatment works needed to meet the water quality goals and standards."

(N.J.S.A. 58:11A-7)

Since population and jobs are the primary determinants for the demand for wastewater treatment capacity, this raises practical questions regarding how the anticipated increases in population and jobs will be planned for and accommodated, as well as constitutional questions relating to the allocation and satisfaction of the statewide need for affordable housing. The Department must anticipate and plan for future growth in both population and jobs. The proposed WQMP process fails to satisfy the dictates of the Act. The proposal must be revised to correct this deficiency, should the Department decide to adopt it despite its glaring constitutional flaws. (18, 42, 44, 45, 61)

RESPONSE: The Department believes it has established a continuing planning process which incorporates water quality management plans into a comprehensive and cohesive Statewide program directed toward the achievement of water quality objectives. The rules integrate and unify water quality management planning processes, assess water quality, establish water quality goals and standards, and develop a statewide implementation strategy to achieve the water quality standards as required by the Water Quality Planning Act at N.J.S.A. 58:11A-7. Water resource planning is conducted based on areawide Water Quality Management (WQM) plans. The areawide WQM plans identify treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a 20-year period, including an analysis of alternative waste treatment systems and any requirements for the acquisition of land for

treatment purposes; and the identification of the necessary waste water collection and urban stormwater runoff systems (N.J.S.A. 58:11A-5a).

The twelve areawide Water Quality Management Plans (formerly known as 208 plans) are umbrella plans, each with various adopted components that address different aspects of water resource planning. For example, Wastewater Management Plans (WMPs), which assess the cumulative water resource impact of future development, are a component of the areawide WQM plans. Total maximum daily loads, which address existing water quality impairment and establish an implementation plan to restore the water quality of those waters, are another component of the areawide plans. The individual components are adopted into the appropriate areawide Water Quality Management Plan in order to give them effect.

WMPs are a key planning document under the Water Quality Management Planning rules. WMPs are intended to provide a comprehensive evaluation of the cumulative effects of existing and future land use on the water resources of the State and to ensure that the areawide WQM plans integrate related Federal, State, regional and local comprehensive, functional and other relevant land use planning activities through a continuing planning process. WQM plans must be updated periodically by WMPs in order to reflect and respond to changes in municipal zoning, State and regional planning activities and regulatory standards, and to ensure that the most up to date information is fully incorporated into decisions concerning wastewater management choices. To accomplish these continuing planning process objectives, WMPs are not static and are required to be updated every six years, similar to the schedule established in the Municipal

Land Use Law for the periodic examination of municipal master plans and development regulations (N.J.S.A. 40:55D-89).

A WMP evaluates whether appropriate and adequate wastewater treatment capacity is available to accommodate the needs (i.e. population and jobs) of existing and future development in consideration of environmental constraints. Thus, WMPs must evaluate existing land use, current local zoning, and environmental constraints information to project future wastewater generation potential. This wastewater generation potential is then compared to the capacity of existing wastewater facilities to determine whether adequate wastewater treatment capacity exists. Where adequate existing wastewater treatment capacity does not exist, the WMP must identify proposed new or expanded wastewater treatment facilities and assess the impact of the new or expanded treatment facilities on surface and ground water quality. If new or expanded treatment facilities or capacity cannot be accommodated, then either the wastewater service area or the density of future development within that service area must be reduced. Therefore WMPs must anticipate and plan for future growth in both population and jobs. A WMP requires that local governments evaluate current zoning, environmental constraints and future development needs, including the municipality's fair share housing obligation, and plan in a manner that meets these needs, taking into account the particular circumstances and desires of that municipality. In this way, the requirement to develop and update WMPs will help to identify the sustainable growth potential so that it is used to satisfy fair share housing obligations and other local objectives in an environmentally sound manner.

Additionally, the Department will be proposing amendments to this rule to address the statewide need for affordable housing. Please see Response to Comments 111 and 112 additional discussion of this issue.

264. COMMENT: Allowing an existing, fully compliant WQMP amendment to be withdrawn or revoked may be statutorily prohibited. A regulation that allows an existing plan to be withdrawn is no different than having no planning at all in those locations, which would seem contrary to the spirit, if not the requirement, of the Water Quality Planning Act where at N.J.S.A. 58:11A-2b, the Legislature has clearly pronounced that it is the Department's responsibility to "establish a *continuing* planning process which will encourage, direct, supervise and aid areawide planning ..." Likewise, under Section 208 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., upon which New Jersey's Water Quality Planning Act is based, it is specifically provided that each State planning organization "shall have in operation a *continuing* areawide waste treatment management planning process consistent with section 201 of this Act (33 U.S.C. § 1281)," 33 U.S.C. § 1288(b)(1)(A). Thus, the Department may well be prohibited by statute from allowing an existing plan to lapse or expire.

The Department has the statutory authority and is obligated to maintain areawide WQM plans and cannot simply defer or delegate that responsibility. Under the Water Quality Planning Act at N.J.S.A. 58:11A-2b, the Department is mandated to "conduct areawide waste treatment management planning for all areas of the State without a designated planning agency." See also N.J.S.A. 58:11A-5: "Every designated planning agency and the Department of Environmental Protection for all areas of the State without a designated planning agency, shall conduct an

areawide waste treatment management planning process and submit an areawide plan for that area...." When a county does not prepare a WMP within nine months of adoption of the new rules, it is tantamount to there being no designated planning agency within that political boundary. In that instance, the Department itself would be statutorily obligated to act by preparing areawide plans (or by authorizing an affected facility to prepare such plan for the Department's approval) and it should do so. (40)

RESPONSE: See the Response to Comment 263 for the reasons why the Department believes it has met its mandate to provide a continuing planning process under the Water Quality Planning Act at N.J.S.A. 58:11A-1 et seq. and the Clean Water Act, 33 U.S.C. § 1251 et seq. Water Quality Management Plans are amended over time in accordance with the continuing planning process. As regions grow and change, their plans change, for example, an undeveloped area adjacent to a sewer service area of a regional STP where actual sewer lines are still a mile away may propose an amendment for a new discharge to ground water to serve a new development. Growth occurring subsequent to the plan amendment may result in the construction of sewer lines to the edge of the property. It may be that connection to the regional wastewater treatment facility is now a more cost effective option, which could trigger a further amendment to the areawide plan to include the proposed development in the sewer service area of the regional STP, thus negating the original amendment calling for a separate treatment facility with discharge to ground water. Withdrawing the original WQMP amendment would not be statutorily prohibited. The same is true with the withdrawal of wastewater service areas. Where wastewater service areas are withdrawn due to recalcitrant WMP agencies, there are amended wastewater service areas in place, thus the WQMPs have not lapsed, they have changed. There are also

"grandfathering" provisions that allow for infill development where legally constructed sewer lines are already in the ground and for developments that have already received local approvals and Department permits. Additionally, WQMP amendments adopted within the last six years remain valid even if there is a wastewater service area withdrawal within the WMP area of the previous amendment. The Department believes six years is an adequate amount of time for a site-specific proposal that required a WQMP amendment to get local approval and Department permits for a proposed development activity before a potential wastewater service area withdrawal could occur under this rule.

The Department does maintain the areawide WQMPs and is not deferring or delegating that responsibility. Additionally, the Department continues to fulfill its role and acts as a designated planning agency for those areas of the State which are non-designated areas. Wastewater management plans, while key elements of the areawide WQMP are not the only component and the Department is not statutorily obligated to prepare WMPs. The responsibility to prepare WMPs has been delegated to county boards of chosen freeholds, seven of which are designated planning agencies while 14 are not designated planning agencies. Thus, whether or not a county prepares a WMP within nine months of adoption of this chapter has nothing to do with whether or not county is a designated planning agency. Additionally, the Department will provide GIS tools to allow county and local governments to see where wastewater service areas can occur, while still meeting the water quality protection goals of this rule, but in New Jersey, where zoning authority is given to local governments and wastewater treatment facilities are locally owned and operated, the Department can not make the necessary changes to zoning and master plans, to implement the wastewater management plans the GIS tools create. Therefore, it makes

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sense for wastewater planning to be done at a more local level, while the Department will help facilitate the planning decisions made by local governments with zoning powers.

265. COMMENT: There is strong concern that there is no provision to meet the continuing planning process for integrating and unifying WQMP processes at all levels of government. (22, 76)

RESPONSE: N.J.A.C. 7:15-2.1(a)1 requires the Department to integrate and unify the Statewide and areawide water quality management planning process conducted under the continuing planning process and N.J.A.C. 7:15-2.1(a)3 requires the coordination and integration of WQM plans with related Federal, State, regional and local comprehensive land use, functional, and other relevant planning activities, programs and policies. Therefore, the Department believes that there are provisions to meet the continuing planning process for integrating and unifying WQMP processes at all levels of government.

266. COMMENT: N.J.A.C. 7:15-2.1(a)5 is meant to "provide opportunities for meaningful public participation in the water quality management planning process" under the continuing planning process. However, there is no meaningful public participation requirement detailed in this proposal. Provision for public notice is not sufficient. (22, 76)

RESPONSE: The public participation opportunities provided in the previous rule are continued with little change in the rule as amended. The changes that have been incorporated in the rule are the result of changes in the types of activities that qualify for a revision, which do not have a

public participation component due to their limited size or ability to have an environmental impact. If a proposed WQMP change does not quality as a revision, the public participation requirements include the formal public notification procedures specified in N.J.A.C. 7:15-3.4, including public notice by publication in a newspaper of general circulation within the area of the proposed amendment and in the New Jersey Register as well as requirements for written statements of consent from affected governmental entities, sewerage agencies, and BPU-regulated sewer and water utilities and an opportunity to request a non-adversarial public hearing. Should significant interest in holding a hearing be expressed, the Department will conduct a public hearing. The Department's experience has been that the existing procedures provide the public with meaningful opportunities for input while assuring the Department has sufficient information to formulate a decision with regard to the amendment proposal.

267. COMMENT: The proposed rules should include a list of all current areawide WQM plans and associated designated planning agencies. (9, 19)

RESPONSE: The Statewide Water Quality Management Plan includes a list of all current areawide WQM plans and associated designated planning agencies. This information is also available in the WQM plan amendment and revision application form on the Division of Watershed Management's website at www.nj.gov/dep/watershedmgt/DOCS/amend rev app 3-14-06.pdf. The Department does not believe it is necessary to codify this readily available information in the WQMP rules.

268. COMMENT: The scope, content and format of areawide WQM plans should be defined in the new rules. (9, 19)

RESPONSE: The scope, content and format of areawide WQM plans is defined in the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq. These plans were developed as required under the WQPA and are now modified through WMPs and other amendments, for which the scope, content and format are specified in the WQMP rules. Therefore, the Department does not believe it is necessary to also codify the scope, content and format of areawide WQM plans in the WQMP rules.

269. COMMENT: The proposed rules very ambitiously expand the scope of the current WMPs to more closely resemble the more wide-ranging Water Quality Management Plans. However, the rule proposal continues to refer to them as WMPs. The rules should clarify if the expanded WMPs will replace the former WQMPs or, if they will still be required, what will be the scope of the new WQMPs? (19, 28)

RESPONSE: The new requirements for WMPs, although expanded to address the analyses and assessment provisions formerly required under E.O. 109 (2000), remain amendments to the areawide WQMPs and as such do not replace the areawide WQMPs. The scope of areawide WQMPs has not changed and will continue to contain not only the WMPs and all previous wastewater management planning documents unless or until replaced by a new or updated WMP, but also total maximum daily loads, regional stormwater management plans, water quality based effluent limitations and schedules of compliance established as NJPDES permit conditions, and

201 Facilities Plans. The rules do not say that WMPs replace areawide WQMPs or that the scope of areawide WQMPs changed, therefore there is no rule text clarify and no changes were made.

270. COMMENT: There is objection to N.J.A.C. 7:15-2.2(e) which authorizes counties to prepare county water quality management plans but then does not define what such a plan should accomplish or what its provisions should include. The provision merely states that in regard to contents the "county WQM plans shall not be in conflict with the Statewide WQM Plan, appropriate areawide WQM plans or this chapter." (22, 76)

RESPONSE: The Water Quality Planning Act at N.J.S.A. 58:11A-5 provides that every county planning board may conduct a countywide waste treatment management planning process and prepare a county water quality management plan. The WQPA further stipulates that a county WQM plan shall be consistent with the coincident areawide WQM plan or plans. Therefore, the Department has left the content of a county WQM plan at the discretion of any county choosing to exercise this option, but believes a county should be guided by the contents of an areawide WQM plan as specified in the WQPA. To date, no county has ever expressed an interest in preparing such a county water quality management plan. The new county WMPs would likely serve any need a county may have for a county WQM plan. Because the contents of an areawide WQM plan are contained only in the WQPA, the Department does not believe it is necessary to specify the contents of a county water quality management plan in the WQMP rules.

271. COMMENT: Over time, the Department has been moving toward expanding the scope and content of wastewater management plans so that the differences between WMPs and Water Quality Management Plans have become increasingly vague. Greater clarity regarding the distinction between WQM planning agency and WMP agency responsibilities is needed. (9, 19)

RESPONSE: At N.J.A.C. 7:15-2.4 the rules prescribe the roll of "designated planning agencies," which are the agencies designated by the Governor to conduct areawide WQM planning. At N.J.A.C. 7:15-5.3 the rules discuss wastewater management planning agencies and their responsibility to prepare and submit wastewater management plans for their wastewater management planning area. The Department does not believe that further clarification of the distinction between these agencies is necessary.

N.J.A.C. 7:15-3 Plan Assessment, Amendment and Adoption

272. COMMENT: Each county will be charged with developing water quality management plans (WQMPs). Built into these WQMPs are wastewater management plans (WMPs) which will include wastewater discharges from publicly owned treatment plants (POTWs), sewer capacities, direct industrial wastewater discharges (to surface or ground waters), non-point pollution sources, wastewater discharges from residential/commercial development as well as water supply approvals.

Once the rule is promulgated, counties will have nine months to submit WQMPs for Department approval. The Department will either deny or approve the plans. Once the WQMPs/WMPs are adopted, any project (development, upgrade, expansion, etc.) in that planning area which will

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impact water supply or water quality must receive a "consistency determination" from the Department prior to any State permit being issued. These State permits can include, New Jersey Pollutant Discharge Elimination System (NJPDES) discharge to surface water or discharge to ground water permits, industrial Treatment Works Approvals (or TWAs), sewer approvals, flood hazard permits, water use certificates, and/or water allocation permits. If a project is deemed "inconsistent" with the adopted plan then the WQMP/WMP would need to be amended prior to the issuance of State permits.

The rule states that if the Department denies a plan or plan amendment, all permits will be held up until a plan is approved. This could create a situation where those unfortunate industrial facilities or companies located in counties that were not able to get their plans approved could be held in limbo, simply due to the actions of recalcitrant planning area officials. Whether or not a planning agency cooperates with the Department is out of the control of the industries or companies in the area but they will suffer the consequences. The rule needs to address this likely scenario. State permits should not be held up because of a planning issue. This would have devastating impacts on New Jersey's economy. (6, 7, 20, 69)

273. COMMENT: The proposed amendments and new rules propose that individual counties develop Water Quality Management Plans (WQM plans). All municipalities must submit complying plans to the counties to be included as "chapters" in the county's WQM plan. The counties will then have nine months to submit the WQM plans for approval by the Department. The WQM plans created by the counties will address all aspects of water quality management planning such as wastewater management plans (WMPs), which govern wastewater discharges.

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If the Department does not approve a county WQM plan or the county does not submit its WQM plan within the time period, the new rules provide that the Department will not issue any permits until the WQM plan is approved.

After the Department adopts the WQM plans, designated projects that will affect the water supply or water quality must undergo a "consistency determination review." This review must be completed prior to the issuance of any Department permits pertaining to water.

The rules propose another review of development plans in the form of a consistency determination. The Department has up to ninety days to complete a consistency determination. If a county has not yet adopted its WQM plan or is in the process of amending the Plan, a developer will be subject to additional delays because the consistency determination cannot be completed without the Plan. The current permitting process is more than adequate to ensure the water quality is protected. The addition of another review will negatively impact development. (29)

274. COMMENT: It is understandable that the Department wants to integrate permitting programs and condition approvals based on consistency with the WMPs. However, it is unfair to hold an individual's permit request "hostage" because a county or municipality has not provided the Department with an updated plan. Individual citizens have no control over whether their municipality or county submits the appropriate plan. (66)

275. COMMENT: Before a permit writer at the Department issues a NJPDES permit or a TWA for an industrial discharge, the proposed project must be deemed consistent with the approved plan. So if a planning agency fails to send in an approvable plan, what happens to those industrial discharges in that area? (69)

276. COMMENT: Will Treatment Works Approval reviews for proposed development stagnate during the interim period before the proposed regulations are adopted? (37)

RESPONSE TO COMMENTS 272 THROUGH 276: The commenters understanding of the rule is a fairly accurate accounting of the process. However, counties are not charged with developing water quality management plans. These documents already exist. What the counties are required to do is develop wastewater management plans, which when adopted, will comprehensively amend the areawide water quality management plans. Once the rule is promulgated, counties will have nine months to submit a wastewater management plan. In addition to approval or denial, the Department could also require the county to change the plan to meet the requirements of the rule, instead of an outright denial. Consistency determination reviews will be conducted against the adopted areawide WQM plan.

In accordance with the Water Quality Planning Act, N.J.A.C. 58:11A-10, the Commissioner shall not grant any permit which is in conflict with an areawide WQM plan. All projects and activities affecting water quality are required to undergo a consistency determination review when Department permits are applied for. This is not a new requirement and will not expand the time needed to obtain a Department permit. The Department will continue to review all permit

applications for consistency with the applicable areawide WQM plans and will make a determination of "consistent," "not addressed," or "inconsistent" as appropriate. Permit proposals that receive a determination of "inconsistent" are not allowed to move forward through the permitting process until the "inconsistent" determination is resolved through the WQM plan amendment process.

Where the underlying areawide WQM plan is not current, the penalty for not updating the plan is the withdrawal of wastewater service areas. Where this occurs, site specific WQM plan amendments will not be permitted until the WMP is updated, thus new sewage treatment plants and expansions of sewer service areas will not be permitted until the WMP is updated. The Department anticipates that developers with proposals found inconsistent with an areawide WQM plan will engage the WMP agency to include their development proposal, if environmentally supportable, in the appropriate WMP. However, even where wastewater service areas are withdrawn, the underlying areawide WQM plan remains in place, thus certain activities, such as development already connected to a sewer system or which qualifies as "infill" development, will continue to be able to obtain Department permits. Thus, not all permits will be held up or denied until a WMP or plan amendment is approved.

Additionally, there are new provisions under the revision section, N.J.A.C. 7:15-3.5(b)4, which provide opportunities for existing NJPDES industrial treatment works to expand their discharges to surface waters where no change in wastewater service area or discharge type are proposed if the discharge is not to an impaired waterbody segment for which a TMDL has not been proposed or adopted (N.J.A.C. 7:15-3.4(b)4i) and for expansions for less than 8,000 gallons per day for

existing NJPDES discharges to ground water without an updated WMP (N.J.A.C. 7:15-3.4(b)4iv). Finally, if the WMP isn't updated and the wastewater service area is withdrawn, applicants always have the option of developing the property using individual subsurface sewage disposal systems provided that the development can meet the nitrate planning standard of two mg/L.

Treatment Works Approval reviews under the NJPDES Program have not changed prior or subsequently to this rule adoption.

277. COMMENT: Businesses and industries discharge their wastewater through a permit with the local municipal utilities authority or through an authorization provided by a New Jersey Pollution Discharge Elimination System (NJPDES) permit. Businesses and industries also have Treatment Works Approvals (TWAs) as well as water allocation permits issued by the Department which, according to this proposal, must all be incorporated into a planning area's WMP/WQMP. There is concern that the additional regulatory layer planned in this proposal will only add to New Jersey's already complex environmental regulatory process. (6, 7)

278. COMMENT: Many businesses discharge their wastewater into either a POTW or a surface water body. Industry could be impacted when the Department views wastewater management plans submitted by the planning agency as inappropriate or insufficient. What happens to the industrial discharges in that planning area? Are they basically held hostage if they want to expand their operation? How can they get their NJPDES permits or sewage permits?

The planning agency has to project out all of the wastewater discharges in their area. Assume a chemical company discharges eight thousand gallons per day. A year from now that plan has been approved, but in another year, the chemical company wants to bring in another process or another plant expansion. This rule proposal will require that the wastewater management plan be amended first, then a NJPDES permit is applied for and then that permit is issued. The rule is not clear as to what kind of process is involved as far as amending that wastewater management plan. Has another bureaucratic layer been added to get that approval? Will it take another year or five months to get the wastewater management plan amended again only to have to wait six or seven months to get a NJPDES permit?

The Department can appreciate from an industrial discharge point of view that in business not only are members competing against other companies but also among other sister plants both nationally and globally. Whether or not a corporate entity wants to bring in a new plant depends on how long it takes to get the necessary permits. If New Jersey will take an extra year or two because of this new proposal, chances are that plant and the jobs will go elsewhere. The Department should look at these scenarios and build enough flexibility so that industry is allowed to grow. Industry will do the right thing and obtain the necessary permits, but don't strap on extra layers of government that are not needed. (69)

RESPONSE TO COMMENTS 277 AND 278: The adopted rules do not add an additional regulatory layer as the requirement to identify all wastewater discharges in areawide WQM plans through WMPs and to obtain consistency determinations prior to issuance of Department permits are not new rule provisions. Further, if an expansion of a domestic or industrial treatment works

is not currently identified in an areawide WQM plan, the consistency determination for the Department permits for the proposed expansion would be "inconsistent" and an areawide WQM plan amendment would be required. The process for amending a WQM plan, including a WMP update, is provided at N.J.A.C. 7:15-3.4.

However, the Department agrees with the commenters that business or industry could be impacted where the underlying areawide WQM plan is not current and the withdrawal of wastewater service areas occurs thus prohibiting new sewage treatment plants and expansions of sewer service areas until the WMP is updated. However, the Department also believes that counties and municipalities have a significant stake in keeping the jobs that business and industry bring to their regions, thus will be proactive, with the Department's assistance, to ensure that WMPs are not allowed to lapse. Additionally, as discussed in Response to Comments 275 and 276, certain activities, such as development already connected to a sewer system or which qualifies as "infill" development, will continue to be able to obtain Department permits. Further, there are new provisions under the revision section, N.J.A.C. 7:15-3.5(b)4, which provide opportunities for existing NJPDES industrial treatment works to expand their discharges to surface waters where no change in wastewater service area or discharge type are proposed if the discharge is not to an impaired waterbody segment for which a TMDL has not been proposed or adopted (N.J.A.C. 7:15-3.4(b)4i) and for expansions for less than 8,000 gallons per day for existing NJPDES discharges to ground water without an updated WMP (N.J.A.C. 7:15-3.4(b)4iv).

The Department believes this adopted rule has achieved a balance of building in enough flexibility so that industry is allowed to grow in the interim even as planning is conducted while still maintaining and protecting water quality.

N.J.A.C. 7:15-3.1

279. COMMENT: The discussion in the summary regarding section N.J.A.C. 7:15-3.1 mentions instances where formal consistency determinations would not be required, for example, projects and activities that do not involve sewage generating development. Water quality impacts associated with public roadway projects are primarily related to stormwater management. Since these projects typically require thorough review under Stormwater Management Rules, N.J.A.C. 7:8, as well as other permitting programs, in some instances, a formal consistency determination may not be necessary for certain types of public roadway projects. (30)

280. COMMENT: The Stormwater Management Rules, N.J.A.C. 7:8, consider the unique characteristics and constraints of public roadway projects and allow for hardship waivers in certain situations. Where hardship waivers are issued, these projects should be deemed consistent and a site specific WQM plan amendment should not be required for such projects. Would such projects be deemed consistent with WQM plans? (30)

RESPONSE TO COMMENTS 279 AND 280: The WQMP rules do not require formal consistency determinations for any public roadway development, unless the road is part of a sewage generating development. Therefore, most, if not all, public roadway projects are not

subject to this rule and will continue to be required to undergo thorough review under the Stormwater Management Rules, N.J.A.C. 7:8, as well as other permitting programs. Since public roadway projects are not required to undergo formal consistency determinations, there is no need for a provision to deem public roadways with hardship waivers as a consistent activity with the areawide WQM plans.

281. COMMENT: The requirement of a consistency determination review at N.J.A.C. 7:15-3.1 that included all actions that could affect water quality is supported. The proposed additional actions that require a consistency determination capture more activities than previously and include environmental criteria, which help to prevent pollution and degradation. (10, 80)

282. COMMENT: Insuring that other Department permit applications undergo consistency reviews is strongly supported. (22, 76)

283. COMMENT: Recognizing that the proposed rules are an improvement over the existing rules, the clarification and expansion of the list of land use, water supply projects and activities that require a formal consistency determination to include those anticipated to have impacts on water quality is supported. (17)

RESPONSE TO COMMENTS 281 THROUGH 283: The Department acknowledges these comments in support of this rule provision.

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284. COMMENT: Proposed N.J.A.C. 7:15-3.1 significantly expands the scope of the Department's review of projects and activities for consistency determinations. This includes actions for all category 1 potable water supply wells including well construction permits for individual domestic wells, bank stabilization projects, permits by rule under N.J.A.C. 7:13-7 and others. As a general comment, the basis for the Department to expand its jurisdiction into individual well permits for single family lots and bank stabilization projects is unclear. Department officials have acknowledged that it does not respond to amendment applications in a timely manner currently, and to address that deficiency, the Department is proposing to hire additional staff to cover each county sufficiently. However, after reading the proposal it seems that the need for additional staff is being driven by the proposed expansion of jurisdiction for consistency determinations rather than the need to ensure that every county has a valid wastewater management plan. (14)

RESPONSE: The Water Quality Planning Act at N.J.A.C. 58:11A-10 already requires that all State approvals, including those related to potable water supply wells including construction permits for individual wells, must be consistent with the applicable adopted areawide WQM plan. The change in the rule is to discern between those State approvals that are likely to be addressed in a WQM plan, and therefore should be specifically assessed for consistency, and those that must be consistent, but need not be specifically addressed because they are not likely to be addressed in the WQM plan or are typically consistent. For example, the rule actually exempts bank stabilization projects and permits-by-rule under the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, from formal consistency determination requirements at N.J.A.C. 7:15-3.1(b)16. Activities covered under N.J.A.C. 7:13-7, permits-by-rule under the Flood Hazard

Area Control Act Rules, for example, the reconstruction of a lawfully existing structure outside a floodway or the construction of an addition that is connected to a lawfully existing building, are not expected to significantly impact water quality and thus are not required to obtain a formal consistency determination. Activities of this nature are not addressed in a regional planning document like the areawide WQM plans, thus there is nothing in the areawide WQM plan to assess for consistency. Similarly, bank stabilization projects improve water quality by reducing channelization and sedimentation into the water body. Bank stabilizations utilizing only vegetation result in no permanent footprint of disturbance or engineered structures that could later fail, degrade or otherwise result in scrap and refuse and, therefore, do not adversely affect water quality. This type of activity which would improve water quality, would always be deemed consistent, thus an additional review for consistency will not be required for these types of permits.

But as indicated at N.J.A.C. 7:15-3.2(a), a consistency determination may be made as part of a permit application, and the Department intends to determine consistency as part of the relevant permit process, but will evaluate a specific request for consistency determination. Contrary to the suggestion of the commenter, this change in the rule is not expected to require significant additional staff resources. The Department's priority and focus for additional or shifting staff resources is to provide staff to proactively work with WMP agencies to develop and maintain up to date WMPs.

285. COMMENT: The Water Quality Planning Act prohibits the Commissioner from issuing any permit or approval that is not consistent with the approved areawide 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 the Department are consistent with and conform to updated water quality management plans, as the current rules merely require that approvals not be inconsistent with the areawide plan, a lower and more confusing standard. (86)

RESPONSE: In accordance with the Water Quality Planning Act at N.J.A.C. 58:11A-10 the Commissioner shall not grant any permit which is in conflict with an areawide WQM plan. Thus, all projects and activities affecting water quality are required to be developed and conducted in a manner that does not conflict with the WQMP rules or the adopted areawide WQM plans. The Department conducts a consistency determination review to ensure Department issued permits affecting water quality are not conflict with with the areawide WQM plans. The rule expands the types of permits that require a formal consistency determination, compared to those that did not require a formal consistency determination, although were still required to be consistent, to ensure that all Department permits that are likely to have water quality impacts, are reviewed to ensure there are no conflicts with the areawide WQM plan. The Department intends to determine consistency as part of the relevant permit process, thus not only reducing review times for applicants, but also ensuring that potential impacts on water quality are addressed as part of the consistency determination review. The rules at N.J.A.C. 7:15-3.2(c)3 provide that a project or activity shall be determined to be consistent if it is in accordance with the written provision of the areawide WQM plan and this rule, is determined to be "not addressed," if the areawide WQM plan and this rule do not contain provisions precluding a project or activity, and is found to be "inconsistent" if he project or activity is in conflict with the written provisions of the areawide WQM plan and this rule. The Department believes these

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"standards" for determining consistency with the areawide WQM plans in this rule are clear. Additionally, the WQMP rules provide the same "standard" as that found in the Water Quality Planning Act.

N.J.A.C. 7:15-3.1(b)

286. COMMENT: Proposed section N.J.A.C. 7:15-3.1(b) specifies the projects requiring review by the Department for consistency with the WQM plan. The lists of projects requiring consistency review is too broad and includes projects that the Department has already determined have nominal environmental impact and/or that already are subject to review by the Department or other agencies under other programs (e.g., projects requiring wetlands general permits for minor road crossings, outfalls, intakes and the like (N.J.A.C. 7:15-3.1(b)4iii) and projects requiring water diversion permits (N.J.A.C. 7:15-3.1(b)15).

The proposed regulation should be revised to omit consistency review for projects involving activities that already are subject to review by the Department or other agencies or that have already been determined by the Department to have nominal environmental impact. Adding yet another layer of review is burdensome on the regulated community, and to the extent that such proposed review adds any additional element of environmental protection, that addition is nominal compared to the magnitude of the burden on the regulated community. (41, 42, 44, 45)

287. COMMENT: The rules add numerous categories to the list of projects that are currently required to attain a consistency determination from the Department. Included in this proposed list are projects such as those that would require individual CAFRA and freshwater wetland

permits, and a number of projects that would require water supply system construction or expansion and well construction permits. Applications for permits that do not involve wastewater issues should not be subjected to a time consuming and expensive consistency review by the Department. This will place an undue burden on applicants. (19, 28)

288. COMMENT: The proposed rules at N.J.A.C. 7:15-3.1(b) identify additional projects and activities that will require a formal consistency determination review, including actions: under the Freshwater Wetlands Protection Act rules; that require water supply system construction permits for expansions or sealing of abandoned wells; that require a permit under the Flood Hazard Area Control Act Rules; and that require permits under the Dam Safety Standards for the construction of Class I through Class III wells. The Department should justify how these projects impact wastewater issues and why a review is needed. The Department should also evaluate the potential costs to the applicants. (85)

289. COMMENT: The rule proposal requires the Department perform a consistency determination review for all Department permit applications with the approved county WMP regardless of the nature of the permit request. These consistency determination reviews should be done concurrently during the initial permit application review. Otherwise, the review process will continue indefinitely and will violate the existing 90 day review timelines. (88)

290. COMMENT: The proposed WQMP rules also have economic ramifications for a municipal budget and developers alike in regards to the financial costs associated with the Department approval process. The additional requirement that all developments requiring sewer

service allocation seek a consistency determination from the Department is likely to result in longer process and increased permit and overhead costs that could potentially result in a proposed project no longer being economically feasible. (74)

RESPONSE TO COMMENTS 286 THROUGH 290: In accordance with the Water Quality Planning Act, N.J.A.C. 58:11A-10, the Commissioner shall not grant any permit which is in conflict with an areawide WQM plan. All projects and activities affecting water quality are required to undergo a consistency determination review when Department permits are applied for thus, areawide WQM plans address more than just wastewater impacts on water resources. The consistency determination review is not a new requirement and will not expand the time needed to obtain a Department permit. The Department reevaluated the list of projects and activities required to undergo a consistency determination review and did revise it to adequately capture the projects and activities that could have an affect on water quality or other relevant provisions of an adopted WQM plan or this chapter. The modified list of projects and activities requiring formal consistency review at N.J.A.C. 7:15-3.1(b) includes only those projects and activities for which a Department permit is necessary and that have the greater potential to adversely affect water resources, such as new surface or ground water discharges that require a NJPDES discharge permit, new or modified public community water systems, and projects requiring permits administered by the Division of Land Use Regulation, such as for flood hazard, waterfront development, and wetlands. Projects or activities that the Department has already determined have nominal environmental impact and/or that already are subject to review by the Department are listed and a formal consistency determination review is not required for these permits.

For example, as explained in the summary at N.J.R. 39 1881, the Department amended N.J.A.C. 7:15-3.1(b)4 to specifically identify the types of individual freshwater wetlands permits, open water fill permits, and transition area waivers under the Freshwater Wetlands Protection Act rules that require a consistency determination to ensure that water quality requirements in the Statewide and areawide WQM Plans have been addressed. Previously, all actions regulated under these rules required a formal consistency determination pursuant to N.J.A.C. 7:15-3.1(b)3 and 4. Thus, in addition to any action that requires an individual permit, general permits under N.J.A.C. 7:7A-5.2, 5.2A, 5.6, 5.7, 5.10A, 5.10B, 5.10C, 5.11 and 5.11A are included. These include general permits for the placement of underground utility lines because this activity has the potential to disturb large tracts of land, both at initial installation and in order to provide future access for maintenance and repair; actions in non-tributary wetlands because these areas assist in regulating baseflow and are often within significant riparian zone areas; actions in headwaters because they have the potential to impact water quality as they are origins of stream flow that will transport chemicals and particulates downstream; road crossings, even minor ones, because they result in increased sedimentation, total suspended solids, and oil-laden runoff into the water body, and create barriers against the migration of fish and aquatic species; outfall structures, because they create a point source that promotes channelization, erosion and sedimentation, provide a direct path for pollutants to enter waterways and sensitive resource areas, and cause further increase of impervious surfaces; and intake structures because they directly or indirectly affect surface and ground water supplies. The Department is not requiring formal consistency determinations for general permits for projects and activities that do not involve sewage generating structures, such as airport sight line clearing and installation of water

monitoring devices, as the environmental impacts of these types of activities are addressed in the applicable permitting process.

N.J.A.C. 7:15-3.1(b)15 requires formal consistency determinations for water supply diversions, except for those diversions that are temporary, such as for construction. Water supply diversions, like water usage certifications, can affect baseflow, with associated impacts on water quality and aquatic life support. Temporary diversions, while still required to be consistent in accordance with N.J.A.C. 7:15-3.1(c), do not warrant a formal consistency determination because they are not permanent, by definition. Additional discussion of the Department's basis for the modified list of projects and activities requiring formal consistency review at N.J.A.C. 7:15-3.1(b) can be found in the summary of the rule proposal at N.J.R. 39 1881-1882.

The adopted rules do not add an additional regulatory layer as the requirement to obtain consistency determinations prior to issuance of Department permits are not new rule provisions. The Department intends to determine consistency as part of the relevant permit process, thus not only reducing review times and costs for applicants, but also ensuring that potential impacts on water quality are addressed as part of the consistency determination review.

291. COMMENT: The Department should excise N.J.A.C. 7:15-3.1(b)9, which requires consistency determinations for "construction of 50 or more realty improvements." This is an unnecessary review as the adopted Water Quality Management Plan would guide how all septic systems are built. (18, 42, 44, 45, 61)

RESPONSE: A separate review of construction of 50 or more realty improvements is required under the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq., for actions requiring Department certifications. The updated WMP will provide the equivalent dwelling units allowed in accordance with the nitrate dilution model for a HUC 11 area. The consistency determination will ensure that these provisions in the WMP are adhered to prior to issuance of the Department's Realty Improvement Sewerage and Facilities Act certification.

292. COMMENT: At N.J.A.C. 7:15-3.1(b)14, any additional requirements for Agricultural, Aquacultural or Horticultural Water Usage Certification rules, including supplying additional information that may be required under this rule proposal to meet the consistency requirements are adamantly opposed. The preferential treatment that agriculture receives in the water supply process is a result of consensus by the Legislature based on the benefits of agriculture and its status as a preexisting and preferred land use in New Jersey. Demanding consistency with these rules regarding wastewater in order to be certified is unnecessary and an example of regulatory overkill, since agricultural water has no corresponding sewer or septic discharge. (58)

293. COMMENT: Proposed N.J.A.C. 7:15-3.1(b)14 requires consistency determinations for category 2 non-potable water supply wells including those used for irrigation and for new, renewal and increases in water withdrawal pursuant to the Agricultural, Aquacultural, and Horticultural Water Usage Certification rules. The Department needs to consider the impact that this will have on the agricultural industry. The additional regulation is bound to have a negative effect and make it even more difficult to conduct business in the State. (14)

RESPONSE TO COMMENTS 292 AND 293: N.J.A.C. 7:15-3.1(b)13 requires consistency determinations for actions that require well construction permits issued pursuant to the Well Construction and Maintenance; Sealing of Abandoned Wells rules, N.J.A.C. 7:9D, for all category 1 potable water supply wells as identified at N.J.A.C. 7:9D-2.1(a)1, category 2 non-potable water supply wells, specifically, irrigation, test, industrial and open loop geothermal wells, as identified at N.J.A.C. 7:9D-2.1(a)2; and category 4 special use wells, specifically, closed-loop geothermal wells, as identified at N.J.A.C. 7:9D-2.1(a)4. The categories of wells required to undergo consistency determinations under this paragraph are all associated with development and have nothing to do with agricultural uses of water.

At N.J.A.C. 7:15-3.1(b)14, actions that require new water usage certifications, or the renewals of water usage certifications if an increase in water withdrawal for a new or different use is proposed as part of the renewal, pursuant to the Agricultural, Aquacultural, and Horticultural Water Usage Certification rules, N.J.A.C. 7:20A, are required to undergo a consistency determination. The only categories of agricultural wells required to receive consistency determinations are new water uses and renewals that involve an increase in the water withdrawal for a new or different use. This requirement does not pertain to a new or different agricultural use, but a new or different use, such as ceasing the agricultural use for new development. The Department is attempting to conduct consistency determination reviews as early as possible in the Department permitting process when new development proposals are made to warn applicants as early as possible in the development process if there are going to be environmental issues with their development proposal. There are no requirements for an agricultural user to obtain a consistency determination for a new or continuing agricultural use under this rule.

294. COMMENT: It is appropriate to seek consistency determinations for all projects. The exception provided at N.J.A.C. 7:15-3.1(b)16i for vegetation is not protective enough. There is concern that merely planting vegetation for bank stabilization projects withdraws them from the need to obtain review. There is nothing in the rules that requires the vegetation be sufficient in placement, quality, or quantity, nor is there anything requiring that the vegetation be maintained over a period of time. Lastly, vegetative plantings should be with native, indigenous plants. The proposal should be withdrawn or at the very least amended to require that these plantings be indigenous to the area and for a demonstration that the project will have the desired outcome over a period of time. (64)

RESPONSE: N.J.A.C. 7:15-3.1(b)16 only exempts flood hazard area permits for bank stabilization projects that use only live plantings or vegetation-derived products such as biologs from the requirements to obtain a formal consistency determination. Soil bioengineering is a method of bank stabilization that utilizes live plants, such as cut, un-rooted branches, as the main structural component. Other natural materials such as rocks and tree stumps can also be used to augment the stability of the vegetation. Bank stabilizations improve water quality by reducing channelization and sedimentation into the water body. Bank stabilizations utilizing only vegetation result in no permanent footprint of disturbance or engineered structures that could later fail, degrade or otherwise result in scrap and refuse and, therefore, do not adversely affect water quality. Bank stabilization projects that require a permit under the Flood Hazard Area Control Act (FHACA) Rules, N.J.A.C. 7:13, are not required to obtain a formal consistency determination review under this rule since they do not involve wastewater infrastructure or

planning issues that are addressed by the areawide WQM plans. However, not requiring a formal consistency determination does not exempt these activities from Department review under the FHACA Rules. The FHACA Rules address the location, quality, quantity and maintenance of vegetation requirements for bank stabilization projects that qualify for bank stabilization permits under those rules. For example, at a minimum, a general permit (2A) will need to be obtained under the FHACA Rules for agricultural activities in a regulated flood hazard area proposing bank stabilization. One of the bank stabilization or bank restoration project requirements under this permit pursuant to N.J.A.C. 7:13-8.4(c)1v, is to replant all cleared , cut or removed vegetation in the riparian zone with indigenous, non-invasive vegetation, except where the removed vegetation has been replaced by non-vegetative stabilizing material. Therefore, the Department believes the commenters' concerns regarding bank stabilization projects are adequately addressed by the FHACA Rules.

295. COMMENT: The proposed rules at N.J.A.C. 7:15-3.1(b)16 refer to consistency determinations for permits-by-rule under N.J.A.C. 7:13-7. These are the Flood Hazard Area Control Act Rules and there is no reference to permit-by-rule in Section 7. Section 7 pertains to flood hazard delineated streams. (14)

RESPONSE: As stated in the rule proposal summary, (See 39 N.J.R. 1882) the Department determined not to require formal consistency determinations for all permits-by-rule as identified in the proposed (now adopted) Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, as these activities were not expected to significantly impact water quality. The Department believes the commenter is referring to the prior version of the Flood Hazard Area Control Act Rules, when he

states that Section 7 pertains to flood hazard delineated streams and not permits-by-rule.

N.J.A.C. 7:13-7, which became effective on November 5, 2007, (See 39 N.J.R. 4573) now addresses permits-by-rule and under N.J.A.C. 7:15-3.1(b)16ii formal consistency determinations are not required for these activities.

296. COMMENT: The summary language for proposed N.J.A.C. 7:15-3.1(b) notes that "some projects or activities are unlikely to have significant impacts to water resources and a formal consistency determination review is unnecessary." The Department should identify the types of projects and activities which would not require consistency determinations. (18, 42, 44, 45, 61)

RESPONSE: The rule summary at N.J.A.C. 7:15-3.1(b) goes into further detail under each paragraph for each of the listed potentially regulated activities that requires a formal consistency determination and lists the Department permits for which a formal consistency determination is not required (See 39 N.J.R. 1881-1882). Additionally, under N.J.A.C. 7:15-3.1(c) any projects or activities not identified at N.J.A.C. 7:15-3.1(b) must be consistent, but do not require a formal consistency determination. Therefore, those projects or activities not required to obtain a formal consistent determination under N.J.A.C. 7:15-3.1(b) and projects or activities listed at N.J.A.C. 7:15-3.1(b) for which a formal consistency determination is not required are those determined unlikely to have significant impacts to water resources.

297. COMMENT: N.J.A.C. 7:15-3.1(c) proposes that certain activities need not undergo a formal consistency determination provided the activity does not conflict with the approved WQM plan. There is nothing in the rules, however, that addresses the potential situation where

there was a presumption the activity does not conflict when in reality, it does conflict with the approved WQM plan. The Department should close this loophole as soon as possible. All wells that withdraw water for any use should be subject to a consistency determination. (64)

RESPONSE: The Department reevaluated the list of projects and activities required to undergo a consistency determination review and revised it to capture the projects and activities that could have an affect on water quality or other relevant provisions of an adopted WQM plan or this chapter. The Department believes this modified list of projects and activities requiring formal consistency review at N.J.A.C. 7:15-3.1(b) is representative of those projects and activities for which a Department permit is necessary and that have the greater potential to adversely affect water resources and thus reduced the potential to have any projects or activities with the potential to be in conflict with the areawide WQM plan to be approved without being consistent. The Department agrees the rule does not addresses the potential situation where there was a presumption the activity does not conflict with an approved WQM plan when in reality it does, but the Department cannot anticipate every possible situation and believes the comprehensive new list of activities required to undergo consistency determination reviews has significantly reduced the potential for any activities to be presumed consistent with an areawide WQM plan when it might not be. If a Department permit is issued for a project or activity that ultimately is determined to be inconsistent with the areawide WQM plan, this issue could be raised as part of an appeal of that Department permit.

The adopted rule requires formal consistency determinations for any wells associated with new development, such as potable wells, geothermal wells and irrigation wells at N.J.A.C. 7:15-

3.1(b)13 and 14. However, the Department is not requiring formal consistency determinations for well repairs or modifications to existing wells under the Well Construction and Maintenance; Sealing of Abandoned Wells rules, N.J.A.C. 7:9D, or the Agricultural, Aquacultural, and Horticultural Water Usage Certification rules, N.J.A.C. 7:20A, for example, for agricultural wells, that are not associated with new development. Wells were not previously required to undergo a formal consistency determination review and the Department believes the adopted rules requiring reviews for all wells associated with new development are adequate.

298. COMMENT: N.J.A.C. 7:15-3.1(g) provides an applicant that has received a decision of inconsistency the opportunity for an informal discussion with the Department to attempt to resolve the conflict, but makes no allowance for public notice or input should the project or activity be revised. This should be amended to include public notice and comment in cases where the project or activity may be revised and deemed consistent. (22, 76)

RESPONSE: The rules do not provide for a public review process as part of formal consistency determination reviews because this review consists of a comparison of a proposed project or activity with the adopted Plans, which themselves were subject to public notice and comment. If a proposed project complies with the adopted plan, further public input is unnecessary. If an applicant comes in with a proposal that is inconsistent with the Plans and is thus unable to obtain Department permits, that applicant should have the opportunity to change their proposal to become consistent with the areawide WQM plan. If the applicant is able to modify their project to be consistent with the adopted areawide plan, there is no reason that the amended project

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should be treated any different with respect to public comment than a project that was initially designed to be consistent with the areawide plan.

299. COMMENT: Proposed N.J.A.C. 7:15-3.1(g) provides for "informal discussions" between the Department and an applicant on how to resolve conflicts between a proposed project or activity and "a WQM plan or this chapter." This section states that "Information provided by the Department in such discussions is for guidance only, and is not binding on the Department or the designated planning agencies." Such discussions should be binding as the applicant may, in good faith reliance and at considerable expense, act upon the Department's or designated planning agency's guidance. (18, 42, 44, 45, 61)

RESPONSE: As informal discussions often are conducted based preliminary, incomplete information at the earliest stages of project design, it would be inappropriate for the Department to be bound by advice given based upon this information. If the Department's advice is based on what turns out to be incomplete or inaccurate information, then initial guidance provided may not be sufficiently protective of public health and the environment.

N.J.A.C. 7:15-3.2

300. COMMENT: At proposed N.J.A.C. 7:15-3.2(a), the proposed rule changes include three plus pages of text. Where responsible development can take place in a community, it will be difficult, if not impossible, for a developer to satisfy the proposed consistency determination requirements. (15, 21, 67)

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301. COMMENT: The information required for a consistency determination at N.J.A.C. 7:15-3.2(a) for virtually every Department permit is completely onerous and unreasonable. Tying an individual or single permit request to a procedure of this magnitude will bring any permitted land use activity to a grinding halt. (66)

302. COMMENT: Currently, the Department compiles the necessary information to make a consistency determination, but it is proposed that the onus of compiling the information be placed on the applicant. (19, 28)

303. COMMENT: The proposed procedures at N.J.A.C. 7:15-3.2 for consistency determination review are burdensome and would require applicants to expend significant monies for legal and consulting services prematurely. Many of the requirements would not be available to an applicant at the early stage of the approval, but would require detailed engineering designs. Since this is a threshold development issue, it should be addressed at the concept stage. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 300 THROUGH 303: The Department reevaluated the list of projects and activities required to undergo a consistency determination review and revised it to capture the projects and activities that could have an affect on water quality or other relevant provisions of an adopted WQM plan or this chapter. This list is very specific as to the Department permits which are required to obtain a formal consistency determination and identifies specific Department permits not required to obtain a consistency determination thus does not require very Department permit to obtain a consistency determination.

Many of the consistency determination information requirements are basic information requirements and are no different from the rule prior to these amendments which applicants have been able to satisfy. Additionally, a significant number of formal consistency determination reviews will be conducted as part of a Department permit review, thus some of the information requirements overlap those that are part of a permit application and information contained in a permit application that is the same for a consistency determination need not be duplicated. It was necessary to expand the list of required information to conduct a consistency determination review to correspond with the additional analyses and assessments that are required under N.J.A.C. 7:15-5.24 and 5.25 to ensure that projects and activities are meeting the new environmental thresholds established in WMPs. This requested information will be used to assess if the proposed project is aligned with the wastewater management options identified in the adopted plan, including that the amount of wastewater generated by the proposed project conforms with the projections based on the zoning in place when the plan was adopted and upon which the environmental build-out analysis was based and that the method of wastewater management has been determined to meet water quality standards; the water supply needs of the project can be met in consideration of water availability; and the proposed project is not located within an environmentally sensitive area or steep slopes subject to required local ordinance protection and/or State regulation.

Thus, applicants are now required to provide State Plane coordinates for their project site (which can be found on the Departments webpage), a description of the proposed water supply, must identify waterbodies within 300 feet of the proposed project and steep slopes on their site plans

and when applicable, must ensure that their proposals meet zoning requirements established in WMPs by submitting a certification. Where applicants are requesting consistency determinations for projects or activities that might meet the criteria to not have the wastewater service area withdrawn under N.J.A.C. 7:15-8.1, specific information requirements to demonstrate these conditions are met are specified and only applicants trying to meet these conditions need submit this information.

Before granting a formal determination regarding consistency of a project or activity with the WQM plan it is necessary to have specific project proposal information. With regard to the detailed engineering designs, the Department is not requiring full treatment plant design details. The engineering designs that are being required are the basic site condition and project proposal locational information such as locations of site improvements such as proposed buildings, parking and roads, stormwater management features, and locations of environmental features such as confirmed wetlands delineation, on-site and adjacent waterbodies and steep slopes. The environmental features information is basic site condition information that the applicant should have from the start of a project for good project design and is not an excessive requirement.

304. COMMENT: N.J.A.C. 7:15-3.2(a) makes reference to the possibility of a WQM plan consistency determination being requested as part of a permit application. However, N.J.A.C. 7:15-1.6 indicates that consistency determination application information should be sent to the Division of Watershed Management. Clarification as to the procedure to have consistency determinations be conducted as a part of a permit application is desired. A streamlined review process by the permitting program to avoid a duplication of efforts and to make the consistency

determination process more efficient is supported. Most of the information required for a consistency determination application that would be applicable to public roadway projects would typically be included in a permit application for the other environmental permitting programs. In the event that additional information would be required for a consistency determination, it is suggested, to further streamline this process, that this information also be submitted directly to the permitting program rather than the Division of Watershed Management. (30)

RESPONSE: The rule at N.J.A.C. 7:15-3.2(a) provides that consistency determinations can be made either by applying for a State permit or outside of the permitting process. In the latter case, the information specified at N.J.A.C. 7:15-3.2(a) would be sent to the Division of Watershed Management. As stated, in the former case, only the information not already contained in the permit application would be sent as a supplement with the permit application to the appropriate contact for the permit being sought.

As indicated by the commenter, N.J.A.C. 7:15-1.6(c) required all applications under this rule to be sent to the Division of Watershed Management in order to be deemed received for the purposes of calculating application review deadlines or other time periods under this chapter. The Department amended the rule language at N.J.A.C. 7:15-1.6(c) on adoption to allow applications for consistency determinations under N.J.A.C. 7:15-3.2 to be submitted directly to a Department permitting program and not the Division of Watershed Management, if the consistency determination is being requested as part of a permit application. The Department made this change so that applications for permits that include a consistency determination

request can go directly to the permitting program without first going through the Division of Watershed Management.

As discussed in Response to Comments 279 and 280, the WQMP rules do not require formal consistency determinations for any public roadway development, unless the road is part of a sewage generating development. Therefore, most, if not all, public roadway projects are not subject to this rule and no additional information will be required to be submitted to the permitting programs.

305. COMMENT: If a county produces a WMP and its municipalities change their zoning to comply, what mechanisms will be in place to keep municipalities from changing their zoning back after the WMP is approved by the Department? How will the Department monitor municipalities? (53)

RESPONSE: At N.J.A.C. 7:15-3.2(a)6 the Department requires that applicants certify that projects seeking consistency determinations are in conformance with the municipal zoning upon which the wastewater management plan was based. As part of the consistency determination review, the Department will confirm that the municipal zoning is not different than that in place when the WMP was adopted. Projects or activities that are inconsistent with the municipal zoning that was in place when the applicable WMP was adopted will not be eligible to receive Department permits. Additionally, WMPs are required to be updated every six years. The Department will review the zoning in place when an updated WMP is submitted to ensure that it continues to meet the requirements established under the build-out analysis in the WMP.

306. COMMENT: Proposed N.J.A.C. 7:15-3.2(a)6 requires the applicant to certify that "the proposal was part of the *zoning approval, without variance,* upon which the wastewater management plan was based." As written, this is an ambiguously inclusive term and clarification is needed on what the "zoning approval without variance" refers to. Many, if not most, major development applications require bulk variances, referred to as "c" variances which do not increase density or change the use. It appears that the intent of the proposal is to apply this section to plans or amendments that increase density, referred to as "d" variances, which either increase residential dwelling units or increase the non-residential floor area ratio (FAR) over permitted density under the zoning ordinance. In addition, "d" variances primarily concern use variances which permit a use that was not previously permitted in the zone. The rule must be clear, as this provision significantly affects the type of analysis that must be done in support of the plan. (18, 42, 44, 45, 61)

RESPONSE: At N.J.A.C. 7:15-3.2(a)6, the applicant is required to certify that the proposal undergoing a consistency determination review was part of the zoning approval upon which the wastewater management plan was based, without variance that changes the development density and the associated wastewater flow projection within the zoning designation as approved in the WMP. Since bulk density variances do not significantly impact the land uses allowed and thus would not impact projected wastewater flows, these types of variances would not impact the zoning densities allowed on project sites or their associated wastewater flows and would not be required to be included within the certification that the zoning was not substantively different than that approved in the WMP. The Department will address why bulk density variances do not

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have to be considered as variances for this purpose in the guidance document that will support the consistency determination review application.

307. COMMENT: An applicant would be required to submit a "folded site plan" at N.J.A.C. 7:15-3.2(a)11. This requirement assumes that the development is at the stage where the applicant has obtained local approvals. The Department should clarify how this requirement would be met for projects that are at an earlier point. Also, in place of a folded site plan, the applicant should only be required to submit a USGS quadrangle map, as proposed at N.J.A.C. 7:15-3.2(a)7. (18, 42, 44, 45, 61)

RESPONSE: As discussed in Response to Comments 300 through 303, before granting a formal determination regarding consistency of a project or activity with the WQM plan it is necessary to have specific project proposal information. The site plans that are being required are the basic site condition and project proposal locational information such as locations of site improvements such as proposed buildings, parking and roads, stormwater management features, and locations of environmental features such as confirmed wetlands delineation, on-site and adjacent waterbodies and steep slopes. The environmental features information is basic site condition information that the applicant should have from the start of a project for good project design. However, the Department can work with applicants that desire a discussion of consistency determination issues or a preliminary consistency assessment of a project site at the concept stage without a full site plan, but such a determination before there is an actual proposal can only be for informational purposes because such a review is outside the scope of this rule and can't be binding on the Department until such time as there is an actual specific project proposal.

Without a site plan, the Department cannot assess all of the elements of a project proposal that must be reviewed to make a consistency determination.

308. COMMENT: At N.J.A.C. 7:15-3.2(a)11iii, "waterbodies" is not a defined term. It must be defined to eliminate any confusion about submission requirements, as application errors may trigger exposure to sanctions under the Department's "Grace Period" rules. (18, 42, 44, 45, 61)

RESPONSE: The Department does not believe a definition of "waterbodies" is necessary as it is a generally accepted and acknowledged term. Waterbodies includes the ocean and its estuaries, springs, streams including intermittent, and bodies of surface water, whether natural or artificial. N.J.A.C. 7:15-3.2(a)11iii requires "waterbodies with 300 feet of the proposed project" to be identified on a site plan when a consistency determination application is made to the Department. The Department will review this information as part of a consistency determination review to ensure that the riparian zone requirements have been met The "Grace Period" rules provide relief from penalties in certain circumstances, they do not create new penalties and thus any consistency determination application errors will not trigger any sanctions under the "Grace Period" rules.

309. COMMENT: Proposed N.J.A.C. 7:15-3.2(a)12 outlines requirements to demonstrate that a project or activity site is an infill development. The Department should clarify how an applicant is to document that there is a "lawfully existing public sewer line," and the "proof the sewer lines existed on the date that wastewater service area was withdrawn." (18, 42, 44, 45, 61)

RESPONSE: Proof that there is a lawfully existing public sewer line and proof the sewer lines existed on the date that wastewater service area was withdrawn in accordance with N.J.A.C. 7:15-3.2(a)12 may be demonstrated with a dated copy of the Treatment Works Approval (TWA) or other local approval where a TWA was not required that was issued for the sewer line the applicant proposes to connect their project or activity to.

310. COMMENT: Proposed N.J.A.C. 7:15-3.2(b) requires information on "potential water quality impacts and a site specific pollution control plan." An applicant would not necessarily have this information available at the early stages of the development process and the Department should clarify how this requirement would be met. (18, 42, 44, 45, 61)

RESPONSE: N.J.A.C. 7:15-3.2(b) provides that the Department "may" require the applicant to provide information regarding the "potential water quality impacts and a site specific pollution control plan" based upon potential negative water quality impacts of the project. As stated in the rule, the Department intends that requirements for such inclusion shall be established through amendments to areawide WQM plans. Thus, the Department would not expect an applicant to have information regarding the "potential water quality impacts and a site specific pollution control plan" at the time of an initial formal consistency determination application, or at the early stages of the development process. This information is not required at that time, unless it was required through an amendment to the areawide WQM plan in which case, the applicant should be aware of the requirement. This is a provision of the rule prior to these amendments which applicants have been able to satisfy.

311. COMMENT: The requirement at N.J.A.C. 7:15-3.2(b) that in certain situations where water pollution or habitat degradation may occur as a result of a project, a site specific pollution control plan must be provided during the consistency determination review process, which requires the applicant to prevent pollution as part of the review, engendering a proactive approach is supported. (10, 80)

RESPONSE: The Department acknowledges this comment in support of this rule provision. However, as discussed in Response to Comment 310, this is not a new requirement and the Department intends that requirements for inclusion of a site specific pollution control plan shall be established through amendments to areawide WQM plans.

312. COMMENT: Proposed N.J.A.C. 7:15-3.2(c) outlines the procedures for the Department to perform consistency determinations. An applicant would incur considerable costs to ensure that it meets the twelve listed plan components. Further, an applicant may not be able to document consistency early on. For example, proposed N.J.A.C. 7:15-3.2(c)1vii refers to using "Best Management Practices for pollution control in accordance with the Stormwater Management rules, N.J.A.C. 7:8." Consistency here may be difficult, if not impossible, to demonstrate at the early stages of the approval process. (18, 42, 44, 45, 61)

RESPONSE: As discussed in Response to Comments 300 through 303, before granting a formal determination regarding consistency of a project or activity with the WQM plan it is necessary to have specific project proposal information. The site plans that are being required are the basic site condition and project proposal locational information such as locations of site improvements

such as proposed buildings, parking and roads, stormwater management features, and locations of environmental features such as confirmed wetlands delineation, on-site and adjacent waterbodies and steep slopes. The environmental features information is basic site condition information that the applicant should have from the start of a project for good project design. However, the Department can work with applicants that desire a discussion of consistency determination issues or a preliminary consistency assessment of a project site at the concept stage without a full site plan, but such a determination before there is an actual proposal can only be for informational purposes because such a review is outside the scope of this rule and can't be binding on the Department until such time as there is an actual specific project proposal. Without a site plan, the Department cannot assess all of the elements of a project proposal that must be reviewed to make a consistency determination.

313. COMMENT: Due to the potential impact on nonpoint source pollution and riparian encroachment, all projects that require any deviation from FEMA standards in the regulated floodplain should trigger a consistency determination review. This should be added to the criteria at N.J.A.C. 7:15-3.2(c). (10, 80)

RESPONSE: Under N.J.A.C. 7:15-3.1(b)16, formal consistency determination review under N.J.A.C. 7:15-3.2 is required before most permits under the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, will be granted. The only exceptions are for permits-by–rule, N.J.A.C. 7:13-7, and for permits for bank stabilization projects utilizing vegetation. The Department's Flood Hazard Area Control Act (FHACA) Rules at N.J.A.C. 7:13 incorporate and exceed most of the FEMA requirements. Therefore, consistency determinations will be completed for

projects prior to the Department granting a Flood Hazard Area permit in both FEMA regulated floodplains and the more stringently regulated areas under the FHACA rules.

314. COMMENT: At N.J.A.C. 7:15-3.2(c)1viii, the Department should explain why environmentally sensitive areas were deleted from the consistency review process in this provision. (86)

315. COMMENT: The proposed language at N.J.A.C. 7:15-3.2(c)1viii that explains "environmentally sensitive" areas does not include T&E species habitat. The rule should be clear that such areas are considered environmentally sensitive for the purposes of making a consistency determination. (68)

316. COMMENT: At N.J.A.C. 7:15-3.2(c)1viii, including riparian zones and steep slopes for identification of areas either suitable or unsuitable for development is supported. However, "environmentally sensitive areas" should not be deleted from this provision. (22, 76)

RESPONSE TO COMMENTS 314 THROUGH 316: Under N.J.A.C. 7:15-5.24, when preparing WMPs, environmentally sensitive areas are defined as any contiguous area of 25 acres or larger consisting of any of the following features alone or in combination: areas mapped as endangered or threatened wildlife species habitat, Natural Heritage Priority Sites, special water resource protection areas along a Category One waters and their tributaries established under the Stormwater Management rules, N.J.A.C. 7:8, and wetlands. Thus, these environmentally sensitive areas will be excluded from sewer service areas, as applicable, as part of the planning

process and consistency issues for development on these sites will have been addressed by WMPs. However, with regard to riparian zones and steep slopes, these environmentally sensitive areas will be protected by municipal ordinances adopted in support of the WMP requirements at N.J.A.C. 7:15-5.25(g). The Department will have to review the ordinance provisions in a WMP as part of the consistency determination review to ensure that riparian zones and steep slope protections are being implemented. Protections of other environmentally sensitive areas occurs under other provisions in this paragraph, for example, the use of BMPs for pollution control under the Stormwater Management rules, N.J.A.C. 7:8 (N.J.A.C. 7:15-3.2(c)1vii. Thus, the change from "environmentally sensitive areas" to "riparian zones and steep slopes" was to clarify which environmental features the Department will focus on during the consistency determination review process when considering an area suitable or unsuitable for development.

N.J.A.C. 7:15-3.2(c)2

317. COMMENT: In requiring formal consistency determination reviews at proposed N.J.A.C. 7:15-3.1(b), the Department should establish a deadline for the completion of these reviews. Given the Department's limited staffing and the expanded list of projects and activities requiring consistency determinations provided at N.J.A.C. 7:15-3.1(b)1-18, rather than streamlining the process this provision adds another step to the regulatory process. (18, 42, 44, 45, 61)

RESPONSE: N.J.A.C. 7:15-3.2(c)2 provides that the Department's established deadline for completing consistency determination reviews is within 90 days of receipt of a complete application for a consistency determination review or within the timeframe established in the

rules under which the applicant is seeking a permit. As discussed in Response to Comments 286 through 290, the Department reevaluated the list of projects and activities required to undergo a consistency determination review and revised this list to adequately capture the projects and activities that could have an affect on water quality or other relevant provisions of an adopted WQM plan or this chapter. The modified list of projects and activities requiring formal consistency review at N.J.A.C. 7:15-3.1(b) includes only those projects and activities for which a Department permit is necessary and that have the greater potential to adversely affect water resources, such as new surface or ground water discharges that require a NJPDES discharge permit, new or modified public community water systems, and projects requiring permits administered by the Division of Land Use Regulation, such as for flood hazard, waterfront development, and wetlands. Projects or activities that the Department has already determined have nominal environmental impact and/or that already are subject to review by the Department are listed and a formal consistency determination review is now not required for these permits. Also, as discussed in Response to Comments 300 through 303, the Department anticipates that several of the required consistency determinations can be made at the time of permit application and separate consistency determination applications will not need to be filed. The Department believes this previously required process has become more streamlined and efficient as a result of the adopted amendments and new rules.

318. COMMENT: The rule specifies that consistency determinations can take up to 90 days to complete. A project sometimes cannot wait 90 days before realizing that it is either consistent or inconsistent. This delay could be devastating should the result be inconsistent and would add

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considerable time onto an approval process. Consistency determinations need to be expedited.

(7, 20, 69)

319. COMMENT: The rule specifies that consistency determinations can take up to 90 days to complete, which is in addition to any permit approval process. Investment in this State by the private sector is based on a number of factors, including approval times. This additional 90 day consistency determination could be an added disincentive toward investment. The Department should provide a shorter time frame within which a consistency determination would be made, or provide an expedited consistency determination whenever possible. (6, 7)

RESPONSE TO COMMENTS 318 AND 319: The Department has not changed the 90 day timeframe for completion of a consistency determination under N.J.A.C. 7:15-3.2(c)2. Instead, the adopted amendment to this paragraph provides that the consistency determination will be made within 90 days or within the timeframe established in rules for the applicable permit. . As indicated in the proposal summary at 39 N.J.R. 1883, this new provision is intended to apply where the rules for the applicable permit provide for some timeframe other than 90 days. The 90 day timeframe for completing a consistency determination has not been found to be problematic in practice. The Department will attempt to make consistency determinations as expeditiously as possible and believes that the process has been streamlined for applicants that have the ability to request a consistency determination as part of their permit application.

320. COMMENT: N.J.A.C. 7:15-3.2(c)2 provides for a 90-day review period for the Department to review an application for consistency determination. The rule should contain a provision that states the consequences if the Department fails to respond within 90-days. (14)

321. COMMENT: Under the proposed new WQMP rules, the scope of Department's WQMP consistency determination review responsibilities and powers are broadened. Additional types of projects would be subject to Department review, and the Department's review timeline would increase from 30 to 90 days. The proposed rules should be modified to assure the Department issues written consistency determinations within this 90 day review period. (9, 19)

322. COMMENT: The rule proposes to extend the Department's deadline for completing a consistency determination from 30 days to 90 days. Additionally, the Department is not mandated to issue the formal written consistency determination within this expanded time frame. Consistency determinations should be issued in writing for all applications that involve wastewater management planning and these determinations should be issued quickly enough so as not to interfere with the review time frames required of the DPAs. If the applicant must provide all necessary information up front, the Department should be able to complete a review within 30-45 days. (19, 28)

323. COMMENT: Proposed N.J.A.C. 7:15-3.2(c)2 requires the Department to complete review "within 90 days of receipt of a complete application for consistency determination review…" but the Department has proposed to remove the following option: "This time period may be extended for a one time only 30 day period by the mutual consent of the applicant and the

Department." The Department should not excise this mutual consent option, but should adopt it. The provision should also include a "deemer clause" establishing that if the Department does not complete its review in the allotted timeframe then the application is deemed consistent. It is incongruous that the Department requires detailed engineering plans for what is supposed to be a planning review. This provision exemplifies the unworkable nature of this proposed regulatory scheme. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 320 THROUGH 323: The proposed rule does not extend the Department review period for consistency determination reviews from 30 to 90 days, as the rule prior to these amendments already contains the 90 day review. The Department intends to meet the timeframe established in the rule. The 90 day timeframe for completing a consistency determination has not been found to be problematic and as such the Department does not believe it necessary to include additional provisions if the timeframe is not met. The issuance of a separate formal written consistency determination for all applications is not necessary as some consistency reviews can be done simultaneously as part of the technical permit review.

324. COMMENT: The rule proposal does not specifically require the Department to notify the DPA and applicant whether an amendment or revision is needed if a consistency determination application is deemed inconsistent with the wastewater management plan. The rule should be amended to mandate that the Department not only determine whether or not a project is consistent with the WQM plan, but also provide direction to a DPA on how to process that project, either as an amendment or revision. (19, 28)

RESPONSE: The Department currently notifies affected governmental entities of consistency determination results by copying them on letters providing consistency determinations to applicants and this practice will continue. Where the Department has enough information about a proposal to inform the applicant and affected governmental entities if the resolution of a determination of "inconsistent" can be rectified by an amendment or revision, the Department will provide such information. However, the Department does not always have enough information from a consistency determination request to determine if a WQM plan amendment or revision is required, therefore can not mandate in the rule that notification as to which type of modification is required be supplied. In order to comply with this request, the Department would need to require additional information for the consistency determination request and this would place an additional burden on those applicants whose proposals are deemed consistent and do not need to supply the additional information.

N.J.A.C. 7:15-3.4

325. COMMENT: The rule must clearly set forth a WQMP process with clear guidance and direction to the regulated community. Requirements for applications must be clearly set forth. The time frames for all steps in the process must have a rational basis. (23)

RESPONSE: The Department believes the rules set forth clear requirements for consistency determination applications at N.J.A.C. 7:15-3.2, WQMP amendment applications at N.J.A.C. 7:15-3.4, WQMP revision applications at N.J.A.C. 7:15-3.5 and wastewater management plan amendment applications at N.J.A.C. 7:15-5 with adequate justification of any timeframes established by the process. The commenter has not specified which applications or requirements

are unclear to her, therefore the Department can not further clarify for the commenter those applications or requirements which the commenter believes requires further clarification. To further assist in compliance with the requirements of the rules, the Department is working with the counties preparing WMPs and providing them with guidance and information. Additionally, the Department will provide guidance documents and checklists for all applications under the WQMP process.

326. COMMENT: There is no time limit specified for how long plan amendments would take. A planning agency may take months or years to amend a plan. Will the Department take any steps to motivate counties to submit plan amendments in a timely manner? (6, 7, 20, 69)

RESPONSE: Under the adopted rules, with limited exceptions, plan amendments are only allowed where a wastewater management plan is up to date. Because of the need to provide opportunities for coordination among affected entities and public participation, a minimum of several months is required to process an amendment. However, this aspect of a plan amendment is important to make a properly informed decision about a proposal and should not be shortened or eliminated to arrive at what may be a poor decision as a result of lack of the coordination and public input. The Department believes that, given a foundation of up to date wastewater management plans that are based on current planning and wastewater management objectives and capabilities which satisfy the requirements of the adopted rule, the amendment process will be more efficient. It has often been the need to update WMPs that has, in the past, caused many amendments to take a significant time period. Where plan amendments are allowed, the time for processing of these amendments should be significantly reduced as the up to date WMP will

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provide the build-out analysis and other assessments needed to determine if the amendment can proceed.

327. COMMENT: The Department should be required to review the WMP submissions in accordance with the regulations in effect at the time of the submission. Requiring submissions to comply with frequently changing regulatory goals is impractical. (60)

328. COMMENT: The Department should only be authorized to review the WMPs based on the adopted rule that is in place at the time of plan submittal. (19, 28)

RESPONSE TO COMMENTS 327 AND 328: The rules at N.J.A.C. 7:15-5.2 provide for a clear transition between the applicability of the old rules and the new rules. If a wastewater management plan has been filed as of (the effective date of this amendment), it will be reviewed under the old rules, unless it is disapproved or returned because of significant deficiencies. Thus, a responsive submission under the old rule will be processed under those rules, while a significantly deficient submission will and should be returned/disapproved and resubmitted under the new rule. However, since applicants with pending WMPs are already required to meet E.O. 109 (2000) to ensure that environmental impacts are assessed and that cumulative and secondary impacts of development are considered during the WMP review process, the Department does encourage WMP applicants to meet the new more stringent standards. Meeting the new standards not only makes sense environmentally, but also creates a more up to date WMP from the start which will speed up future WMP updates for the WMP agency.

329. COMMENT: Clarification in the rules is needed regarding the approval process for projects seeking approval for amendments and revisions to wastewater management plans. (74)

RESPONSE: The Department believes the rules set forth clear requirements for WQM plan amendment approvals at N.J.A.C. 7:15-3.4 with clear cross-references to the environmental analysis and assessment criteria at N.J.A.C. 7:15-5.24 and 5.25 as well as to agencies that should be consulted or will be required to issue statements of consent at N.J.A.C. 7:15-5.22 and WQM plan revision approvals at N.J.A.C. 7:15-3.5 with similar clear cross-references. The commenter has not specified which parts of the approval process are unclear to her. Therefore, the Department can not further clarify for the commenter these requirements that the commenter believes require further clarification. The Department will provide updated guidance documents and checklists for amendment and revision applications under the WQMP process and these documents will contain additional updated information regarding any new requirements to gain amendment or revision approvals.

330. COMMENT: The primary premise of the new rules in planning for water quality is planning for land use. The rules rely on land use to achieve water quality goals. From this perspective, proposed water quality planning begins to make sense, but when tied to the existing, traditional role of municipalities and counties in the land development approval process, water quality planning under the proposed rules gets confusing. The rules do not clearly address how the traditional land development planning and approval process will work with water quality management planning. The role of all the government agencies involved in the revision and

amendment process, coordination of work among the agencies and steps involved in the amendment approval process requires a clear explanation in the rules. (51)

RESPONSE: The Department believes the rules adequately address the roles of county and municipal government in water quality management planning. Counties are responsible for performing the environmental analyses and assessments required pursuant to N.J.A.C. 7:15-5.25 and with the Department's assistance will determine how the standards in that section will be met on a regional basis. Based upon this analysis, the counties will then work with the municipalities to assure that municipal planning, including local zoning, establishes a development plan that assures that environmental carrying capacity limits are taken into account in the master planning process. Working within the confines of the regional plan, it continues to be the responsibility of the municipality to determine how potential development is distributed within their municipal boundaries.

The roles of other government agencies involved in the revision and amendment process, except for utilities and sewerage authorities that now have a more defined and limited role as described at N.J.A.C. 7:15-5.6, remain as before, with responsibilities to respond when consulted with by the WMP agency when WMPs are being developed (N.J.A.C. 7:15-5.22(a)) and an obligation to consider a request for consent when a final plan is proposed for adoption (N.J.A.C. 7:15-3.4(g)4i). The steps involved in the amendment approval process for other governmental agencies have not significantly changed.

331. COMMENT: A key issue not addressed by the proposed rules is the procedure for review, adoption and implementation of the plan by the municipalities, counties, and the Department. (85)

RESPONSE: The Department does not believe it is appropriate to prescribe the process followed by the municipalities to implement their portion of the county WMP as this primarily involves adjustments to zoning and their master plan controlled by the Municipal Land Use Law, N.J.S.A. 40:55D. However, the rule does require consultation with municipalities as WMPs are developed and proposed (see N.J.A.C. 7:15-5.22) as well as municipal involvement through request for consent requirements when a final plan is proposed for adoption (see N.J.A.C. 7:15-3.4(g)4i). The Department fully expects that municipalities will implement any zoning changes made by the WMP and comply with any ordinances adopted in support of the WMP. The procedures for the review, adoption and implementation of WMPs by counties and the Department are prescribed by the rules at N.J.A.C. 7:15-3.4 and N.J.A.C. 7:15-5. Further, the Department will provide guidance and assistance to the counties as they prepare their WMPs and will provided updated guidance and checklists regarding the preparation of WMPs. Municipalities and counties will implement WMPs by making planning decisions and issuing approvals that carry out the stated intentions in the WMPs. The Department implements WMPs through consistency determination reviews for water quality related Department permits.

332. COMMENT: N.J.A.C. 7:15-3.4(b)4 which requires WQLS segments and schedules be adopted as amendments to the Statewide WQM plan and adopted TMDLs made part of areawide WQM plans is supported. This integrates the TMDL program into the watershed planning

process, making it more possible that the TMDL program can be successful, which it has not proven to be as of yet. (10, 80)

RESPONSE: The Department acknowledges the comment in support of this continuing rule provision. The Department has been aggressively developing TMDLs since 2002 and agrees that the continued implementation of identified load reductions, to be achieved or supported in part by required consistency with WQM plan provisions, will result in increased water quality improvement which is the intended result of the TMDL process.

333. COMMENT: In the past, plans have not been prepared and updated on a timely basis by the designated wastewater management planning agencies and the Department has not performed timely reviews of the documents that are submitted. The proposed rule provides a strict timeline for the submittal of updated plans by the counties, but does not provide a timeline for review and comment by the Department. A timeline for Department review and comment should be included in the regulations, along with assurance that there is adequate staff to comply with that timeline. (4, 35, 73)

334. COMMENT: The new rules should establish guidelines and timeframes for the Department to follow for reviewing and adopting county WMPs. This will increase the level of certainty and predictability associated with the county WMP process and will facilitate greater accountability by the Department's review staff. All applications involving projects or activities requiring revisions or amendments to wastewater management plans should be reviewed within a 90 day period. (9, 19)

335. COMMENT: The proposed rules lack guidelines and time frames for the Department to adhere to when reviewing the wastewater management plans for adoption which causes concern. Statements in the *Impacts Section* such as "the Department will be able to establish a close working relationship with each of the counties" are not sufficient. The rules should clearly identify the role of the Department in the review and approval process, and establish clear and decisive time frames for their review. (19, 28)

336. COMMENT: At N.J.A.C. 7:15-3.4, a specific schedule for Department review and approval/rejection of water quality and wastewater management plans and updates submitted by applicants to the Department needs to be proposed. The Department's review and approval of such plans has historically taken time with some applicants waiting several years for a final determination regarding their submissions. The Department should propose to complete its review and issue an approval/rejection letter within four months of receiving each wastewater management plan (WMP) or amendment to an approved plan. Given the Division of Watershed Management's expectation that its current level of staff assigned to complete such reviews will be doubled in size from nine to eighteen, the obligation to complete a review within four months should not be overly restrictive. (60)

337. COMMENT: The proposed regulations do not give the Department any time frame to reach a decision on an administratively complete WMP. There should be a reasonable time frame, say 180 days, for issuance of a Department decision upon receipt of a complete WMP and 90-days upon receipt of a complete WMP amendment. (46)

338. COMMENT: The proposed rules should establish time limits for the Department's review of each county WMP, after which time the county WMP would receive automatic approval. (88)

339. COMMENT: A deadline should be established by which the Department must act upon a WMP renewal application. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 333 THROUGH 339: At N.J.A.C. 7:15-3.4(g)2, the Department has 90-days to review amendment applications. However, because of the potential negative impact inappropriate development could have and the varying complexity of submissions (from a submission covering a single site to one covering an entire county) as well as the varying quality and completeness of applications, the Department does not believe that it would be appropriate to provide for automatic approval of the amendment application if, for some unforeseen reason, this timeframe can not be met. The perception that there are long time frames experienced with Department review is often a reflection of the quality and completeness of the submissions. The rule changes which reduce the number of wastewater management entities with which the Department must work and the elimination of amendments where plans are not up to date will allow Department staff to provide prompt responses and be more proactive with applicants in the development of satisfactory products. As discussed in Response to Comments 42 through 50 the Department understands/recognizes the need for it to be adequately staffed in order for these rules to be implemented successfully. The Department, therefore, will shift staff resources to support a quick-turnaround time for reviewing plans, as well as to provide for technical assistance to the counties' planning staff. Also, as discussed in Response to Comments 84

through 87, status of a WMP, in terms of submission or review, can be determined by contacting the Department, which is the current practice.

340. COMMENT: Noticing for site specific amendments is being curtailed. Every effort needs to be made to solicit public response. Any addition of a sewer area will have an impact on the surrounding areas, as well as the municipality. (36)

RESPONSE: The Department has not changed the notice requirements for site specific amendments. Accordingly, nothing regarding site specific amendments was curtailed. However, while the notice requirements for amendments have not been changed, the Department has expanded the number of activities that may qualify for processing as a revision. For the reasons indicated in Response to Comment 368, the Department does not believe that public notice of this limited range of activities that have very little or no impact on the environment is necessary.

N.J.A.C. 7:15-3.4(e) – DPA amendment procedures

341. COMMENT: Many counties will need time to revise current WQM plan revision and amendment procedures and adopt new ones based on the rules. These procedures are ordinances which require public hearings and two readings prior to Freeholder adoption. The process takes at least six weeks *after* the procedures are written. Therefore, the nine-month period to update WMPs is insufficient. (51)

RESPONSE: At N.J.A.C. 7:15-3.4(e), designated planning agency procedures adopted prior to (the effective date of this amendment) remain in effect and there is no requirement in the rules to

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revise them. The Department does not believe any of the existing designated planning agency procedures require changes to conform with these rules as the timeframes for review and procedures for adoption have not changed.

342. COMMENT: Provisions for county WMP agency review of amendments and revisions and the submission of county WMP agency review comments to the Department for consideration prior to any Department action on said projects or activities should be added to the proposed rules. (9, 19)

RESPONSE: General provisions for county WMP agency review of amendments are provided for at N.J.A.C. 7:15-3.4(g). Provisions for county WMP agency review of revisions are provided at N.J.A.C. 7:15-3.5. Counties may create their own review procedures provided they meet the timelines and review procedures established by the Department's amendment procedures at N.J.A.C. 7:15-3.4(g). Counties which are also designated planning agencies, except for Ocean County which uses the Department's procedures, already have review procedures for their areas which remain in effect, but can be amended under N.J.A.C. 7:15-3.4(e). The Department is required to consider any county WMP agency review comments prior to any Department adoption of proposed amendments pursuant to N.J.A.C. 7:15-3.4(g)4. The Department is required to consider any county WMP agency review comments prior to any Department adoption of proposed revisions pursuant to N.J.A.C. 7:15-3.5(d).

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343. COMMENT: The Department should ensure enforcement of the 90 days timeframe for rendering a decision at N.J.A.C. 7:15-3.4(g)2 after the application is deemed complete. (18, 42, 44, 45, 61)

RESPONSE: The Department will endeavor to adhere to the guideline for response contained in the rule and will review amendment applications, including WMPs, *as expeditiously as possible.*

344. COMMENT: Within 90 days of receipt of an amendment application, proposed N.J.A.C. 7:15-3.4(g)2ii allows the Department to "return the amendment application to the applicant for additional information or other necessary changes." The Department should not be able to return the application, but should only be able to request additional information from the applicant. This subsection should be amended to reflect this change. (18, 42, 44, 45, 61)

345. COMMENT: The proposal introduces a term "returned" in reference to a wastewater management plan or a chapter of the WMP. A WMP or WMP chapter can be adopted, disapproved, or returned. The term "returned" lacks substance and quantitative parameters that may lead to a WMP being "returned" for unspecified reasons or an unspecified amount of time. This may lead to a WMP languishing, with many iterations of new requested revisions. The term "returned" should be removed as a path that a WMP might follow. (19, 28)

RESPONSE TO COMMENTS 344 AND 345: In cases where the Department determines that applications are so deficient as to require what amounts to a complete new application to be sufficient, the Department believes that it is more efficient and appropriate to return the

application rather than engaging in a potentially extensive dialog to obtain missing or incomplete information. This is especially appropriate under the adopted rules where the Department is allowing amendments that are essentially complete prior to the effective date of the amended rules or WMPs that were submitted prior to the effective date of the amended rules to continue to be processed under the rules prior to these amendments. Where an application is significantly incomplete or inaccurate, it would be inappropriate to continue to toll the applicability of the new rules. However, where the application, whether a WMP filed prior to the effective date of these amendments or going forward, is substantively complete and accurate, the Department will work with the applicant to correct any deficiencies without returning the old application and requiring a new application. The Department believes the provision is appropriate as proposed.

346. COMMENT: Notifications regarding regional stormwater management plans at N.J.A.C. 7:15-3.4(g)3 should include the New Jersey Department of Transportation due to the potential applicability to public roadway projects. (30)

RESPONSE: The Department agrees with the commenters' suggestion that the New Jersey Department of Transportation should receive notifications when regional stormwater management plan amendments are proposed due to the potential applicability of these plans to public roadway projects. Therefore, on adoption, the Department has added the New Jersey Department of Transportation to the list of State entities to be notified about regional stormwater management plans at N.J.A.C. 7:15-3.4(g)3.

347. COMMENT: The process for adopting and amending the WMP and the WQMP at the county level is not clear. For example, will county freeholders have to pass a resolution to authorize a county-wide WMP? Will county freeholders have to review and approve revisions/amendments to the WMP and will they need to do so through passage of a resolution for each revision or amendment? (53)

RESPONSE: Under the Department's WQM plan amendment procedures, as an affected governmental entity, county boards of chosen freeholders will be requested to issue a written statement of consent (e.g. a resolution) before the Department adopts a WMP, WMP update or WQMP amendment for any proposal within their county. However, while there is a notification requirement and comment period for proposed revisions under N.J.A.C. 7:15-3.5(d), statements of consent are not required from county boards of chosen freeholders for revisions.

348. COMMENT: Under the proposed rules, it appears that the WMP will, in effect, become the Water Quality Management Plan for each county. Amendments to the WQMP will actually be amendments to the WMP and only consistency determinations and minor revisions will be handled outside the WMP amendment process. What will be the role of non-county Designated Planning Agencies in reviewing these amendments, if a WMP created by the county is being amended? (53)

RESPONSE: Wastewater management plans remain a separate plan from Water Quality Management Plans and Designated Planning Agencies will continue to play the same role as they

currently do with respect to adopting amendments, including wastewater management plans, to areawide WQM plans.

349. COMMENT: There should be a public process if the Department proposes modification to a county WMP and this process should include a collaborative effort between all stakeholders. (19)

RESPONSE: The rule at N.J.A.C. 7:15-3.4(g) sets forth opportunities for coordination among affected entities and a public review and comment process for all amendments to areawide WQM plans, including any amendments initiated by the Department. Thus, there will be a collaborative process and a public process for modifications to a county WMP.

350. COMMENT: Proposed N.J.A.C. 7:15-3.4(g)4i allows the Department "as part of each notification of a decision" to "identify a list of governmental entities, sewerage agencies, and BPU-regulated sewer and water utilities that may be affected by, or otherwise have a substantial interest in, approval of the proposed amendment, and that shall be asked to issue written statements of consent for the proposed amendment." Since public comments will not be invited in all cases, (proposed N.J.A.C. 7:15-3.4(g)7), the Department should be required to identify these other entities in advance, rather than when a decision is rendered. Not only would this allow for the applicant to be aware of the identity of these interested groups, it would also avoid these entities from being identified on a case-by-case basis. (18, 42, 44, 45, 61)

RESPONSE: Public comment is solicited on all amendments published in the New Jersey Register pursuant to N.J.A.C. 7:15-3.4(g)6. N.J.A.C. 7:15-3.4(g)7 does not limit public comment on amendments published in the New Jersey Register, rather it provides a mechanism for an optional additional public hearing on amendment requests. Thus, the commenters are mistaken when they state that public comments will not be invited on all amendments. Under N.J.A.C. 7:15-3.4(g)4i, the Department does provide a list of entities that shall be asked to issue written statements of consent for the proposed amendment prior to publication of the public notice in the New Jersey Register. Notification of the list of entities at this time is prior to when a final decision is rendered and provides 60 days for these entities to respond. Additionally, the Department usually provides this same list to applicants for informational purposes as part of a review letter on the amendment application. However, the list is created on a case-by-case basis no matter where in the amendment process it happens as each amendment has the potential to affect different entities and all applicable entities should be included in amendment reviews for which they have an interest.

351. COMMENT: No wastewater management plan amendment should be permitted unless expressly endorsed by the DPA. The time frame for review of said amendments by the DPA should be at least 60 days. (46)

RESPONSE: Where the commenter referenced a designated planning agency, the Department believes he meant that WMP amendments should not be permitted where not endorsed by the countywide regional sewerage authority and these authorities should have at least 60 days to review amendments. Designated planning agencies will continue to play the role with respect to

WQM plan amendments as they do under the rule prior to the adopted amendments. Those DPAs that have amendment review responsibility and approved procedures would continue to perform that role in accordance with the approved procedures. On the other hand, countywide regional sewerage authorities do not have the same authority as DPAs and do not have the decision making authority to reject WQM plan amendments. However, countywide regional sewerage authorities do have the opportunity to provide statements of consent, or reasons why such consent is withheld, as part of the amendment process, and are provided with 60 days to provide same.

352. COMMENT: N.J.A.C. 7:15-3.4(g)6 and 7 provides for public comment and allow requests for public hearings. However, proof of a public hearing at the municipal level should be required when the entity proposing an amendment is a municipality. (22, 76)

RESPONSE: The Department believes it would be an unnecessary burden on applicants and the municipality to require a local public hearing at the municipal level on every amendment proposed by a municipality. Proposals of a size to require a WQM plan amendment, would likely have to undergo local planning board approval, thus there should be an opportunity for public comment at the local level, prior to an application being made to the Department.

353. COMMENT: Proposed N.J.A.C. 7:15-3.4(g)7 allows for the Department to determine if "significant interest" warrants a public hearing to be held. Instead, the Department should hold a public hearing **only** if the additional information could not be submitted by written comment, thereby requiring a public hearing format for comment. (18, 42, 44, 45, 61)

RESPONSE: The Department believes that the public should have the opportunity to comment on amendment proposals through the non-adversarial public hearing process laid out in the rules and will not limit the public's ability to comment in a verbal forum.

354. COMMENT: N.J.A.C. 7:15-3.4(g)7, where public notice in two newspapers is reduced to only one newspaper, should not be adopted. The Department should continue to encourage and seek out public participation and reducing the number of publications is contrary to this goal. (64)

355. COMMENT: There is objection to reducing the publication of a public notice regarding a public hearing about a WQM plan amendment from two newspapers to one newspaper at N.J.A.C. 7:15-3.4(g)7. Interested parties often read different papers depending on what news service area they live in, which is particularly true for areas that are served by weeklies and dailies. Two newspapers allow for more public access to the information regarding the proposed amendment, which is a good thing for both the applicant and the planning area affected and is not a burdensome expense for the applicant. (10, 80)

RESPONSE TO COMMENTS 354 AND 355: The Department concurs that public input is essential to inform good decisions with regard to WQM plan amendments. However, in the Department's experience, publication in one newspaper has been sufficient for purposes of secondary notification for a public hearing. Accordingly, the amendment to reduce the publication requirement has been adopted as proposed.

356. COMMENT: The reference to both "wastewater management plans" and "wastewater management plan updates" at proposed N.J.A.C. 7:15-3.4(g)9 is confusing. The Department must be specific as to which formal application process applies (for example, initial applications for areawide WMPs under this proposal, readoptions of areawide WMPs, and WMP amendments). It should also be made clear that this does not apply to site specific amendments. (18, 42, 44, 45, 61)

RESPONSE: The requirement that proof of adoption of municipal ordinances required under N.J.A.C. 7:15-5.25 be submitted before any approval may be granted would not apply to a site specific amendment that did not require any type of wastewater management plan (new or update, there are no provisions for readoption of WMPs). The Department believes that inapplicability of this requirement to site specific amendment is clear by the omission of reference to this category in N.J.A.C. 7:15-3.4(g)9. However, very few site specific amendments will be processed under this rule and once WMPs are adopted Statewide, all site specific amendments would be updates to WMPs, which are required to meet the proof of adoption of municipal ordinances provision.

357. COMMENT: At N.J.A.C. 7:15-3.4(g)9, the proposal that WMPs and plan updates not be approved unless documentation has been submitted to the Department demonstrating that municipal ordinances as required under N.J.A.C. 7:15-5:25 have been adopted and conform to the requirements of this chapter is opposed. Each county board of chosen freeholders, which serves as the wastewater management planning agency, does not have the authority to require

municipalities to adopt such ordinances. Therefore, this proposed submission requirement should be deleted. (60)

RESPONSE: The Department recognizes that counties cannot adopt the required ordinances, a municipality must do that. However, in order for a municipality's chapter to be included as a satisfactory component, the municipality must provide the required ordinances. Failure to do so would mean the municipal chapter will not be included and sewer service area in that municipality will be withdrawn in accordance with N.J.A.C. 7:15-8.1(a).

358. COMMENT: Developing a WMP is an arduous enough process. Requiring the simultaneous development and adoption of the required municipal ordinances at N.J.A.C. 7:15-3.4(g)9 will subject the WMP agency to an even longer time frame. The requirements outlined for WMPs and ordinances will never be accomplished within the nine months allocated in the rules. In effect, these rules serve as a defacto moratorium on any land use activity. (66)

RESPONSE: The requirements for WMP development have been revised as part of this rulemaking so that most of the work will be accomplished as a GIS exercise. In addition, the Department is prepared to provide technical assistance upon request, on topics such as the initial sewer service area delineation, GIS tools to complete the build-out analysis, and model ordinances to facilitate completion of satisfactory plans. Through these refinements to the WMP development requirements, the Department believes the established timeframe is adequate. In the event that, despite good faith efforts, there is reasonable cause, an extension of the timeframe for WMP development can be accomplished in accordance with N.J.A.C. 7:15-5.22(f).

359. COMMENT: N.J.A.C. 7:15-3.4(g)9 states wastewater plans and updates will not be approved unless the documentation is submitted to the Department demonstrating that municipal ordinances that are required under N.J.A.C. 7:15-5.25 have been adopted. Could this mean one municipality could delay the adoption of an entire county wastewater plan? What effect would this delay have on other municipalities that are in compliance? (14)

360. COMMENT: At N.J.A.C. 7:15-3.4(g)9 clarification is needed that only the relevant municipal chapter shall not be approved if the wastewater management planning agency fails to submit documentation demonstrating that the required municipal ordinances have been adopted and do conform to the requirements of the chapter. (38)

RESPONSE TO COMMENTS 359 AND 360: N.J.A.C. 7:15-5.14(b) provides that each municipality is considered independently through its chapter in the WMP and allows each municipal chapter to be adopted, returned or disapproved accordingly, regardless of the progress of the county-wide WMP. This provision is not intended to prevent counties from planning on a regional basis and filing a WMP to cover the entire county. It is intended to provide an alternative to penalizing municipalities that are participating in the process where county-wide compliance is not possible because of a recalcitrant municipality. No amendment to N.J.A.C. 7:15-3.4(g)9 is necessary to allow only the complying portions of the WMP or the applicable municipal chapters to be adopted.

THIS IS A COURTESY COPY OF THIS RULE. THE OFFICIAL VERSION WAS PUBLISHED IN THE JULY 7, 2008 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPENCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE PROPOSAL, THE OFFICIAL VERSION WILL GOVERN.

361. COMMENT: The Department should adopt enforcement measures (in other words sanctions) to ensure that municipalities adopt the required ordinances pursuant to N.J.A.C. 7:15-5.25 which are required for WMP adoption at N.J.A.C. 7:15-3.4(g)9. Without some mechanism in place and enforced by the Department, developers and property owners will be subject to a temporary taking until the municipality adopts the ordinance. (18, 42, 44, 45, 61)

RESPONSE: The enforcement measure provided is the withdrawal of wastewater service area should a municipality fail to adopt the required ordinances to implement the WMP. The Department anticipates that municipalities will follow through and amend their ordinances as necessary since they will not want to lose the jobs and possible revenues associated with new development.

362. COMMENT: The proposed rule allows the Department to make changes to proposed county WMPs without seeking feedback on those changes from the implementing county agencies and municipal governments that might offer alternative solutions based on a detailed knowledge of local conditions. The rules should allow county WMP agencies, affected municipalities and other stakeholders to evaluate the Department's recommended modifications to proposed WMPs and give them the opportunity to offer other alternative solutions that take into consideration detailed knowledge of local conditions. The Department must be required to substantiate all of its changes to, or disapprovals of, county WMP updates and amendments to WQM plans. (78)

363. COMMENT: The Department should not be permitted to make modifications directly to proposed updated county WMPs without approval from county WMP agencies. N.J.A.C. 7:15-3.4(g)9 which states that the Department may "prepare a new proposed plan amendment, appropriately modified…" and further states that "except where the Department has already disapproved or returned the proposed amendment…, the Governor or his designee shall render a final decision on the amendment," and "adopt the amendment" is opposed The proposed new rules must include a process through which county WMP agencies, affected municipalities and other stakeholders can evaluate the Department's recommended modifications to updated WMPs, and can offer alternative solutions that take into consideration detailed knowledge of local conditions. The Department must substantiate all of its requests for changes to, or disapprovals of county WMP updates and amendments to WQM plans. (9, 19)

RESPONSE TO COMMENTS 362 AND 363: The Department provides opportunities for WMP agencies and municipal governments to suggest changes to WQM plan amendments including WMPs when amendment review letters are sent out under N.J.A.C. 7:15-3.4(g)2 requesting additional information or other necessary changes. Many of these letters are followed up by meetings with the Department to discuss the Department's recommended changes to proposed WMPs or amendments which allow these other entities to suggest alternate modifications. This collaborative process occurs prior to the formal publication of a public notice in the New Jersey Register and the Department's final decision making process at N.J.A.C. 7:15-3.4(g)9.

The rule does not allow the Department to make changes to proposed county WMPs or any amendments without seeking comments from county agencies, municipal governments, other

governmental entities or the general public. N.J.A.C. 7:15-3.4(g)8 provides that the Department may "prepare a new proposed plan amendment, appropriately modified, for proposal under this section" which means that the application would have to be publicly noticed with a comment period and that affected governmental entities would have to be solicited to consent to the re-proposal. N.J.A.C. 7:15-3.4(g)9 provides the Department's decision-making options after any proposed amendment, whether proposed by the Department or not, has been publicly noticed in the New Jersey Register. Prior to this decision-making stage, the Department has reviewed any comments from applicable WMP agencies and local governments, any public comment received as well as any statements of consent or comments submitted by applicable governmental units. The Department can only adopt an amendment as proposed, adopt the amendment with changes that don't effectively destroy the value of the public notice or disapprove the amendment after it has been through an inclusive review process and including consideration of any comments received on the proposal. Further, the Department is required to substantiate any amendment disapproval as part of the final decision on that amendment. Thus, the rules already require the Department to seek and consider the county and municipal feedback and to substantiate requests for changes to, or disapprovals of, county WMP updates and amendments to WQM plans as requested by the commenters.

364. COMMENT: Proposed N.J.A.C. 7:15-3.4(j) requires that any amendment to an adopted wastewater management plan for projects in the Highlands preservation area must first be endorsed by the Highlands Council before the Department will take action. If the county is the designated entity, then the proposal is inconsistent in requiring a recommendation from the Highlands Council. Further, the Highlands Council does not have a procedure in place to review

and make recommendations on Water Quality Management plan amendments. (18, 42, 44, 45, 61)

RESPONSE: N.J.A.C. 7:15-3.4(j) provides that applications for plan amendments in the Highlands preservation area that require a Highlands Preservation Area Approval shall use the application filing procedures in the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38-11.6. If the Department determines to proceed with the amendment application, then the procedures in this rule govern. N.J.A.C. 7:15-3.10(a), requires the Department to seek comments from the Highlands Council on any proposed WQM plan amendment or revision in the Highlands Region. The Department will seek these comments prior to making a decision pursuant to N.J.A.C. 7:15-3.4(g)2iii to proceed further with the amendment request by publishing a preliminary notice in the New Jersey Register, thus a Highlands Council endorsement is not required before the Department will undertake any application review actions. Additionally, the Highlands Council does have a process by which they review and make recommendations on WQM plan amendments. The Highlands Council, not unlike the Pinelands Commission or the New Jersey Meadowlands Commission, is not required to adopt rules to govern its review of WQM plan amendments.

365. COMMENT: The provision at N.J.A.C. 7:15-3.4(l), which prohibits the alteration of a sewer service area as an amendment to a WQM plan where a sewer connection ban is in effect or a WMP is not in compliance with the schedules at N.J.A.C. 7:15-5.23 unless it is part of a new or updated WMP, is strongly supported. (22, 76)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

366. COMMENT: At N.J.A.C. 7:15-3.4(l)1, the proposal to delete the established preference for expanding or upgrading existing regional DTWs when such action is cost effective, environmentally sound and feasible is opposed. Use of existing regional DTWs, considering 201 Facilities Plan grant funding, represents environmentally sound policy and therefore, this rule should be retained. (60)

RESPONSE: Grant funding under the 201 Facilities Planning process which identified expansions of a domestic treatment works and associated future sewer service areas consistent with a previously issued "Finding of No Significant Impact" (FNSI) are dated, with the last FNSI having been issued in 1985, and circumstances, including stream classification and water quality standards, may have changed since a FNSI was issued. Each proposal for expansion of a wastewater treatment facility or sewer service area must be evaluated on its merits relative to the standards and rules that currently apply. The Department believes that it is incorrect to assume that expansion of a regional treatment facility should always be the preferred wastewater treatment option. In consideration of all environmental factors, wastewater treatment alternatives, instead of a regional STP expansion, should be considered. For example, experience has shown that decisions made to discharge significant amounts of fresh water to the oceans has led to reduced recharge and depletion of water resources. It would be unwise to continue this policy without consideration of wastewater treatment alternatives.

367. COMMENT: At N.J.A.C. 7:15-3.4(l)2, the Department is proposing that a sewer service area change will not be allowed if the wastewater management plan is not in compliance with the schedule at N.J.A.C. 7:15-5:23. This proposed change is opposed. Recognizing the original 201 Facility Plan approvals and grant conditions, it is unreasonable for the Department not to allow limited sewer service area changes, which are economically prudent and environmentally beneficial. (60)

RESPONSE: See Response to Comment 366 for a discussion of the original 201 Facility Plan approvals and grant conditions process. These additional restrictions on sewer service area changes at N.J.A.C. 7:15-3.4(l) are intended to support the overall objective of the rule to maintain up to date WMPs as the appropriate base for decision making regarding projects or activities requiring a Department permit.

N.J.A.C. 7:15-3.5

368. COMMENT: The rule proposal should be re-proposed to reduce the substantive revisions and limit them to clerical errors and corrections. (22, 76)

RESPONSE: The allowance for substantive revisions has been in the rule since May 5, 1997. The Department believes that certain projects where it has been determined that the environmental standards have been met and that no significant individual or cumulative impacts will occur should be allowed to qualify for a less extensive and time consuming administrative and comment process. The Department has strengthened the criteria and limited the scope of projects that may qualify as a revision to ensure the best possible environmental protection. In

many instances revisions are only allowed if the WMP is current in accordance with the schedule at N.J.A.C 7:15-5.23. As such, the overall regional environmental evaluations and protections have already been put in place. The Department does not believe that removing such changes from the public notice and comment undercuts the rule or protection of the environment.

369. COMMENT: The proposed rule amendments drastically reduce the number of acres throughout the State that may be responsibility developed. Where development on septic systems is indicated, the proposed rules require that a developer of six houses must submit a TWA application to the Department for approval and, among other constrains, the development must occupy a minimum of 25 acres. The developer of 23 houses must submit a TWA application to the Department for approval and, among other constraints, the development must occupy a minimum of 100 acres. Before these rules become effective, an independent cost impact analysis on property taxes must be conducted. (15, 21, 67)

RESPONSE: The rule does not require Department TWA permits for development on individual subsurface sewage disposal systems and it does not specify minimum acreage occupancy for these developments other than the development must meet the two mg/L nitrate planning target for the HUC 11 watershed they are located in. Further, the revised thresholds for amendment review do not prohibit development above the thresholds. Development above the thresholds will be reviewed against environmental standards and acceptable development will qualify for a WQM plan revision or possibly an amendment, if the WMP is up to date. A proposed new development on individual subsurface sewage disposal systems of five or fewer houses is an activity considered to be consistent with the areawide WQM plan and does not require a WQM

plan revision or amendment. A proposed new 23 house development on individual subsurface sewage disposal systems, if being build on less than 100 acres, may qualify for a WQM plan revision, if the site is able to meet the nitrate dilution standard in the rules. The lowered thresholds were necessary to help prevent cumulative impacts from development that goes unassessed relative to the environmental standards. The rule encourages growth and development in areas where infrastructure exists and that are not environmentally constrained. The rule continues the integration of water resource management and land use planning to ensure that adequate wastewater treatment capacity exists to support local and regional land use plans. Significant economies, efficiencies and savings will be realized by both public and private development projects if land use planning, at all levels of government, become consistent through integrated planning. Sound comprehensive water quality and land use planning can dampen sprawl development. Studies of the economic impact of continued sprawl development compared to more center based development make clear that the cost of providing municipal services to sprawl development is significantly greater.

370. COMMENT: The language in the proposed rules as it pertains to Water Quality Management Plan revisions and amendments is supported. The proposed rules clearly outline that revisions are available for simple modifications such as updating incorrect information, establishing alternate assignment of wastewater management planning responsibility, and other minor changes, but that all other modifications will be required to undergo the more rigorous analysis and review as an amendment. (82)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

371. COMMENT: For every positive in the rules, there seems to be a negative that sends the rules in the wrong direction. Whole sections of these rules need to be rewritten. These sections are opposed not only because they are bad planning, but also because they will add more pollution and more sprawl, negatively impacting New Jersey's waterways. Most of N.J.A.C. 7:15-3.5 is opposed because this section undermines the overall water quality planning and creates a whole series of loopholes that are justifications for more sewers and sprawl. (49, 79)

RESPONSE: The provisions for revisions at N.J.A.C. 7:15-3.5 were carefully crafted to balance the need to prevent cumulative impacts of unassessed development with the need to allow smaller activities to proceed without the full public process required for amendments, which would create an unnecessary administrative burden. The Department believes that certain projects where it has been determined that the environmental standards have been met and that no significant individual or cumulative impacts will occur should be allowed to qualify for a less extensive and time consuming administrative and comment process. The Department has strengthened the criteria and limited the scope of projects that may qualify as a revision to ensure the best possible environmental protection. In many instances revisions are only allowed if the WMP is current in accordance with the schedule at N.J.A.C 7:15-5.23. As such, the overall regional environmental evaluations and protections have already been put in place. The Department does not believe that removing such changes from the public notice and comment undercuts the rule or protection of the environment.

N.J.A.C. 7:15-3.5(b)

372. COMMENT: It should be made clear as to who has standing to submit an application for a revision. (18, 42, 44, 45, 61)

RESPONSE: The Department does not restrict the entities that can submit an application for a revision. Applications from any reasonable entity such as the property owner, developer or their agents, or a WMP or designated planning agency are accepted. The application must be submitted in writing in accordance with the Department's application procedures at N.J.A.C. 7:15-3.5 and any applicable designated planning agency application procedures.

373. COMMENT: Revisions, which require less analysis, should be deemed by the Department to comply with the environmental standards in the rule or be processed as an amendment. However, this could become a loophole if less than rigorous review is done by the Department. (10, 80)

RESPONSE: N.J.A.C. 7:15-3.5(b)4 requires that the revision comply with the environmental standards established in N.J.A.C. 7:15-5.24 and 5.25, as applicable. N.J.A.C. 7:15-3.5(d) specifies that if the Department is unable to determine that a proposed project or activity qualifies as a revision based on the information in the application, or submitted after notification of the need for additional information, the Department will review the proposal as an amendment. Therefore, the rule requires that only those projects or activities that qualify as revisions are processed as revisions.

374. COMMENT: N.J.A.C. 7:15-3.5(b)4 includes cumulative impacts, but it does not include secondary growth impacts and thus would not consider secondary impacts surrounding the development that would utilize an approval issued for capacity. How are secondary impacts calculated? The rule should be obligated to calculate secondary impacts. (86)

RESPONSE: The rule requires agencies to assess and provide for wastewater and water supply needs based on the environmental build-out capacity of each sewer service or other wastewater service area. The rule establishes criteria for evaluating ground water impacts, stormwater impacts including riparian zone and steep slope considerations, and impacts to threatened and endangered species habitat. The standards require consideration of anti-degradation requirements prior to approval of a plan with new or expanded discharges to surface water. The establishment of a nitrate planning standard of two mg/L of nitrate for projects involving a discharge to ground water will ensure that, considering the State as a whole, the ground water quality will not be degraded. As such, environmental based capacity limits will control the maximum development that can occur within a given sewer service or other wastewater service area.

375. COMMENT: Proposed N.J.A.C. 7:15-3.5(b)4 does not indicate whether there will be any opportunity for public notice or comment on revisions as the rules state this opportunity will be afforded only to “certain directly affected municipal and county agencies and other interests as identified by the Department.” There is no indication what is meant by “other interests” or how and under what circumstances the Department will identify such interests as warranting the

opportunity for notice or comment. This needs to be clarified to state that the public will have the opportunity for notice and comment of all revisions. (17, 49)

RESPONSE: The categories of revisions in the new rule have been carefully defined to be limited to actions that are not significant in scope and are determined by the Department to conform to the standards at N.J.A.C. 7:15-5.24 and 5.25 The Department has strengthened the criteria and limited the scope of projects that may qualify as a revision to ensure the best possible environmental protection. In many instances revisions are only allowed if the WMP is current in accordance with the schedule at N.J.A.C 7:15-5.23. As such, the overall regional environmental evaluations and protections have already been put in place. Additionally, at N.J.A.C. 7:15-3.5(d), the rule specifies that agencies identified at N.J.A.C. 7:15-5.22, which are the same agencies that must be notified regarding WQM plan amendments, must be provided a copy of the proposed revision and provided with 21 days to comment on the proposal. The public at large will not be notified via public notice, but the Department believes due to the limited scope of projects involved and the provision for review by the affected entities including but not limited to municipalities, wastewater management planning agencies, sewerage and utility authorities, and water purveyors, there is sufficient availability for concerns to be provided to the Department for consideration. The Department does not believe that removing such changes from the public notice and comment undercuts the rule or protection of the environment.

376. COMMENT: Unlike the provision for amendments, it is unclear (in other words the rules are silent on) whether the Department is required to act on applications for revisions within a certain period of time. To the extent some other provision in the rules mandate that the

Department must act upon revisions within a certain time period and if a failure to act within that period is deemed to be an approval of the revisions, then any such language to that effect should be deleted. (17, 49)

RESPONSE: The rule does not specify any time period within which revisions must be acted upon. The Department intends to follow the same time period established for the review of amendments when reviewing revisions. However, because of the potential negative impact inappropriate development could have (for example, what if the revision application does not qualify as a revision) as well as the varying quality and completeness of applications, the Department does not believe that it would be appropriate to provide for automatic approval of the revision application if, for some unforeseen reason, this timeframe can not be met. Thus, no amendments to the rule are necessary.

N.J.A.C. 7:15-3.5(b)4i

377. COMMENT: At N.J.A.C. 7:15-3.5(b)4i, the language seems to be tied to approval of expansions in reference to a total maximum daily load. On adoption that language should be tightened up to say approvals under the rules can not be issued unless a total maximum daily load has been adopted, wasteloads have been allocated, and NJPDES permits including water quality based effluent limits that obtain the standard are issued.

For example, if an expansion of a sewer service area in an impaired watershed where there was existing approved permitted NJPDES capacity to serve the flow is proposed, the Water Quality Management plan approval should be conditioned upon the actual inclusion of the water quality

based effluent limit in that NJPDES permit such that the developer could not connect and proceed with the development until the sewage treatment plant that is receiving the flow had its permit modified. Otherwise, there will be no change from what happens under the rules now, which is the assimilative capacity has been exceeded and the water bodies are impaired, while the planning process still allows wastewater management plans, site specific plans, expansion of service areas, expansion of flows, and re-rating of plants to be approved. That void has to be filled and this is the way to get the discharger community onboard to implementing the TMDL program because when connections can't be made until that plant is in compliance, it will be effectively the equivalent to a sewer ban. Right now across the State the Department continues to issue Water Quality Management plan approvals and NJPDES permit renewals, modifications and revisions without the plant being in compliance with the Clean Water Act. (86)

378. COMMENT: N.J.A.C. 7:15-3.5(b)4i, which allows increased discharges into an impaired waterbody, whether there is an adopted TMDL or not, is opposed. This allows an already impaired water body to continue to degrade in violation of the Clean Water Act. (49, 79)

RESPONSE TO COMMENTS 377 AND 378: The comment is confusing in that the first commenter discusses the expansion of sewer service area as his example. However, N.J.A.C. 7:15-3.5(b)4i specifies that this revision type is only allowed for industrial treatment works where no change in wastewater service area or discharge type is proposed. Additionally, this provision only allows expansions of industrial treatment works if the discharge is not to an impaired waterbody for which a TMDL has been proposed or adopted. Further, if the discharge

is to a listed (impaired) waterbody and the discharge contains any of the parameters that are the basis for the listing, the expansion may be allowed under the revision procedures if the expansion is consistent with the wasteload allocations set forth in an adopted TMDL developed for the affected waterbody for the listed parameters in the discharge. Industrial treatment works expansions that cannot meet these requirements cannot be adequately assessed under the revision procedures for compliance with the standards at N.J.A.C. 7:15-5.25 and must be reviewed as amendments. The Department believes that approvals issued pursuant to this provision will be in compliance with the Clean Water Act.

379. COMMENT: The rule is silent on exactly what type of information is needed for a WQMP/WMP as it relates to industrial discharges. Will WQMP/WMP language be specific to include the exact amount of flow from each industrial facility in a planning area? If the flow changes by one gallon per day (gpd), would a plan revision or amendment be needed? There are no de minimis thresholds specified in the rule. The rule should include de minimis language that would not hamper industrial expansions that do not impact water quality or water supply. This would create undue delays and will cost needless resources and considerable monies to rectify. (7, 20, 69)

RESPONSE: The information requirements needed for a WQMP/WMP for industrial treatment works are contained in N.J.A.C. 7:15-5.16 and 5.18 and include such things as name, owner, location, NJPDES permit number, actual flow, permitted flow and planning flow. The Department recognizes that determining wastewater planning flow from industrial facilities that are continually changing product lines is difficult. Thus, the Department has provided WQM

plan revision opportunities, which qualify for a less extensive and time consuming administrative and comment process than amendments, for industrial dischargers where the Department believes these types of discharges can meet the environmental standards and that no significant individual or cumulative impacts will occur from these activities. N.J.A.C. 7:15-3.5(4)i allows for increases in flow from industrial treatment works where there is no change in the wastewater service area or discharge type (for example, a change from a surface water discharge to a ground water discharge), that do not involve a discharge to an impaired waterbody segment for which a TMDL has been proposed or adopted, and that provide a demonstration that adequate water supply is available to support the expansion. Additionally, if the discharge is to a listed (impaired) waterbody and the discharge contains any of the parameters that are the basis for the listing, the expansion may be allowed under the revision procedures if the expansion is consistent with the wasteload allocations set forth in an adopted TMDL developed for the affected waterbody for the listed parameters in the discharge. Industrial treatment works expansions that cannot meet these requirements cannot be adequately assessed under the revision procedures for compliance with the standards at N.J.A.C. 7:15-5.25 and must be reviewed as amendment. Also, at N.J.A.C. 7:15-3.5(b)4iv, any change in the estimated planning flow (see N.J.A.C. 7:15-5.16(b)8) or permitted flow (see N.J.A.C. 7:15-5.16(b)9) of less than 8,000 gallons per day to an existing NJPDES regulated discharge to ground water, provided there is no change to the sewer service area and the same general type of treatment works is proposed. These provisions also allow for the processing of the revision prior to or simultaneously with the NJPDES permit for the same change in flow. There are no fees associated with revision applications to the Department. As such, the Department has tried to minimize both time delays and costs associated with these revisions.

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N.J.A.C. 7:15-3.5(b)4ii

380. COMMENT: In N.J.A.C. 7:15-3.5(b)4ii, the ability to trade 8,000 gallons of sewage from one TWA to another is open ended and could happen multiple times within one municipality or to another municipality. This scheme will open up many areas to development and more pollution without proper environmental analysis and is opposed. (49, 79)

381. COMMENT: N.J.A.C. 7:15-3.5(b)4ii is opposed as the transfer of sewer service area from one domestic treatment works to another is a rare occurrence that should be an amendment unless it is in the same municipal jurisdiction. (22, 76)

RESPONSE TO COMMENTS 380 AND 381: As a point of clarification, N.J.A.C. 7:15-3.5(b)4ii does not limit the transfer of sewer service area to 8,000 gpd. Under N.J.A.C. 7:15-3.5(b)4ii, the areas to be transferred must already be identified for sewer service, must be contiguous, both treatment works must have capacity, and both wastewater management planning agencies must concur with the proposed revision. Additionally, as with all revisions, local governmental entities will be provided an opportunity to comment on the proposal for a three week period. Thus, the Department does not believe this provision opens up areas to development as these areas were already planned for development. Further, adopted N.J.A.C. 7:15-3.5(b)4ii requires all affected wastewater management plans to be up to date in order to qualify for this revision to apply. This will provide a basis to evaluate the proposed change with respect to continued compliance with the environmental standards at N.J.A.C. 7:15-5.25 and is why an amendment was not required. While it is possible that multiple revisions could be

requested under this provision, the Department believes that having up to date WMPs in place will ensure the environmental standards at N.J.A.C. 7:15-5.25 are maintained. Further, the Department has the option to require an amendment if necessary.

N.J.A.C. 7:15-3.5(b)4iv

382. COMMENT: The provision at N.J.A.C. 7:15-3.5(b)4iv which allows changes to wastewater flows of less than 8,000 gallons per day to existing NJPDES permitted facilities provided certain conditions are met should only be allowed for a one-time increase. (22, 76)

RESPONSE: N.J.A.C. 7:15-3.4(b)4 provides that the determination that WQM plan revisions effecting substantial changes will not result in significant individual or cumulative impacts to environmentally sensitive areas or other natural resources, will be based on the Department's assessment that the projects or activities meet the environmental standards at N.J.A.C. 7:15-5.24 and 5.25. Where compliance cannot be conclusively determined by the Department's review of existing information, the Department will either determine to process the proposed revision as an amendment or obtain additional information on the project from the applicant necessary to enable the Department to determine compliance with the standards at N.J.A.C. 7:15-5.24 and 5.25. Thus, while proposals under N.J.A.C. 7:15-3.5(b)4iv, which allow changes to wastewater flows of less than 8,000 gallons per day to existing NJPDES permitted facilities provided certain conditions are met, are not limited to a one-time increase, should additional revision proposals to expand the same facility trigger a concern that an additional expansion would have a significant individual or cumulative impact to environmentally sensitive areas or other natural resources, a WQM plan amendment would be required.

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N.J.A.C. 7:15-3.5(b)4v

383. COMMENT: At N.J.A.C. 7:15-3.5(b)4v, the expansion of the sewer service area should be tied into an adopted TMDL with inclusion of water quality based effluent limited in NJPDES permits. (86)

RESPONSE: N.J.A.C. 7:15-3.5(b)4v provides for expansion of a future sewer service area to contiguous lots, where the expansion involves less than 100 acres, contributes less than 8,000 gallons per day of additional wastewater flow, and does not create a significantly new pattern of sewered development such that a significant potential or incentive is created for additional revisions or amendments to open new areas to sewered development. A revision under this subparagraph shall be processed only if the applicant demonstrates that the receiving domestic treatment works has sufficient capacity under the projected build-out to serve the proposed development in addition to its existing approved sewer service area, and any affected wastewater management plan is current in accordance with the schedule at N.J.A.C. 7:15-5.23. Thus, proposed expansions under this provision can only occur where the wastewater treatment plant has an existing NJPDES permit which should already include water quality based effluent limits that meet any adopted TMDL.

384. COMMENT: N.J.A.C. 7:15-3.5(b)4v which allows a revision for a sewer service area of less than 100 acres that generates less than 8,000 gallons per day of wastewater should be processed as an amendment and not as a revision. These projects could generate as many as 26

houses (300 gpd wastewater generation) on 3.8 acre lots. Such lot sizes could be part of an area served by individual septic systems rather than through a treatment facility. (22, 76)

RESPONSE: To qualify for a revision under N.J.A.C. 7:15-3.5(b)4v, there must be an up to date WMP, which will ensure the revision does not compromise the assessment of current and future wastewater management needs. Where a WMP is up to date, there has been adequate consideration of the cumulative impacts of wastewater management decisions. The applicant must demonstrate that the receiving domestic treatment works has sufficient capacity under the projected build-out. Once sufficient capacity is demonstrated, the Department's review will include assessment of any impacts to environmentally sensitive areas and where a more detailed review of water resources impacts is necessary, a WQM plan amendment would be required instead of a revision.

385. COMMENT: At N.J.A.C. 7:15-3.5(b)4v, the Department is proposing to limit the processing of revisions to expand sewer service areas for contiguous lots (less than 100 acres/8,000 gallons per day) to only those areas which have an up to date wastewater management plan. This change is opposed as such minor adjacent development would not create a significant new pattern of sewered development nor would it have a noteworthy impact on sewer service area capacity or water resources. (60)

RESPONSE: These additional restrictions on sewer service area changes at N.J.A.C. 7:15-3.5 (the requirement to have an up to date WMP) are intended to support the overall objective of the rule to maintain up to date WMPs as the appropriate base for decision making regarding projects

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or activities requiring a Department permit. When WMPs are up to date, expansions of sewer service areas for contiguous lots of less than 100 acres and 8,000 gallons per day will be minor.

N.J.A.C. 7:15-3.5(b)4vi

386. COMMENT: The proposed regulations would impose significant burdens on developers of commercial properties seeking to use septic systems with flows greater than 2,000 gpd. The proposed regulation should be amended to provide a streamlined procedure for WMP amendments relating to septic systems with flows that exceed the 2,000 gpd limit by only de minimis volumes. A streamlined procedure for de minimis flows above 2,000 gpd is particularly appropriate for single-user commercial projects where the flows are predictable. (43)

RESPONSE: The Department has determined that continuing to allow unlimited amendments would be contrary to achievement of the overall objective of the rule to maintain up to date WMPs as the appropriate base for decision making regarding projects or activities requiring a Department permit. However, at N.J.A.C. 7:15-3.5(b)4vi, the Department has provided for WQM plan revisions where WMPs are not in compliance with the schedule at N.J.A.C. 7:15-5.23 for projects utilizing individual subsurface sewage disposal systems where the project involves less than 100 acres and generates less than 8,000 gallons per day of wastewater flow. If the proposed development is residential, the 8,000 gallons per day is roughly equivalent to 22 residential units. Revisions under this category will still be required to analyze the effects of the ground water discharge on nitrate concentration pursuant to N.J.A.C. 7:15-5.25(e). Thus, the Department has provided a streamlined procedure for proposals relating to septic systems with de minimis volumes of wastewater flows of less than 8,000 gallons per day.

387. COMMENT: The ability to add 100 acres next to existing sewer service area at proposed N.J.A.C. 7:15-3.5(b)4vi could extend sewers 100 acres at a time into infinity, adding more pollution and more sprawl. (49, 79)

RESPONSE: The Department believes the commenter meant N.J.A.C. 7:15-3.4(b)v and not 3.4(b)vi as 3.4(b)vi addresses individual subsurface sewage disposal systems and 3.4(b)v deals with sewer service area expansions. As discussed in Response to Comment 382, should additional revision proposals to expand the same sewer service area trigger a concern that an additional expansion would have a significant individual or cumulative impact to environmentally sensitive areas or other natural resources, a WQM plan amendment would be required.

388. COMMENT: Proposed N.J.A.C. 7:15-3.5(b)4vi provides that the Department will process revisions to a Water Quality Management Plan, even when the Plan is not in compliance with the submission and update schedule set forth at proposed N.J.A.C. 7:15-5.23, when the project utilizes individual subsurface sewage disposal systems, involves less than 100 acres and generates less than 8,000 gallons per day of wastewater flow, or a total of fewer than 23 residential dwelling units. Essentially, this provision creates an exemption from the more rigorous “amendment” process for this type of project and, instead, allows it to be considered as a “revision”. This is problematic for several reasons.

The Department's rationale for selection of the 8,000 gallons per day as the threshold for allowing a revision, as opposed to an amendment, is stated as being because flows of 8,000 gallons per day or more from a single property is the threshold requirement for a Treatment Works Approval. However, while this may be a convenient regulatory cut off, the Department provides no explanation, nor does it cite to any analysis or water quality based information, for its determination that projects of this size are less likely to adversely affect the environment and are therefore eligible for the streamlined procedures of the revision process. The Department attempts to further justify the 100 acre/8,000 gallon per day threshold by stating that the volume is the same as that set forth in the current rules at N.J.A.C 7:15-3.5(b)4v. But the Department fails to acknowledge or address that there is a considerable difference between the old rules, which allow future expansion on contiguous lots when it is determined that such expansion will not trigger a pattern of sewered development, and the proposed rules, which will allow the installation of similarly sized individual subsurface sewage disposal systems. Projects of the type and magnitude should be required to be submitted and reviewed as Plan amendments and not as Plan revisions. (17, 49)

RESPONSE: The inclusion of this revision category for projects on individual subsurface sewage disposal systems is intended to reduce the administrative and economic burden for smaller scale developers. The rule requires these projects demonstrate that the project will not result in nitrate concentrations exceeding two mg/L when considering the dilution available on the project site. The Department believes that by applying the nitrate dilution model to proposed projects of this size, potential environmental impacts will be minimized. This provision allows

development on individual subsurface sewage disposal systems equivalent to development allowed in sewered areas under N.J.A.C 7:15-3.5(b)4v.

389. COMMENT: At N.J.A.C. 7:15-3.5(b)4vi no revisions should be processed until such time as WMPs are in place. To allow piecemeal revisions will create an unacceptable drain on Department resources, will counter the goals of the WQMP rules and ultimately lead to less protection for the environment, and lessen the incentives for planning agencies to maintain and update their plans. (64)

RESPONSE: N.J.A.C. 7:15-3.5(b)4vi addresses the utilization of individual subsurface sewage disposal systems. The Department has attempted to balance the need for environmental protection with the needs of small scale projects. The rules require these projects demonstrate that the project will not result in nitrate concentrations exceeding two mg/L when considering the dilution available on the project site. The Department believes that by applying the nitrate dilution model to proposed projects of this size, potential environmental impacts will be minimized. This provision allows development on individual subsurface sewage disposal systems equivalent to development allowed in sewered areas under N.J.A.C 7:15-3.5(b)4v.

390. COMMENT: The imperfect application of the nitrate dilution models is a weakness in the proposed rule that causes concern. N.J.A.C. 7:15-3.5(b)4vi could be abused through improper nitrate dilution analysis and this circumstance should not be allowed as a revision but should require an amendment. (10, 80)

RESPONSE: The Department is confident in the nitrate dilution model as discussed in the Response to Comments 1006 through 1013 and does not believe that the use of this model will be abused by applicants requesting WQM plan revisions under N.J.A.C. 7:15-3.5(b)4vi. Since a revision process is required, the Department will ensure as part of its review that the model was applied appropriately.

391. COMMENT: N.J.A.C. 7:15-5.3(b)4vi states that 8,000 gpd of wastewater flow is equivalent to 23 residential dwelling units. This equates to a flow of 350 gpd which is inconsistent with the Department's average flow rate of 500 gpd mentioned in the definitions for "equivalent dwelling unit." The flow rates should be consistent throughout the Department rules. (14)

RESPONSE: The Department used the minimum volume for a residential dwelling of 350 gallons per day as established in the Standards for Individual Subsurface Disposal Systems at N.J.A.C. 7:9A-7.4 when determining that 23 dwelling units would generate less than 8,000 gallons per day of wastewater. The Department did not use the same process for determining "equivalent dwelling units."

The minimum volume for a residential dwelling generating ground water discharges begins at 350 gpd, however, that volume is based on a 1-or-2 bedroom dwelling. For a 3-bedroom (or more) single-detached dwelling or apartment proposed for ground water discharges, the volume increases incrementally at 150 gpd per additional bedroom, such that for a 3-bedroom dwelling

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or apartment the total is 500 gpd. Refer to Response to Comments 196 and 197 for a detailed discussion of the flow values used for the basis of "equivalent dwelling units."

N.J.A.C. 7:15-3.5(b)4vii and viii (beneficial reuse)

392. COMMENT: At N.J.A.C. 7:15-3.5(b)4vii and viii, reclaimed water for beneficial reuse (RWBR) projects should not be processed as revisions. Depending on their size, these types of proposals should be processed as amendments for full public scrutiny. (22, 76)

393. COMMENT: Proposed N.J.A.C. 7:15-3.5(b)4vii and viii discuss how Reclaimed Wastewater for Beneficial Reuse (RWBR) would be allowed for a WQMP revision. While this is a positive policy, the Department is encouraged to clarify how it will be implemented. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 392 AND 393: All RWBR projects that involve public access or potential environmental impacts are subject to full public scrutiny and will continue to include public involvement prior to approvals. When the Department accepts a proposal for a RWBR project, public participation is instituted through the NJPDES permit process, which is the only mechanism through which reclaimed water projects are authorized. As part of this rule making, the Department is providing for revisions for these alternative, non-potable water supply projects, so that the activities can be identified in the plan. This identification was determined to be appropriately addressed through the revision process for two primary reasons. First, the institution of RWBR activities does not allow for additional flows to the treatment works. If a proposed project involves the expansion of plant capacity to accept additional flows, an

expansion of plant capacity would be required and therefore the proposed project would require an amendment to the WQMP and NJPDES discharge permit. Secondly, with the exception of restricted access RWBR activities authorized under the NJPDES General Permit NJ0142581, all modifications to NJPDES discharge permits to authorized RWBR activities require a public comment period. Additionally, when a project has significant public access concerns, the Department also encourages additional public outreach for the project prior to proposing specific RWBR locations. Applicants are not only required to demonstrate that public outreach was conducted, but document what was done, including how the applicant intends to address any comments received.

The provisions for RWBR revisions at N.J.A.C. 7:15-3.5(b)4vii and viii were crafted to balance the need to prevent cumulative impacts of unassessed proposals with the need to speed up the review process for activities with an environmental benefit to proceed without the full public process required for amendments. The Department believes that the public will have an adequate opportunity to comment on RWBR proposals as part of the NJPDES permit review process without requiring these proposals to also undergo the more extensive and time consuming administrative and comment process for an amendment. The Department does not believe that removing such changes from the public notice and comment undercuts the rule or protection of the environment. Revisions for this category would be processed in the same way as other revisions as set forth at N.J.A.C. 7:15-3.5.

394. COMMENT: The “revision” category has been significantly expanded to include projects that under the current rules would be processed as amendments. One example is the class of

projects known as Reclaimed Water for Beneficial Reuse (RWBR), which would be processed as revisions under the proposed rules. This method of wastewater discharge is promoted by the Department throughout the proposal as something positive. These projects would receive their only environmental review from the Department through a NJPDES permit application, and DPAs would no longer be part of this review. While reusing water is considered positive for water supply, counties should be given the opportunity to consider these projects and their impacts on the land and residents and the Department should recognize that the full range of these impacts on the environment and humans is still unknown. Projects that would make a significant change should be left in the category of WQMP amendments. (19, 28)

RESPONSE: Reclaimed Water for Beneficial Reuse is not a wastewater discharge. Rather, it is a diversion of a waste product which is reclaimed for uses that do not require potable water. If a county or other agency is concerned about these project impacts, these issues should be discussed during local planning and zoning authorizations. RWBR simply provides alternatives for water supply management. DPAs have the opportunity to participate in the projects during the NJPDES permit development through the public comment process that will be provided there. In the WQM plan revision process, involvement of a DPA will depend upon the approved procedures of the DPA. Some DPAs have procedures for addressing revisions while others have not included specific revision procedures. At a minimum a DPA would be given the opportunity to comment during the 21 day revision comment period provided at N.J.A.C. 7:15-3.5(d).

395. COMMENT: The use of RWBR at N.J.A.C. 7:15-3.5(b)4viii as a water resource conservation tool is supported. The reduction of water withdrawal and discharge that would result from RWBR is significant and highly beneficial. (10, 80)

RESPONSE: The Department acknowledges the commenters' support of the RWBR program.

396. COMMENT: Requiring WQM plan revisions as opposed to amendments for beneficial reuse projects as per N.J.A.C. 7:15-3.5(b)4viii is commendable, since it would serve to encourage beneficial reuse projects. However, the requirement of providing onerous demonstrations for discharges to non tidal waterbodies to evaluate the impact of disposing less wastewater to the stream should be removed so as not to discourage beneficial reuse projects in non tidal watersheds.

Wastewater reuse does not involve any stream diversion; rather, it involves using wastewater instead of discharging it. However, the Department has taken the unfortunate and unjustified position that wastewater reuse must be evaluated as if it were a stream diversion. In fact, the analyses proposed for beneficial reuse are often not even required for water allocation permits, which actually do involve stream diversions.

A permit is not required for a facility that does NOT discharge wastewater. There are hundreds of facilities in New Jersey that formerly discharged to surface waters in accordance with a valid NJPDES permit, but when those facilities stopped discharging to a stream, they did not apply to renew their NJPDES permit; the Department simply revoked their permits. No studies were

performed for any of these facilities to evaluate the impact of removing their discharges, because no permission is required to stop discharging to a surface water. Similarly, no analyses should be required to reduce wastewater discharged to a stream. The focus of beneficial reuse approval should focus only on ensuring that the quality of the reused water and the infrastructure utilized is appropriate for the use and protective of public health.

To treat wastewater reuse as if it were a stream diversion per N.J.A.C. 7:15-3.5(b)4viii, and require an analysis of the impact of reducing the discharge of wastewater to the stream, would only provide a major disincentive for beneficial reuse in non tidal watersheds, and appears to directly conflict with the Department's stated policy “to encourage and promote RWBR and water conservation.” (1)

RESPONSE: In areas above the head of tide, a wastewater discharge may make up a substantial portion of the baseflow in freshwater streams. Since the discharge adds to or maintains baseflow, reduction of this contribution may not only affect ecological resources but may impact the safe or dependable yield of downstream water supply withdrawals and reservoirs. Established biota must be protected under the Surface Water Quality Standards and impacts on water supply safe yields must also be protected. Therefore the Department has to look at the effects on biota and water supply. While the Department does not require a discharger to continue discharging if they are shutting a facility completely and giving up their NJPDES discharge permit, if the facility is continuing to discharge under a NJPDES permit, it would be inappropriate for the Department to allow changes in the amount discharged, whether increases or decreases, without analyzing the impacts from such a change.

N.J.A.C. 7:15-3.5(b)4ix

397. COMMENT: At N.J.A.C. 7:15-3.5(b)4ix, the proposal to enable the expansion of a sewer service area to provide for the sewer connection of an existing structure with a malfunctioning septic system that cannot be repaired or replaced when such structure is located contiguous to an existing sewer line is supported. (60)

RESPONSE: The Department acknowledges this comment in support for this rule provision.

398. COMMENT: N.J.A.C. 7:15-3.5(b)4ix provides for the connection of an existing structure with a malfunctioning subsurface sewage disposal system to a sewage treatment plant. The rule should define what constitutes a "malfunctioning" system, as the definition provided in N.J.A.C. 7:9A-3.4 is very broad and includes a system which pollutes ground or surface waters. Arguably all septic systems "pollute" by their very nature. In addition, the proposed rule should include the term "alter" or "alteration" when describing remedial efforts to restore the function of a septic system. (84)

RESPONSE: N.J.A.C. 7:9A-3.4 provides a list of indications that an individual subsurface sewage disposal system is malfunctioning which includes such things as contamination of near-by wells, ponding or breakout or sewage on the land surface, seepage of sewage into portions of buildings below ground or back-up of sewage into the building served that is not caused by a physical leakage. The Department believes these very specific conditions are not that broad as to include a system which pollutes ground or surface waters. Additionally, a malfunctioning

system is one which is not operating according to the intended design. Malfunctions can be as a result of broken equipment or failure to maintain the system through periodic pumpouts. These sorts of malfunctions may be correctable by repairs or other remediation, activities which are intended to encompass activities that may also be deemed alterations. Some malfunctions are the result of improper location. In this case, or where lot size is too small to allow repairs to achieve a system compliant with current requirements, connection to a sewer system may be the only feasible alternative to address the problem. The Department believes that what constitutes a "malfunctioning" individual subsurface sewage disposal system is adequately defined.

N.J.A.C. 7:15-3.5(b)4x

399. COMMENT: There are benefits to cluster development and land preservation as components of development projects. However, such development patterns concentrate nitrate pollution in residential areas of the project. For example, if a large development proposal that overlaps two subwatershed sites identifies the clustered development in one HUC 14 and the 70 percent preservation area in the adjacent HUC 14, the nitrate pollution in one subwatershed will be allowed to exceed the proposed two mg/L, and the preserved land will not offset the pollution in the impacted subwatershed. Therefore, provisions for approving such designs should be included in the rule so that consequent impacts are fully considered as well as compensation for higher nitrate levels in the same subwatershed. (68)

RESPONSE: The objective of the nitrate dilution standard is to maintain the ambient ground water concentration of two mg/L, outside of the Highlands Protection Area where other targets apply. The Department selected two mg/L of nitrate as the value that best represents the ambient

ground water quality for the State as a whole, balancing pristine areas and those affected by a reasonable level of human influence. Considering the regional basis of the analyses that were used to develop the nitrate standard, the Department believes that the HUC 11 watershed level is an appropriate scale for demonstrating attainment of the nitrate standard. It cannot be assumed that conformance with the density outcome of the model will ensure that this ambient is achieved in every location at all times. Further, the nitrate model makes simplifying assumptions in reaching conclusions about ground water impacts. For example, the nitrate load is assumed to distribute evenly and immediately over the entire area in question, which is not an accurate reflection of the behavior of the discharged load. In addition, ground water does not strictly conform to surface water based watershed delineations, such that using surface watersheds as the area over which to dilute load with recharge is an approximation of actual physical and chemical processes. Therefore, while clustering may indeed locally increase the concentration, the overall outcome is still valid for the planning level analysis embodied in the nitrate dilution analysis.

The Department will consider such factors as the development proposal that overlaps two subwatersheds example during the review process and if a determination is made that the environmental standards at N.J.A.C. 7:15-5.25 cannot be met, a WQM plan amendment will be required. However, the Department anticipates that such development proposals will be offset and addressed when there is a complete up to date WMP in place for the area that has assessed nitrate dilution on the entire HUC 11.

400. COMMENT: The provision on clustering at N.J.A.C. 7:15-3.5(b)4x will allow for the spread of sewers into rural areas in violation of the State Planning Commissions Rural

Wastewater Policy 22, which states that sewers, including package plants, should only be in centers. Clustering will increase nonpoint pollution loads in rural areas and create a haphazard land use pattern. On top of that, when these package plants need to be upgraded at some point, the extension of sewer lines will increase sprawl. (49, 79)

RESPONSE: The Department believes the goals and policies of the State Plan are generally consistent with this proposal. However, the State Plan does not serve as a technical basis for this proposal, and there is no reference to the State Plan Policy Map with regard to the identification of appropriate sewer service areas. The Department's intent by allowing cluster development proposals to be processed as revisions is to support the opportunity to preserve open space and believes the clustering option is supportive of the center based development concept. When package treatment plants are properly operated and maintained, there is no reason to assume that they will need to be abandoned and connected to a distant wastewater treatment facility. Many package treatment plant have Department permits with no operational failures.

401. COMMENT: Proposed N.J.A.C. 7:15-3.5(b)4x creates another exception to the Plan amendment procedures and allows projects to be instead considered as a revision that involve the utilization of individual subsurface sewage disposal systems or a NJPDES regulated discharge to ground water for certain clustered residential developments that, among other things, ensure that a minimum of 70 percent of the property is permanently restricted from development. The rationale for this exception is stated as follows: "By allowing such clustered development to proceed under the simplified revision process, development that minimizes the deleterious effects of sprawl is encouraged without sacrificing water resources protection…" However, <u>all</u>

development in this State should be designed and reviewed with the purpose of minimizing the deleterious effects of sprawl, regardless of where it is or what type of project is proposed, and this concept should not serve as a reason to relax the review process when dealing with our most limited natural resource, water. Projects of the type and magnitude should be required to be submitted and reviewed as Plan amendments and not as Plan revisions. (17, 49)

402. COMMENT: The cluster option at N.J.A.C. 7:15-3.5(b)4x should not be processed as revisions. Such activities constitute site specific projects that should only be considered as part of a WMP or a WMP amendment. Full public review should also be provided through a public notice and a public hearing in the municipality. (22, 76)

403. COMMENT: There is objection to the provision at N.J.A.C. 7:15-3.5(b)4x which allows cluster development to be processed as a revision under certain circumstances. The 70 percent conserved land should be 70 percent of the entire parcel, not only the developable portion. This is not specified in the rule proposal. Also, there is no confidence in the nitrate dilution modeling that may be used to prove the two mg/L nitrate planning standard is met. This is particularly true if GSR-32 is used in the review process. GSR-32 is not an appropriate model for many soils and geologic formations in New Jersey and should not be universally applied as inaccurate nitrate dilution analyses will result. Clustered development should require being processed as an amendment and not as a revision. It should not be assumed that water resource protection would be achieved by these clustering provisions and this section should be deleted. (10, 80)

RESPONSE TO COMMENTS 401 THROUGH 403: The Department believes that the revision category allowing for clustered development using ISSDSs or NJPDES regulated discharges to ground water warrant a simplified administrative process and should be allowed even where a WMP is not up to date because this sort of project is expected to have an overall positive environmental benefit and should be encouraged over the normal sprawl development proposals. The Department included additional standards at N.J.A.C. 7:15-3.5(b)4x to ensure that such revisions will only be approved if they are consistent with the objectives of this rule. As the rule provision at N.J.A.C. 7:15-3.5(b)x requires "that a minimum of 70 percent of the property is permanently restricted from development," it can reasonably be inferred that the requirement applies to the entire parcel and not only the developable portion. If the requirement were meant to only apply to the developable portion of a property, the rule would have specified this. Regarding the commenter's concern over the Department's nitrate-dilution model and GRS-32, please refer to Response to Comments 1006 through 1013.

By requiring additional criteria be met for these types of revisions, the Department believes this category of revision in the new rule has been limited to actions that are not significant in scope and must still be determined by the Department to conform to the standards at N.J.A.C. 7:15-5.24 and 5.25. Additionally, at N.J.A.C. 7:15-3.5(d), the rule specifies that agencies identified at N.J.A.C. 7:15-5.22, which are the same agencies that must be notified regarding WQM plan amendments, must be provided a copy of the proposed revision and provided with 21 days to comment on the proposal. The public at large will not be notified via public notice, but the Department believes due to the limited scope of projects involved and the provision for review by the affected entities including but not limited to municipalities, wastewater management

planning agencies, sewerage and utility authorities, and water purveyors, there is sufficient availability for concerns to be provided to the Department for consideration. The Department does not believe that removing such changes from the public notice and comment undercuts the rule or protection of the environment.

404. COMMENT: It is unnecessary to require an applicant to undergo the WQM plan revision process for cluster development, which is time-consuming. The Department should eliminate this requirement. (18, 42, 44, 45, 61)

RESPONSE: While the Department supports the minimization of the deleterious effects of sprawl as demonstrated by inclusion of this revision category, the Department cannot sacrifice protection of water resources. The Department believes an analysis of environmental impacts is necessary for cluster development proposals; however, where the project complies with the additional standards at N.J.A.C. 7:15-3.5(b)4x and the environmental standards established at N.J.A.C. 7:15-5.24 and 5.25 and no impacts to environmentally sensitive areas or other natural resources are identified the Department believes processing these proposals as revisions is sufficient.

405. COMMENT: The open space requirement with the clustered development initiative presented at N.J.A.C. 7:15-3.5(b)4x is supported. It is important that the State protect voluntarily as much open space as possible in a manner that helps protect the environment. (64)

406. COMMENT: Allowing clustering where large amounts of open space are protected is supported. (78)

407. COMMENT: The opportunities for residential clustering in the rule proposal is supported. (5)

RESPONSE TO COMMENTS 405 THROUGH 407: The Department acknowledges these comments in support for this rule provision.

408. COMMENT: The proposed rule needs to include more incentives for better design. Only the clustering option with 70 percent open space, a positive element of the proposed rule, addresses design. (53)

RESPONSE: The WQMP rule objectives of improving, enhancing, and protecting the quality of New Jersey's natural environment, as well as ensuring equitable and beneficial uses of the State's waters are achieved by characterizing and assessing environmental capacity and aligning proposed development with that capacity. Including a revision category that allows the utilization of individual subsurface sewage disposal systems or a NJPDES-regulated discharge to ground water for a clustered residential development, where the applicant ensures that a minimum of 70 percent of the property is permanently restricted from development, encourages clustered development without sacrificing water resources protection. The WQMP rule is a planning rule and looks at broader issues. Site design is a more project specific consideration that is best addressed through regulatory programs that evaluate and can encourage particular

designs. Therefore, site design considerations are deferred to rules such as the Stormwater Management rules, N.J.A.C. 7:8, which include requirements for use of low impact development and nonstructural stormwater management strategies as a means to address stormwater. Other Department and State rules such as Freshwater Wetlands, Waterfront Development, CAFRA, Flood Mitigation, Highlands and Pinelands have provisions that regulate project design through site coverage limitations, limiting development of riparian buffers, and establishing net fill requirements. These other rules and regulations provide incentives for developers and site designers incorporate innovative designs into their projects.

409. COMMENT: Although proposed N.J.A.C. 7:15-3.5(b)4x allows for clustered development where 70 percent of the property is permanently restricted from future development, the conditions required indicate that the approval of any such application would be unattainable. (66)

410. COMMENT: Proposed N.J.A.C. 7:15-3.5(b)4x allows a revision for septic systems or a NJPDES permit for a discharge to ground water for clustered residential development. However, cluster development requires a conservation restriction where “a minimum of 70 percent of the property is permanently restricted from development.” The Department has not provided the basis for the 70 percent deed restriction and should explain the basis before adopting this stringent restriction. Additionally, this cluster provision is of no practical benefit. When taken in context with referenced N.J.A.C. 7:15-5.25(e) and (h)2, the few very large lots that could be developed would not justify the use of clustering. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 409 AND 410: The Department does not believe that the conditions for approval of the clustering revision are in any way unattainable. These conditions are that the standards at N.J.A.C. 7:15-3.5(b)4x be met. The standards include a deed restriction under a conservation restriction prepared in accordance with N.J.A.C. 7:15-1.7, the nitrate dilution demonstration specific to a cluster be met, that the preserved portion be located to maximize continuity and protection of important habitat, and that if the clustered portion is and will continue to be in agricultural use, that the findings of a Conservation Plan be implemented.

The Department used the minimum of 70 percent of the property is to be permanently restricted from development to meet the conservation restriction for clustered development to allow some flexibility for the developer, while still preserving a significant enough portion of the property so as to viable as open space. Because this revision type will allow an onsite community owned treatment works, it may be possible for a developer to increase the number of units and density of units allowable on a property in exchange for the preservation of 70 percent of the land area of the property. This will potentially reduce the negative economic impact of the rule on properties that are affected by the new nitrate planning standard. Such clustered development will result in higher density development that continues to meet the nitrate planning standard of two mg/L (N.J.A.C. 7:15-5.25(e) and (h)2) but minimizes environmental impact associated with sprawl development. Thus, the Department believes the allowance for and use of clustered development is practical and has been justified.

411. COMMENT: At N.J.A.C. 7:15-3.5(b)4x, the use of community owned onsite (decentralized) wastewater treatment systems appears to be limited to instances where

development is clustered and design flows are 2,000 gallons per day or less. This should be amended to allow provisions for the use of community (decentralized) onsite wastewater treatment systems, with design flows in excess of 2,000 gallons per day, even in the absence of clustering. This is particularly important to serve authorized, non-residential development located beyond the reach of centralized wastewater treatment infrastructure, within some Pinelands Regional Growth Areas, Pinelands Towns and Pinelands Villages. Decentralized wastewater treatment systems operating under NJPDES permit requirements provide opportunities for the economic well being of center based development without the sprawl associated with the sole reliance on expansive land areas to provide dilution to meet the Ground Water Quality Standards. (84)

RESPONSE: The clustering category for revisions does not include a flow cap, as indicated by the commenter. The Department agrees that development utilizing discharges to ground water can be an acceptable means to meet wastewater management needs with or without clustering, but has only provided a revision option to those proposals that preserve 70 percent of the land area of the property. The Department also believes that it is necessary to address wastewater management needs comprehensively within the WMP area. Where onsite wastewater treatment systems are the appropriate wastewater management alternative, this means to address wastewater treatment should be identified in the WMP or through an amendment to the WMP where a WMP is up to date if the need for such a facility is determined to be necessary after the WMP is adopted.

412. COMMENT: A ground water antidegradation analysis is required for both point and nonpoint sources that discharge to ground water. For instance, a NJPDES point source discharge to ground water (DGW) is subject to the antidegradation provisions of the Ground Water Quality Standards, which (as proposed) dictate a demonstration of six mg/L nitrate at the site boundary. On the other hand, at N.J.A.C. 7:15-5.25(e)1, septic development areas are proposed to be subject to a nonpoint source antidegradation analysis, specifically a demonstration that the proposed nitrate planning standard of two mg/L is satisfied on a watershed scale.

The Department should clarify on adoption that a clustered development utilizing a community owned treatment works (alternative wastewater service) with a discharge to ground water at N.J.A.C. 7:15-3.5(b)4x should not have to perform a point source antidegradation demonstration (six mg/L nitrate), since a nonpoint antidegradation analysis (in other words, the two mg/L nitrate planning standard) will have already been performed. Alternative wastewater service within septic development areas should be subject to the 10 mg/L ground water quality standard at the site boundary, as proposed for on-lot septic system development. In other words, NJPDES permits for DGWs within septic development areas, which were included in the nonpoint source antidegradation analysis (nitrate planning standard) will not be subject to an additional point source antidegradation analysis. This clarification will eliminate the disincentive in the proposed rule for alternative wastewater service. (1)

RESPONSE: Clustered development utilizing NJPDES-regulated onsite wastewater treatment systems with a discharge to ground water at N.J.A.C. 7:15-3.5(b)4x do not perform the same analysis as those utilizing individual subsurface sewage disposal systems under N.J.A.C. 7:15-

3.5(b)4x(1). The Department requires that when a new or expanded treatment facility with a discharge to ground water subject to regulation under NJPDES is proposed, compliance with the Ground Water Quality Standards, N.J.A.C. 7:9C, must be demonstrated. (see N.J.A.C. 7:15-5.25(d)) Technical feasibility will be demonstrated through the review for the NJPDES permit process. For domestic treatment facilities, the Department will determine conformance with antidegradation requirements, in terms of the nitrate planning standard, through the planning process. Compliance with the nitrate planning standard shall be assessed using the equivalent dwelling units attributed to the treatment facility and the dilution associated with the land area that would be served by the proposed discharge to ground water. This is appropriate because, where future development in a wastewater service area will be served by a centralized treatment facility with discharge to ground water, the nitrate load that would have been associated with ISSDSs will be conveyed to the treatment facility. Equivalent dwelling units can be calculated based on flow (500 gallons per day equals one unit), where no nitrate effluent limits will be imposed, or based on mass (30 lbs/year equals one unit), where nitrate effluent limits are imposed.

413. COMMENT: Proposed N.J.A.C. 7:15-3.5(b)4x(1) states that where there are septic systems, the two mg/L nitrate standard must be met for the overall project site and the ground water criteria of 10 mg/L must be "met at the edge of the developed portion of the clustered residential development." The Department is engaging in site design here rather than wastewater management planning. Requiring 10 mg/L for the ground water indicates that large lots are needed. (18, 42, 44, 45, 61)

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RESPONSE: At N.J.A.C. 7:15-3.5(b)4x(1), where individual subsurface sewage disposal systems are proposed, the density standard necessary to achieve the two mg/L for nitrate planning standard in N.J.A.C. 7:15-5.25(e) and (h)2 must be met for the overall project site and the ground water quality criterion of 10 mg/L for nitrate must be met at the edge of the developed portion of the clustered residential development. The two mg/L standard is the ambient nitrate quality in ground water, considering the State as a whole. The 10mg/L nitrate standard is both a ground water quality criterion and acute drinking water criterion. As such, the Department believes it is appropriate to require the meeting of the standard in the wastewater management planning process.

414. COMMENT: The Department should further clarify proposed N.J.A.C. 7:15-3.5(b)4x(2). First, an exception is provided for "unique site conditions" which is an undefined term. The term "unique site conditions" must be defined and illustrative examples provided. Alternatively, it should be replaced by a more appropriate term, such as "specific."

This provision also discusses the location of the "development," which is assumed to not refer to the entire project. The provision should also clarify what is meant by "areas" in the phrase "located to maximize continuity of the preserved area and in areas that do not contain Natural Heritage Priority Sites or habitat patches …" It is unclear whether "areas" as used in this provision refers to the development itself, or to the components of a project on a site containing features warranting protection. (18, 42, 44, 45, 61)

RESPONSE: The intent of N.J.A.C. 7:15-3.5(b)4x(2) is to discourage proposals in which the minimum 70 percent preserved area is linear or fragmented pieces of undeveloped land. The referenced text regarding "area" and "areas" means that the proposed clustered development must be located to maximize continuity of the preserved area without encroachment of development, specifically those portions of the project that involve disturbance and construction of structures, on Natural Heritage Priority Sites or habitat patches identified as Rank 3, 4, or 5 on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife.Proposals should maximize large contiguous areas for preservation and enhance protection of environmentally sensitive areas. Examples of "unique site conditions" could be the property is cut in half by a waterbody, with developable edges or corners, or this site is a hill top where only the top is not environmentally sensitive. The Department believes this term is self explanatory and no definition is necessary. The Department expects clustered development proposals to contain sound designs that will in fact be protective of habitat areas.

415. COMMENT: N.J.A.C. 3.5(b)4x(3) states that existing agricultural uses are allowed to continue on restricted portions of land in cluster subdivisions provided that the farmers implement Best Management Practices as recommended in a Conservation Management Plan or a Natural Resources Management Plan. The financial responsibility for developing these plans should not be borne by the farmer. (14)

RESPONSE: The Department discussed this comment with the Natural Resources Conservation Service (NRCS) and learned that a "Conservation Plan" is the umbrella term that would cover any type of farm conservation plan that would be needed on a site and thus, the NRCS does not

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develop “Conservation Management Plans” or “Natural Resources Management Plans.” Thus, the Department is correcting the language at N.J.A.C. 7:15-3.5(b)4x(3) by amending this provision on adoption to read "Existing agricultural land uses allowed to continue on the restricted portion are required to implement Best Management Practices by implementing the findings of a Conservation Plan developed by the Natural Resources Conservation Service.”

The NRCS will develop a Conservation Plan at no cost to the farmer. Additionally, NRCS administers the conservation programs made available under the Farm Security and Rural Investment Act of 2002 (Farm Bill). The Farm Bill programs offer cost-sharing for implementation of practices.

However, the Department anticipates that as the land under this provision is part of the 70 percent deed restricted area the developer needs to construct the clustered development, that in practice the agreement between the developer and the farmer to acquire the right to place the conservation restriction would include an agreement that this cost would be borne by the developer or that the price for obtaining the farmer’s property rights reflected by the conservation restriction would include an amount to fund these plans.

416. COMMENT: At N.J.A.C. 7:15-3.5(b)4x(3), there is a concern that using the term “existing agricultural land uses” may be misconstrued to forbid a change in the type of agriculture allowed in the area deed-restricted as a result of a cluster development. The language should be clarified by removing the word “existing.” For the health and protection of the soil, cropping patterns change from year to year. If covered by a farm conservation plan that prevents water quality

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problems, farmers should be able to change the type of crop to meet changing market conditions. Limiting the farming to what was "existing" when the development occurred reduces the residual value of the set-aside land and could lead to intensified Right to Farm conflicts with the new residential neighbors. (58)

417. COMMENT: The requirement that the agricultural portion "implementing the findings of a Conservation Management Plan or a Natural Resources Management Plan" at N.J.A.C. 7:15-3.5(b)4x(3) is too vague. The requirement for these plans must be explicitly stated so as not to lead to argument about what it means. The wording should be changed to: "…and that existing agricultural uses allowed on the restricted portion must comply with and fully implement all provisions of a Conservation Management Plan or a Natural Resources Management Plan…." Further, these plans need to be reviewed and approved by the Department. (10, 80)

RESPONSE TO COMMENTS 416 AND 417: The Department's intention was to provide for continuance of existing agricultural land uses and not to require that a particular crop type be maintained and believe the language of the rule adequately addresses this intent. Lands that are part of an existing agricultural operation (such as crop rotation) are allowed to continue on the restricted portion of the land provided Best Management Practices that use the findings of a Conservation Plan developed by the Natural Resource Conservation Service are implemented. The Department believes the correct agency to review Conservation Plans is the Natural Resource Conservation Service (NRCS) as they are more familiar with agricultural practices than the Department. Additionally, NRCS administers the conservation programs made available

under the Farm Security and Rural Investment Act of 2002 (Farm Bill). The Farm Bill programs offer cost-sharing for implementation of practices.

418. COMMENT: N.J.A.C. 7:15-3.5(b)4x(3) is in violation of the Municipal Land Use Law because land left over from clustering belongs to the homeowner's association and is supposed to be kept as open space. (49, 79)

RESPONSE: The commenters do not identify the specific provisions of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (MLUL) that they believe N.J.A.C. 7:15-3.5(b)4x(3) conflicts with or violates. N.J.A.C. 7:15-3.5(b)4x(3) provides only that the Department may process certain projects as revisions rather than amendments if the project is a clustered residential development and meets all of the identified criteria, including the requirement that minimum of 70 percent of the property is permanently restricted from development and subject to a conservation restriction as defined under the rules. This provision does not conflict with the MLUL. The conservation of open space and the preservation of continued agricultural uses serves the objectives of the MLUL. See, N.J.S.A. 40:55D-2. The MLUL authorizes municipalities to enact ordinances permitting residential cluster. N.J.S.A. 40:55D-39 provides that an ordinance for a planned development is to require that any common open space resulting from the application of standards for density or intensity of land use, be set aside for the use and benefit of the owners or residents in such development. To meet the requirements of this section, the developer may provide for an organization for the ownership and maintenance of any open space for the benefit of owners or residents of the development, if the open space is not dedicated to the municipality or some other governmental agency. N.J.S.A. 40:55d-43. N.J.A.C. 7:15-

3.59(b)4x(3) can be implemented in a manner that is consistent with the MLUL as well as an individual town's relevant ordinances.

N.J.A.C. 7:15-3.5(d)

419. COMMENT: Under current regulations, a revision to a wastewater management plan undergoes very little review by the wastewater management planning agency. Under the proposed rules, it appears there would be even less county input as it does not appear that the DPA has any role in processing a revision prior to the Department's decision, despite the county's local knowledge and experience. The DPA's role in processing revisions has been severely reduced. There are even fewer projects that would be reviewed by the agencies responsible for wastewater management planning. The county role in the revision process should be reinforced, not weakened. The proposed time frame for county comment is 21 days after notification from the Department, which is not sufficient for staff review, committee review, Planning Board action, or Board of Chosen Freeholders formal comment, even with the limited role. At best, boards meet once per month, so the minimum acceptable time frame for a revision to be processed at the county level would be 60 days and the rule should be changed accordingly. It would be preferable to increase the role of the DPA in the revision process and increase the review time frame to 90 days. (19, 28)

RESPONSE: Involvement of a designated planning agency (DPA) will depend upon the approved procedures of the DPA. The approved procedures of the DPA remain in effect for their areas under this adopted rule, but can be amended under N.J.A.C. 7:15-3.4(e). Some DPAs have procedures for addressing revisions while others have chosen not to include specific revision

procedures. At a minimum a DPA would be given the opportunity to comment during the 21 day revision comment period provided at N.J.A.C. 7:15-3.5(d). Not all counties are DPAs thus general provisions for county WMP agency review of revisions are provided at N.J.A.C. 7:15-3.5 and include the same 21 day revision comment period. Counties may create their own review procedures provided they meet the timelines and review procedures established by the Department's procedures at N.J.A.C. 7:15-3.5.

420. COMMENT: Proposed N.J.A.C. 7:15-3.5(d) outlines procedural aspects for a revision application. The current process contains very vague and subjective application requirements, which lead to delays as requests for clarifications are often made and resolutions are needed from various governmental entities. The proposed approach is similarly ambiguous and does not make the process any easier or more transparent. The proposed process should be revised to provide clear and efficient procedures, objective criteria, timely and well-documented decisions, and should provide a mandatory schedule with specific deadlines for its staff to follow. The Department should ensure that only objective criteria are utilized. Clarification is also needed as to what, if any, documentation is needed from other State agencies. (18, 42, 44, 45, 61)

RESPONSE: The Department has further clarified the revision procedure and criteria to be met in this rulemaking. N.J.A.C. 7:15-3.5(b) and (d) further clarify the procedure to be followed from written application, requests for additional information, to the 21 day comment period and entities notified of the revision proposal. N.J.A.C. 7:15-3.5(b)4 specifies objective criteria that must be met such as wastewater management plans in compliance with the submission schedule (N.J.A.C. 7:15-3.5(b)4ii and v), available capacity demonstrations (N.J.A.C. 7:15-3.5(b)4iv and

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v), meeting of the two mg/L nitrate planning standard (N.J.A.C. 7:15-3.5(b)4vi and x), and minimum 70 percent preserved land (N.J.A.C. 7:15-3.5(b)4x). The rule does not specify any time period within which revisions must be acted upon. The Department intends to follow the same time period established for the review of amendments when reviewing revisions. Further, the Department will provide a guidance document and checklist for revision applications under this rule. Finally, for revisions, documentation would only be needed from other State agencies, if that State agency was an affected entity as identified at N.J.A.C. 7:15-5.22.

N.J.A.C. 7:15-3.5(e)

421. COMMENT: There is strong opposition to N.J.A.C. 7:15-3.5(e)2 which only requires publication of adopted revisions once each year. Applicants should be responsible for publishing public notice of revisions as they are approved. Notification once a year does not keep the public adequately informed and the notice cost should be borne by each applicant and not by the State. (22, 76)

RESPONSE: Due to the limited scope of projects allowed to be processed as revisions the Department feels yearly publication is appropriate. The adopted revisions are and will continue to be published in the New Jersey Register annually. The adopted revision notices are also now posted on the Department's web site at http://www.nj.gov/dep/watershedmgt/wqmp_adopted_amendments.htm generally within a couple of months of adoption.

422. COMMENT: Proposed N.J.A.C. 7:15-3.5(e)2 states that "Under N.J.A.C. 7:15-3.4, interested persons may submit petitions to amend WQM plans to repeal or modify such revisions." If the Department adopts this posture, there will be no reliable WQM planning, since the plans will be subject to the continuing consideration of revisions. This is the antithesis of "sound planning." If a revision to a WQM plan is adopted, then the Department should ensure that this adoption can be relied upon. Third parties should be required to challenge these revisions when adopted. (18, 42, 44, 45, 61)

RESPONSE: N.J.A.C. 7:15-3.5(e)2 which provides that interested persons may submit petitions to amend WQM plans under N.J.A.C. 7:15-3.4 to repeal or modify adopted revisions is a readopted provision that has been in place for many years without impacting WQM planning. The Department believes that certain projects where it has been determined that the environmental standards have been met and that no significant individual or cumulative impacts will occur should be allowed to qualify for a less extensive and time consuming administrative and comment process. These revisions are intended to provide relief for small proposals so that where an updated WMP is not required, the applicant does not have to wait for a WMP to be adopted. Any adopted revisions would be reflected in the next update to the WMP. The process to appeal Department decisions is provided at N.J.A.C. 7:15-3.9 and third party challenges are addressed in Response to Comments 447 and 448.

N.J.A.C. 7:15-3.5(f)

423. COMMENT: Proposed N.J.A.C. 7:15-3.5(f) authorizes designated planning agencies to revise areawide WQM plans in accordance with procedures they establish that have been

approved by the Department. Yet, nowhere in the rules are basic procedures spelled out, except for amending the areawide plans. Public participation was an important part of establishing the original areawide Water Quality Management plans and should be a minimum requirement. (22, 76)

RESPONSE: The approved procedures of DPAs remain in effect for their areas under this adopted rule, but can be amended under N.J.A.C. 7:15-3.4(e). Some DPA procedures currently address revisions and others may amend their procedures to include or clarify their revision process. All DPA procedures must be approved by the Department pursuant to N.J.A.C. 7:15-3.4(e) and all revisions to areawide WQM plans proposed by DPAs are valid only upon adoption by the Governor or his or her designee. The Department believes that certain projects where it has been determined that the environmental standards have been met and that no significant individual or cumulative impacts will occur should be allowed to qualify for a less extensive and time consuming administrative and comment process. The Department has strengthened the criteria and limited the scope of projects that may qualify as a revision to ensure the best possible environmental protection. In many instances revisions are only allowed if the WMP is current in accordance with the schedule at N.J.A.C 7:15-5.23. As such, the overall regional environmental evaluations and protections have already been put in place. The Department does not believe that removing such changes from the public notice and comment undercuts the rule or protection of the environment.

N.J.A.C. 7:15-3.6

424. COMMENT: Proposed N.J.A.C. 7:15-3.6(a) refers to coordination with the Coastal Zone and Hackensack Meadowlands programs. The provision states that the "Department's Rules on Coastal Zone Management, including, but not limited to, provisions concerning the New Jersey Meadowlands Commission … shall provide the basic policy direction for WQM planning in the New Jersey Coastal Zone …" This provision requires clarification because, as drafted, this would require reference to the entire Coastal Zone Management rules to discern "the basic policy direction." (18, 42, 44, 45, 61)

RESPONSE: The Coastal Zone Management rules shall provide the basic policy direction for planning actions undertaken in the coastal zone by the Department as the lead State agency for Coastal Management under Section 306 of the Federal Coastal Zone Management Act. (see N.J.A.C. 7:7E-1.2(h)) Thus, N.J.A.C. 7:15-3.6 as adopted is consistent with the requirements established in the Coastal Zone Management rules that all of the Coastal Zone Management rules, N.J.A.C. 7:7E are used to discern the basic policy direction in the coastal zone.

425. COMMENT: At N.J.A.C. 7:15-3.6, the coordination with the Coastal Zone Management Program needs stronger standards to reflect unique coastal zone issues. For example, saltwater intrusion is a major coastal issue. There is no enforceable standard for saltwater intrusion identified in these rules and there needs to be a standard. There's a description of how the salt level migrates in feet per year, and what the concentration is where a violation of a standard situation is reached, but this section of the rules must be tied to a violation of those standards so that geologists can determine that the salt line is migrating at a certain rate or the actual sodium concentration has reached a certain limit. The Department is already obligated to do this in

Section 10 of the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., (CAFRA) which mandates the Department make specific findings, one of which is that the CAFRA permit would not result in saltwater intrusion. There is a direct connection between these rules and the CAFRA permit statute, which is currently not being implemented in the CAFRA permit program. For example, there are not findings made on the record based upon facts when the Department issues a CAFRA permit that the project getting the permit will not incrementally contribute to saltwater intrusion. The same is true for Sections 11 and 12 of CAFRA, which talk about cumulative impacts. Because there is so much overdevelopment and environmental stress in the coastal zone, there needs to be secondary and cumulative impact standards and enforcement of those standards. In order to get to this point, there needs to be regulatory bridges built into these rules including a numerical standard and development of technical manuals to evaluate enforcement of the standard. (86)

RESPONSE: Section 10 of the Coastal Area Facilities Review Act (CAFRA) requires, at N.J.S.A. 13:19-10, that the Department be able to make positive findings for seven criteria prior to issuing a CAFRA permit. Failure to demonstrate compliance with any one of these seven findings may result in either a conditional approval or denial of a CAFRA application. While salt water intrusion is not specifically mentioned, one of the required findings is that a CAFRA permitted facility must result in minimal feasible impairment of the regenerative capacity of water aquifers or other ground or surface water supplies.

In addition to Section 10 of the CAFRA statute, in order to obtain a permit in the coastal zone, applicants are required to demonstrate compliance with the rule on Groundwater Use at N.J.A.C.

7:7E-8.6 in the Coastal Zone Management rules. This rule requires that applicants proposing coastal development "shall demonstrate, to the maximum extent practicable, that the anticipated ground water withdrawal demand of the development, alone and in conjunction with other ground water diversions proposed or existing in the region, will not cause salinity intrusions into the ground waters of the zone, will not degrade ground water quality, will not significantly lower the water table or piezometric surface, or significantly decrease the base flow of adjacent water sources. Ground water withdrawals shall not exceed the aquifer's safe yield."

In order to demonstrate compliance with Section 10 of the CAFRA statute and the Groundwater Use rule, the Department requires that a coastal zone permit application include verification from the intended water provider that sufficient capacity exists to adequately service the proposed facility. Most parts of the CAFRA region are served by public water. In the rare cases where wells are proposed, a CAFRA application would need to include verification that the drawdown from the wells for the facility would not significantly affect the regenerative capacity of the aquifer.

The Department does not require studies or calculations as part of the coastal zone permit application unless necessary to corroborate the verification. There is no formal tracking of the aquifer drawdown. The CAFRA reviewer relies on the veracity of information provided by the applicant of existing potable water capacity because the ground water withdrawal issue is addressed in more detail, as part of a Water Allocation permit under N.J.A.C. 7:19. Further, the Department assumes that the water provider will not approve a drawdown that would result in saltwater intrusion since that would significantly affect the regenerative capacity of the well.

N.J.A.C. 7:7E-8.6(c) further requires that "Coastal development shall conform with all applicable DEP and, in the Delaware River Basin, Delaware River Basin Commission requirements for groundwater withdrawal and water diversion rights." This requirement ensures that applicants proposing facilities in the coastal zone are informed that other agencies may have jurisdiction over the project and that compliance with CAFRA and the Coastal Zone Management Rules does not obviate the need to obtain all necessary approvals whether they are local, State or Federal.

The Department is unclear as to what the commenter is referring to in Section 11 and 12 of the CAFRA Act. N.J.S.A. 13:19-11 refers to the inapplicability of requirement for low and moderate income housing provision and N.J.S.A. 3:19-12 is reserved. Neither section refers to cumulative impacts.

When the CAFRA statute was amended in July of 1994, the jurisdictional thresholds were lowered. Prior to the amendments, a residential facility would have had to consist of 25 units or more and a commercial facility would have had to consist of 50 or more parking spaces to be CAFRA regulated regardless of the location within the CAFRA zone. The CAFRA statute, as amended, lowered the regulatory threshold to as low as one residential unit, or portion thereof, and a commercial facility of three or more parking spaces depending on the proximity of development with the mean high water line. These amendments were adopted to address the cumulative impacts of small developments within the CAFRA zone.

Therefore, the Department believes that compliance with the standards under the Coastal Zone Management rules (N.J.A.C. 7:7E) address accumulation of impacts since by regulating both large and small projects, the impacts are more tightly controlled.

These rules contain provisions at N.J.A.C. 7:15-5.25(f) that provide that the Department will only adopt a wastewater management plan, a wastewater management plan update or wastewater management plan amendment where an applicant has demonstrated that the water supply needs have been met in a manner that does not conflict with the most recent New Jersey State Water Supply Plan, regional water supply plans, TMDLs and any limitations on withdrawals due to ecological and salt water intrusion concerns.

426. COMMENT: Regarding coordination with the coastal zone program, because of the way wastewater is managed in the coastal zone, billions of gallons of freshwater are being dumped into the ocean, depleting the freshwater flows in the coastal streams, which is having adverse ecological effects. These rules need to address this issue. (86)

427. COMMENT: Bays are being starved of freshwater inputs. The estuary program for Barnegat Bay identifies a 30 percent reduction in freshwater flow into the bay from Toms River, causing nitrification and other adverse ecological effects on the bay. Obviously, there is coordination needed with the coastal zone. The Department should start looking at ecological effects of reduced flows associated with development of coastal zones and wastewater management in the coastal zone due to regionalization of the sewerage treatment plants and discharge to the ocean. (86)

RESPONSE TO COMMENTS 426 AND 427: The Department is concerned with increasing demands on fresh water resources and the effects of past decisions with respect to water supply and wastewater management, especially with respect to areas in the coastal zone. The Department has deleted from the rule prior to these amendments N.J.A.C. 7:15-3.4(l)1, which established a preference for expanding or upgrading existing regional DTW to the construction of additional DTW. The Department recognizes that expanding regional sewage treatment plants, especially in the coastal zone where fresh water discharges are made to the ocean, is not automatically a preferable option and it is appropriate to consider alternatives and their impacts before selecting a wastewater treatment alternative. The Department is further encouraging reductions to fresh water withdrawals by requiring applicants to consider beneficial reuse of wastewater at N.J.A.C. 7:15-5.25(d)3. Additionally, as mentioned in Response to Comment 425, these rules contain provisions at N.J.A.C. 7:15-5.25(f) that provide that the Department will only adopt a wastewater management plan, a wastewater management plan update or wastewater management plan amendment where an applicant has demonstrated that the water supply needs have been met and do not conflict with the most recent New Jersey State Water Supply Plan, regional water supply plans, TMDLs and any limitations on withdrawals due to ecological and salt water intrusion concerns.

428. COMMENT: The Rules on Coastal Zone Management (CZM), N.J.A.C. 7:7E, which implement a variety of statutes affecting the coast, apply across a range of actions or decisions by the Department on the uses of coastal resources within or affecting the coastal zone. These categories are listed at N.J.A.C. 7:7E-1.2. Included in the affected actions are Department

permits, planning actions, N.J.A.C. 7:7E 1.2(h), and management activities, N.J.A.C. 7:7E 1.2(e), (g) and (h). The activities, which are subject to the proposed WQMP rule amendments are subject to N.J.A.C. 7:7E-1.2.. Specifically, the regulations at N.J.A.C. 7:7E require that the CZM rules be used in decisions on the consistency or compatibility of proposed actions by Federal, State and local agencies within or affecting the coastal zone; permit decisions, approvals, certifications, and conveyances in or affecting the coastal zone; and, shall provide the basic policy direction for planning actions undertaken by the Department.

Given these requirements, it is important that the proposed WQMP amendments specifically acknowledge the jurisdiction of the rules on coastal zone management, particularly in the preparation of WQMPs and WMPs, as well as other decisions and activities affected by the proposed amendments. Proposed N.J.A.C. 7:15-3.1(b) seeks to ensure that permits issued under the Rules on CZM are consistent with the WQMP, but not vice versa. (17)

RESPONSE: Under N.J.A.C. 7:15-3.6, the rules do establish that in the coastal zone, the Department's rules on Coastal Zone Management provide the basic policy direction for WQM planning. Thus, any water quality management plan amendments including WMPs in the coastal zone must follow the policy direction in N.J.A.C. 7:7E. As discussed in other parts of this document, the existing areawide WQM plans are old and based on outdated information. One of the many reasons that 30-year old areawide WQM plans need updating is that wastewater planning provisions that they contain may not have considered newer policies contained within N.J.A.C. 7:7E. Consistency determinations under N.J.A.C. 7:15-3.1 are based on the information that is currently adopted in the areawide WQM plan, thus without an update to these

Plans, not all activities that are deemed consistent with the areawide WQM plans will be consistent with the Coastal Zone Management rules. The adopted rule attempts to address this issue at N.J.A.C. 7:15-5.24(c) by prohibiting Coastal Fringe Planning Areas, Coastal Rural Planning Areas and Coastal Environmentally Sensitive Planning Areas identified on the CAFRA Planning Map from being identified as sewer service area. In addition, at N.J.A.C. 7:15-5.24(d), areas as defined in the Coastal Zone Management rules policies as Beaches at N.J.A.C. 7:7E-3.22, Coastal high hazard areas at N.J.A.C. 7:7E-3.18 and Dunes at N.J.A.C. 7:7E3.16 as well as environmentally sensitive areas in which Federal 201 grant limitations prohibit the extension of sewer service areas shall not be identified as sewer service areas.

429. COMMENT: While proposed N.J.A.C. 7:15-3.6 reflects and retains current policy regarding coordination with Coastal Zone and Hackensack Meadowlands programs, there should be a specific statement in the rules requiring demonstration of compliance with the rules at N.J.A.C. 7:7E for activities and actions conducted under the water quality management program and affecting or occurring within the coastal zone. It should be clear that activities that are affected will be required to demonstrate that they are in compliance with the substantive rules and policies under the CZM rules, as well as other requirements specific to the water quality management program, even if they are not subject to CAFRA or the Waterfront Development Law (N.J.S.A. 12:5-3). Only in this way can the CZM rules "provide the basic policy direction…for planning actions undertaken by the Department." Since this requirement exists in current regulations, the addition of such a statement or rule should be seen as clarification and coordination between Departmental programs, and as providing clarity to regulated entities. (17)

RESPONSE: In the rules on Coastal Zone Management at N.J.A.C. 7:7E-1.2(g), when the Department describes the oversight of the Coastal Zone Management rules to permit decisions, approvals, certifications and conveyances affecting the coastal zone, the provision clearly states that the Coastal Zone Management rules will apply "to the extent statutorily permissible." Consequently, the Department cannot require compliance with the Coastal Zone Management rule standards on projects that are not subject to CAFRA or the Waterfront Development law. However, all projects that are subject to the Rules on Coastal Zone Management must demonstrate compliance with the applicable policies. The Coastal Zone Management rules at N.J.A.C. 7:7E-8.4(b), Water Quality, state "In accordance with N.J.A.C. 7:15 concerning the Water Quality Management Planning and Implementation process, coastal development that is inconsistent with an approved Water Quality Management (208) Plan under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., is prohibited."

N.J.A.C. 7:15-3.7

430. COMMENT: N.J.A.C. 7:15-3.7(b) acknowledges that the Department will coordinate with the Pinelands. The rule reads "The Department shall seek comments from the Pinelands Commission." The rule should be amended to say, "The Department shall seek and address comments from the Pinelands Commission." (83)

431. COMMENT: N.J.A.C. 7:15-3.7, Coordination with the Pinelands program, appears to only require the Department to seek comments from the Pinelands Commission but not necessarily to address those comments in a manner that assures consistency with the Pinelands Comprehensive

Management Plan (CMP), N.J.A.C. 7:50 et seq. especially with regard to WQM plan amendments or revisions pertaining to the Pinelands Area for which consistency with the standards of the Pinelands CMP is required pursuant to N.J.S.A. 13:18A-27 and 13:18A-10(c). It should be clarified that all proposed Water Quality Management plan amendments and revisions pertaining to the Pinelands Area and Pinelands National Reserve would always result in early consultation with the Pinelands Commission to guarantee consistency with the intent and programs of the Pinelands Protection Act, N.J.S.A. 13:8A-1 et seq., and Section 502 of the National Parks and Recreation Act of 1979, 16 U.S.C. § 471i, as implemented through the Pinelands CMP. (84)

RESPONSE TO COMMENTS 430 AND 431: The Department views the Pinelands CMP and the WQMP rules as intending to accomplish the same basic objectives with regard to protection of natural resources. Given the common objectives, the Department believes that coordination and integration during development of WMPs and amendments will lead to outcomes that are mutually supportive of the Pinelands CMP and the WQMP rule objectives. Under the rule prior to these amendments, the Department worked closely with the Pinelands program staff to develop WMPs and amendments that were mutually satisfactory, which necessarily includes addressing issues raised by the Pinelands Commission. As in the past, the Department will continue to coordinate closely with the Pinelands staff and to address issues raised, but will continue to retain the final decision making authority with respect to WQM plan amendments and revisions.

432. COMMENT: The requirement for comment from the Pinelands Commission on revisions within their jurisdiction at N.J.A.C. 7:15-3.7(b) is supported. This will help promote the utilization of the Commission's expertise in reviewing and implementing project proposals. (64)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

N.J.A.C. 7:15-3.8

433. COMMENT: N.J.A.C. 7:15-3.8 includes language that addresses site specific amendments and revisions. Could the Department more fully explain how site specific amendments and revisions would be approved? They are not supposed to be approved unless they're part of a larger plan. There is not a lot of flexibility in the Water Quality Planning Act to allow the Department to approve site specific amendments in the absence of consistency with an underlying plan. Explain how the issue of site specific amendments works. (86)

434. COMMENT: The issue of site specific amendment is serious and has been an end run around the planning process. If the rule is not designed to establish severe restrictions on site specific amendments, undermining the planning process and standards, then the whole concept of site specific amendments should be taken out of the rule. (86)

RESPONSE TO COMMENTS 433 AND 434: The Department agrees that allowing unlimited site specific amendments and revisions to the WQM plans is contrary to achieving the objective of the rule. For this reason, site specific amendments will only be allowed, with very limited

exceptions, where a WMP is up to date. Further, activities that are allowed to proceed under the revision category without an up to date WMP are limited and the Department must be able to find that the standards at N.J.A.C. 7:15-5.24 and 5.25 are met.

Site specific amendments and revisions are small changes made to the areawide WQM plans that go through a proposal, review, public noticing and comment period, and decision process. Approvals of these projects must be authorized by the Governor or his or her designee and once adopted become part of the regional areawide WQM plan upon which the Department uses to make consistency determinations. Revision categories are explained at N.J.A.C. 7:15-3.5(b)4 and make provisions for things as simple as corrections of errors in the Statewide or areawide WQM Plans, but also include allowances for small treatment plant expansions, and sewer service area modifications of less than 100 acres where a WMP is up to date. The revision process is described at N.J.A.C. 7:15-3.5 but basically includes the following: Revisions are submitted by applicants, reviewed by the Department, usually additional information is needed from the applicant and once it appears to meet the rule requirements, the Department provides affected government agencies with three weeks in which to provide written comments. If there are no objections, the revision is adopted, but if there are issues, the revision could be changed before adoption or denied.

The “site specific” WQM plan amendment process under the rule prior to these amendments was only allowed for proposals of less than 20,000 gallons per day of wastewater discharge and less than 100 acres or industrial facilities. Larger proposals required the preparation of a WMP. Under the adopted rules, with limited exceptions, plan amendments are only allowed where a

wastewater management plan is up to date. The amendment process (which includes site specific amendments) is described at N.J.A.C. 7:15-3.4 but basically includes the following: Site specific amendments are submitted by applicants (WMPs by WMP agencies), reviewed by the Department, usually additional information and changes are needed from the applicant and once it appears to meet the rule requirements, the Department provides a public notice in the New Jersey Register with a 30 day comment period and the applicant posts a notice in a local newspaper and requests statements of consent (resolutions) from affected government agencies and provides 60 days for these statement. If there are no objections, the amendment is adopted, but if there are issues or significant public comment, a non-adversarial public hearing may be held. The amendment can also be changed so as to not invalidate the public notice provided, could be returned for changes before adoption or denied. The Department provides guidance documents and checklists explaining these processed on the web or by request.

435. COMMENT: Concerns exist regarding the unrestricted grandfathering of amendments, site specific amendments, and revisions that are submitted up until adoption of the rule. (22, 76)

436. COMMENT: Concern was expressed regarding proposed N.J.A.C. 7:15-3.8, which relates to the validity of site specific water quality management plan amendments and revisions. This section of the proposed rules provides that site specific water quality management amendments for which notice has been filed for publication or published in the New Jersey Register as of the effective date of the proposed rules will be subject to the current rules. For this provision, the Department should pick a date certain in the very near future and any site specific amendments

or revisions that have not been deemed "complete for review" prior to that date will be subject to the new rules. (17, 49)

RESPONSE TO COMMENTS 435 AND 436: N.J.A.C. 7:15-3.8(b) allows site specific plan amendments that have been reviewed sufficiently, such that the Department has filed notice of them for publication in the New Jersey Register or notice has already been published in the New Jersey Register, to continue to be processed under the requirements of this chapter in effect before the effective date of this rule adoption. These projects have made a good faith effort to become consistent with the areawide WQM plan and have performed analyses under EO 109 that indicates that the proposed project would not significantly affect water resources. The Department did not establish a date by which amendments would no longer be received because this would have amounted to a moratorium on new proposals until this rule was adopted. This approach was not practicable as some public purpose projects need to move forward, other proposals that lie within areas designated for growth would be unfairly penalized, and it would result in the Department's permitting process becoming unpredictable.

If the proposed plan amendment is not adopted and is re-submitted as a new or modified amendment, it would be subject to the rules in affect at the time of re-submission. The grandfathering of WMPs is addressed at N.J.A.C. 7:15-5.2. (see Response to Comments 487 through 489)

N.J.A.C. 7:15-3.8(c) specifies that WQM plan revisions that have been submitted to the Department but not adopted prior to the effective date of these rules shall be subject to the

requirements of the rules in effect after the effective date of these amended rules, thus the Department does not believe that unrestricted grandfathering was allowed.

437. COMMENT: N.J.A.C. 7:15-3.8(b) grandfathers "proposed site specific WQM plan amendments for which notice has been filed for publication or published in the New Jersey Register" prior to the effective date of the new rules. The Department should not utilize the *New Jersey Register* publication timeframe, as proposed, for grandfathering, where issues regarding proper noticing may arise. Instead, the grandfather should commence from the date of completeness of the site specific WQM plan amendments. (18, 42, 44, 45, 61)

RESPONSE: The WQM plan amendment process does not contain a provision for "completeness," therefore a provision to "grandfather" for "completeness" can not be provided. The Department believes the "filed for publication in the New Jersey Register" provision provides a legal and justifiable date for establishing a grandfathering provision for amendments therefore this rule provision was not changed.

438. COMMENT: N.J.A.C. 7:15-3.8(b), which establishes that all amendments and revisions not approved under the old rules be required to reapply and be subject to the rules in affect at the time of application is supported. (64)

RESPONSE: The Department acknowledges this comment in support of this rule provision. However, N.J.A.C. 7:15-3.8(b) does provide for a grandfathering provision for amendments filed for publication in the New Jersey Register to continue to be process under the rule prior to these

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amendments. N.J.A.C. 7:15-3.8(c) provides for revisions that have not been adopted to meet the new requirements.

439. COMMENT: At N.J.A.C. 7:15-3.8(b) and (c), it is proposed that once these amended rules are formally adopted by the Department, all site specific water quality management plan amendments under review by the Department but for which a notice has not yet been filed for publication in the New Jersey Register would be required to comply with the newly adopted rules. Similarly, proposed water quality management plan revisions submitted to the Department but not approved as of the day prior to the formal adoption of these proposed rules would be required to comply with the newly adopted rules. These provisions seem to be contradictory to wording proposed at N.J.A.C. 7:15-5.2(b) where the WMPs "filed" as of the effective date of the proposed rule may continue to be processed under the provisions of the current rule. Both of these provisions at N.J.A.C. 7:15-3.8(b) and (c) should be modified to provide that all plan amendments and revisions received by the Department prior to the approval date of newly adopted rules need only comply with the rules effective upon the date of submission. Given the length of time it takes the Department to review and act on amendment and revision proposals, and the probability that the timeframe for approval of these rules will extend past the Department's April 2008 target, it is unreasonable for the Department to attempt to have applicants comply with these proposed rules prior to a full and complete opportunity for public scrutiny as provided for by the Department's administrative rulemaking procedure.

For example, a site specific amendment is filed, reviewed and found to be in compliance with the current regulations. If the Department fails to publish the proposal of this amendment in the

New Jersey Register before the new rule is adopted, the applicant would be required to resubmit under the new rules due to a regulatory technicality. It is unreasonable and onerous to require resubmission of a new amendment proposal for a project that already achieved substantial compliance. Additionally, the review and approval process for the newly submitted amendment would be unfairly delayed if the host county was required to modify, submit and gain approval of its WMP before the new site specific amendment could be approved. (60)

440. COMMENT: The Department should establish realistic timeframes that would determine which rules are applicable for WQM plan amendments and revisions for N.J.A.C. 7:15-3.8(b) and (c). If the Department does not act on a new or modified site specific plan amendment or revision that has been deemed complete within 30 days of receipt, then the amendment should be processed under the previous rules. Further, any written notification by the Department regarding any proposed amendment or revision should be sent by certified or overnight mail. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 439 AND 440: The WQM plan amendment process does not contain a provision for "completeness," therefore a provision to "grandfather" for "completeness" can not be provided. N.J.A.C. 7:15-3.8(b) allows site specific plan amendments that have been reviewed sufficiently, such that the Department has filed notice of them for publication in the New Jersey Register or notice has already been published in the New Jersey Register, to continue to be processed under the requirements of this chapter in effect before the effective date of this rule adoption. These projects have made a good faith effort to become consistent with the areawide WQM plan and may have performed an analysis under EO 109 that

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indicates that the proposed project would not significantly affect water resources. Thus, the Department believes this is a reasonable timeframe for grandfathering of amendment proposals and requiring the remaining proposals to meet the new standards at N.J.A.C. 7:15-5.24 and 5.25. If the proposed plan amendment is not adopted and is re-submitted as a new or modified amendment, it would be subject to the rules in affect at the time of re-submission.

N.J.A.C. 7:15-3.8(c) specifies that WQM plan revisions that have been submitted to the Department but not adopted prior to the effective date of these rules shall be subject to the requirements of the rules in effect after the effective date of these amended rules. The Department believes this is a reasonable timeframe for grandfathering of revision proposals and requiring remaining proposals to resubmit and meet the new standards at N.J.A.C. 7:15-5.24 and 5.25.

N.J.A.C. 7:15-5.2 refers to the validity of previously adopted or submitted wastewater management plans and specifies the criterion that must be met for a wastewater management plan to be considered under the rules existing prior to these amendments. It is customary and appropriate to allow applications that are prepared and submitted to the Department to be completed under the rules applicable during the development and submission of the application, especially recognizing the investment a WMP agency has made by that point in a project. The Department does not want to punish WMP agencies that have been working in good faith to meet the requirements under the rules existing prior to these amendments. Thus, WMPs were provided with a longer grandfathering period.

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441. COMMENT: The Department proposes at N.J.A.C. 7:15-3.8(c) that WQM plan revisions that have been *submitted but not adopted* would be subject to the new amended WQM planning rules. This subsection should provide a grandfathering provision like subsection N.J.A.C. 7:15-3.8(b) that precedes it and the grandfather should commence from the date of completeness of the site specific WQM plan revisions. (18, 42, 44, 45, 61)

RESPONSE: Plan amendment applications are not grandfathered based upon any determination of "completeness." Instead, only those amendments for which notice has been filed for publication in the New Jersey Register prior to the effective date of the new rules are grandfathered. The WQM plan revision process, like that for amendments, does not contain a provision for "completeness," therefore a provision to "grandfather" for "completeness" can not be provided. Under the amended rule, the categories of projects that qualify for revisions is expanding while the scope is more limiting and the Department would like to opportunity to review these projects under the amended rule provisions. However, most of the revisions not involving sewer service area expansions that were not adopted under the rules prior to these amendments will most likely continue to qualify to be processed as revisions under the amended rules. The Department has strengthened the criteria and limited the scope of projects that may qualify as a revision to ensure the best possible environmental protection. In many instances revisions are only allowed if the WMP is current in accordance with the schedule at N.J.A.C 7:15-5.23. This rule provision was not changed.

442. COMMENT: The rule proposal will have significant unintended and undesirable consequences in its present formulation which, in many cases, will actually complicate, rather

than facilitate, the planning process and could lead to decreased protection of water supplies and water quality in those locations where existing water quality planning is already fully protective of the environment. The proposed rules should either be amended before adoption or withdrawn and re-proposed to address these concerns.

Projects that have already obtained Water Quality Management Plan amendment and General Development Plan (GDP) approvals pursuant to Executive Order No. 109 (EO109) criteria that comply with all appropriate planning and use criteria are fully protective of water resources and therefore already meet the substantive and planning requirements set forth within the purpose and intent of the proposed rules. There is a serious risk that all of this good planning could be rendered uncertain, disregarded, or even replaced by less comprehensive and less environmentally protective planning in the future unless certain changes are made to the rule proposal. Not only does this thwart the underlying intent of all planning processes, which is to create certainty and to promote beneficial goals, but it is also enormously disruptive to the business operations of socially and environmentally responsible companies, not to mention wasteful of both public and private sector resources.

For example, a thorough and comprehensive GDP, which was in every way the functional equivalent of a full site plan approval under the MLUL, accompanied by an approved Water Quality Management Plan amendment that meets all relevant EO 109 criteria for the build-out of the project site, maintains a commitment to sustainable development and environmental stewardship, which is guided by the following water resource protection and conservation principals: protecting the aquifer that provides water to both the project and its neighbors;

preserving the quality and beauty of the local waterway; providing wastewater treatment that meets or exceeds water quality standards; utilizing water recycling; preserving and enhancing the character of the project site; and working with the Department to develop creative approaches to stormwater management, such as wetland creation and enhancement.

Instead of rewarding good planning efforts that comply with all EO 109 criteria, the proposed rules create additional and unnecessary obstacles that will impose undue hardship on facilities that met the EO 109 criteria and could even result in the expiration or withdrawal of adopted WQMP amendments and replacement with another plan that is less desirable from an environmental stewardship perspective.

N.J.A.C. 7:15-3.8(d) states that individual WQMP amendments shall be valid for six years from the date of adoption or until the wastewater service area is revoked, whichever is later. Wastewater service area revocation occurs within nine to twelve months of rule adoption if the local municipality or county does not maintain a current WMP. It is unduly burdensome to suspend approval of an entity's approved WQMP amendment in instances where by design or default, the municipality or county in which the entity is located fails to timely submit a WMP or WMP update. Indeed, the recalcitrance of a county or municipality can result in the nullification of the years of work that an entity has invested in order to receive WQMP amendment approval in accordance with EO 109.

In instances where an entity has already received a GDP and a WQMP amendment that have been reviewed and approved in full accordance with EO 109 criteria, such entities should not be

subjected to possible expiration of their adopted WQMP amendments whenever a municipality or county fails to maintain a current WMP. Rather, entities with such approved WQMP amendments should be permitted to have their amendments reinstated for an additional six years from the date of the rule adoption, as would be the case if the entity submitted an application for a WQMP amendment under the current rules or after the municipality or county prepared its WMP. Such entities should not be penalized for having proactively taken such initiative prior to the proposed rule adoption.

Proposed N.J.A.C. 7:15-3.8(d) should be revised to provide that, when municipalities or counties fail to submit their WMPs to the Department in the time required under the proposed WQMP rules, entities with approved WQMP amendments in accordance with EO 109 criteria are permitted to have their WQMP amendments reinstated for an additional six years from the date of the rule adoption. (40)

RESPONSE: The Department acknowledges the commenters concern that site specific amendments adopted prior to six years before the effective date of these rules, do not fall within the validity period of six years for previously adopted amendments and as such, would be subject to a wastewater service area withdrawal within nine to twelve months of rule adoption if the county or local municipality does not submit a WMP or updated WMP. However, the WQMP rules set forth the framework for the continuing planning process (CPP) required under the Federal Clean Water Act and the New Jersey Water Quality Planning Act. The intent of the CPP is to synchronize Federal, State, regional and local land use planning. This necessarily required periodic reexamination of those land use plans to ensure that the most recent environmental

factors and other land use planning objectives and projections are reflected in the WQMPs. Therefore WMPs and amendments to areawide WQM plans are not static and reexamination is required. The Department has attempted to recognize in the rules those projects where a significant investment has been made in reliance on earlier versions of the WQMP and has provided an exception from the wastewater service area withdrawal for projects that have received local preliminary or final site plan or subdivision approval and a wastewater approval prior to the date of the wastewater service area withdrawal. (See N.J.A.C. 7:15-8.1(b)2) If an applicant has already received a NJPDES permit to its full planned capacity and if any of the proposed development secures preliminary or final site plan approvals prior to the effective date of the withdrawal of wastewater service area (e.g. nine months from the effective date of the rule) then that part of the development meeting these tests would also be exempted from the wastewater service area withdrawal. The Department believes that six years from the rule adoption and the development approval exemptions provide adequate time and relief for previously adopted site specific amendments to maintain validity and an additional extension date of six years beyond the date of the rule adoption is not necessary.

The intent of the rules is not to result in a unilateral withdrawal of wastewater service area anywhere in the State, but rather to provide incentive to compel compliance with the CPP and the statutory mandates.

443. COMMENT: Proposed N.J.A.C. 7:15-3.8(d) and (e) state that a site specific amendment or revision would be valid for six years from the date of adoption. The six-year timeframe of validity does not account for the lengthy time needed to obtain all the necessary development

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approvals and to process the application. A ten-year timeframe would be more realistic and would provide reliance on the WMP in pursuing development approvals. (18, 42, 44, 45, 61)

RESPONSE: As discussed in Response to Comment 442, WMPs must be updated periodically to ensure that the most up to date information, such as changes to municipal zoning, State and regional planning activities and regulatory standards, is fully incorporated into decisions concerning wastewater management choices. The Department chose a six-year WMP update schedule to correspond with the schedule established in the Municipal Land Use Law for the periodic examination of municipal master plans and development regulations (N.J.S.A. 40:55D-89) and believes this is an adequate amount of time for the entity seeking to develop the property to process the necessary development approvals. The Department further chose to use the same six year period as the validity period for previously adopted amendments and revisions to correspond with the WMP submittal and update requirements. Thus, if a WMP agency adheres to the schedule for WMP updates in the rule, the site specific amendments and revisions should be included within a full WMP or WMP update within the six year period.

444. COMMENT: The Department should authorize other entities with responsibility to review a development application to proceed with an approval, conditioned upon an ultimate finding of consistency and approval of a WMP plan, amendment or revision. This approach would allow concurrent processing of plans and development applications and minimize processing time. (18, 42, 44, 45, 61)

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RESPONSE: This rule does not prohibit review of development applications at the local level and does not prohibit local approvals or approvals from other agencies from being sought. Regarding Department approval, while Department permitting programs can not grant permits or approvals before a consistency determination is conducted, the consistency determination review can be done at the same time as the permit review. Thus, concurrent processing of a consistency determination review and a Department permit can be done, minimizing the processing time as requested by the commenter.

445. COMMENT: The length of a plan's valid timeframe should be tolled in the event of litigation challenging the WMP, amendment or revision, (e.g., the timeframe "clock" should be halted until the litigation process is over). Likewise, if there is litigation challenging a development approval in a sewer service area, there should be grandfather protection of that approval. The development should not be subject to a loss of its right to connect to sewer if there is WMP amendment, revision or update deleting the sewer service area while the approval is litigated. (18, 42, 44, 45, 61)

RESPONSE: Under these rules an approval remains valid for six years. This should be sufficient time for a project to commence. Because this rule envisions an ongoing and continuing planning process, the Department does not believe there is a reason to provide a tolling provision as suggested by the commenters. Local planning is based on particular facts and circumstances with relevance to that locale and the WMP should reflect the priorities of the locals.

446. COMMENT: Proposed N.J.A.C. 7:15-3.8(e) suggests that a wastewater management plan update *may* include a site specific amendment or revision. Instead, all updates should be required to include all pending and adopted site specific amendments or revisions. (18, 42, 44, 45, 61)

RESPONSE: Water Quality Management Plan amendments and revisions are changes to planning documents and planning document are subject to change. The Department anticipates all previously approved amendments or revisions will continue to be accommodated in WMPs or WMP updates. However, as a result of undergoing the environmental build-out analysis for a county, it is possible that previously approved amendments or revisions (those over six years old where local approvals are no longer valid) where no permits were pursued or approved for the proposal, could be areas considered for zoning changes to accommodate, for example, lack of treatment plant capacity issues or lack of available water supply. Additionally, new updated WMPs could determine to provide sewer capacity at a regional STP to a site which previously was approved for a site specific ground water discharge through an amendment or revision, thus negating the need for the prior approval. All adopted site specific amendments and revisions must be addressed by a WMP or WMP update, but the Department will not require all adopted site specific amendments or revisions to be included in the WMP or WMP update exactly as adopted unless the prior adopted amendment or revision has not been changed by the new WMP proposal. All pending site specific amendments and revisions must be addressed by a WMP or WMP update. Site specific amendments or revisions that are not included within a WMP or WMP update, as applicable, will not be reviewed independently.

N.J.A.C. 7:15-3.9

447. COMMENT: The proposed rule at N.J.A.C. 7:15-3.9(a) allows applicants to appeal decisions regarding consistency determinations but does not clarify the process by which it occurs. The rule should allow other affected parties and stakeholders to provide input to verify the validity of a consistency determination when it is appealed. (68)

448. COMMENT: N.J.A.C. 7:15-3.9(g) and (i) should be clarified to state that the appeal can only be brought by the "applicant" and not by any other interested parties, including third party appeals (N.J.S.A. 52:14B-3.3). (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 447 AND 448: N.J.A.C. 7:15-3.9(a) does not allow applicants to appeal consistency determinations, this provision only allows applicants to appeal Department decisions regarding WQMP plan amendments. Pursuant to N.J.A.C. 7:15-3.9(g), consistency determinations may only be appealed in accordance with the statutes and rules that govern the permit that is the subject of the consistency determination. The appeal process of a consistency determination is therefore in accordance with the statute and rules that govern the issuance of that permit. Decisions governing whether third parties can participate in appeals of permit decisions are governed under the facts particular to those applications. (N.J.S.A. 52:14B-3.1) Many of the Department permitting programs allow and invite public comment on proposals which will provide third parties with an opportunity to comment on the consistency of the proposal with the areawide WQM plan.

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449. COMMENT: N.J.A.C. 7:15-3.9(g) indicates that the applicable rules and statutes concerning a permit in question would govern. Rather, the applicant should be able to appeal the consistency determination on its own without involving the affected permit. (18, 42, 44, 45, 61)

RESPONSE: The Department obtains the information needed to make a consistency determination, including all of the potential issues involved with a decision, during the permitting process. It would be premature to allow appeals of consistency determinations since the Department would not have adequate information for the legal proceedings.

N.J.A.C. 7:15-3.10

450. COMMENT: N.J.A.C. 7:15-3.10, which provides for coordination with the Highlands Council, is supported. (17, 64)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

451. COMMENT: Under N.J.A.C. 7:15-3.10(a) the Department is to seek comments from the Highlands Council on proposed water quality plan amendments and revisions for the Highland Region. The concern is that the Highlands Council is providing comments to the Department based on an un-adopted draft Highlands Regional Master Plan. While the Highlands Council may offer comments, the Department should not require revisions to wastewater plans based on the draft Highlands Regional Master Plan. (14)

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452. COMMENT: The referral for recommendation from the Highlands Council at N.J.A.C. 7:15-3.10(a) is unworkable. There is no basis for a Highlands Council recommendation. The Highlands Council has yet to adopt a Highlands Regional Master Plan, nor has it formally adopted through rulemaking the procedures for reviewing any WQM plan amendments. The proposal must be amended to defer Highlands Council reviews until the Council: (1) formally adopts a statutorily compliant (in other words, complete) Regional Master Plan; and (2) adopt rules, pursuant to the Administrative Procedures Act governing its review of WQMP amendments. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 451 AND 452: Under the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38, prior to adoption of the Highlands Regional Master Plan the Department shall not approve a WQM plan amendment for a project proposed in the Highlands planning area or Highlands preservation area without first obtaining a recommendation from the Highlands Council. (see N.J.A.C 7:38-1.1(k)) The Department will review and consider the Highlands Council's recommendation and any comments provided. However, as the commenter notes, the Department can not require consistency with the Highlands Regional Master Plan prior to its adoption. At this time, it is anticipated that the Highlands Regional Master Plan will be adopted sometime in July of 2008. This is well in advance of the county WMP submittal deadline, and since very few, if any, proposals would qualify for a WQMP amendment in the interim period, the Department does not anticipates that amendments will be processed prior to adoption of the Highlands Regional Master Plan. Additionally, the Highlands Council, not unlike the Pinelands Commission or the New Jersey Meadowlands Commission, is not required to adopt rules to govern its review of WQM plan amendments.

453. COMMENTS: Proposed N.J.A.C. 7:15-3.10(a) provides that the Department shall seek comments from the Highlands Council "on proposed WQM plan amendments and revisions pertaining to the Highlands Region" prior to the Department rendering its decision. This provision is inconsistent with N.J.A.C. 7:38-1.1(k), which only provides for referral of WQMP amendments, not revisions, to the Highlands Council for review and recommendation. Any reference to Highlands Council review of revisions should be deleted. (18, 42, 44, 45, 61)

RESPONSE: The rule at N.J.A.C. 7:15-3.5(d) provides that once the Department determines that a project or activity qualifies for a revision, the Department shall provide a copy of the proposed revision to the agencies identified in N.J.A.C. 7:15-5.22 and provide 21 days for these entities to comment on the proposed revision. The Highlands Council is one of the agencies listed at N.J.A.C. 7:15-5.22, thus the Highlands Council will have 21 days to comment on a revision proposal like any other governmental agency listed in this section.

454. COMMENT: The proposal must to be amended to specify a 60-day timeframe for the Highlands Council to review amendments and forward its recommendation(s) to the Department. If the Highlands Council fails to timely respond within the 60-days, the Department must be required to take action on the amendment within 30-days. There should be no extension of time to the Highlands Council if it does not timely file its recommendation with the Department. (18, 42, 44, 45, 61)

RESPONSE: Under the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38, prior to approval of a WQM plan amendment, the Highlands Council is authorized to issue determinations of consistency with the Highlands Regional Master Plan once adopted and recommendations for areas within the Highlands planning area and Highlands preservation area prior to adoption of the Highlands Regional Master Plan (see N.J.A.C 7:38-1.1(k)). There is no set time limit for Highlands Council reviews under those rules. The Department anticipates that the Highlands Council will usually act within the 60-days recommended by the commenters, however, should a proposal be particularly complicated, or perhaps an applicant is not forthcoming with all the information required by the Highlands Council to make its' determination, the Department does not believe it is appropriate to limit the Highlands Council review of amendments and forwarding of its recommendation(s) to the Department to 60 days. Should this time period extend beyond the close of the comment period and receipt of all other requested statements of consent, the Department will remind the Highlands Council that comments were requested, but should they not be forthcoming, the Department retains the final decision making authority with respect to WQM plan amendments and revisions.

455. COMMENT: Language similar to that at N.J.A.C. 7:15-3.10 regarding coordination with the Highlands Council should be added to the rule regarding coordination with the State Planning Commission. Requiring coordination with the State Planning Commission should provide a stronger link between the delineation of sewer service areas and the State Plan. (77)

456. COMMENT: The Department should also seek comments on amendments and revisions from the State Planning Commission. (85)

457. COMMENT: The Department should coordinate with the State Planning Commission by notifying and seeking comments on proposed WQM plan amendments and revisions that include any changes that are inconsistent with State Plan planning areas over a certain threshold size. (78)

458. COMMENT: The purpose rule should require all WMP, WMP update and WMP amendment submissions be provided to the Office of Smart Growth (OSG) for review in connection with an assessment of redevelopment proposals and their consistency with the State Development and Redevelopment Plan policies. The State Development and Redevelopment Plan is the guidance document for the State of New Jersey including all State Agencies and levels of government. Similarly, the review report prepared by the Department for WMP, WMP update and amendment submissions should be reviewed by the OSG prior to their release to applicants to assure consistency in addressing redevelopment and preservation goals. (88)

RESPONSE TO COMMENTS 455 THROUGH 458: The Department added coordination with the Highlands Council at N.J.A.C. 7:15-3.10 because the Highlands Council, like the New Jersey Meadowlands Commission and the Pinelands Commission, has independent statutory review authorities outside of the Water Quality Planning Act. These agencies are given statutory responsibility for environmental resources in their geographic jurisdiction with the Department as the overarching agency for Statewide environmental protection, including these areas. While the Department will consult with all affected governmental bodies as indicated by N.J.A.C. 7:15-5.2, due to the similarity of mission between the Department, the Pinelands Commission and the

Highlands Council, Department believes it is particularly important to specify the coordination process that will be followed with these agencies.

The Department currently coordinates with the Office of Smart Growth on amendment proposals through the Office of Planning and Sustainable Communities without codification in rules. Additionally, where municipalities are actively engaged through proposed center based development, an element of an endorsed plan approved by the State Planning Commission, ongoing Department coordination with the Office of Smart Growth will continue to ensure that established sewer service areas evaluate the inclusion of any environmentally sensitive areas and provide the necessary environs protections needed to implement the center based development..

N.J.A.C. 7:15-4 Water Quality and Wastewater Management Policies and Procedures

449. COMMENT: Subchapter 4 should contain policies regarding contents of water quality and wastewater management plans beyond just standards for consistencies, inconsistencies and septic system management. For example, in one Water Quality Management Plan protection of headwaters areas is a priority whereas in another, protection of recreational values is a priority. (22, 76)

RESPONSE: The Department agrees that regional or local issues of concern may exist beyond those required to be addressed in the rule. It is for this reason that municipalities and counties are allowed to establish additional or more stringent standards in the individual wastewater management plans at N.J.AC. 7:15-5.25(a). For example, a municipality may wish to remove

rural areas that are otherwise eligible for sewer service from the sewer service area in order to preserve agriculture and the associated rural setting.

460. COMMENT: Under the *Mount Laurel II* decision and the COAH regulations, a court or COAH can impose a scarce resources order where there is a scarcity of sewer capacity. The order mandates that priority in access to scarce sewer capacity shall be given to those *Mount Laurel* inclusionary developments specified in the order. The Department regulations should specifically state that the county or municipality preparing a WQMP must fully comply with the terms of a court or COAH scarce resources order and that those sites must remain as priority sites for the provision of sewer. Any other interpretation will lead to prolonged litigation as to the authority of the Department to countermand a court or COAH order. (18, 42, 44, 45, 61)

RESPONSE: It is not necessary to state that a scarce resource order or any other court order needs to be respected in WMP development. The lack of a reference in this rule to the responsibility of local governments to satisfy any and all constitutional or court ordered responsibilities does not in any way countermand or undercut an order of the court or other obligation of the local government. The Department further expects that where wastewater management and water supply resources are shown to be strained, these are areas that should be the focus of reserving capacity to ensure that affordable housing goals can be achieved. For additional discussion of COAH issues and scarce resource orders, see Response to Comments 111 and 112.

N.J.A.C. 7:15-4.2

461. COMMENT: N.J.A.C. 7:15-4.2 outlines particular projects and activities that would be "deemed to be consistent with the WQM plans." The Department should include other types of activities, including private sector projects that will minimally impact the environment and are subject to review under other departmental programs. (18, 42, 44, 45, 61)

462. COMMENT: Language should be added to N.J.A.C. 7:15-4.2 stating "water permits not involving an increase in capacity or service area to the project and activities are deemed to be consistent and coordinated with N.J.A.C. 7:15-3.1(b)." (38)

RESPONSE TO COMMENTS 461 AND 462: A very limited set of activities are specified at N.J.A.C. 7:15-4.2 as activities that are deemed consistent. This set of treatment related activities represent activities which may not be specifically reflected in a WQM plan, but would not warrant a plan modification process. The identified treatment works approvals include treatment improvements, actions to remediate pollution that are directed by the Department or EPA, interim or emergency construction of treatment works, removal or remedial actions at hazardous sites, certain combined sewer overflow (CSO) improvements and restricted access reclaimed water for beneficial reuse activities. These activities do not represent or support new development but rather advance the objective of water quality improvement. Water supply permits and development activity, even if ultimately found to minimally impact the environment, do not fit this category of activities that will not have impacts. Accordingly, these activities, which could possibly support new development, are appropriately addressed under the consistency determination requirements in accordance with N.J.A.C. 7:15-3.1(b). While activities that are deemed consistent under this provision will not require a consistency

determination, they still must be conducted in a manner consistent with the plan, in accordance with N.J.A.C. 7:15-3.1(c).

463. COMMENT: Proposed N.J.A.C. 7:15-4.2(c) allows restricted access reclaimed water for beneficial reuse activities to be deemed consistent with the WQM plan, including for the "irrigation of restricted access locations at treatment works facilities." The Department should clarify whether any restricted access within the development can then be irrigated. (18, 42, 44, 45, 61)

RESPONSE: Irrigation of restricted access locations at a treatment works facility associated with this specific condition would be limited to those areas specifically associated with the treatment facility.

464. COMMENT: N.J.A.C. 7:15-4.3(a)1 provides that expanded or new domestic or industrial treatment works "not identified in the existing areawide WQM plan" would be inconsistent. The Department should explain the phrase "not identified in the existing areawide WQM plan." (18, 42, 44, 45, 61)

RESPONSE: The rule language in this regard is straightforward; if a treatment facility is not identified by name and/or permit number with an associated wastewater planning flow number in the areawide WQM plan, then it is "not identified in the existing areawide WQM plan."

N.J.A.C. 7:15-4.3(c)

465. COMMENT: N.J.A.C. 7:15-4.3(c)5 causes concern. The discharge of non-contact cooling water is considered discharge of a pollutant. Under the Federal Clean Water Act, "pollutant" has been defined to include heat. According to New Jersey's Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., pollution as defined, includes thermal waste. This Act also goes further than the CWA and regulates discharges into ground water. Therefore, a discharge into ground water of heated water is a discharge of a pollutant.

There is nothing in the law or science which should allow the discharge of heat pollution into ground water without being reviewed and permitted. In fact, in several locations the Department acknowledges that there is a "direct interrelationship between ground water and water quality in streams," and "baseflow of streams in primarily made up of ground water flow that reaches streams." The Department's assertion that this type of discharge "should result in little or no harm to water resources" is inaccurate, as the discharge of heat into the ground water can result in an increase in ground water temperature, which can then result in an increase in receiving water's temperature, which may then result in changes to conditions and habitats at the surface. As these changes are contrary to the stated goals of the Water Quality Planning Act, e.g., to restore the "chemical, physical and biological integrity of surface and ground water resources of the State," this portion of the rule proposal should not be adopted. (64)

RESPONSE: This rule provision does not say that the discharge of heat pollution into ground water will not be reviewed and permitted under the NJPDES program as a pollutant, rather it states that the Department will not deem these types of activities as inconsistent with an areawide WQM plan when NJPDES permits are applied for. The Department has learned through

experience that requiring amendments for these types of activities after finding them inconsistent has not added any environmental benefit to the review of these activities under the NJPDES program, thus is deferring the appropriate environmental review to that program to be conducted as part of a permit review.

N.J.A.C. 7:15-4.4(a)1

466. COMMENT: N.J.A.C. 7:15-4.4(a)1, which deems individual subsurface sewage disposal systems with a wastewater flow that does not exceed 2,000 gpd or five residential units consistent with WQM plans, is supported. N.J.A.C. 7:9A provides standards for these systems, but the cumulative impacts of multiple houses (over 5) that generate higher flows in total are not adequately regulated or measured. The best way to address these negative impacts is this requirement and elsewhere in the rule that six houses or greater with septic systems must amend the areawide WQM plan, which requires that environmental standards be met. (10, 80)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

467. COMMENT: N.J.A.C. 7:15-4.4 is inconsistent with the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq., regarding septic requirements for building "50 or more" realty improvement developments and should not be adopted. N.J.A.C. 7:15-4.4(a)1 only allows septic systems that do "not exceed 2,000 gallons per day or five dwelling units." If this provision is adopted, the reference to gallons per day (gpd) should be eliminated as it creates confusion. (18, 42, 44, 45, 61)

RESPONSE: The rule provisions at N.J.A.C. 7:15-4.4(a)1 state that the depiction of future sewer service is not intended to prohibit the lawful construction of individual septic systems, defined as those singly or cumulatively discharging 2,000 gpd or less, which is the threshold for requiring a NJPDES permit. This would mean that if more than five septic systems are proposed within a sewer service area, then an amendment would be required to change the designation to general service area equal to or less than 2,000 gpd. The provisions of the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq., would also apply if 50 or more units using septic systems were proposed. The Department believes the gallons per day provision is necessary and should not cause confusion. Where the septic development is for individual residences, the number of five dwelling units applies. However, if the development is commercial or industrial, the less than 2,000 gallons per day value applies.

N.J.A.C. 7:15-4.4(b)

468. COMMENT: The use of temporary or infill septic systems causes concerns. In cases of redevelopment, and in and around the edges of sewer services areas, temporary infill septic systems may be warranted. However, there is opposition to the proposed language that standardizes such development. N.J.A.C. 7:15-4.4(b) states that domestic treatment works with planned discharge of less than 2,000gpd "shall be constructed in depicted sewer service areas only if legally enforceable guarantees at the local government level are provided before such construction that the depicted sewer service will be used when it becomes available, and that any discharge to ground water will then be discontinued." This policy promotes the abandonment and ultimate failure of septic systems. The WQMP regulations and/or the Individual Subsurface Sewerage Disposal System rules should be revised to include

requirements for decommissioning septic systems. Septic systems planned for future abandonment due to installation of sewer lines should be required to be pumped and pulled or filled to ensure no further use. (82)

469. COMMENT: The policy at N.J.A.C. 7:15-4.4(b) promotes the abandonment and ultimate failure of infrastructure. Allowing for in-fill septic systems in sewer service areas under the condition that those septics are eventually connected to sewer lines necessitates the abandonment of septic systems. The proposed rules and/or the Individual Subsurface Sewage Disposal System proposed rules should be revised to include requirements for decommissioning septic systems. Systems planned for abandonment, due to installation of sewer lines, should be pumped, pulled, or filled to ensure no further use. (49)

RESPONSE TO COMMENTS 468 AND 469: The Department does not concur that the policy to allow development to proceed with ISSDSs in sewer service areas, with the proviso of abandonment when sewage conveyance facilities are available, promotes failure of the systems. It is expected that such systems will be properly maintained while they are in use, just as if they were intended as the permanent wastewater management alternative for the development. It is true that such systems are intended to be abandoned. This is necessary because, if areas allowed to utilize ISSDSs within sewer service areas were allowed to continue to use the ISSDSs when the sewage infrastructure was placed adjacent to the properties, these areas designated for sewer service will would inappropriately tie up resource capacity as the plan anticipates all properties in the sewer service connected to the sewage treatment facilities. This highlights the importance of designating the appropriate long range wastewater management type for each area as plans are

developed. The Standards for Individual Subsurface Sewage Disposal Systems establish the requirements for such systems and at N.J.A.C.7:9A-12.8(a) state that the local plumbing inspector is responsible for ensuring that the septic system is abandoned in accordance with the requirements for abandoned systems in the rule. The specific requirements are that all tanks (septic, pump, seepage pits, cesspools, etc.) need to be cleaned out and filled with dirt (or other inert material). Disposal fields can be abandoned in place or if the material is removed it must be disposed of at a sanitary landfill, beneficially reused in accordance with Solid Waste Rules, N.J.A.C. 7:26 or, in the case of a residential structure, it may be buried on a low area of the property. If someone wants to remove a tank or any other piping, it must be done in accordance with the Solid Waste rules. Additionally, the Department of Community Affairs has issued a Bulletin on proper procedures for abandonment of these systems this issue to all of its licensed inspectors. The last paragraph of this document (Bulletin No. 79-7, last updated May 1995), which specifically addresses the issue of abandonment, can be viewed at http://www.state.nj.us/dca/codes/bulletins_ftos/list_of_bulletins_ftos/b79_7.pdf.

N.J.A.C. 7:15-5 Wastewater Management Planning Requirements

470. COMMENT: This proposal seeks to institute a more complex, restrictive and inequitable framework upon which to base future decision-making regarding sewer service areas. This proposed framework has the potential to not only preclude future expansion of sewer service areas into locations that are in need of such infrastructure due to environmental, social and economic considerations, but it could also result in the Department's withdrawal of previously approved sewer service areas. (60)

RESPONSE: The Department believes that the criteria set forth in the rule relative to sewer service area delineation will result in sewer service areas that are better aligned with natural and water resource constraints, while providing the opportunity to accommodate local development objectives within these constraints. Based on the currently applicable WQM plans or WMPs, many of which are out of date, some sewer service areas include areas with the potential to generate wastewater far in excess of the wastewater treatment capacity. However, additional discharge of wastewater to the receiving stream cannot be accomplished within the Federal and State requirements for antidegradation. Further, some sewer service areas contain significant threatened and endangered species habitat, which is not compatible with development at the intensity warranting sewer service. Sewer service area withdrawal where wastewater management plans are not updated is necessary because the Department relies on the wastewater management plan (WMP) components of the areawide WQM plans to provide a comprehensive evaluation of the cumulative effects of land use on the water resources of the State and to ensure that the WQM plans reflect changing conditions and new information.

A WMP is a detailed planning document intended to ensure that adequate wastewater treatment capacity is available to accommodate the needs of existing and future development. These plans are essential to ensuring that the planned method of wastewater treatment is appropriate given local environmental constraints and that wastewater treatment facilities can accommodate the future needs of the wastewater management planning area. An outdated WMP cannot be relied upon to accurately predict the future wastewater management needs of the WMP area. Similarly, where land use plans have changed, an outdated WMP may not accurately assess point and

nonpoint source pollutant loading, hydro-modification issues, water supply sustainability, and the protection of sensitive environmental resources.

Furthermore, if the WMP is not updated, the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately reflected in the plan against which the project will be measured. For example, a recent designation of Category One waters and the associated antidegradation policies with respect to point and nonpoint pollutant sources may prevent the permitting of new or expanded wastewater treatment facilities that are identified in an outdated plan, leaving areas without a suitable wastewater management alternative. Further, the lack of a comprehensive or updated WMP may lead to a greater density of development than is appropriate or sustainable in terms of water resources because the cumulative impacts of development in the WMP area have not been evaluated.

471. COMMENT: The scope of evaluation in the preparation of a Wastewater Management Plan was significantly changed when Executive Order 109 was enacted. The environmental constraints including Natural Heritage Priority Sites, wetlands, Category 1 buffers and threatened and endangered species habitats must be considered. The adequacy of water supply to support development, which would generate the wastewater flow, must be considered. Nitrate dilution modeling for ground water quality protection is also required and non-point source stormwater controls must be addressed in the plan.

The document that is required to be prepared under the proposed regulations is no longer a Wastewater Management Plan, as its scope is greatly broadened to include the preservation of all water resources. Therefore, the name of the plan should be changed to something along the lines of a Water Protection Plan, or Local Water Management Plan. Since these plans will be prepared by the counties, perhaps the document that will be prepared under these rules should be called a County Water Quality Management Plan. (4, 35, 73)

RESPONSE: There is a provision for a County WQM plan at N.J.A.C. 7:15-2.2(e), as required by the WQPA (N.J.S.A. 58:11 A-2b). However, this is an optional study that can be prepared at the discretion of the county and must be consistent with the applicable areawide WQM plans. Following the initial development of the areawide WQM plans, WMPs were conceived as a means to accomplish the periodic update of the areawide WQM plans required under the Clean Water Act as part of the Continuing Planning Process. While the other names suggested by the commenters are equally suitable, the Department does not believe changing the name attributed to the document used to accomplish the requirement for a Continuing Planning Process will be an improvement over the name that has been historically utilized.

N.J.A.C. 7:15-5.1

472. COMMENT: Site-specific amendments to Water Quality Management plans should be considered only under very narrow conditions and should be prohibited where there is no wastewater management plan or an outdated one. (22, 76)

473. COMMENT: The proposed provision that site specific amendments are not allowed in areas where wastewater management plans are out of date is supported. (17)

474. COMMENT: N.J.A.C. 7:15-5.1(a) is supported. Amendments or revisions to a WMP should only be considered when the WMP is up to date. For too long, amendments were the only updating of these plans, which led to a piecemeal, development project-driven process, which was not protective of water and/or ecological resources. (10, 80)

475. COMMENT: The provisions at N.J.A.C. 7:15-5.1(a) are supported. If a planning agency has not performed the required analysis and had their plan approved, it is counterproductive and a waste of resources to permit amendments and revisions. (64)

RESPONSE TO COMMENTS 472 THROUGH 475: The Department acknowledges these comments in support of this rule provision.

476. COMMENT: At N.J.A.C. 7:15-5.1(a), the Department is proposing to reject an application for an amendment or revision, with limited exceptions, in areas where a WMP has not been adopted or updated in accordance with the schedule at N.J.A.C. 7:15-5.23. The Department should allow amendments to WMPs that are not up to date as long as such amendments are cost effective, environmentally sound and technically feasible. It is unreasonable for the State to propose the establishment of such a strict standard for consideration of applications. (60)

RESPONSE: The requirement at N.J.A.C. 7:15-5.1(a), which limits the circumstances under which site specific amendments and revisions will be allowed where a WMP is not up to date is necessary because, allowing numerous, piecemeal amendments to a WMP to address single projects fails to address the secondary and cumulative impacts of these projects. The availability of unlimited amendments and revisions has contributed to the failure to develop and maintain up to date WMPs. The Department relies on the wastewater management plan (WMP) components of the areawide WQM plans to provide a comprehensive evaluation of the cumulative effects of land use on the water resources of the State. A WMP is a detailed planning document intended to ensure that adequate wastewater treatment capacity is available to accommodate the needs of existing and future development. These plans are essential to ensuring that the planned method of wastewater treatment is appropriate given local environmental constraints and that wastewater treatment facilities can accommodate the future needs of the wastewater management planning area. An outdated WMP cannot be relied upon to accurately predict the future wastewater management needs of the WMP area. Similarly, where land use plans have changed, an outdated WMP may not accurately assess point and nonpoint source pollutant loading, hydro-modification issues, water supply sustainability, and the protection of sensitive environmental resources. Furthermore, if the WMP is not updated, the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately reflected in the plan against which the project will be measured. For example, a recent designation of Category One waters and the associated antidegradation policies with respect to point and nonpoint pollutant sources may prevent the permitting of new or expanded wastewater treatment facilities that are identified in an outdated plan, leaving areas without a suitable wastewater management alternative. Further, the lack of a comprehensive or updated

WMP may lead to a greater density of development than is appropriate or sustainable in terms of water resources because the cumulative impacts of development in the WMP area have not been evaluated.

477. COMMENT: Amendment applications should not be allowed under N.J.A.C. 7:15-5.1(a)1 to allow expansion of a sewer service area if it is less than 100 acres and less than 8,000 gallons per day of flow, or for "clustered" residential development where there is no WMP. These types of projects constitute site-specific amendments that should not be allowed except as part of a WMP or WMP amendment. (22, 76)

478. COMMENT: At proposed N.J.A.C. 7:15-5.1(a)2 the rule exempts "public good" projects from the required WMP update and allows the project to proceed by amendment. Such projects may provide a public benefit, but such expectations should be weighed against the environmental cost. The proposed rule should include a requirement for a cost-benefit analysis and a discussion of feasible alternatives rather then assuming all State and Federally initiated projects offer public benefit beyond that which the rule intends to provide. (68)

479. COMMENT: Proposed N.J.A.C. 7:15-5.1 states that the Department will reject applications for amendments or revisions to water quality management plans in areas where a wastewater management plan has not been adopted or updated in accordance with the schedule established under the rules at N.J.A.C. 7:15-5.23. However, this provision also creates exceptions to such rejections, including where "the specific purpose or effect of the amendment is to address projects or activities that are either proposed, constructed, operated or conducted by

the State or Federal government…" According to the Department's summary of the proposed rules, this exemption is included for the following reasons: "Project proposed under the auspices of State and Federal authorities, such as State run correctional facilities or the Fort Dix/McGuire Air force base, are for the overall public benefit and should not be delayed if the WMP entity has not provided and maintained an up to date WMP."

There is disagreement with this logic. Under this definition, it appears as if schools, among numerous other entities, because they are operated by the State Board of Education, would be included in this exception. The sheer size and number of entities such as schools, prisons, and bases, and the amount of water usage associated with them makes it imperative that the Department has the most up to date information about them and is involved in adequate planning for them. (17, 49)

RESPONSE TO COMMENTS 477 THROUGH 479: As indicated in Response to Comment 476, it is necessary to limit the opportunities for site specific amendments and revisions. Nevertheless, the Department recognizes that some circumstances warrant site specific determinations even where an up to date WMP is not in place. Therefore, the rule includes provisions for site specific amendments at N.J.A.C. 7:15-5.1(a) and categories of projects that are allowed to proceed under the revision process at N.J.A.C. 7:15-3.5(b)1 through 3, 4i, 4iii through iv, or 4vi through x. It should be noted that the site specific amendment for projects or activities that are either proposed, constructed, operated or conducted by the State or Federal government, or that are regulated by the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., does not categorically include schools. These categories of projects were carefully selected to be

minor in nature or have overriding public benefit. For example the increase in industrial flow includes conditions designed to ensure no adverse water quality impact will result. The revision allowing the increase in a discharge ground water from a public school or institution was reduced from 20,000 gpd to 8,000 gpd and is allowed only for existing public schools or institution. The revision allowing connection of septic systems that are failing is allowed only if they can't be fixed and are contiguous to existing sewers. RWBR projects are an allowed revision only if they meet certain conditions that will ensure there is no adverse environmental impact. In addition the Department has also exempted certain State and Federal projects from requiring that a WMP be up to date as a condition of eligibility to proceed with an amendment to the areawide WQMPs. Such projects are directed to serve a larger public need and must be allowed to be evaluated, even if the WMP is not up to date. While the Department will accept this very limited universe of revisions and amendments for consideration without an up to date WMP, these exempted revisions and amendments are still required to demonstrate compliance with environmental analyses and assessments set forth at N.J.A.C. 7:15-5.24 and 5.25 to receive approval.

480. COMMENT: N.J.A.C. 7:15-5.1(a) indicates that where the applicable wastewater management plan has not been updated, the Department must reject an application for an amendment or revision. This penalizes innocent parties for the failures of the governmental entities responsible for wastewater management planning. There is no penalty in the rule proposal for governmental entities that fail to keep their wastewater management plan up to date therefore, this is a fundamentally flawed approach and must not be adopted.

In such cases, the Department must go beyond passive deference and sanction non-performing agencies or revoke their designations. In addition, on an emergent basis, the Department must adopt a WMP for the affected area. While the Department may delegate planning authority, if delegated authorities fail, then the Department is legally bound to assure the adoption of wastewater management plans. (18, 42, 44, 45, 61)

481. COMMENT: The proposed regulation that provides for a default to individual septic would deprive the regulated community of due process. Under the proposed regulation, a county or municipality that wants to stop growth only has to do nothing in order to get the desired result – a ban on sewer service. The "do nothing" approach does not afford the regulated community any opportunity for public input. To the contrary, they are deprived of a right to seek amendment of the WMP simply by the inaction of government entities. The regulated community's only recourse under the proposed regulations would be litigation to force the recalcitrant wastewater management planning entities to "do something."

The proposed regulations should be revised to provide some meaningful consequence to wastewater management planning entities that fail to update their WMPs. (41-45)

482. COMMENT: The proposed regulations would encourage the "no growth" scenario. Pursuant to proposed N.J.A.C. 7:15-5.1(a), WMP amendments will not be approved by the Department if the existing WMP is out of date or has not been updated within the timeframes set forth in the regulations. This gives the counties and municipalities that want to stop growth in their communities a lawful tool to achieve the "no growth" scenario. The proposed regulations

impose no penalties on counties or municipalities that do not update their WMPs. To the contrary, the proposed regulations further advance a "no growth" objective by stripping such communities of their general service area designations and limiting them instead to development with individual septic systems.

A wastewater planning program such as the one proposed by the Department could result in the entire State being stripped of sewer service area designation. A regulatory program that results in individual septic as the only wastewater planning alternative is poor wastewater management planning. Moreover, it is wholly inconsistent with the goals of New Jersey's affordable housing program.

The proposed regulations should be revised to include a mechanism whereby recalcitrant wastewater management planning agencies are forced to take some action to update their WMPs or that allows the Department to assume that responsibility. (41-45)

RESPONSE TO COMMENTS 480 THROUGH 482: The Department believes that the lack of consequences for failure to maintain an up to date WMP has been a significant factor in the failure to submit WMPs. The withdrawal of sewer service area where a plan is not up to date is warranted because, where wastewater management plans have either never been adopted or are more than six years old, the assumptions concerning wastewater treatment capacity, water supply and nonpoint source pollution, if provided at all, may no longer be accurate as a result of subsequent master plan or zoning changes at the local level. By compelling those affected wastewater management planning agencies to comply with the requirements of this chapter, the

Department will assure that all projects discharging more than 2,000 gallons per day of wastewater will receive a comprehensive analysis of environmental impacts to assure that approvals aren't based upon outdated information, thereby allowing areawide WQM plans to achieve their statutory mandate and enhancing the effectiveness of continuing planning process. Most areas will find the withdrawal of sewer service areas to be a significant incentive to work with the Department to maintain an updated WMP. Further, the Department is focusing efforts to minimize this consequence by working proactively with counties to ensure that WMPs are submitted on time and that they meet the standards set forth in the rule, as described in Response to Comments 537 through 547. Nevertheless, it is possible that up to date plans may not be achieved in some areas for various reasons, including as suggested by the commenters, as a means to avoid the need to invest in infrastructure and/or minimize development pressure. While the Department could exercise its authority at N.J.A.C. 7:15-3.4(a) to initiate an amendment, it is expected that the efforts directed toward development of satisfactory WMPs will be successful and obviate the need to do so. To ensure that the lack of an up to date WMP is not a deterrent to provision of affordable housing, the Department plans to propose an amendment to the rule to include COAH housing as an eligible amendment category. It should be noted, however, that the rule does not foreclose all opportunities for projects and activities that are not consistent with the applicable WQM plan. The rule provides revision categories that can proceed in the absence of an up to date plan for projects or activities such as such as development already connected to a sewer system or which qualifies as "infill" development.

483. COMMENT: N.J.A.C. 7:15-5.1(a)1 allows some WQM plan revisions where the wastewater management plan is outdated. The Department must establish procedures and criteria governing the consideration of *all* revisions. (18, 42, 44, 45, 61)

RESPONSE: As described in Response to Comment 476, continuing to allow unlimited project specific amendments and revisions due to a lack of an up to date WMP fails to consider the cumulative and secondary impacts of the numerous individual changes. The rule at N.J.A.C. 7:15-3.5(b)4 identifies the categories of projects that qualify as a revision, including the revision types are significant enough to require the framework of an up to date plan and those that can be allowed to proceed in the absence of an up to date plan.

484. COMMENT: Where the wastewater management plan is outdated, N.J.A.C. 7:15-5.1(a)2 allows an exception for the State or Federal government to submit an application "to address projects or activities that are either proposed, constructed, operated or conducted" by the government. The rule proposal has not provided the rationale for this exemption, except that certain governmental projects (i.e. State correctional facilities or Fort Dix/McGuire Air Force Base) are "for the overall public benefit and should not be delayed if the WMP entity has not provided and maintained an up to date WMP."

However, there are many private projects that further public policy and benefit the general public (e.g., redevelopment plans that are intended to clean up contaminated sites, provide needed housing and economic development, and otherwise return abandoned and contaminated properties that are a blight on the community to safe conditions and productive reuse). WMP

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amendments and revisions for such initiatives should also be permitted as they are also for the "overall public benefit." (18, 42, 44, 45, 61)

RESPONSE: A key goal of these rule amendments is to limit the processing of site specific amendments in the absence of an up to date WMP. Therefore, exceptions to this limitation must remain extremely limited. The Department has determined that the threshold established in the rule in effect prior to these adopted amendments should be continued. This would limit the circumstances under which a site specific amendment could be processed when a plan is not up to date to those with overriding public implications. These include projects proposed by the State or Federal government or those regulated under the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.

485. COMMENT: Are county correctional facilities, and other county "public" institutions such as nursing homes and educational facilities, exempt from triggering a WMP or WMP update as specified in N.J.A.C. 7:15-5.1(a)2? (51)

RESPONSE: N.J.A.C. 7:15-5.1(a)2 only exempts State and Federal government proposals from triggering the preparation of a WMP, therefore county correctional facilities, and other county "public" institutions such as nursing homes and educational facilities are not exempt.

N.J.A.C. 7:15-5.2

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486. COMMENT: The language at N.J.A.C. 7:15-5.2 establishing the validity of previously adopted or submitted WMPs is appropriate and supported given the expenditures many WMP agencies made to bring WMPs into compliance with current requirements. (38)

RESPONSE: The Department acknowledges support for this provision of the rule.

487. COMMENT: Concerns exist regarding the unrestricted grandfathering of WMPs that are submitted up until adoption of the rule. N.J.A.C. 7:15-5.2(b), which allows WMPs filed as late as the effective date of this rule to be subject to the old rules, is opposed. This provision should also clarify that WMP applications submitted before the proposed rule's effective date be administratively complete, including EO 109 analyses and publicly noticed, before the effective date of the rule. (22, 76)

488. COMMENT: Proposed N.J.A.C. 7:15-5.2(b) states that proposed wastewater management plans that, as of the effective date of the rules have been filed with the Department, shall be subject to the rules that are in effect the day before the proposed rules become effective. This provision is problematic for several reasons. First, it is not entirely clear whether it applies to initial plans as well as amendments and revisions (it refers to "plans" and "amendments" but does not mention "revisions"). Second, it sets up an arbitrary date, the day before the proposed rules are adopted, by which filers of plans (and perhaps amendments and revisions) must file in order to be subject to the existing rules. This approach will create a rush for planning entities to file plans in a concerted effort to avoid the application of the proposed and improved rules. Instead, the Department should set a date certain by which plans must be filed and that date

should be in the very near future and, instead of the term "filed", which is not defined in the proposed rules, the Department should require that such plans have been "filed and deemed complete for review". The list of planning entities that have never filed a Plan or that have failed to update an existing plan is lengthy and simply unconscionable. They have been given every opportunity to comply and past attempts by the Department to create incentives for them to comply with the law have gone completely unheeded. It is highly unlikely that whatever they submit between now and the day before the proposed rules go into effect will be anything close to being substantively adequate and, as such, unless the submitted plan is deemed "complete for review", the Department should reject it outright and require it to be refiled and reviewed under the new rules. (17, 49)

489. COMMENT: The proposed rules should clearly state that "in house" WMPs and amendments refers to applications that are "accepted for review" and not out for public notice. (54)

RESPONSE TO COMMENTS 487 THROUGH 489: N.J.A.C. 7:15-5.2 refers only to the validity of previously adopted or submitted wastewater management plans and sewer service areas and specifies the criterion that must be met for a wastewater management plan to be considered under the rules existing prior to the adoption of this rule. The validity of previously adopted or submitted site specific WQMP amendments and revisions is addressed at N.J.A.C. 7:15-3.8, which states at N.J.A.C. 7:15-3.8(b) that site specific amendments must be filed for publication before rule adoption in order to be continued, while at N.J.A.C. 7:15-3.8(c), revisions must be adopted prior to rule adoption. It is customary and appropriate to allow applications that

are prepared and submitted to the Department to be completed under the rules applicable during the development and submission of the application, recognizing the investment that an applicant has made by that point in a project. The Department does not want to punish WMP agencies that have been working in good faith to meet the requirements under the rules in effective prior to the effective date of these rules. The Department also recognizes that some applicants may submit a WMP prior to adoption of the rule in order to avoid meeting the requirements of the adopted rule. However, both applications that have been in progress for some time and any new submissions filed prior to the date of rule adoption will need to comply with the WMP requirements under the rule in effect prior to the current rule and EO109 (2000). If not, that WMP may be disapproved or returned for additional information or other necessary changes until compliance is attained. As the standards at N.J.A.C. 7:15-5.24-5.26 are largely met in the application of EO109(2000) during review, the potential environmental impact of this reasonable regulatory accommodation is minimized. The one significant change will be in the nitrate planning target, with which the adoption of companion amendments to the Ground Water Quality Standards, will be two mg/L.

Suggestions to change the threshold for application of the previous versus adopted rule to one in which the application is “administratively complete” or “complete for review” or establishing a filed by deadline, other than the effective date of the rule are problematic. First, there is no determination of administrative completeness in the review process. Setting the threshold for application of the adopted rule as a date prior to the effective date of the rule would effectively create a moratorium period during which no applications could be processed. The stated concern associated with the second scenario was that the Department would experience an influx of

applications just prior to the effective date of the adopted rule. The Department agrees that it is a common occurrence for there to be an influx of applications just prior to adoption of rule amendments. However, the analyses required under EO 109 (2000) will provide a meaningful evaluation of the natural resources of applications that predate applicability of the rule. As discussed in Response to Comments 537 through 547, the Department is actively working with counties to develop plans that satisfy the adopted rule in advance of the effective date of the rule. Moreover, if an application filed so as to be considered under the previous rule fails at any point in the process, either as the result of the technical review by the Department or as an outcome of public participation, additional information or modifications will be required, if deficiencies are minor, or the application will be disapproved and will be subject to the adopted rule when resubmitted.

490. COMMENT: The proposed WQMP rules should include provisions that will allow areas with approved wastewater management plans to be grandfathered as to their boundaries and existing allocations. (74)

RESPONSE: The provisions of WQM plans, including the WMPs and amendments prepared within the planning areas, remain in effect until modified through adoption of a WMP, WMP update, amendment or revision. The rule at N.J.A.C. 7:15-8.1(a) only withdraws sewer service area designations where a plan is not up to date. Going forward, however, the WMP agencies and areas are modified in accordance with the rule at N.J.A.C. 7:15-5.24.

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491. COMMENT: Proposed N.J.A.C. 7:15-5.2(a) provides that existing wastewater service area designations in wastewater management plans remain in effect for either six years from when the WMP had been adopted or for one year after adoption of the WQM planning rules. Proposed N.J.A.C. 7:15-5.2(b) provides that the applicable wastewater sewer service area designation of a wastewater management plan adopted after the proposed WQMP rule becomes effective would remain effective for six years. Six years is an insufficient time period for a valid wastewater service area designation and should be extended to ten years. (18, 42, 44, 45, 61)

RESPONSE: The six-year timeframe selected for updating WMPs was informed by the schedule established in the Municipal Land Use Law for the periodic examination of municipal master plans and development regulations (N.J.S.A. 40:55D-89). WMPs are intended to provide a comprehensive evaluation of the cumulative effects of existing and future land use on the water resources of the State and to ensure that the areawide WQM plans integrate related Federal, State, regional and local comprehensive, functional and other relevant land use planning activities through a continuing planning process. Further, WQM plans must be updated periodically by WMPs in order to reflect and respond to changes in municipal zoning, State and regional planning activities and regulatory standards, and to ensure that the most up to date information is fully incorporated into decisions concerning wastewater management choices. Therefore, an update schedule comparable to that for municipal land use planning is appropriate. A longer schedule would likely lead to the need for numerous site-specific amendments, which is an inefficient and piecemeal approach that would not provide adequate assurances that the objectives of the water quality management planning process are met. As a point of clarification, the wastewater service area designations do not extend for one year from the effective date of the

rule in all cases. The wastewater service area designations remain in effect for nine months after the effective date and will continue upon submission of a WMP application, unless and until the WMP is returned or disapproved. Further, if a county fails to make a timely submission, a municipality can request designation as a WMP agency and will receive three months beyond the nine month time frame to make a WMP submission, thereby maintaining the existing wastewater service area designations, unless and until the WMP application is returned or disapproved.

492. COMMENT: The rules may allow too many applications to get to the Department before the rules apply due to retroactivity and transitional implementation of the regulations. (59)

493. COMMENT: Regarding grandfathering, it seems that anybody who comes in that's deemed complete before this rule is adopted will end up not having to apply these rules until they come up in six years. Some of the most environmentally sensitive places in New Jersey, Cape May County and Sussex County, have plans that are due now. If these plans are deemed complete before this rule is adopted, two of the biggest areas for development on septic in the most environmentally sensitive parts of the State are going to be grandfathered out. (65, 79)

494. COMMENT: The proposed rule provision that the rules in place the day before adoption of new rules apply to applications filed before the adoption not only is contrary to the time of decision rule but it invites mischief. The proposal of that provision effectively encourages entities to submit applications on the day before the new proposed rules are adopted and thereby avoid the obligation to exclude environmentally sensitive areas from their sewer service areas. (49)

RESPONSE TO COMMENTS 492 THROUGH 494: It is customary and appropriate to allow applications that are prepared and submitted to the Department to be completed under the rules applicable during the development and submission of the application, recognizing the investment that an applicant has made by that point in a project. It should be noted that amendments that are being processed under the existing rules are subject to the analyses identified in EO 109(2000), including build-out, antidegradation, riparian buffer protection, consideration of threatened and endangered species habitat and nitrate dilution analysis.

Nevertheless, it is necessary to establish a bright line test so that the Department and the regulated community know which set of rules apply to their application. Further, it is appropriate to allow those that have expended potentially significant amounts of time and money to comply with the rules in effect at that time on an application that has reached an advanced stage in the review process to continue to be able to proceed to completion of the process without the need to potentially start over again. The Department believes that the grandfathering provisions strike the appropriate balance between the need to apply the more protective standards contained in this rule and the need to take a fair and reasonable regulatory approach. However, because the Department has adopted a revised antidegradation standard for ground water, unless a WMP or amendment has been noticed for proposal, the new nitrate planning standard will apply.

495. COMMENT: As N.J.A.C. 7:15-5.2(c) and (d) are related circumstances, subsection (d) should be designated as (c)1. (18, 42, 44, 45, 61)

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RESPONSE: The existing format of the rule is appropriate.

496. COMMENT: Proposed N.J.A.C. 7:15-5.2(b), (d) and (e) permit the Department to "return" a proposed wastewater management plan. Allowing the Department to return a submitted WMP or WMP update would only delay the process. The Department should not return an application but instead should prepare a deficiency letter detailing the information that is required from the applicant. (18, 42, 44, 45, 61)

RESPONSE: As is the current practice, the Department would return an application with a written indication of the deficiencies that resulted in the decision to return. The applicant would then have the option to correct the deficiencies, within a timeframe specified in the deficiency letter, or decline to address the deficiencies, after which the application would be returned/disapproved. While the Department intends to work with applicants to correct minor deficiencies to an application, where applications contain significant deficiencies that require more than minor corrections or adjustments, the Department believes that it is entirely appropriate that the application be returned as insufficient and the applicant required to submit a new application that must comply with the rules in place at the time of the subsequent application.

497. COMMENT: The proposed revisions to the WQMP rules should describe with specificity the consequences to a facility with an adopted site specific WQMP, when a municipality or county does not maintain a current WMP. The proposed rules simply provide that site specific

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WQMP amendments or revisions adopted prior to the effective date of the rules shall be valid for six years from the date of adoption or until the sewer service or wastewater service area is revoked. Inexplicably, however, the proposed rules do not provide for maintenance of previously approved WQMP amendments following a withdrawal or suspension. Further, the proposed rules should state that the WQMP amendment is maintained in full force and effect, subject only to changes that may be necessary after approval of the WMP, when the WMP agency does submit its WMP or WMP update to the Department.

Proposed N.J.A.C. 7:15-5.2(c) should be revised to provide that in circumstances where municipalities without WMPs have already approved site-specific WQMP amendments that were prepared in accordance with EO 109 criteria for establishment of a self-sufficient sewer service area (e.g. self-supplied water supply and wastewater treatment), such site-specific WQMP amendments shall remain valid as long as the applicant's plan remains the same, regardless of whether or not the county or municipality maintains a current WMP. (40)

RESPONSE: N.J.A.C. 7:15-3.8(d) states that a site specific amendment that was adopted prior to (the effective date of this amendment) shall be valid for six years from the date of adoption or until the sewer service or wastewater service area is revoked under N.J.A.C. 7:15-8.1, whichever is later. An amendment that was adopted more than six years prior to the effective date of the rule for a project that was not built presents the same issues as does an out of date WMP in that the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately accounted for by an amendment that was approved more than six years ago. Where a project has not proceeded, it is

necessary to reevaluate it considering the needs of the overall planning area. If it is appropriate, it would be included in the new or updated WMP. For the particular circumstance that the commenter identifies, in which a separate wastewater treatment plant and service area was identified, if this project has been implemented, then the sewer service area would not be withdrawn, in accordance with N.J.A.C. 7:15-8.1(a).

498. COMMENT: N.J.A.C. 7:15-5.2(e), which will withdraw wastewater service areas where WMPs are not in compliance with the submittal schedule within nine months after this rule is effective is supported. This subsection is a potentially effective enforcement tool if rigorously implemented. (22, 76)

499. COMMENT: The provision at N.J.A.C. 7:15-5.2(e), where planning agencies that do not submit a compliant WMP or WMP update as required shall have their wastewater service areas withdrawn is supported. Hopefully if this provision is enforced, the planning agencies will comply to the benefit of all of New Jersey. (64)

RESPONSE TO COMMENTS 498 AND 499: The Department acknowledges these comments in support of this rule provision. It is the Department's intent to work with WMP agencies to achieve timely submission of satisfactory WMPs, but where this objective is not achieved the sewer service area withdrawal will be enforced.

500. COMMENT: In N.J.A.C. 7:15-5.2(e) the rules state that "if the wastewater management planning agency does not submit a WMP or WMP update for a wastewater management plan

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that is not in compliance with the nine month schedule, or *if the Department disapproved or returns the wastewater management plan, the Department shall withdraw the wastewater service area*." Does this mean that if the county is able to meet the nine month deadline but the plan is returned that the Department will discount the effort that a county made to meet the deadline and withdraw the existing wastewater service area? (81)

RESPONSE: The Department does not intend to exercise the return or disapproval option unless warranted because of a seriously deficient or noncompliant submission. As has been the practice, submittals are reviewed, deficiencies are identified and there is an opportunity provided to address the deficiencies. However, if the applicant fails to address the deficiencies in a reasonable timeframe or if the deficiencies are of such a significant nature as to render the application seriously deficient, the application will be denied or returned. This rule provision is intended to deter the practice of submitting a seriously deficient WMP with the intent of avoiding the consequence of sewer service area withdrawal where a plan is not up to date. WMP amendment applications that do not demonstrate conformance with the standards and are not corrected to do so would be disapproved. The Department has made available tools that will assist applicants in preparing satisfactory WMPs. The Department is currently working with some counties toward preparation of satisfactory WMPs and is prepared to work with other WMP entities upon request.

501. COMMENT: Where the Department returns a WMP or WMP update application pursuant to proposed N.J.A.C. 7:15-5.2(d), the immediate consequence is that the wastewater service area designation or the sewer service area designation would no longer be valid. Proposed N.J.A.C.

7:15-5.2(e) states this direct negative impact: "*if the Department disapproves or returns the wastewater management plan, the Department shall withdraw the wastewater service area …*" (Emphasis supplied) The summary states that "[t]he Department believes that this measure will provide the necessary incentive for timely water quality management planning."

This action would not encourage compliance with the Department's goal of obtaining updated or new WMPs, but simply penalizes those dependent on the WMP agency's timely and responsible performance of its duties. Given the history of noncompliance under the current rules and the complexity of the proposed substitute rules, adoption of the WQMP rule proposal has the potential to disrupt the provision of wastewater service in large areas of the State. The social and economic costs of such a policy make its very consideration untenable. The Department must abandon this option. N.J.A.C. 7:15-5.2(e) should be deleted and wastewater service area designations should not be withdrawn. (18, 42, 44, 45, 61)

RESPONSE: The Department believes that the lack of consequences for failure to maintain an up to date WMP has been a significant factor in the failure to submit WMPs. The withdrawal of sewer service area where a plan is not up to date is warranted because, where wastewater management plans have either never been adopted or are more than six years old, the assumptions concerning wastewater treatment capacity, water supply and nonpoint source pollution, if provided at all, may no longer be accurate as a result of subsequent master plan or zoning changes at the local level. By compelling those affected wastewater management planning agencies to comply with the requirements of this chapter, the Department will assure that all projects discharging more than 2,000 gallons per day of wastewater will receive a

comprehensive analysis of environmental impacts to assure that approvals aren't granted based upon outdated information. Requiring that the plans are kept up to date will assure that areawide WQM plans achieve their statutory mandate and will enhance the effectiveness of the continuing planning process. The Department recognizes that, even with the consequence of sewer service area withdrawal, there may be some instances where WMPs are not timely or cannot be approved. However, the Department is focusing efforts to minimize this consequence by working proactively with counties to ensure that WMPs are submitted on time and that they meet the standards set forth in the rule.

N.J.A.C. 7:15-5.3

502. COMMENT: Language at N.J.A.C. 7:15-5.3(g) which states WMP agencies may submit WMPs covering only part of their planning area, as long as the plan covers an entire municipality or municipalities, is supported. (38)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

503. COMMENT: At N.J.A.C. 7:15-5.3 the rule proposes that WMPs address an entire municipality or municipalities. WMPs should be based on watershed boundaries. This would allow the integration of the Department's watershed planning programs, county stormwater management programs, HUC 11 water budgets, and the ecological flow model. (85)

RESPONSE: The Department recognizes the importance of analyzing water resources impacts on a watershed basis. This is the reason for disaggregating the environmental build-out,

wastewater management and water supply needs and availability among HUC 11 drainage areas, as well as municipalities, sewer service areas, and public water supply service areas. However, land use decision-making is primarily a local responsibility, which requires that municipalities and counties be fully engaged in developing and implementing the plans. The Department believes that aligning the land use planning and approval responsibilities of the municipalities with the wastewater management planning responsibilities, while still analyzing impacts on a watershed basis using the disaggregated information will result in a much more efficient and effective system.

504. COMMENT: N.J.A.C. 7:15-5.3(g) allows the submission of a WMP reflecting the complying municipalities. The Department should include enforcement provisions to ensure the participation of all affected municipalities, including the withholding of permits and funding. (18, 42, 44, 45, 61)

RESPONSE: The Department did consider the option of not approving any permits where WMPs were not up to date. However, it was determined that this approach is not practicable as some public purpose projects need to move forward, other proposals that lie within areas designated for growth would be unfairly penalized, and it would result in the Department's permitting process becoming unpredictable.

N.J.A.C. 7:15-5.4

County Planning Act

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505. COMMENT: The Department should provide an explanation with respect to the current County Planning Act and Municipal Land Use Law, and consider the implications of amendments to coincide with the new role of counties in water quality management planning as stipulated in the proposed rules. The proposed rules assign the duty to prepare and update wastewater management plans to county boards of chosen freeholders. Throughout the rules the proposed policies and procedures infer an expanded county role in the development and maintenance of WMPs and data and ultimately in decision-making about zoning. Under the current County Planning Act, in accordance with the Municipal Land Use Law, counties have limited jurisdiction on municipal land development decisions. Counties do not have zoning authority. In addition, composite zoning and the use of it to determine build-out and ultimately the need to rezone, infer that counties have authority over municipal growth. Under the proposed rules counties will be involved in the development of zoning generalizations within and across municipal boundaries. These regulations appear to abrogate State law. However, the density standard associated with septic systems, which is proposed to be related to the identified nitrate concentration in ground water, gives the Department some level of zoning authority. (51)

506. COMMENT: The County Planning Act does not provide the county freeholders with the authority to enact and enforce a county-wide WMP. Do the county freeholders still have the authority?

If the County Planning Act is not updated to be consistent with the proposed rule changes, will counties be vulnerable to more law suits from both the private sector (developers) and the public

sector (municipalities)? A county could be challenged with having the *authority* to create and implement a WMP or using sound *reasoning* to create and implement a WMP. (53)

RESPONSE TO COMMENTS 505 AND 506: There is no conflict between the County Planning Act (N.J.S.A. 40:27-2) and counties having wastewater management planning responsibility. Counties possess general land use planning authority under the County Planning Act and several counties currently serve as wastewater management planning agencies. Further, the Water Quality Planning Act provided that counties should be designated planning agencies, as appropriate (N.J.S.A. 58:11A-4).

Support for county WMP agencies

507. COMMENT: Counties are uniquely in a position to embark on regional planning. WMPs are a sound and comprehensive way to address the problems of sprawl and the problems of development. (13)

508. COMMENT: There is substantial merit in the proposed rule linking wastewater management planning to land use. The decision to shift WMP responsibility to the counties, not only is supported, but recognizes that counties understand planning and zoning and may have more technical prowess and capabilities than individual municipalities. (53)

509. COMMENT: The identification of counties as designated wastewater management planning agencies is supported because counties can implement regional wastewater planning, they have greater technical and planning capabilities, and because this creates only 21 WMP

agencies which will enable effective and timely Department assistance in the development and review of WMPs. (78)

510. COMMENT: The proposed rule, based on county-based water quality management planning, which provides a practical approach to administering watershed-based plans, is supported. Reviewing only 21 WMPs will be more manageable for Department staff. (5)

511. COMMENT: The importance of identifying counties as the designated planning agencies for water quality/wastewater management planning is supported. (19, 28)

512. COMMENT: The identification of counties as the wastewater management planning agencies, inclusion of municipal chapters within WMPs that focus on their role in implementing the county WMP, and the provision of greater clarity regarding WMP content, format and the associated analyses is supported. (9, 19)

513. COMMENT: Currently there are about 170 designated wastewater management planning agencies, including counties, municipalities, and sewerage and utilities authorities. The sewerage and utilities authorities in New Jersey do not have legal jurisdiction over land use planning, non-point source pollution control, or septic system management. The proposed rules will designate the 21 counties in New Jersey as the planning agencies, which would closely align the wastewater management planning responsibility with land use planning, non-point source pollution control, and septic system management, which are municipal and county responsibilities. (4, 35, 73)

514. COMMENT: The proposed WQMP rule amendment to transfer wastewater management planning agency responsibility from the existing 161 agencies to the 21 counties to alleviate the inefficient and lengthy review process and the difficulty in providing Departmental outreach under the current system is supported. (17)

515. COMMENT: The rule provisions that strongly encourage county governments to assume the role of wastewater management planning agencies is supported. This will result in fewer WMP planning entities and will facilitate better oversight and regional planning. While municipalities retain control of local zoning as per the Municipal Land Use Law, counties have the opportunities to serve as coordinating agencies and provide recommendations so that development in individual municipalities takes place with respect to achieving the regional nitrate standard for ground water and protecting environmentally sensitive areas. (82)

516. COMMENT: This rule proposal makes a bold change in wastewater management planning authority by reducing the number of plans and planning agencies. This change in framework is welcomed and supported. (18, 32)

517. COMMENT: Counties are the most appropriate responsible planning agencies. In the past, WMP planning responsibility was assigned to utilities authorities for the municipalities within their district. These utilities authorities opposed assignment of WMP responsibility because they had no planning responsibility for these municipalities and no jurisdiction over municipalities to compel submission of information in a timely manner. Also, the costs to

prepare a WMP for the entire district would be paid by the utilities authorities' ratepayers, which are a small fraction of the total district population. The proposed rules appear to have resolved these issues. (31)

518. COMMENT: Counties are the most appropriate responsible planning agencies. Municipal utilities authorities sometimes have a customer base which is a small fraction of the total municipal population so the costs to prepare a WMP for the entire municipality were paid by these ratepayers, which is unfair. In the past, WMP updates and amendments that were funded by the municipality or developer. Municipal authorities would not have planning information such as steep slopes, land use, Master Plans, related ordinances or Septic Management Plans, or the authority to adopt such ordinances and plans. In this proposal, the Department appears to have resolved these issues. (63)

RESPONSE TO COMMENTS 507 THROUGH 518: The Department believes the commenter that referenced designated planning agencies and the commenters that referenced responsible planning agencies were actually referring to designating counties as wastewater management planning agencies. The Department acknowledges these comments in support of the provisions to designate counties as the primary wastewater management planning entity. As stated in the summary for the rule proposal, this approach is expected to achieve positive results with respect to the efficiency and effectiveness of the planning efforts and administrative processing because, with fewer WMP agencies, it will be possible for the Department to work more closely with the planning entity and assist in the development of a satisfactory plan. In addition, counties are already responsible for developing or reviewing components of a WMP, such as county master

plans, and are well positioned to integrate all the information necessary to update a WMP. Further, the counties will be able to provide a regional perspective to the plan elements.

519. COMMENT: The idea of identifying counties as the designated planning agency is supported. However, each county is unique with regard to their capabilities and staffing resources, and funding available does not seem adequate to help support counties in meeting their responsibilities. The same concern applies to the municipalities. (66)

RESPONSE: The Department believes the commenter meant wastewater management planning agencies when she referenced identifying counties as designated planning agencies. The Department acknowledges this comment in support of this rule provision, and recognizes that assistance will be needed to ensure efficient and timely implementation of the rule. In addition to making funds available to assist counties in the development of wastewater management plans, the Department plans to work closely with each county to facilitate development of satisfactory plans and has already begun working with counties. The Department additionally has already made available GIS tools, such as the build-out model, and will assist in the delineation of sewer service areas, upon request.

Opposition to county WMP agencies

520. COMMENT: It does not make sense to transfer wastewater management planning authority to counties that have never been involved with water quality management because they are served by large regional authorities such as the Passaic Valley Sewerage Commission and multiple municipal authorities.

Additionally, more than half of Passaic County lies within the Highlands Region, the majority of which is in the Highlands preservation area, where much of the existing sewer service areas have already been restricted and many rely on septic and private systems. (48)

RESPONSE: The Department recognizes that the counties in the area served by the PVSC have had little experience with preparing wastewater management plans. However, the wastewater management plan for this service area was recently updated on December 4, 2006 and provides much of the information needed to prepare the county plans. However, there are additional components that are not contained in that WMP, as well as areas within the counties that are not covered by the WMP that must be addressed. The Department is offering both technical and financial assistance in the preparation of the county plans. With such assistance as the counties may seek from the Department, they are more than capable of formulating WMPs that will protect the environment while reflecting regional patterns of growth appropriate for that region of the State.

521. COMMENT: Where counties have a countywide regional sewerage authority, the designated planning agency for such counties should be said regional sewerage authorities, and not the counties themselves. (46)

RESPONSE: Where the commenter referenced designated planning agencies, the Department believes he meant countywide regional sewerage authorities should be wastewater management planning agencies. As a point of clarification, designated planning agencies are those entities

that were originally designated by the Governor to have responsibility and authority for development of the original areawide water quality management plans. A wastewater management planning agency is designated through the WQMP rules. In the previous rules, the assignment of wastewater management plan responsibility occurred along a hierarchy beginning with designated areawide WQM planning agencies, through the Passaic Valley Sewerage Commissioners, various joint meetings and municipal utilities authorities and ending with municipalities. Regional sewerage authorities have a limited stake and authority to carry out the overall planning function envisioned in the development of wastewater management plans under this rule. As a result, they have a defined role to provide information within the span of their control, but are not the appropriate wastewater management planning entity. The counties concern themselves with broader land use issues and are appropriately positioned to coordinate the more detailed land use information that is the domain and authority of municipalities.

522. COMMENT: The designation of each county as the wastewater management planning agency is not supported. It will not achieve greater efficiency, consistency, or a regional perspective. County planning boards are too under staffed to compile wastewater management plans and counties that currently have wastewater management authority, do not have the most up to date or conforming plans. (62)

523. COMMENT: Turning over responsibility to county management for some of these things may not make sense and is not an improvement. The tax costs may be more when so many experts must be hired on a county level rather than one department at the state level. There is

corruption and sloppy administration in some counties. How can county government be trusted to do a good job on water quality management? What about the disadvantaged citizens of those counties? The Department might even do a better job than leaving this up to counties and it might even be cheaper. Experts with some clout are needed to insist on clean water and county agents might not have that clout. (70)

524. COMMENT: Preparation and update of wastewater management plans (WMPs) should not be assigned to county boards of chosen freeholders. It is very important that the water quality management plans and wastewater management plans are organized and carried out by watersheds as well as dealt with on a regional basis. Many, if not most, counties are not prepared, trained or funded to carry out these duties, nor are they oriented towards planning on a watershed basis, so it should not be assumed that counties have an inherently regional approach or that their "regional" perspective will be watershed-based. Counties typically provide county-wide services such as roads, bridges, and transit, and do not delve into municipal planning or the regionalization of municipal plans, except where mandated by the State Development and Redevelopment Plan program and municipal stormwater plans. The uneven execution of these responsibilities by some counties is evidence that not all counties are ready for yet another formidable responsibility. Counties are simply not equipped in expertise or funding to carry out WQMP and WMP planning and their approach is not necessarily protective of watershed quality. (10, 80)

RESPONSE TO COMMENTS 522 THROUGH 524: The Department believes that county-level wastewater management plans will, in fact, offer the advantages of providing a regional

perspective to issues that have spatial implications well beyond a municipality, like water supply, and of fostering a more proactive working relationship between the wastewater management planning entity and Department review staff. This relationship, along with providing direct technical support and financial assistance, is expected to offset any inexperience or staffing shortage that the counties may currently have.

525. COMMENT: It can take over two years for the Department to approve a WQMP. By adding another layer of government to the process, how does the Department believe that WQMPs/WMPs will be approved expeditiously? (6, 7)

RESPONSE: There has been no additional layer added to the wastewater management planning process. Rather, counties will replace the multiple wastewater management planning agencies that currently exist. As a result, instead of attempting to review and attempt to offer assistance to 161 WMP agencies, as were present in the system in place before this adoption, the Department will now be able to dedicate its staff time and efforts to formulation and update of 21 county WMPs. In addition, because of the simplified process that relies heavily on GIS and models the Department has provided, as well as the direct technical and financial assistance the Department will provide, the time required to develop a satisfactory WMP is expected to be significantly shortened.

526. COMMENT: The Highland Council should do the wastewater management planning in the Highlands region because it is a land use planning agency instead of the counties that the rule proposes do the wastewater management planning. The Highland Council is currently

developing the kinds of information about the existing wastewater management systems, the existence of water quality, and water supply that would be needed to do an effective and realistic plan for wastewater management. The counties differ greatly from one to another on their capacities and on their view of environmental protection and development. Particularly in the Highlands there needs to be a rational data based plan for the region and the Highlands Council is where this planning should be taking place. In effect, it will be taking place at the Highlands Council and therefore, they should be recognized as the authority to do that planning. (24)

RESPONSE: The Department has determined that counties are the best suited to function as the WMP agency. Assigning WMP responsibility to the Highlands Council in the Highlands area would create a significant number of overlaps and bifurcation of municipalities and counties that would make coordination of WMP development difficult. However, coordination with the Highlands Council is required as an element of WMP development.

527. COMMENT: Putting counties in the forefront of wastewater management planning seems to take away the power of municipalities to set their own sewer areas. Municipalities are more aware of environmental and zoning factors than the county. The county should be in the position to provide mapping and other guidance needed to allow municipalities to make an informed decision. (36)

528. COMMENT: The proposed rule is an indirect contrast to the stormwater management planning process in which the plans were prepared at the local level and reviewed by the county planning board. Stormwater and wastewater management planning should be coordinated by the

same local agency so greater attention gets focused on the reduction of non-point source pollution. Counties can and should play an important role in wastewater management planning as a regional coordinative and review agency, similar to that performed during the cross-acceptance and stormwater management planning review. However, counties should not be lead planning agencies for wastewater management as described in the proposed rules. (62)

RESPONSE: Having municipalities serve as the WMP agencies would expand the number of WMP agencies from the current 161 to 566 and would not allow the Department to cultivate a close working relationship with the WMP agencies. The Department agrees that counties should serve to coordinate locally relevant information and the rule establishes a coordinating role for counties, thereby providing the needed regional perspective for issues such as water supply. Municipalities provide key inputs to the WMP as they are called upon to provide pertinent local information. This includes ground truthing and modifying sewer service area delineations to reflect local objectives, providing population projections, and distributing the development that can be accommodated consistent with sustainable use of natural resources in accordance with local planning objectives.

Other WMP agency comments

529. COMMENT: Eliminating authorities as wastewater management planning agencies is strongly supported. (22, 76)

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RESPONSE: The Department believes that the counties are the best first option for designation as WMP agencies, with wastewater treatment entities serving the relevant support role with respect to this aspect of a WMP.

530. COMMENT: Language at N.J.A.C. 7:15-5.4 making county boards of chosen freeholders the primary wastewater management planning agencies will adversely affect existing WMP agencies by diminishing their ability to guarantee revenue to their bondholders and is opposed. Existing utilities authorities, having similar circumstances, should be able to seek assignment from the Department to prepare WMPs (at N.J.A.C. 7:15-5.13(b)) that otherwise have the same content as those prepared by the counties. Alternatively, allowing the counties to contract with another public entity (such as a utilities authority) to prepare plans for all or part of the county, in accordance with N.J.A.C. 7:15-5.3(c) is supported. (38)

RESPONSE: Under the present rules, existing WMP agencies include the Passaic Valley Sewerage Commissioners, joint meetings, sewerage authorities and municipal utilities authorities. These entities are adept at the construction, operation and maintenance of wastewater collection, conveyance and treatment systems, and their mission is to provide sewerage treatment to those areas that the municipality or municipalities they serve identify as sewer service areas. However, these entities lack the land use planning and zoning authority required to ensure that the future wastewater generated within a sewer service area does not exceed the reasonable capacity of the sewage treatment plants they operate. Recognizing that only a finite amount of pollutants can be discharged into any surface or ground water without impairing water quality (also referred to as the assimilative capacity), there is a limit to the area

that can be served by any treatment plant. These entities also have little to no input or authority over areas to be served by septic systems. Because land use planning and zoning authority and oversight are essential to the preparation of a WMP, counties, or in the alternative, municipalities, are better suited to serve as WMP agencies. While the Department will be providing both technical and financial support to counties, assistance from other sources, such as a utilities authority is allowed by the rule. It is essential that the expertise of authorities and other similar entities continue to be a valuable part of the wastewater planning process.

531. COMMENT: The requirement at N.J.A.C. 7:15-5.4 that county boards of chosen freeholders have wastewater management plan responsibility for a wastewater management plan area consisting of all of its county is an unfunded mandate. Those counties that agree to assume this responsibility will need to devote public resources to the work program, which is vast in nature. It is critical that the rules state the relationship between the county WMP and the county WQM plan so that the county knows exactly what is expected to fulfill both plans. Is the county WMP and the county WQM plan one and the same plan? If so, this needs to be clearly stated in the rules. (81)

RESPONSE: Assignment of WMP responsibility to counties does not represent an unfunded mandate, as discussed in Response to Comments 505 and 506. Regarding the status of county Water Quality Management plans, the Department assumes the commenter is referring to areawide Water Quality Management plans. Areawide WQM plans, whether developed for an area that is coincident with county boundaries or some other area, are the base plan that is updated by amendments, including WMPs, as part of the continuing planning process required

under the Water Quality Planning Act. N.J.A.C. 7:15-2.2(e) allows counties to develop county Water Quality Management Plans, in accordance with the WQPA at N.J.S.A. 58:11A-5. However, these plans must be consistent with the areawide WQM plan that applies to that area. To date, no county has opted to develop or submit a county WQM plan in accordance with N.J.A.C. 7:15-2.2(e).

532. COMMENT: In the proposed rules, it appears that the Tri-County Water Quality Management Plan, which was deliberately created with a regional perspective, will cease to be meaningful. What will be the role of the Tri-County Water Quality Management Board, which remains regional in its approach, when there are three separate, unrelated WMPs for the three counties of Burlington, Camden, and Gloucester? (53)

RESPONSE: The designated planning agencies continue under the adopted rule, as do their functions, including amendment responsibilities. Some DPAs requested amendment responsibility and operate under Department approved amendment procedures. The Delaware Valley Regional Planning Commission is the designated planning agency for the Tri-County WQM plan but never sought amendment responsibility. Instead, the Tri-County Water Quality Management Board was formed, for which the DVRPC serves as staff. The Tri-County Water Quality Management Board has routinely provided comments on amendments proposed with respect to the Tri-County WQM plan. It is anticipated that the Tri-County Water Quality Management Board will continue to be comment on proposed amendments to the Tri-County WQM plan.

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533. COMMENT: Because the content of wastewater management plans (WMPs) is part of the content of areawide WQM plans set forth in the Water Quality Planning Act at N.J.S.A. 58:11A-5, it is not clear if the Department has the authority to adopt a rule that prevents a designated planning agency that is not a county board of chosen freeholders from having WMP responsibility. (56)

RESPONSE: The WQPA requires preparation of areawide WQM plans and allows the Department to assignment of responsibility to Designated Planning Agencies to prepare the plans. Wherever appropriate, counties were to be the designated planning agencies. The WQPA also requires the Department to conduct a continuing planning process and allows the Department to delegate aspects of the continuing planning process to other agencies. The WQMP rules at N.J.A.C. 7:15-2.4 describes the roles and responsibilities of the Department and of DPAs with regard to areawide WQM plans. DPAs are responsible to, among other things, prepare, revise, and amend the areawide WQM plans for their designated area and fulfill all responsibilities assigned to them under the WQMP rules. The Department's role includes, among other things, to require the preparation and updating of wastewater management plans, and provide for their review and adoption into areawide WQM plans. The previous rule included a hierarchy for assigning WMP responsibility, with the DPA as the first option. Under the adopted rule, the Department has identified counties as the primary WMP agency, and provides for alternate assignment to municipalities. The Department believes that the rules, as amended, continue to provide the DPAs with the authority necessary to fulfill their functions under the WQPA.

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534. COMMENT: The Department should indicate why it believes that the proposed amendments to this section are better than a combination of (a) the Governor designating all county board of chosen freeholders as designated areawide planning agencies pursuant to the Water Quality Planning Act at N.J.S.A. 58:11A-4; and (b) assigning WMP responsibility to those agencies. (In other words, if those boards will be WMP agencies, why not go further and designate them as areawide planning agencies, with WMP responsibility as an essential part of their statutory areawide planning role?) (56)

RESPONSE: The set of actions suggested by the commenter could effect the same results as the rule as amended. It cannot be ascertained as to which approach would be a better way to achieve the desired end.

535. COMMENT: The rules should address and clarify, if necessary, how the approval process will work in counties with a County Executive form of government in which the County Executive performs executive functions and the Board of Chosen Freeholders acts in a legislative capacity. (51)

RESPONSE: The rule at N.J.A.C. 7:15-5.4 simply identifies county boards of chosen freeholders as the WMP agencies. As indicated in the summary of this provision, this change is made to achieve efficiency and greater effectiveness by allowing the Department to work more closely with the planning entity. Additionally, these bodies are considered to be uniquely qualified as they already are involved in the development of components of the WQMP, such as county master plans, and are able to bring a regional perspective to the process (see 39 N.J.R.

1890). To the extent these functions are performed in a particular county by another county official, the Department will work with that county to assure that the wastewater planning envisioned by this rule is accomplished.

536. COMMENT: Does the county have any jurisdiction in an individual municipality's or water purveyor's service area? (37)

RESPONSE: The comment is not specific as to the issue of concern. Counties are not responsible for permits for construction of or connection to water supply or wastewater infrastructure, unless the county is also a utilities authority. For WMP development, most relevant information regarding water supply is available from the Department's website. Where additional information is not needed and is not forthcoming from purveyors, the Department will use its authority to obtain required information.

County costs

537. COMMENT: The cost estimate of $250,000 for a wastewater management plan is too low. This cost estimate only works for a county which already has most of their wastewater management planning done. For a county where many wastewater management plans are not done or most of them need to be updated, that's not going to be enough. This does not help us address real estate taxes in the State. (3)

538. COMMENT: The development of county-based wastewater management plans is a major undertaking and exists as a largely unfunded mandate. The expense associated with the development of such plans needs to be examined in more detail by the State. (81)

539. COMMENT: Insufficient grant money has been set aside to manifest the required changes as it would require additional staff and mapping expertise to cover the work in such a limited time. (36)

540. COMMENT: Proposed funding for the counties to develop county-wide wastewater management plans is inadequate to the task. (53)

541. COMMENT: The proposed funding to support counties as the WMP agencies is insufficient. This funding amount is more appropriate for entities who already have updated WMPs, and therefore, WQMPs, requiring only the processing of amendments, revisions, etc. For counties who will be required to update WMPs, and continue the planning process, the funding is insufficient. In addition, many of technical requirements of the regulations, including capacity and antidegradation analyses, and nitrate dilution modeling, will require that counties hire outside consultants with the expertise in these areas. Since plans are required in both printed and digital form, funding should also support printing costs. (51)

542. COMMENT: Private dollars will not be available to fund the preparation of updated plans. The Department concluded that there are many plans that are either incomplete or out of date

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which supports the fact that there are not private or public dollars currently available to fund the process. (23)

543. COMMENT: It is the regional and municipal sewerage and utilities authorities that currently maintain all the relevant records and placing the burden of WMP responsibility onto counties could be considered onerous in these tough fiscal times. The estimated $50,000 funding allotted each county would quickly be spent, and there are no assurances that additional funding will be made available. (48)

544. COMMENT: At N.J.A.C. 7:15-5.4 the proposed rules are amended so that a county board of chosen freeholders will be responsible for the preparation and updating of wastewater management plans (WMPs). The Department will provide funding to each county from the 604(b) Water Quality Planning Pass-Through Grant Program and the Corporate Business Tax-Watershed funds to assist in preparing the WMPs. Each county expected to receive $57,000 to assist in WMP preparation. What funding can be anticipated in future years to prepare, revise, update, and publish WMPs? (85)

545. COMMENT: The summary for N.J.A.C. 7:15-5.4 states that the Department anticipates providing each county with $57,000 to “facilitate the completion of wastewater management plans.” This is insufficient financial assistance to support the counties (or other designated planning agencies) in fulfilling their wastewater management planning responsibilities. The summary provides examples of the significant grants received by county planning departments, upwards of $218,000, to develop onsite wastewater treatment management plans, revise

wastewater management plan, and an infiltration and inflow study. In anticipation of such studies being required for the new process, the Department should allocate greater financial assistance to the planning agencies. (18, 42, 44, 45, 61)

546. COMMENT: It is evident that the WMP development process is time-consuming and labor-intensive. The GIS mapping and analysis required is extensive and costly. Most municipalities do not have GIS capabilities and will rely heavily on the county as a resource. The estimated $57,000-grant that may be available to each county will not cover the resources necessary. In addition, counties do not have the ability to raise revenue through mechanisms available to utilities or authorities. In counties where most of the households rely on private wells and septic systems, the Department is urged to consider a funding formula which reflects this revenue limitation. (19)

547. COMMENT: There are no compelling reasons for a county to assume the role of designated wastewater management planning agency. It is doubtful that the funding available would be enough to cover the county's expenses for consulting and staffing. Furthermore, there is a long-term ongoing county commitment that would require additional staff and funding to carry out the responsibilities. (14)

RESPONSE TO COMMENTS 537 THROUGH 547: The rule has been designed so that WMP preparation is largely a GIS exercise using data layers that already exist. The Department has been working with counties to provide a preliminary eligible sewer service area delineation and will provide one upon request to any county. Further, the Department has developed a GIS tool

that will calculate the environmental build-out, which can be sorted by HUC 11, municipality, sewer service area or public water supply area, thereby facilitating the wastewater management and water supply needs and capacity analyses. The Department is prepared to assist counties in the use of this GIS tool. The entities other than the Department that maintain information relevant to wastewater management plan development are required to provide this information to the county. It is not expected that the county would need to generate this information. The counties' role is one of coordinating and compiling the information from the municipalities within the county and providing the regional perspective for overarching issues and competing demands on limited resources. While the Department recognizes that there will be costs to the counties for preparing WMPs, the Department believes its estimate of cost for WMP preparation is reasonable. To assist counties, at the time of rule proposal, the Department estimated it would be able to provide approximately $57,000 per county. The Department is increasing the total amount of grant funding available to assist counties in preparing wastewater management plans to a total of $2.1 million using additional Corporate Business Tax funds, to be provided on average about $100,000 per county for preparation of WMPs under this rule. Because the next round of WMP development would be six years from the date of adoption of the first round of plans, it is not possible to commit funds for future plan development at this time. However, the Department expects that the six-year update will require far less work than the present effort to close a 20 to 30 year planning gap. The Department will continue to seek sources of funding to assist WMP agencies in the development and update of WMPs.

It should be noted that the Continuing Planning Process is a federal requirement under the Clean Water Act, which is echoed in State law under the Water Quality Planning Act. The continuing

planning process in New Jersey is carried out in part through the development and update of WMPs. Full county WMP responsibility was assumed by 6 of the 21 counties and two counties had assumed partial WMP responsibility prior to this rule adoption. Both of the partial counties and four additional counties have expressed interest in assuming this responsibility. In addition, the Department has several large regional wastewater management plans in process that will address substantial portions of other counties including Bergen County Utilities Authority, Gloucester County Utilities Authority, Rahway Valley, and Passaic Valley Regional Sewerage Commissioner's wastewater management plan was recently adopted.

Fees

548. COMMENT: There is little doubt that fees will be assessed by the local planning agency to amend plans, yet the rule is silent to how much an agency can assess (if any)? Given the budget constraints faced by New Jersey year after year, it is likely that counties, townships and utilities will seek new ways to generate revenues. This rule should not be a revenue generator for local authorities and should address potential fees. (7, 20, 69)

549. COMMENT: It is not clear whether counties will be authorized to assess fees. New fees are opposed. If, however, counties are allowed to charge fees, a specific fee structure needs to be in place. Without a fee structure, there is a tremendous amount of uncertainty about the potential impact fees will have on the regulated community. It is clear that budgetary constraints are forcing counties and municipalities to actively pursue other sources of revenue to balance their budgets. Will counties be allowed to charge fees? Are there limitations on those fees? Has the Department contemplated this issue? (6, 7)

RESPONSE TO COMMENTS 548 AND 549: The WQMP rule does not establish fees for developing or reviewing WMPs. Assessment of fees by counties for any activity would necessarily be under the purview and authority of counties and is beyond the scope of these rules.

N.J.A.C. 7:15-5.6

550. COMMENT: Under the proposed rule readoption, municipal utilities authorities must etain review responsibility for wastewater related issues, as provided under N.J.S.A. 40:14B. This is crucial because municipalities and counties don't always have the knowledge and experience, or are too focused on financial issues, to make appropriate long-term wastewater decisions. (31, 63)

RESPONSE: This rule implements the authority granted to the Department under the Water Quality Planning Act, The Water Pollution Control Act and the other acts cited in the authority section above. Utilities authorities have important expertise that will be an important asset in assuring wastewater management plans are developed in an appropriate manner. In accordance with N.J.A.C. 7:15-5.6, municipal utilities authorities are called on to provide information about the facilities for which they are responsible. In addition, N.J.A.C. 7:15-5.22 requires that utilities authorities are consulted in the development of a WMP. The Department encourages that municipal utilities authorities take advantage of this and other opportunities provided through the amendment process at N.J.A.C. 7:15-3.4.

551. COMMENT: Under N.J.A.C. 7:15-5.6, sewerage and municipal authorities are required to provide technical data. However, many utility authorities neither have nor keep data that is required of them. One example is the location of existing sewer pipe lines in sewer service areas. Who is going to enforce the requirement that municipalities and utility authorities supply technical data and will the Department penalize the municipalities and utility authorities if they do not comply? (53)

RESPONSE: Under these rules, counties will need to obtain information from entities that operate wastewater treatment facilities and water supply purveyors about their systems in order to prepare a WMP. The Department expects that these entities will be able to provide basic information about their systems, such as the location of existing sewer pipe lines. The Department is prepared to exercise its authority to assist WMP agencies in obtaining information needed from providers of wastewater and water supply infrastructure where these entities fail to provide it.

552. COMMENT: Both N.J.A.C. 7:15-5.6, Responsibility of sewerage authorities and municipal authorities, and N.J.A.C. 7:15-5.16, Existing jurisdictions, wastewater service areas, and treatment works, require the domestic treatment works (DTW) to provide information required for the facility in question. N.J.A.C. 7:15-5.6 focuses on sewage treatment plants that are located partially or wholly within the planning area while N.J.A.C. 7:15-5.16 focuses on information for sewage treatment plants that are located inside or outside the planning area. It would be helpful to the agency developing the wastewater management plan if N.J.A.C. 7:15-5.6 were moved and placed before N.J.A.C. 7:15-5.16. The information the county is required to

obtain for DTW located within the planning area is linked to both sections, and in order to ensure that it is clear that both lists of information required in the plan be developed appropriately, the placement of the two sections in the sequential order would be helpful. This connection should also be presented in a guidance document. (81)

RESPONSE: N.J.A.C. 7:15-5.6 identifies as the responsibility of sewerage authorities and municipal authorities, agencies which are no longer responsible to be WMP agencies, to provide the information specified in this section to the county or municipal WMP agency, while N.J.A.C. 7:15-5.16 specifies the existing information which WMP agencies (the county or applicable municipalities) must include within their WMP document. The sewerage authorities and municipal authorities are required to submit the information listed in N.J.A.C. 7:15-5.6 to the WMP agency so that the WMP agency can compile the information required to be identified in the WMP at N.J.A.C. 7:15-5.16. These sections are not directly related and as such there would be no benefit to codifying them consecutively. The Department will address the responsibilities of sewerage authorities and municipal authorities and the information requirements for a WMP in its' guidance documents.

553. COMMENT: Regarding proposed sewerage and municipal authority's responsibilities under the proposed rules at N.J.A.C. 7:15-5.6(a) through 5.6(10), certain sewerage and municipal authorities agree to provide the following:

The name and NJPDES discharge permit number of any domestic treatment works owned or operated by the entities;

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The existing permitted flow of each named domestic treatment works in million gallons per day;

The meter flow data for all municipal participants except for the municipalities that are not metered. Actual flows can not be provided where it is not metered from each municipality;

Capacity allocation to each municipality within the sewer service area of each named DTW in million gallons per day where capacity *is* allocated to the municipalities that are served;

A description of the legal or financial arrangement concerning the capacity allocation through copies of Municipal Service Agreements and Bond Covenants, where they exist. Not all sewerage and municipal authorities have Service Agreements with the municipalities they serve. Will this information be included in the Wastewater Management Plan document? What will the counties and the Department will do with this information?;

Will identify total committed flow not presently connected to each named DTW in million gallons per day for each municipality within the sewer service area by providing the committed capacity for each municipality as reported to the Department quarterly in the Capacity Assurance Program Reports. Municipalities may have more up to date committed capacity information;

Will provide requested documents prepared by them, if any exist, with any information relevant to a future DTW expansion demonstrated to be needed in accordance with N.J.A.C. 7:15-5.25(d), including but not limited to, stream studies or affluent characteristics;

Will provide wasteload allocations formally established in its NJPDES permit, as identification of any wasteload allocations in a total maximum daily load assigned to any named DTW and a proposed schedule to meet any non-compliance with the wasteload allocation;

Will provide mapping for facilities owned by the sewerage or municipal authority (such as the treatment plant, major pumping stations, force mains and interceptor sewer), including public facilities within portions of the served communities, to meet the requirement for maps prepared in accordance with the requirements at N.J.A.C. 7:15-5.20, showing the name, NJPDES discharge permit number, and the existing collection and conveyance systems of any named domestic treatment works. The municipal collection systems are owned and operated by the municipalities or smaller sewerage authorities and these entities should be responsible for mapping their own systems; and

Will provide any other information needed to satisfy the requirements of N.J.A.C. 7:15-5.16 with existing public information, but can not commit to develop new information; and do not agree to provide

Capacity allocation to each municipality within the sewer service area of each named DTW in million gallons per day where capacity *is not* allocated to the municipalities that are served. (4, 35, 73)

RESPONSE: The Department looks forward to anticipated cooperation on the part of entities responsible for wastewater treatment facilities in providing the information that they have that is needed for preparation of a satisfactory wastewater management plan. The Department expects that wastewater treatment entities will fully comply with the requirements of the rule, but also recognizes that the information specified at N.J.A.C. 7:15-5.25(d) may not be relevant with respect to every entity responsible for providing sewer service. The Department requires entities that provide wastewater treatment facilities to provide information only for the facilities for which they are responsible. The Department will work with the responsible entities if

unforeseen circumstances arise in order to achieve a satisfactory wastewater management plan the meets the intent of the rule, for example, in situations where there is no formal allocation of capacity when more than one municipality is served by a single treatment facility. The Department is requiring a description of the legal or financial arrangement concerning the capacity allocation to each municipality within the sewer service area of each named DTW in million gallons per day in order to establish the existing framework of capacity allocations that would need to be considered in evaluating alternatives for wastewater management in each WMP area.

554. COMMENT: At N.J.A.C. 7:15-5.6(a)9 the responsibility of an authority should be limited to providing information on facilities under the direct control of the authority. (38)

555. COMMENT: The proposed rule lacks clarity in who is responsible for providing digital maps of the sanitary sewer systems. The proposed rule should require the asset owner to provide the maps. For example, if the asset owner is the municipality who owns the collection system, then they would be the one to provide digital maps to the county. (18, 32)

RESPONSE TO COMMENTS 554 AND 555: The rule at N.J.A.C. 7:15-5.6(a) specifies that information is to be provided for the facility for which the authority is responsible.

556. COMMENT: The summary and N.J.A.C. 7:15-5.3(b) highlight that there are entities other than the WMP agency that would be required to provide necessary information for the preparation of the WMP. Proposed N.J.A.C. 7:15-5.6(e) recognizes that sewerage authorities

may serve more than one county or municipality and would be required to provide wastewater infrastructure information. The Department should also recognize that there would be instances where one sewage treatment plant serves more than one county (designated WMP planning agency). The Department should explain how it would address potential issues affecting sewer plant capacity, allocations and build-out where multiple wastewater treatment authorities serve multiple counties or municipalities in a given WMP area. This provision should also include enforcement and/or over-ride mechanisms to ensure these entities comply with requests for information. (18, 42, 44, 45, 61)

RESPONSE: The Department recognizes that there will be instances where the relevant spatial extent, both HUC 11 drainage areas and service areas of wastewater management and water supply service providers, will not coincide with county or municipal boundaries. The Department's role will include identifying and assisting in resolving any issues that arise as the WMPs are submitted for review. With regard to concern that information requests will not be fulfilled, where responsible entities are not forthcoming, the Department is prepared to exercise its authority to assist WMP agencies in obtaining information needed from providers of wastewater and water supply infrastructure.

557. COMMENT: The proposed rule establishes the responsibilities of sewerage authorities and municipalities at N.J.A.C. 7:15-5.6 and 5.8. If a sewerage authority or municipality chooses not to cooperate (for whatever reason), what recourse does the WMP entity have in developing the appropriate chapter(s) for its county-wide WMP? In addition, timeframes should be established for submission by municipalities and Sewerage Authorities of required data to the counties. (88)

558. COMMENT: The Department should include a provision to address coordination and the respective responsibilities between the sewage authorities and the counties and municipalities. For example, a prototype Memorandum of Understanding should be created between the delegated planning agency and the authorities stipulating the necessary information, the information available only to the authorities, respective responsibilities, and a schedule for deliverables. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 557 AND 558: The respective responsibilities of counties, wastewater treatment entities and municipalities are specified at N.J.A.C. 7:15-5.4, 5.6 and 5.8, respectively. While the rule does not specify timeframes for delivery of information expected to be provided by the municipalities and wastewater treatment entities if a municipality does not provide the required information, then that municipal chapter will not be part of the WMP and any sewer service area designations will be withdrawn in that municipality. If entities other than municipalities do not provide the required information, the Department will exercise its authority to obtain the information that is not already available on the Department's website. The Department does not believe it is necessary to specify or develop a memorandum of agreement or similar instrument in order to accomplish the exchange of information required to compile a WMP.

N.J.A.C. 7:15-5.8

559. COMMENT: In order for municipal responsibilities to be fulfilled under N.J.A.C. 7:15-5.8, municipalities will need education, training, funding and consistent guidance.

Municipalities will need well organized help from the Department in order to successfully achieve the requirements of this rule. Department informational forums must be clear and not conflict with each other and guidance must not shift as issues emerge with the interpretation of the details. (10, 80)

RESPONSE: The Department has already provided information about the rules and WMP development in multiple forums (see Response to Comments 37 and 38, and 41) and will continue to do so upon request as rule implementation proceeds. The Department believes that it is both necessary and appropriate to expand guidance to deal with emerging issues and fully intends to make any necessary to make any necessary changes to assure that the guidance addresses all necessary issues.

560. COMMENT: What input do municipalities have in the development of the county-wide water quality management plan? (37)

RESPONSE: The Department assumes the commenter is referring to WMPs to be prepared for each county by the county. The rule at N.J.A.C.7:15-5.8 specifies the information that municipalities are to provide for the overall wastewater management plan prepared by the applicable county. This includes maps identifying current zoning and water supply service areas, ordinances to demonstrate compliance, population projections, and where applicable, septic management plans. As necessary in response to the outcome of the environmental build-out analysis and related analyses at N.J.A.C. 7:15-5.25(c) through (e) , municipalities will need to provide revised zoning to address wastewater management and water supply issues.

Municipalities are also called upon to adopt ordinances required at N.J.A.C. 7:15-5.25(g) for stormwater management and the protection of riparian buffers and steep slopes. In addition, in the event a county does not fulfill its role in preparing the wastewater management plan, a municipality has the option of preparing its chapter of the county plan.

561. COMMENT: N.J.A.C. 7:15-5.8 includes requirements for information municipalities need to provide to the counties. However, greater clarification in terms of which ordinances would apply to which situations needs to be stated in the rule. (This represents one of many sections of the rules that require a guidance document to fully understand.) The Department seems to assume that this information can be easily accessed by the municipality and/or the county in question. The reality may be different. (81)

562. COMMENT: N.J.A.C. 7:15-5.8(a) requires municipalities to provide certain information to WMP agencies, however, this information may not be readily available. The Department should clarify how this mandate would be met, particularly without adequate State funding. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 561 AND 562: The Department believes that every municipality is in a position to have and provide either population and employment projections, a requirement that applies to urbanized municipalities (which are available on the Department's website at http://www.nj.gov/dep/watershedmgt/rules.htm), or zoning maps and ordinances for other municipalities. Model ordinances to comply with N.J.A.C. 7:15-5.25(f)3iii, (g)1, (g)3 or (g)6 have been provided by the Department and are required to be adopted by each municipality.

After assessment of the study area , it may be necessary for a municipality to adjust existing zoning as one option to align the development yield according to zoning with the natural and water resource capabilities in the municipality. In this situation, a municipality would also be called upon to provide the zoning revised accordingly. These requirements are very straightforward and, in addition to the model ordinances and guidance on a satisfactory septic management plan the Department has developed a web based model WMP to assist in the development of satisfactory WMPs.

Municipal cost/budget

563. COMMENT: Based upon current timing, it would appear that these proposed rules would be adopted sometime in 2008 in the middle of most municipalities' fiscal years. It is likely that no funding would be then be available before the nine month deadline making meeting that deadline unlikely. (87)

RESPONSE: The information expected to be provided by municipalities should, in large part, be readily available as of the date of adoption , such as population projections or infrastructure needs, compiled in preparation of master plans, or for complying with build-out requirements under the Stormwater Management rule, N.J.A.C. 7:8, and the Municipal Stormwater Permitting rule, N.J.A.C. 7:14A-25. Moreover, the majority of a WMP can be prepared as a GIS exercise using existing data and that the Department will provide technical assistance upon request in preparing key elements of the WMP, including the sewer service area delineation and environmental build-out analysis. Further, the Department has provided model ordinances that will assist municipalities in complying with the requirements at N.J.A.C. 7:15-5.25(g). Thus,

taking into account the information required pursuant to this rule, and the assistance the Department will provide, municipalities are expected to be able to comply with this rule within the allotted timeframe, even if the adoption falls in the middle of the municipality's fiscal year. It is important to note that the rule at N.J.A.C. 7:15-5.23(f) allows an extension of the schedule where justified.

564. COMMENT: The unfunded costs that the proposal will impose of municipalities causes extreme concern. Just the cumulative cost of requiring consultants to read and digest the proposal will be considerable, but will be far exceeded by the costs to local governments that attempt to adopt compliant plans and ordinances. Due to the proposal's complexity and imprecision, most if not all plans will be rejected and need to be redone. This financial burden constitutes an impermissible and unfunded mandate. (18)

RESPONSE: This rule does not constitute an impermissible and unfunded mandate. Pursuant to N.J.S.A. 52:13H-3(c), rules that repeal, revise or ease an existing requirement of mandate, or which reapportion the costs of activities between counties and municipalities are not unfunded mandates. Further, rules which stem from the failure to comply with previously enacted rules are not unfunded mandates. (N.J.S.A. 52:13H-3(d)). Here, the Department is assigning WMP responsibility to the counties. This assignment reapportions the costs already associated with the requirement to prepare WMPs from municipalities, sewerage authorities and counties to the counties to achieve better efficiencies in planning efforts. Further, this reassignment is necessary due to the wide spread non-compliance with the existing requirement to prepare WMPs. The Water Quality Planning Act envisioned that counties would be the most suitable entity to

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perform water quality management planning because they can provide for a regional perspective. N.J.S.A.58:11A-4. Refer to the Response to Comments 537 through 547 regarding assistance the Department is providing to prepare WMPs.

565. COMMENT: At N.J.A.C. 7:15-5.8(a)2 water purveyors should be made responsible for providing information about their water systems instead of making municipalities responsible. (38)

RESPONSE: N.J.A.C. 7:15-5.8(a)2 requires a map of water supply service areas within the municipality, which is important in determining where development may appropriately occur. This information is available on the Department's webpage.

566. COMMENT: N.J.A.C. 7:15-5.8(a)3 requires municipalities to provide a septic management plan "where applicable." The preparation of a septic management plan is a major undertaking. State guidance and funding are needed on the development of the many elements of a septic management plan. (18, 42, 44, 45, 61)

RESPONSE: The septic management plan is required at N.J.A.C. 7:15-5.8(a)3 where a municipality will have septic systems as a means of wastewater management within the municipality. N.J.A.C. 7:15-5.25(e)3 specifies what the septic management plan must accomplish, which represents a minimum level of effort relative to the scope of could be encompassed in such a plan. The septic management plan is envisioned to include a local ordinance establishing the requirement for periodic pumpouts and a database set up at the local

level for tracking the location of systems and the periodic pumpouts. A guidance document describing this minimum level of effort, as well as other information that will assist municipalities has been prepared and is available at http://www.nj.gov/dep/watershedmgt/rules.htm.

567. COMMENT: N.J.A.C. 7:15-5.8(a)4 requires additional employment and population projections from "urbanized municipalities." As a function of its statewide planning responsibilities, the Department must either provide the actual projections or must specify a common data source and methodology to be used in calculating these projections. (18, 42, 44, 45, 61)

RESPONSE: At N.J.A.C. 7:15-5.25(d)1ii the Department has specified acceptable sources of population projections, but provide flexibility to the urbanized municipalities to use those sources that best represent the expectations of each municipality. These projections are not "additional" for urbanized municipalities; rather, they are in place of providing zoning maps and ordinances and performing an environmental build-out analysis.

568. COMMENT: N.J.A.C. 7:15-5.8(a)5 requires current and modified zoning maps and associated ordinances to demonstrate compliance with proposed N.J.A.C. 7:15-5.25. Such ordinances are for water conservation, stormwater management, riparian zone protection, steep slope protection, and septic management plan. Because the proposal fails to acknowledge, much less respond to, the dictates of the *Mount Laurel* Doctrine, it does not properly take cognizance of the housing obligations of municipalities, particularly those relating to modest income

households. Simply put, the Department not only lacks the authority, it is constitutionally barred from forcing towns (directly or indirectly) to adopt ordinances that conflict with their fulfillment of their duty to create realistic opportunities to satisfy their fair share of the statewide need for affordable housing. (18, 42, 44, 45, 61)

RESPONSE: Refer to Response to Comments 111 and 112. The rule does not prevent municipalities from exercising their authority to zone, but does require that the zoning be consistent with the natural resource constraints that exist. Identifying and resolving conflicts between existing zoning and the ability of natural resources to support the zoning yield will facilitate predictability for land owners with respect to regulatory outcomes. In the current situation, lands may be zoned for dense development and identified as within a sewer service area, but are in a location where sufficient wastewater treatment capacity cannot be made available consistent with requirements under the Clean Water Act and the Water Pollution Control Act. Identification of areas where natural resources are constrained will allow a reservation of scarce resources to allow a municipality to fulfill its obligations to provide affordable housing.

N.J.A.C. 7:15-5.13

569. COMMENT: The rule specifies that a county can designate an alternate should the county choose not to be the responsible agency. This will create uncertainty and confusion upon rule promulgation, as it will not be clear which agency will be the governing agency with regard to WQMP/WMP. Is there any mechanism in place to provide information to the regulated community about alternative agency authority over the WQMPs? (6, 7, 20, 69)

RESPONSE: The Department assumes the commenter is referring to the WMP agency, whether it be the county or one or more municipalities where a county does not fulfill its responsibility. The Department will provide information about the WMP agency upon request.

570. COMMENT: There are permitting processes already in place that fully protect the water quality of the State and allows the Department to regulate and monitor any development that will affect water. There are strict regulations regarding stormwater management that create a long process to ensure that water is protected and sewer and drainage are properly accounted for. More stringent regulations are unnecessary and will likely cause confusion and delay as different agencies are faced with the responsibility of creating these WQM plans. (29)

RESPONSE: The Department assumes the commenter is referring to the WMPs to be developed in accordance with the WQMP rule. One of the tools the Department utilizes to attempt to assure that both current decision making and future planning adequately take into account protection of water quality and quantity is the Water Quality Management Planning rules, N.J.A.C. 7:15. The Department develops and administers the Water Quality Management Planning rules in conjunction with the Statewide Water Quality Management Plan, which is part of the Continuing Planning Process required pursuant to the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and as required by Sections 303(e) and 208 of the Federal Clean Water Act. Accordingly, the rules prescribe water quality management policies, procedures and standards which protect public health; safeguard fish, aquatic life, and scenic and ecological values; and enhance domestic, municipal, recreational, industrial and other uses of water. These rules do not take the

place of more specific rules that regulate development on a site-specific basis. Rather, the WMPs establish an overall framework upon which development that is consistent with the framework can be further assessed with regard to other concerns, such as disturbance of regulated areas or conformance with project design requirements.

571. COMMENT: The option in the proposed regulations for a municipality to assume the role of wastewater management planning entity should the county within which it resides decline to do so is supported. This provision allows for responsible proactive planning at the local government level. (82)

RESPONSE: The Department acknowledges these comments in support of this rules provision.

572. COMMENT: Municipalities should be the first designee as wastewater management planning entity with the county as a default if the municipality fails to submit their WMP, subject to Department approval. There is objection to assignment of WMP responsibility to a municipality only if the county fails to act. (10, 80)

RESPONSE: Based solely on land use planning authority, municipalities would emerge as the best candidates to prepare WMPs. However, expanding the number of WMP agencies from the current 161 to 566 would not allow the Department to cultivate a close working relationship with the WMP agencies. Further, at this scale, a regional perspective for addressing environmental issues of a regional scale would be lost.

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Therefore, the Department has determined that counties are the best first choice for WMP agency.

573. COMMENT: Proposed N.J.A.C. 7:15-5.13(a) and (b) provide that an alternative assignment of wastewater management planning responsibility to a municipality must be pursued through the adoption of a revision to an areawide WQM plans. This additional administrative requirement is unnecessary and would only further delay the WMP adoption. If the Department disowns its obligations to step-in where a county does not perform, it must simplify the assignment of responsibility by automatic delegation to the interested municipality. (18, 42, 44, 45, 61)

RESPONSE: There needs to be an administrative process by which WMP responsibility is officially transferred, as well as to reflect the revised schedule that would likely accompany such an action. The revision process is simple, can be accomplished quickly and is appropriate to officially recognize these types of changes.

574. COMMENT: N.J.A.C. 7:15-5.13(b) states that a municipality may request wastewater planning responsibility if the county has not submitted or stipulates that it does not intend to submit a wastewater plan. The proposed rule continues on to say that as a part of the municipal request to the Department, it must certify that the information it was required to submit in N.J.A.C. 7:15-5.8 was submitted to the county. If a county stipulates at the onset that it does not intend to submit a wastewater plan, why should a municipality submit the information to the

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county? It seems that a notification of intent on the part of the municipality would be sufficient. (14)

575. COMMENT: Proposed N.J.A.C. 7:15-5.13(b) requires municipalities to "certify that the information it was required to submit … was submitted to the county." The Department should explain why such certification is necessary from the municipality, particularly if, as stated at proposed subsection (a), "the county WMP agency has not submitted or stipulates it does not intend to submit a WMP." If the county's determination is clear, a certification from the municipality serves no purpose. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 574 AND 575: If a county WMP agency does not request the information required at N.J.A.C. 7:15-5.8, then the certification at N.J.A.C. 7:15-5.13(b) is not required.

576. COMMENT: It seems the only entity benefiting from the rule proposal is the Department. Counties that are not also DPAs will not have final approval power on subsequent plan amendments while the Department retains the decision making role. It would be more appropriate to designate the wastewater treatment entities as the wastewater management planning agencies for their respective service areas as they have a stake in their STPs future and are better equipped to deal with multi-jurisdictional wastewater issues. Municipal utilities authorities should be given the opportunity to plan for wastewater service in its service area. (14)

RESPONSE: As described in Response to Comment 530, the Department has determined that, despite the expertise of wastewater treatment entities in construction and operation of wastewater treatment systems, counties are better positioned to perform the planning functions required under the rules. The Department calls on wastewater treatment entities to provide the relevant information at N.J.A.C. 7:15-5.6 and encourages them to in assuring that plans reflect all available information and expertise they can provide by participating in the development and review of WMPs as provided in the WQMP rules.

577. COMMENT: There is concern that if a county chooses not to submit a Wastewater Management Plan or WMP update and that responsibility falls to the municipality, some municipalities may not posses the financial and/or technical ability to fulfill the requirements of the proposed rule. At N.J.A.C. 7:15-5.13(b) the rule should provide for additional alternative assignments of wastewater management planning responsibilities. For example, a regional planning entity should be allowed to relieve the planning burden on those municipalities that cannot afford to produce the WMP on their own. The Department should also provide extensive technical assistance, in way of guidance documents and human resources, to the wastewater management planning agencies. (77)

RESPONSE: In designating counties as the wastewater management planning entity, the Department sought to reduce the number of such entities in an effort to increase the efficiency of the process and enhance the ability of Department staff to provide significant technical support in developing satisfactory plans. Continuation of the concept of multiple alternative assignment options would defeat this purpose. A municipality prepared wastewater management plan would

largely consist of components that a municipality has primary responsibility to provide to its chapter in a county plan and the Department would be prepared to assist a municipality in development of its chapter, should the applicable county fail to fulfill its role. Counties and/or municipalities are free to accept assistance from other entities, such as regional planning entities in development of plans, but responsibility must remain with the local government units.

578. COMMENT: While trying to create incentives for local agencies to remain current with their planning responsibilities is understandable, it is frankly naïve for the Department to assume, as it did in an April 10, 2007 letter to the New Jersey Clean Water Council, that all local agencies even want to have approved and implementable WMPs. There are recalcitrant planning areas within the State which, under the Department's present scheme, would be presented with an easy way to thwart all development, even existing and approved development, within their borders merely by failing to update a plan or prepare a new plan when a deadline is imposed. It is outside the jurisdiction and mandate of the Department to become involved with essentially political or "home rule" issues of this nature, and the Department should not allow itself to become a pawn in that process by adoption of ill-advised rule changes for the same reason.

The Department's expectation seems to be that municipalities or counties having planning responsibilities will generally find disincentives in having their plans lapse or expire and, thus, they will work to avoid that from happening. However, while that may be true in many instances, some governmental bodies that may have an interest in thwarting new development or delaying development that has already been approved may accomplish this agenda on a *de facto* basis merely by failing to submit a timely WMP or a WMP update. Due to this, recalcitrant

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municipalities and counties seeking to stifle development can take advantage of this provision by simply not preparing their WMPs.

Unlike the situation when a municipality does not prepare a WMP (or fails to timely update a WMP) and an entity within the municipality cannot receive approval for its site specific WQMP amendment, there are instances in which municipalities without WMPs have already approved site-specific WQMP amendments. In such instances, the entity that obtained the WQMP approval should not be treated as under the jurisdiction of the municipality when it comes to determining whether the site-specific WQMP amendment is valid. In circumstances where municipalities without WMPs have already approved site-specific WQMP amendments prepared in accordance with EO 109 criteria for establishment of a self-sufficient sewer service area (e.g. self-supplied water supply and wastewater treatment), the proposed rule should provide that such site-specific WQMP amendments shall remain valid as long as the applicant's plan that was the basis for the site-specific WQMP has not changed, regardless of whether or not the county or municipality maintains a current WMP. Inclusion of such a provision would not undermine the spirit or integrity of the proposed rules because a self-sufficient sewer service area that meets the requirements of EO 109 excludes future development that is unsustainable and cannot meet the self-supplied water and wastewater treatment criteria approved by the municipality. The proposed rule should address and clarify this particular circumstance, and provide a means to clarify an entity's status when that entity has received an approval for self sufficient site-specific WQMP amendments from a municipality that has failed to develop a WMP.

Proposed N.J.A.C. 7:15-5.13(b) should be revised to provide that entities with individual projects

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that have approved WQMP amendments in accordance with EO 109 may apply for "assignment" directly to the Department to prepare or approve those portions of a WMP that will permit the entity to continue forward with the development of its project when the municipality does not act to prepare a WMP or the county in which the entity resides has not prepared a WMP.

Allowing entities that have approved WQMP amendments in accordance with EO 109 criteria to step into the shoes of recalcitrant municipalities or counties will not only permit these entities to move forward with their proposed development projects, it will also provide necessary incentives for such recalcitrant municipalities and counties to meet their responsibilities. In this decidedly "home rule" State, no branch of local government is going to want to cede control of an important perquisite of its jurisdiction, the planning function, to a private entity, even when there is (and maybe even because of) Department oversight and approval.

The proposed rule provides at N.J.A.C. 7:15-5.13(b) that municipalities may apply to be assigned WMP planning responsibility if a county does not prepare a WMP within nine months of adoption of the adopted rules. The proposed rule should also provide that individual projects which have previously approved WQMP amendments in accordance with EO 109 may apply for "assignment" directly to the Department to prepare or approve those portions of a WMP that will permit the entity to continue forward with the development of its project when the municipality does not act to prepare a WMP or the county in which the entity resides has not prepared a WMP. This added provision will provide currently missing safeguards and protections when, in fact, it is a municipality's recalcitrance in complying with its planning responsibilities (either by indifference or design) that is the reason why an existing WMP has been allowed to be

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withdrawn, suspended, expired, ceased, or lapsed.

The Department should be willing to review these site-specific WQMP amendment much the same as it would in an instance where a municipality could apply for assignment if a county fails to act. Department review of site-specific WQMP amendments would not present an undue administrative burden for the Department, nor would it undermine the overall goal of the proposed revisions to the WQMP rules, which is to streamline the planning and permitting process. Indeed, there are probably very few projects that have received site-specific WQMP amendment approvals or GDPs that have been reviewed and approved in accordance with EO 109 standards, and allowing this amendment to the rule proposal would only reinforce incentives for local planning agencies to avoid abdicating their WMP responsibilities.

Finally, providing a limited, site-specific plan exception to be built into the regulations will help the Department conserve resources. By allowing individual parties to submit their own plans for their own sites and to go directly to the Department for approval, the towns will sense the loss of control and any town that is inclined to be recalcitrant will have positive incentive to become involved in the planning process. The goal is to force such towns to do the right thing, rather than to give them incentives to do nothing. (40)

RESPONSE: The Department has found that relying on numerous site specific amendments to accommodate individual projects is an inefficient process that fails to consider the cumulative and secondary impacts of the individual decisions. Failing to consider wastewater management and water supply needs and the means to address them comprehensively and holistically

jeopardizes the ability of the Department to achieve its objective to restore and maintain the chemical, physical and biological integrity of the waters of the State as required by the Water Quality Planning Act (N.J.S.A. 58:11A-2b). An amendment that was adopted more than 6 years prior to the effective date of the rule for a project that was not built presents the same issues as does an out of date WMP. An outdated WMP cannot be relied upon to accurately predict the future wastewater management needs of the WMP area. Similarly, where land use plans have changed, an outdated WMP may not accurately assess point and nonpoint source pollutant loading, hydro-modification issues, water supply sustainability, and the protection of sensitive environmental resources. Furthermore, if the WMP is not updated, the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately reflected in the plan against which the project will be measured. The lack of a comprehensive or updated WMP may lead to a greater density of development than is appropriate or sustainable in terms of water resources because the cumulative impacts of development in the WMP area have not been evaluated. Where a project has not proceeded, it is necessary to reevaluate it considering the needs of the overall planning area. For the particular circumstance that the commenter identifies, in which a separate wastewater treatment plant and service area was identified, if this project has been implemented, then the sewer service area would not be withdrawn, in accordance with N.J.A.C. 7:15-8.1(a). The Department recognizes that there may be circumstances where the lack of an updated plan may prevent projects intended to meet affordable housing needs from proceeding. The Department plans to address this situation through an amendment to the rule.

N.J.A.C. 7:15-5.13(c)

579. COMMENT: Proposed N.J.A.C. 7:15-5.13(c) requires a municipality that becomes a planning entity to submit its wastewater management plan within ninety days after the adoption of the revision assigning it wastewater management planning responsibility. Ninety days is insufficient time to compile information from the various agencies that are required to provide the necessary information for the preparation of the WMP. This would be the case especially for areas where a wastewater management plan is nonexistent. (18, 42, 44, 45, 61)

580. COMMENT: If a county fails to comply and submit a WMP, towns have the option to prepare their own plans, but only after getting a WQM plan revision. Realistically, this could take more than a year, yet the Department gives towns just three months. (54)

581. COMMENT: There is strong opposition to N.J.A.C. 7:15-5.13(c) which places a time limit of 90 days for preparation of a WMP on municipalities that become WMP agencies. This time limit is unrealistic. (22, 76)

582. COMMENT: Proposed N.J.A.C. 7:15-5.13(b) and (c) provides for alternate assignment of wastewater management planning responsibility to individual municipalities in the event a county board of chosen freeholders opts to decline said responsibility and requests assignment to the municipalities. If a municipality is requested to be the Designated Planning Agency by the county board of chosen freeholders, the deadline provided for an individual municipality to submit a WMP amendment application is 90-days after being deemed a their own Designated Planning Agency. This deadline is completely unrealistic due to the extensive time required for a through preparation of a township-wide WMP. The time required to establish township

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committees to oversee environmental studies, establish and adopt ordinances, etc., is way beyond the timeframe proposed. This deadline should be extended to at least nine to 12 months. (34)

583. COMMENT: If a county does not meet the nine month deadline to produce a county-wide Water Quality Management Plan, it is likely the municipalities will need more than three months to complete their own plans. What allowances will be provided if the municipalities do not then meet their deadline? (37)

584. COMMENT: N.J.A.C. 7:15-5.13(c) states that a municipality has 90-days to submit its wastewater management plan. Ninety days is not enough time for a municipality to submit its plan. In addition, this conflicts with N.J.A.C. 7:15-5.23(b) where the rule gives a municipality one year to submit the plan. (14)

RESPONSE TO COMMENTS 579 THROUGH 584: As a point of clarification, municipalities can request assignment of WMP responsibility, not for designation as a designated planning agency and the plan being developed is a wastewater management plan, not a water quality management plan. The process for reassignment of wastewater management planning responsibility to a municipality envisions that, in the course of the nine months provided to the county to develop a plan, the municipality would have compiled and submitted the information specified at N.J.A.C. 7:15-5.8. This constitutes the great majority of the information needed to complete the plan. The three months identified at N.J.A.C. 7:15-5.13(c) is from the date of adoption of the revision designating the municipality as the WMP agency and is believed to be adequate as it is to accommodate the need to complete the remaining components of the plan, not

to develop the whole plan. The rules at N.J.A.C. 7:15-5.23(e) and (f) do provide a means to negotiate a schedule modification where there are extenuating circumstances, such as the need to perform specific examinations required under N.J.A.C. 7:15-5.18(a)2 or 5.25(a) through (g).

585. COMMENT: These sections appear in some instances to give a municipality excessive wastewater planning duties outside that municipality's borders. Suppose, for example, that Sayreville Borough is assigned WMP responsibility under N.J.A.C. 7:15-5.13. The Middlesex County Utilities Authority (MCUA) main sewage treatment plant, which receives sewage from many municipalities outside that Borough, is physically located in that Borough. Even though Sayreville Borough (a) has no independent power to regulate land use or wastewater management in those municipalities; (b) does not own or operate that MCUA treatment plant; and (c) has minimal independent power to regulate MCUA, the Sayreville Borough WMP would still apparently be required under N.J.A.C. 7:15-5.18(c) and (d) to depict the entire future multi-municipal wastewater service area of that MCUA treatment plant, and to provide corresponding future multi-municipal flow information.

Although N.J.A.C. 7:15-5.6 may require MCUA to submit at least most of the related information to Sayreville Borough, that Borough would still apparently be responsible for reviewing that information, and, possibly, for trying to resolve many site-specific disputes about sewer service at locations remote from that Borough. Fundamentally, the "host municipality" of this and similar sewage treatment plants should not ever have anything approaching these kinds of extra-territorial wastewater planning duties. (56)

RESPONSE: If a municipality requests and is assigned WMP responsibility for that municipality, the information pertaining to relevant wastewater treatment facilities, including allocation of the capacity, is required to be provided to the municipality by the entity responsible for the wastewater treatment facility. The municipality with WMP responsibility is not required to make decisions or resolve disputes regarding the allocation of capacity to areas served. It is the Department's role to ensure that the information provided in various WMPs is integrated and coordinated.

586. COMMENT: The Department recognized at N.J.A.C. 7:15-5.13(a) that some counties may not submit a WMP and/or have stipulated that they do not intend to submit WMPs. The Department should further anticipate that municipalities may not request wastewater management planning responsibility. Withdrawal of sewer service area designation should not be pursued by the Department as proposed at N.J.A.C. 7:15-5.14(c). This action only penalizes those dependent upon wastewater management. Rather than shift its obligations to municipalities, the Department must use its own resources to adopt, on an emergent basis, an interim WMP and the Department should ensure that the existing WMP remains in effect until the Department develops a compliant WMP. (18, 42, 44, 45, 61)

RESPONSE: The Department believes that the lack of consequences for failure to maintain an up to date WMP has been a significant factor in the failure to submit WMPs. The withdrawal of sewer service area where a plan is not up to date is warranted because, where wastewater management plans have either never been adopted or are more than six years old, the assumptions concerning wastewater treatment capacity, water supply and nonpoint source

pollution, if provided at all, may no longer be accurate as a result of subsequent master plan or zoning changes at the local level. By compelling those affected wastewater management planning agencies to comply with the requirements of this chapter, the Department will assure that all projects discharging more than 2,000 gallons per day of wastewater will receive a comprehensive analysis of environmental impacts to assure that approvals aren't based upon outdated information, thereby allowing areawide WQM plans to achieve their statutory mandate and enhancing the effectiveness of continuing planning process. The Department recognizes that, even with the consequence of sewer service area withdrawal, there may be some instances where WMPs are not timely or are cannot be approved. However, the Department is focusing efforts to minimize this consequence by working proactively with counties to ensure that WMPs are submitted on time and that they meet the standards set forth in the rule. While the Department could exercise its authority at N.J.A.C. 7:15-3.4(a) to initiate an amendment, it is expected that the efforts directed toward development of satisfactory WMPs will be successful and obviate the need to do so.

N.J.A.C. 7:15-5.14

587. COMMENT: Proposed N.J.A.C. 7:15-5.14(a) provides that each county-wide wastewater management plan would include an independent chapter for each municipality in that county. Proposed N.J.A.C. 7:15-5.14(b) permits each chapter to "be adopted, returned or disapproved … independent of other chapters." The Department should not be authorized to "return" an application but should specify the outstanding information necessary to render a decision on the WMP. (18, 42, 44, 45, 61)

RESPONSE: As is the current practice, the Department would return an application with a written indication of the deficiencies that resulted in the decision to return. The applicant would then have the option to correct the deficiencies, within a timeframe specified in the deficiency letter, or decline to address the deficiencies, after which the application would be returned/disapproved. While the Department intends to work with applicants to correct minor deficiencies to an application, where applications contain significant deficiencies that require more than minor corrections or adjustments, the Department believes that it is entirely appropriate that the application be returned as insufficient and the applicant required to submit a new application that must comply with the rules in place at the time of the subsequent application.

588. COMMENT: The inclusion of municipal chapters within county WMPs to facilitate implementation at the local level through municipal zoning and other land use ordinances is supported. (78)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

589. COMMENT: At N.J.A.C. 7:15-5.14does not specify the procedures that will be followed in the event of an incomplete or returned WMP chapter. What is the time frame for review and/or returning of a WMP chapter? What, if any, comments will be given to the WMP entity by the Department to allow it to re-submit a more appropriate chapter to allow for its adoption? Consequently, once a chapter has been resubmitted, what is the time frame for review and adoption? (88)

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RESPONSE: As described in Response to Comment 587, the outcome of the initial review of a WMP submission would be a deficiency letter. As part of this letter, the Department would suggest a reasonable period of time to address deficiencies, the length of which would reflect the number and complexity of the deficiencies. The time needed for the Department's review of the response would similarly depend on the nature of the deficiencies. The Department's overall objective is to work proactively with WMP entities to develop satisfactory WMPs, minimizing the need for back and forth over deficiencies.

590. COMMENT: N.J.A.C. 7:15-5.14 describes a county WMP as a collection of chapters, each chapter a municipal WMP. In effect, this equates a county WMP to being little more than just a patchwork of municipal WMPs. Detail and description on how to integrate numerous municipal WMPs into a cohesive, countywide "whole" should be provided. The county WMP should provide a regional overview with policies to address water quality issues and strategies to address those issues. The rule proposal should be re-proposed to include requirements for county WMPs to provide a regional context for municipal WMPs. (22, 76)

591. COMMENT: N.J.A.C. 7:15-5.14 requires a separate chapter for each municipality and states that each chapter may be adopted, returned, or disapproved independent of other chapters. If the Department is reviewing each chapter independent of each other, what is the point of having a regional countywide plan? (14)

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592. COMMENT: The rules propose that the new format of a wastewater management plan shall include an independent chapter for each municipality in a county and each chapter shall address the entire municipality. At the same time, it is proposed that a wastewater management planning agency may submit a WMP that covers only a portion of the county provided the Plan addresses entire municipalities. If the WMP is countywide, the county as a whole should be addressed and each municipal chapter within a countywide WMP should not be allowed to be adopted, returned, or disapproved independently. WMPs be viewed in a regional context, with recognition that each municipality is not independent but is part of an overall sewerage authority franchise area and therefore cannot be removed from a regional plan without numerous, serious ramifications to the Plan. (19, 28)

RESPONSE TO COMMENTS 590 THROUGH 592: The Department believes role of the county is to coordinate the municipal chapters so that issues of a broader scale, such as water supply, can be better addressed. However, the precise nature of the issues that will be important in each county may be different and so the rule is not proscriptive in this respect, allowing flexibility to each county to address issues of higher priority there. Where county and municipalities cooperate in the preparation of the overall county plan, the Department envisions opportunities for economies of scale and greater efficiency in addressing larger scale issues. However, recognizing that there will not be uniform cooperation throughout the state, the allowance for wastewater management plans to address a municipality was necessary.

593. COMMENT: Most regional sewer systems have been constructed and can only be reasonably understood on a regional basis. Therefore, wastewater management plans should not include a separate chapter for each municipality. (46)

RESPONSE: Regional sewer systems were developed, necessarily, by considering the needs of the component parts of the service area, generally municipalities. The future development plans within each municipality were examined and equated to an amount and location of wastewater expected to be generated. The regional system was designed as a response to the needs of the municipalities addressed. It is appropriate moving forward to continue to examine the changing needs of the components of the service area. To the extent that the regional system is able to address the future sewer service needs of the included municipalities, a single demonstration will satisfy that component of a wastewater management plan. However, there may be portions of one or more municipalities that will not be adequately addressed by the regional system, necessitating a municipality based response.

594. COMMENT: The proposed rules will designate the counties as wastewater management planning agencies and the county WMP is to contain a chapter for each municipality. Certain aspects of the analysis and plan, however, will be conducted on a HUC 11 basis. HUC 11 watersheds are not consistent with the municipal or county boundaries. The disbursement and aggregation of the HUC 11 areas into municipal boundaries and county boundaries will be difficult and actions by municipalities or counties that overlap into HUC 11 areas will likely compete for available water resources. There is particular concern about sewer service area falling under the jurisdiction of two counties. The delays in the preparation of county WMPs or

preparation of one municipal element of the county WMP could delay the preparation of a composite plan for sewerage and/or utilities authorities. A municipality that does not want or need to serve either development or redevelopment could prevent sewerage and/or utilities authorities from serving other appropriate facilities in other communities. A regional authority must be permitted by the Department to serve the needs of it participants that comply with the regulations. (4, 35, 73)

RESPONSE: The rules at N.J.A.C. 7:15-5.6 require entities responsible for wastewater treatment facilities to identify the amount of the capacity of each plant that is allocated to each municipality. This requirement was to ensure that each municipal chapter could proceed, even if all municipalities in a county did not cooperate or if a county did not perform its role in developing the overall county wastewater management plan. The disaggregation of the allocated capacity among HUC 11 drainage areas and for future development within each municipality is then a local decision, subject to constraints such as water supply availability and location of environmentally sensitive areas. Competing demands on a potentially limited resource will need to be resolved in consideration of the feasibility of expanding existing treatment facilities or managing wastewater through alternative means. Where a municipality fails to participate in the development of a WMP, they would not be in a position to compete for this limited resource or to prevent its use in other compliant municipalities, except as may be necessary to satisfy a scarce resource order or other similarly binding instrument.

595. COMMENT: A regional authority representing three towns in three different counties is at the mercy of three other agencies. Companies located in one town may be at a disadvantage if

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they need a plan amendment to provide for a major project such as a large expansion of an existing facility or the relocation or location of a new entity when their neighboring communities may not have the motivation to complete a timely update. Is there any recourse for a company affected by the aforementioned situation? (6, 7)

596. COMMENT: A regional authority representing three towns in three different counties is at the mercy of three other agencies. Citizens of one town may be at a disadvantage if they need a WMP amendment to provide for a major project such as a school when their neighboring citizens may not have needs to inspire a timely update. (18, 32)

597. COMMENT: Projects located in more than one municipality or in more than one county may face a problem if the counties are on different schedules for adoption of the WQM plans. If a given business needs an amendment to a WQM plan in order to expand an existing space or its operations, such businesses will be subject to additional delays as a result of a municipality's inefficiency. (29)

RESPONSE TO COMMENTS 595 THROUGH 597: The Department believes the commenter is referring to WMPs when referring to county schedules for adopting WQM plans. The rule changes the agency responsible for wastewater management planning, by designating counties, in an attempt to foster more comprehensive regional water resource planning. The rule does not significantly alter the local coordination required during the wastewater management plans and amendments. The rules have since 1989 required the integration of local master plans and zoning, the delineation of future areas to be served by sewers, the eventual wastewater treatment

demand and the capacity of wastewater treatment facilities. The rules have also required consents from the various entities that would potentially be affected by wastewater management planning decisions including municipalities and sewer authorities. Thus, an amendment in one town that affects a regional sewerage entity is already subject to review by other affected entities. The rule doesn't significantly change this level of coordination. The rule at N.J.A.C. 7:15-3.4(g)4i establishes a 60-day period for the submission of consents or comments from those affected agencies. This too has been a requirement since 1989. The Department does not believe that municipal inefficiency will cause additional delays as a result of the shift to counties as the designated wastewater management planning agency.

Under the rule prior to these amendments wastewater management plans were to be accomplished by a singular plan for a regional authority. However, those plans often left parts of municipalities that were outside of a sewer service area unplanned. Other municipalities may have been included in two or more independent wastewater management plans. The designation of counties as wastewater management planning agencies is intended to ensure that the entire county receives the benefit of wastewater management planning. The Department acknowledges that there are some regional sewer authorities that will be divided among two or more counties or municipalities. In cases where an authority serves more than one county, it will be the Department's responsibility to bring the two county plans together and work with both counties and the authority to ensure that sufficient wastewater treatment capacity exists or can be developed to meet the needs of the entire service area. Where a sewer authority serves more than one municipality, it will be the county's role to coordinate among the towns and the authority to ensure that the wastewater treatment needs can be satisfied. The degree of difficulty in achieving

this result will depend on the type of agreement that exists between the member municipalities and the authority. Where an authority has capacity allocation agreements or contractual agreements among its member municipalities, the limits in those agreements will form the basis of the build-out and capacity analysis. If each municipality plans within its allocation, there should be no difficulty in demonstrating that capacity exists to serve the sewer service area. Where one municipality holds an allocation that exceeds its demand and another has demand that exceeds its capacity it would seem feasible to renegotiate the allocation by some means.

Obviously, where a sewage treatment plant has sufficient capacity to meet the needs of all the municipalities it serves there should be no issue. Where this is not true and where no capacity agreement exists among municipalities in a regional authority the negotiation of a final sewer service area may be more difficult. However, since the Department expects to begin the wastewater management planning process by examining the presently adopted sewer service areas, where these problems are discovered it is likely that they will have already existed. Thus, the rule requires an acknowledgment and planning to solve a problem that already existed and did not create a new problem. It is important to understand the degree of capacity shortfall among the entire service area and to look at potential solutions over the entire service area. For example if inflow and infiltration is a significant problem reducing available capacity, a plan can be formulated to investigate and fix that problem. The rule also treats all municipalities as independent chapters in a wastewater management plan and each is subject to the withdrawal of sewer service area if a cooperative agreement can not be reached. No one town can hold another town hostage. If one municipality fails to participate in wastewater management planning, that municipality is subject to the withdrawal of wastewater designations and the others may proceed

provided treatment capacity exists. Thus all municipalities should be equally motivated to find consensus, which will aid in the negotiation process.

598. COMMENT: The regional aspect of the counties submitting WMPs is admirable as there needs to be sound regional planning. In this respect, the Department needs to evaluate how the county plans affect each other. (36)

RESPONSE: The Department acknowledges this comment in support of this rule provision. The Department concurs that one of the Department's roles is to ensure that the county plans make sense from a State-wide perspective, as reflected in the description of the relationship between the Statewide, areawide and county Water Quality Management Plans at N.J.A.C. 7:15-2.2.

599. COMMENT: Applying the nitrate dilution model on a HUC 11 basis will require some level of coordination of county WMPs to create uniformity in development, especially on county borders. The rules should acknowledge and address the coordination of counties in the planning and approval process. Where TMDLs are not met due to conditions in adjacent counties or watersheds, some method of agreement between counties on the implementation and corrective strategies to meet TMDLs is needed. (51)

RESPONSE: In working proactively with counties and through the review process the Department expects to play a coordinating role between counties to ensure that the county WMPs work together and achieve goals from a State-wide perspective. With respect to the two

areas cited by the commenter: The HUC 11 nitrate dilution analysis yields a density of units which would then be applied by the county or municipality to the undeveloped and underdeveloped acreage in the HUC 11 area within the county or municipality. Coordination across political boundaries is not required given the need to use a single model approach within each HUC 11 drainage area. Implementation measures identified in a TMDL will generally apply within whole drainage areas, because pollutant loads of concern are generated within entire drainage areas upstream of an impairment. Some of the implementation measures are regulatory. In this case, the load reductions will be achieved through the permitting process and will not depend on political boundaries. Other implementation measures are non-regulatory and will require a cooperative approach. The Department will work through watershed stewards and target available funding, such as the Clean Water Act 319(h) pass through grants, to achieve necessary load reductions.

600. COMMENT: At proposed N.J.A.C. 7:15-5.14(c), the concept that where WMPs have not been adopted in accordance with the provisions at N.J.A.C. 7:15-5.2 or the schedule at N.J.A.C. 7:15-5.23, wastewater service areas designations would be withdrawn from a municipality is punitive in nature and should be removed from the proposed rule. (15, 21, 67)

RESPONSE: The Department believes that the lack of consequences for failure to maintain an up to date WMP has been a significant factor in the failure to submit WMPs. The withdrawal of sewer service area where a plan is not up to date is warranted because, where wastewater management plans have either never been adopted or are more than six years old, the assumptions concerning wastewater treatment capacity, water supply and nonpoint source

pollution, if provided at all, may no longer be accurate as a result of subsequent master plan or zoning changes at the local level. By compelling those affected wastewater management planning agencies to comply with the requirements of this chapter, the Department will assure that all projects discharging more than 2,000 gallons per day of wastewater will receive a comprehensive analysis of environmental impacts to assure that approvals aren't based upon outdated information, thereby allowing areawide WQM plans to achieve their statutory mandate and enhancing the effectiveness of continuing planning process.

N.J.A.C. 7:15-5.15

601. COMMENT: Proposed N.J.A.C. 7:15-5.15(a) specifies that wastewater management plans should contain existing and future wastewater-related jurisdictions and wastewater service areas and also public water supply service areas. Water purveyors should also be required to provide information on public water supply service areas to counties. (18, 42, 44, 45, 61)

RESPONSE: The spatial extent of public water supply service areas is available on the Department's webpage.

602. COMMENT: The inclusion of individual subsurface sewage disposal systems information in wastewater management plans at N.J.A.C. 7:15-5.15(b) is supported. (22, 76)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

N.J.A.C. 7:15-5.16

603. COMMENT: The language clarification at N.J.A.C. 7:15-5.16(f) that specifies mapping of existing constructed and/or permitted sewer infrastructure is required at the time a WMP is prepared or updated is supported. In the past, many WMPs included very large areas where no infrastructure was in place. Because many of these early WMPs were not required to carry out EO 109 reviews to address sewer-induced development impacts, this resulted in much larger sewer service area delineations than were warranted. (22, 76)

RESPONSE: The Department acknowledges these comments in support of this rules provision.

N.J.A.C. 7:15-5.17

604. COMMENT: Under N.J.A.C. 7:15-5.17 many of the mapping features required to be mapped are information layers provided by the Department Landscape Project. It is critical that the latest version of landscape project information be provided to the county. (81)

RESPONSE: The Department concurs that the most current available information should be used in developing WMPs. The Landscape Project maps are available on the Department's website.

605. COMMENT: The requirements to map environmental features at N.J.A.C. 7:15-5.17, which includes many environmental features not previously considered in the rules (although some, not all, were addressed through EO 109) is supported. The inclusion of environmental features in the WMP process ties this planning program to other state environmental programs

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and allows the process to attain its stated goals and the mandates of the Clean Water Act and Amendments. (10, 80)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

606. COMMENT: Under N.J.A.C. 7:15-5.25, a WMP must address and analyze many environmental data sets. Some data sets may be supplied by the Department but other data sets are not available. "Steep slopes" is one example of a data set that is either grossly out-dated or needs to be created. Is it the counties responsibility for data creation? If so, what agency will supply quality assurance or data creation guidelines? Data creation will place unreasonable burdens on certain counties. Will the Department and the New Jersey Office of Information Technology coordinate? Are counties becoming data warehouses? The proposed rules should contain a list of notable and reputable sources for environmental data sets. (53)

RESPONSE: The mapping requirements for wastewater management plans at N.J.A.C. 7:15-5.17 are available as GIS coverages from the Department or are to be provided to the counties by municipalities, dischargers and purveyors. The Department is providing financial assistance to counties, which can be used to develop information that is not already available. With regard to the steep slopes example, the rule at N.J.A.C. 7:15-5.17(a)11 specified steep slopes as an environmental feature to be mapped. However, the Department recognized that such a coverage is not currently available on a State-wide basis, as discussed in greater detail in Response to Comment 237. The mapping of environmental features required in WMPs was intended to include only those features that were available in existing data layers, to ensure that satisfactory

WMPs could be developed within the specified timeframe. Therefore, the Department has included a clarification upon adoption at N.J.A.C. 7:15-5.17(a)11 that steep slopes mapping shall be included as an environmental features map in a WMP where the GIS layer is available. Steep slope concerns are important to assess on a site specific basis. For smaller scale actions, such as revisions or site specific amendments as well as for consistency determinations of specific projects, preparation of site plans will routinely include the information needed to identify steep slopes and will provide the basis for evaluating conformance with the requirement at N.J.A.C. 7:15-5.25(g).

607. COMMENT: N.J.A.C. 7:15-5.17 and N.J.A.C. 7:15-5.18(d)6 should also include mapping which identifies impaired waters identified in the Department's integrated list and the designated uses and criteria for each water body. (22, 76)

RESPONSE: The Department did not specify a map of impaired waterbodies or the designated uses and criteria for each water body as required components of a wastewater management plan because this information changes over time. For example, the list of impaired waterbodies is revised every two years and wastewater management plans are intended to be updated every six years; thus, any map included would be accurate for a very limited time. As a result, it is more appropriate for the WMP agency to consult the latest list of impaired waterbodies and the criteria and designated uses in effect according to the Surface Water Quality Standards at the time of development of a WMP, amendment or revision.

608. COMMENT: The mapping features required at N.J.A.C. 7:15-5.17 should also include Wild and Scenic Rivers and floodplains. (85)

RESPONSE: Wild and Scenic Rivers are already required to be mapped at N.J.A.C. 7:15-5.17(a)5 and flood prone areas, which are essentially equivalent to floodplains for the purpose of this planning level analysis, are required to be mapped at N.J.A.C. 7:15-5.17(a)3.

609. COMMENT: The mapping features required at N.J.A.C. 7:15-5.17 should also include the following: Source Water Assessment Maps; Known Contaminated Sites; FW1 Waters and Pinelands Waters; Aquifer Recharge Areas; Exceptional Resource Value Wetlands; Water Supply Critical Areas; Wells (public, industrial, agriculture, institutional, and domestic); and "Classification Exception Areas." (85)

RESPONSE: The rules do not require other environmentally important areas because they do not figure into the standards and decision points set forth in the rule. The rules do allow counties and municipalities to establish more stringent or additional requirements where important to achieve local planning objectives. Therefore, to the extent these or other environmental features will figure into the additional or more stringent standards, it would be appropriate to include the features in the WMP.

610. COMMENT: The proposed rules should also require that WMPs include a HUC 11 Map. (85)

RESPONSE: The rules do not specify inclusion of the HUC 11 drainage areas within the planning area as a separate required map because the analyses are conducted on a HUC 11 basis and this will require the HUC 11 boundaries to be reflected on some if not all of the maps.

Wetlands

611. COMMENT: The proposed rules should address data and map accuracy. For example, the New Jersey Freshwater Wetlands maps were completed in 1986. (85)

612. COMMENT: How old is wetland data and how often is the original dataset updated? Does the wetland layer include newly created wetlands resulting from development over the past 20 years? (51)

RESPONSE TO COMMENTS 611 AND 612: The environmental features map for wetlands should reflect the Department's maps prepared under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-25c. These wetlands are adequately reflected in the Department's GIS coverages, embedded in the land use/land cover layers, which are periodically updated. The Department expects the best available GIS information will be used to develop WMPs, but also recognizes that more accurate information on the presence of wetlands may have been developed locally. Use of alternative data is discussed in more detail in Response to Comment 766.

Floodplains

613. COMMENT: FEMA floodplain delineations, where available, should also be a required feature to be shown. (10, 80)

RESPONSE: FEMA delineates flood hazard areas, not floodplains, are FEMA flood hazard areas are a required feature to be shown under N.J.A.C. 7:15-5.17(a)3, if delineations of flood hazard areas made by the Department under the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. are not available.

614. COMMENT: At N.J.A.C. 7:15-5.17(a)3 updates need to be made to mapping for floodplains as noted in the Department's Flood Mitigation Report. This will impact where sewer areas may or may not be allowed. (36)

RESPONSE: For the purpose of environmental features mapping, the floodplain information as specified at N.J.A.C. 7:15-5.17(a)3 is of sufficient quality. Floodplains are not used to determine where sewer service is allowed. Special water resource protection areas along a Category One waters and their tributaries established under the Stormwater Management rules, N.J.A.C. 7:8 are one area used to determine the composite of environmentally sensitive areas that would be eliminated from sewer service area as set forth at N.J.A.C. 7:15-5.24. Surface waters that are designated Category One are listed in the Surface Water Quality Standards at N.J.A.C. 7:9B. These waters can be determined using the download available on the Department's webpage at http://www.nj.gov/dep/gis/listall.html titled "Surface Water Quality Standards".

Open Space and recreation areas less than 10 acres

615. COMMENT: N.J.A.C. 7:15-5.17(a)4 should not continue to exclude mapping of open space areas that contain less than 10 acres. In urban areas especially, where population densities

can be high per area, even areas smaller than 10 acres could support a high-rise apartment with high population and could distort wastewater needs. The rule proposal should be re-proposed to eliminate the 10-acre threshold for protection of open space since ignoring these smaller areas of open space could lead to many diversion proposals that could eliminate these important open space areas. (22, 76)

616. COMMENT: All permanently protected open space should be included in the build-out analysis. The 10 acre threshold is insufficient to accurately determine wastewater capacity and all open space areas, both over and under 10 acres, should be reflected in the build-out analysis. (11)

RESPONSE TO COMMENTS 615 AND 616: The threshold set for mapping open space was chosen to facilitate mapping at the large scale at which WQM planning occurs. Mapping as an environmental feature for a WMP does not diminish the protection afforded to these areas. Concern was expressed regarding potential implications in estimating future wastewater flows because of the mapping threshold. In urbanized areas, where small parcels of open space are most likely to occur, wastewater generation is based on population projections and information about redevelopment rather than the environmental build-out analysis. As a result, the open space mapping will not have a bearing on wastewater flow projections. Where environmental build-out analyses are performed, wastewater that may be generated by open space is likely to be limited to flows from comfort stations and concessions. Imprecision is expected in the wastewater flow projections because of the many assumptions that must be made, for example

about zoning yield, that will lead to overestimates in some instances and underestimates in others, but on balance will produce an estimate of sufficient accuracy for planning purposes.

617. COMMENT: The Department should clarify whether the mapping of riparian zones at N.J.A.C. 7:15-5.17(a)10 would be based on the pending Flood Hazard Area Control Act regulations. (18, 42, 44, 45, 61)

RESPONSE: The riparian zones under this rule were mirrored after the riparian zones in the Flood Hazard Area Control Act rules (N.J.A.C. 7:13). However, the Flood Hazard Area Control Act rules are site specific and apply to "regulated areas" around "regulated waters." These "regulated waters" are all waters of the State, with a few specific minor exceptions. Mapping of "regulated waters" under the Flood Hazard Area Control Act rules requires detailed topography mapping, cross sections and hydrologic analysis of the contributory watershed. Requiring counties and municipalities to do countywide or municipality-wide mapping at that same detail would be extremely time consuming and onerous. Therefore, the Department is requiring that mapping of surface waters and their associated riparian zones be based upon the Department's GIS hydrography coverage for the purposes of developing a wastewater management plan. An approved plan, however, does not obviate the need for a project to comply with the riparian zone requirements of any other Federal, State or local statute, regulation or ordinance.

618. COMMENT: At N.J.A.C. 7:15-5.17(a)11 the mapping of steep slopes over 20 percent is supported. However, since the definition of "environmentally sensitive areas" does not include

steep slopes greater than 20 percent, its inclusion in this section is questioned, unless the definition of environmentally sensitive areas is amended to include steep slopes. (22, 76)

619. COMMENT: The Department should discuss which government agency is responsible for developing the steep slope data set, publishing a method for creating this data and when it will be available. (51)

RESPONSE TO COMMENTS 618 AND 619: While the Department would agree that steep slopes are environmentally sensitive, as described in Response to Comment 187 through 193, the definition of environmentally sensitive areas does not exclude areas beyond those listed as examples. As described in Response to Comment 237 and as detailed in "agency initiated changes," steep slope mapping will only be required as a map in a WMP if it is available. If a WMP agency should choose to develop the data layer, it must meet the data quality standards set forth at N.J.A.C. 7:15-5.20.

620. COMMENT: The requirement to map underdeveloped property at N.J.A.C. 7:15-5.17(a)14, which could support additional or new sewage generating development, should be limited to other than "urbanized municipalities." In addition, N.J.A.C. 5.17(a)14 does not specify who is responsible for developing this mapping. If the planning agency is responsible by default, this will require a tremendous amount of effort. (38)

RESPONSE: The mapping of undeveloped and underdeveloped land areas is a component of the environmental build-out analysis required at N.J.A.C. 7:5.25(c), which does not apply to

urbanized municipalities. This information is only to be provided by each municipality required to do an environmental build-out analysis. Delineation of these areas is intended to be accomplished as a GIS exercise, for which the Department has prepared a model..

621. COMMENT: Although the Department has provided a definition for the term "undeveloped and underdeveloped property," data would not be readily available on these types of properties so requiring mapping of these areas under at N.J.A.C. 7:15-5.17(a)14 would delay the preparation of wastewater management plans. This requirement should be removed. (18, 42, 44, 45, 61)

RESPONSE: The Department has developed a GIS tool that will quickly approximate the location and extent of undeveloped and underdeveloped lands relevant to the environmental build-out analysis in which this information is used. This tools uses existing GIS coverages to give an initial estimate. More detailed assessment would be at the discretion of the county or municipality to reflect more recent or anomalous information.

622. COMMENT: The proposed mapping requirements do not include proposed zoning changes for affordable housing under the *Mount Laurel* Doctrine, a constitutional obligation to create the opportunity to provide affordable housing pursuant to the Fair Housing Act and the State Planning Act. (18, 42, 44, 45, 61)

RESPONSE: Existing zoning is a needed component to calculate the environmental build-out required at N.J.A.C. 7:15-5.25(c). Zoning adjustments may be the selected response to the

results of analyses at N.J.A.C. 7:15-5.25(d) through (f). Beyond these zoning requirements, if a municipality anticipates zoning changes to address affordable housing obligations, these can and should be reflected in cited analyses, even if they are not existing.

N.J.A.C. 7:15-5.18

623. COMMENT: Proposed N.J.A.C. 7:15-5.18 contains requirements that reflect the subjectivity of the proposed process. For example, N.J.A.C. 7:15-5.18(a)2 requires wastewater management plans to "include analysis of critical economic, social, environmental, or institutional factors" that relate to wastewater management alternatives. The required analysis is so vague and so broad that it provides neither applicants nor the Department with sufficient guidance as to the standard of review and lays the process open to administrative and legal challenges of almost infinite stripes. The effect of this requirement is that the wastewater management planning process would be delayed. Another example of this subjectivity arises with proposed N.J.A.C. 7:15-5.18(b)6 that allows a proposed WMP to be inconsistent with zoning ordinances "for compelling reasons." This standard needs to be defined precisely. (18, 42, 44, 45, 61)

RESPONSE: N.J.A.C. 7:15-5.18(a) refers to N.J.A.C. 7:15-5.24 and 5.25 as the location for additional direction regarding the wastewater management alternatives analysis required as a component of a WMP. For example, if the need for centralized wastewater treatment service exceeds the capacity available in existing permitted facilities and expanded or new wastewater facilities with a discharge to surface water are being considered, N.J.A.C. 7:15-5.25(d)3 sets forth the hierarchy of alternatives to be analyzed. The economic, social, environmental, and

institutional factors relevant to each level in the hierarchy would certainly be relevant when deciding to accept or reject an alternative. With regard to allowing the use of other than existing zoning for a compelling reason, the Department includes this flexibility to allow for circumstances in which a zoning change will be required or is pending but not yet effective to accommodate, for example, an affordable housing decision that results in a development yield different than the existing zoning, but which must be reflected in the projections of wastewater needs.

624. COMMENT: The rule proposal should be changed to require WMP agencies, during preparation of a WMP plan, update, or amendment, to identify and explain any significant inconsistencies with the State Plan map. (78)

RESPONSE: The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2.a.). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A. 58:11A-5.) that accomplish this objective. These areawide plans

are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5.a.) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5.e.). This set of rules does not rely on the State Planning Act nor implement the State Planning Act or the State Development or Redevelopment Plan developed pursuant to that act. The Department believes that environmental and capacity constraints should be acknowledged by the State Planning Commission in the development of the SDRP. Where it has done so, the SDRP and wastewater management plans should be in general agreement. Through the continuing planning process the Department will seek to integrate the SDRP, regional and local land use plans where those plans do not interfere with the restoration and maintenance of water quality. However, the Department cannot abdicate its statutory obligation in reliance on those plans where they conflict with the legislated mandate of the Department.

The State Plan does not serve as a technical basis for this proposal, and there is no reference to the State Plan Policy Map with regard to the identification of appropriate sewer service areas. The State Plan Policy Map is derived based on generalized information due to its State-wide scope. A detailed build-out analysis and capacity assessment are not performed in the development of the State Plan Policy Map. However, the goals and policies of the State Plan are generally consistent with this proposal, including, but not limited to: Goal #2: Conserve the State's Natural Resources and Systems; Goal #4: Protect the Environment, Prevent and Clean Up Pollution; and the Statewide Policies for Water Resources (#11), Open Lands and Natural

Systems (#12), and Coastal Resources (#16). Where these resources have been properly considered in developing the State Plan Policy Map, the Department expects consistency between wastewater management plans and the SDRP will be achieved. Further at N.J.A.C. 7:15-5.24(h), when a more detailed assessment has been performed under an endorsed plan, the rule allows a wastewater management plan to be aligned with that endorsed plan subject to the requirements that it not jeopardize a local population of threatened or endangered species, provides adequate environs protection outside of designated centers, and demonstrates a wastewater treatment alternative with adequate capacity.

Because this set of regulation does not rely on the State Development and Redevelopment Plan as a technical basis for the delineation of sewer service areas, there is no need to require wastewater management plan to identify and discuss inconsistencies with that plan. However, because wastewater management plans are to be developed on a GIS platform, a comparison with the State Plan Policy Map should be a simple exercise for those interested in such an analysis. In addition, all of the data layers used to prepare a wastewater management plan are also available digitally, making a determination of potential reasons for inconsistency equally possible.

625. COMMENT: N.J.A.C. 7:15-3.8(e) provides that site-specific amendments and revisions must be updated every six years, therefore the usefulness of a 20 year employment or population projection required at N.J.A.C. 7:15-5.18(a) is called into question. Such long range projections are subject to substantial error, particularly in an unstable regulatory environment. The 20 year

timeframe should be changed to a period of between 6 to 10 years. This comment also relates to N.J.A.C. 7:15-5.25(d)1ii concerning estimated future wastewater flows. (88)

RESPONSE: It is important to consider population projections for a 20 year timeframe because of the lag time between planning and implementation of needed expansions.

626. COMMENT: The Department should reconsider N.J.A.C. 7:15-5.18(a), which requires the wastewater management planning agency to describe anticipated wastewater service areas and domestic treatment works that are necessary "over a 20-year period for urbanized municipalities or at build-out for all other municipalities." Similarly, N.J.A.C. 7:15-5.18(c) requires maps of such areas and DTWs to meet "anticipated wastewater management needs" based upon this same timeframe.

Not only is "build-out" an undefined term, this requirement may be very difficult for the wastewater management planning agency to meet and would be based on speculation as one cannot predict what will actually occur at build-out. This requirement is not based on proper use of sound science and "environmentally sound wastewater management" (N.J.A.C. 7:15-5.18(a)1), which would examine the useful life of the facility rather than build-out. If the Department is concerned with planning for build-out, then limiting the validity of WMPs to only six years is not appropriate and should be extended. (18, 42, 44, 45, 61)

RESPONSE: While not included in definitions, the meaning of and direction for performing the environmental build-out analysis is at N.J.A.C. 7:15-5.25(c). The planning for wastewater

management needs must consider the build-out condition but must also recognize that the build-out projection may change over time as actual land use decisions are made and so must be reflected in regularly updated WMPs. This is because failure to align development plans with the ability to provide environmental infrastructure consistent with water resources constraints would simply perpetuate the existing situation, which is inefficient and ineffective. Too often development plans are made in reliance on the apparent availability of environmental infrastructure, yet the assimilative capacity of streams or sustainable use of water supply cannot support the capacity and location of infrastructure that exists in plan only. At the same time, the Department recognizes that actual land use decisions may be made or new information or technologies may arise that alter the effective outcome of an environmental build-out analysis, necessitating that it be reconsidered periodically. The six-year threshold was selected because it reflects the time frame in which each municipality is required to update its master plan in accordance with the MLUL. A longer time frame is likely to lead to numerous site-specific amendments because of the changed circumstances since the plan was adopted.

627. COMMENT: The requirement at N.J.A.C. 7:15-5.18(a)2 for examination of alternatives to include analysis of economic, social, environmental or institutional factors is supported. (22, 76)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

628. COMMENT: At N.J.A.C. 7:15-5.18(a)2, the Department is proposing to require an analysis of alternatives for all new or proposed expansions of a wastewater treatment facility or

sewer service area. This proposal is opposed and it is recommended that the current regulatory language, which makes such analysis discretionary, be retained. (60)

629. COMMENT: N.J.A.C. 7:15-5.18(a)2 is being altered to require the consideration of WMP alternatives and to require the analysis of "critical economic, social, environmental, or institutional factors pertaining to such alternatives." Previously, such alternatives were to be explored on a case-by-case basis when the Department found a need for such examination. Unless there is a specific concern generated by a portion of a proposed WMP, this requirement is superfluous, unnecessarily time consuming, and cost generative. Therefore, such examination should only be required when warranted by specific conditions and/or concerns. (88)

RESPONSE TO COMMENTS 628 AND 629: When a WMP agency was potentially a sewerage authority for a WMP area that consisted only of the service area of the facility, it was appropriate to consider alternative means of wastewater management on a case by case basis. In order to develop an adequate wastewater management plan for a county or municipality, all of the potential wastewater needs in the WMP area must be considered at a level of detail and certainty appropriate within a planning construct. It is recognized that the level of precision available for some portions of the plan will be greater than others. As plans are updated or permit actions for future facilities are required, refinement will occur.

630. COMMENT: The provision at N.J.A.C. 7:15-5.18(b) is supported. It is essential for the proper and efficient growth within this state as well as environmental protection that WQM planning and zoning be coordinated, and this provision will help in that process. (64)

631. COMMENT: At N.J.A.C. 7:15-5.18(b)2, the requirement that wastewater need projections be based on zoning rather than master plans as a more realistic basis for making growth projections is supported. (22, 76)

632. COMMENT: Wastewater management plans not being based on county master plans, which may not be consistent with municipal zoning, is supported. The more appropriate measure of build-out and future need is what is allowed under municipal zoning. (10, 80)

RESPONSE TO COMMENTS 630 THROUGH 632: The Department acknowledges these comments in support of these provisions of the rule.

633. COMMENT: N.J.A.C. 7:15-5.18(b)2 requires WMPs to "identify relevant zoning ordinances on which the wastewater management plan is based, specifying the type, density, and intensity of land use allowed in each district." The rule proposal must be revised to reflect the statewide, regional and municipal obligations arising from (1) unfulfilled affordable housing obligations that accrued prior to 1999; and (2) those arising since. (18, 42, 44, 45, 61)

RESPONSE: Existing zoning is a needed component to calculate the environmental build-out required at N.J.A.C. 7:15-5.25(c). Zoning adjustments may be the selected response to the results of analyses at N.J.A.C. 7:15-5.25(d) through (f). Beyond these zoning requirements, if a municipality anticipates zoning changes to address affordable housing obligations, these can and should be reflected in cited analyses, even if they are not existing.

634. COMMENT: N.J.A.C. 7:15-5.18(b)3 states that the wastewater management plans may be based on development allowed through a zoning variance. However, because variances are allowed on a case-by-case basis, it is unclear how a wastewater management plan can be based on a prediction of zoning variances being granted. (14)

635. COMMENT: N.J.A.C. 7:15-5.18(b)3 and 4 seem to allow towns to anticipate future zoning variances or unanticipated development and are opposed as this is not realistic. Zoning based on master plans that have a sound natural resource basis should result in strong zoning ordinances that can withstand variance requests and not result in unanticipated development. (22, 76)

636. COMMENT: N.J.A.C. 7:15-5.18(b)6 is opposed as it does not provide guidance as to what kinds of compelling reasons there may be for a WMP to be inconsistent with zoning ordinances. (22, 76)

RESPONSE TO COMMENTS 634 THROUGH 636: The Department concurs that zoning based master plans grounded in sound natural resource protections are desirable. However, experience indicates that master plans and zoning do not always keep pace with development objectives that arise, particularly with respect to redevelopment of declining areas. Where these objectives are known, and are also consistent with protection of natural resources, it is appropriate to consider them when developing wastewater management plans. The reference to variances is intended to accommodate situations where variances have been granted for projects

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that would affect the wastewater generation suggested by zoning, not those that are random or theoretical.

637. COMMENT: The WMP wastewater service area may also be based on a "zoning variance," N.J.A.C. 7:15-5.18(b)3, or on "preliminary or final subdivision or site plan approvals," N.J.A.C. 7:15-5.18(b)4, that would allow for development generating greater wastewater than permitted under the ordinance.

First, the Department should clarify whether N.J.A.C. 7:15-5.18(b)3 refers to use variances that have already been approved. If so, the term "zoning variance" should be clarified to be "pre-existing zoning variances pursuant to N.J.S.A. 40:55D-70(d) [which] includes use variances, density variances and other non-bulk variances." Otherwise, there is no way to know what variances may be allowed in the future, as variances are exceptions to the ordinance.

Second, at N.J.A.C. 7:15-5.18(b)4, subdivision or site plan approvals could not have allowed development generating greater wastewater than permitted under ordinance unless a use variance had been granted as already established at N.J.A.C. 7:15-5.18(b)3. Also, the Department indicates that "for some or all of those locations" the WMP may be based on the zoning variance. However, the Department has not, but should specify under what conditions the variance can be relied upon as long as it remains valid pursuant to the municipal zoning ordinance. (18, 42, 44, 45, 61)

RESPONSE: As a point of clarification, the rule allows that the WMP may reflect approved variances that would affect the wastewater generated by a particular land area, it does not allow variances to result in changes in the wastewater service area. This would only apply if a zoning variance had already received local approval and would be valid for as long as the variance was valid, for the purposes of this rule.

638. COMMENT: Proposed N.J.A.C. 7:15-5.18(c)1 requires the maps to locate all "existing, expanded or new DTW, if any, that would not be a sewer or a pumping station, but that would receive sewage." This information will be unknown until an application is reviewed and approved and thus should not be a required element. (18, 42, 44, 45, 61)

RESPONSE: While the final nature of new and expanded DTWs will depend on a finding of conformance with the rule, the WMP must initially identify propose new or expanded facilities, for which the plan will then provide the basis for concluding they are in conformance with the rule. Based on the review of the submission, it may be necessary to modify this element of the plan, but it is an essential element of a proposed and final WMP.

639. COMMENT: N.J.A.C. 7:15-5.18(f) states that the wastewater management plan should use 75 gallons per day per capita to estimate future residential flow if the future specific residential type is unknown. The 75 gallons per day per capita does not comport with the 500gpd per dwelling unit or the 350 gpd per dwelling unit flow used elsewhere in these proposed rules. Consistency is needed. (14)

RESPONSE: The derivation and application of the 75 gallons per day per capita and 500 gallons per day per dwelling unit referenced by the commenter are discussed in Response to Comments 196 and 197 and Response to Comments 1019 and 1020. These values are used to project wastewater flows for treatment facilities when development type is not known and to determine equivalent dwelling units in septic service areas, respectively. The flow value of 350 gallons per day per dwelling unit is relevant at N.J.A.C. 7:15-8.1(c)2, which requires all new development associated with wastewater discharges of greater than 2,000 gpd, including residential developments totaling six or more dwelling units and expansions of existing facilities that have not previously assessed environmental impacts, to assess the impacts associated with that development through an amendment or revision to the areawide WQM plan, except for certain exempt existing discharges to ground water and the properties that they serve. In determining what size residential development would generate 2,000 gallons per day of discharge, the Department utilized the flow projections from N.J.A.C. 7:9A-7.4(b). N.J.A.C. 7:9A-7.4(b) requires a minimum volume of 350 gallons per day per dwelling unit using a septic system. Based on this estimate, six homes would produce a total of 2,100 gpd. Thus, a development of more than five units could have the same impact on the ground waters of the State as an individual discharge of greater than 2,000 gpd.

640. COMMENT: Proposed N.J.A.C. 7:15-5.18(f) establishes that wastewater flows are the "30 day average flow from DTW that discharge to surface water" and a "daily maximum flow from DTW that discharge to ground water." The Department should explain the basis for this difference in calculation. Moreover, these calculations should be based on yearly averages, as that base would better serve planning purposes. (18, 42, 44, 45, 61)

RESPONSE: NJPDES discharge to surface water permits express wastewater flows are as a 30-day average. NJPDES discharge to ground water permits express flows as a daily maximum flow The expression of flows as annual averages in the WQM plans as provided in the previous rules has been a source of confusion when attempting to equate the planning flows to a proposed permitted flow. To remedy this, the WQMP rules were revised to be consistent with the permit basis to facilitate determinations of consistency between WQM plans and proposed permit actions.

N.J.A.C. 7:15-5.19

641. COMMENT: At N.J.A.C. 7:15-5.19(b) the Department should place strict conditions on construction of individual subsurface sewage disposal systems within sewer service areas. Such construction should only occur when the wastewater management facility is under a sewer ban. (22, 76)

RESPONSE: The rule at N.J.A.C. 7:15-5.19(b) allows ISSDSs within a sewer service area only if legally enforceable guarantees are made at the local level that such facilities must be abandoned when conveyance facilities become available. The Department believes that flexibility needs to be afforded to allow development to proceed where physical infrastructure to convey the wastewater to the wastewater treatment facility is not immediately planned, in addition to situations where the facility is under sewer ban. The Department further believes that the requirement that the ISSDS be abandoned once facilities are available will assure that any impacts from the temporary allowance of use of such a system is minimized.

642. COMMENT: N.J.A.C. 7:15-5.19(b) restricts the WMP from allowing the construction of septic systems unless there is a "legally enforceable guarantee at the local government level" that these systems would be discontinued upon availability of sewer service. The Department should specify what it envisions as a "legally enforceable guarantee" as most municipalities utilize a mandatory hook up ordinance. (18, 42, 44, 45, 61)

RESPONSE: The Department is aware of the common use of a mandatory hook-up ordinance at the local level to compel septic system development in sewer service areas to connect to conveyance facilities when they have been made available. This method has met and will continue to meet the requirement in the rule. The rule modification was simply to clarify that the requirement was to be applied and enforced at the local level and not by the Department.

N.J.A.C. 7:15-5.20

643. COMMENT: At N.J.A.C. 7:15-5.20(a) the proposed rules should specify the Department's software capabilities. (85)

RESPONSE: The Department's software capabilities change over time due to technology upgrades. If the Department specified its software capabilities in a rule, every time the technology changed and was updated, the Department would have to do rulemaking to change this information in the rule which is not only a wasteful practice, but would perpetually be behind the current software capabilities. Contacting the Department for the current standards as specified in the rule or checking the guidance documents on the Department's website, will

provide far superior information and keep up with technology upgrades far better than listing soon to be outdated information in a rule, thus the rule was not changed to specify the Department's software capabilities.

644. COMMENT: The rules propose that the text and maps of a wastewater management plan shall be submitted in hard copy and in an electronic format that is compatible with the Department's software. Until all agreements have been made and the WMP has been approved, draft text and maps provided in PDF format should be sufficient for the Department to review. It is not standard for the reviewing agency to ask for, or the applicant to submit, a plan in a format that could be altered without the permission of the agency that has created it. The Department has expressed a desire to make changes directly to the documents while in draft form. The Department should review all data, maps, text, or information associated with a WMP and suggest proposed changes but the DPA should be the entity to make changes to the WMP. Differences of opinion about the Department's proposed changes should be negotiated with the county according to an agreed upon process. (19, 28)

RESPONSE: The Department's request for digital submission was intended to facilitate and speed the review and revision process by allowing simple text edits to be made using the track changes tool. The Department views the development of an acceptable WMP as a collaboration among the Department and the WMP agency and WMP contributors. While the WMP agency and contributors (counties, municipalities, sewage authorities, purveyors) will need to concur with the findings of an approvable WMP in order to implement the provisions of the WMP, a WMP can only be approved if it meets the requirements of the rule. Therefore, to the extent a

WMP agency or contributor does not concur with Department direction, it will be necessary to provide additional information that supports that a different finding comports with the rule requirements.

645. COMMENT: N.J.A.C. 7:15-5.20(b) contains extensive requirements for mapping of wastewater management plans, updates, amendments and revisions, including both hard copy and compatibility with the Department's Geographic Information Systems. Mapping is very expensive and the Department should provide financial assistance to support those wastewater management planning agencies unable to budget for this requirement. (18, 42, 44, 45, 61)

RESPONSE: Much of the information required to prepare a WMP is available from data bases and existing GIS data layers and will not require new mapping efforts by WMP agencies. To assist counties in developing WMPs, including any new mapping, the Department is providing both direct technical and financial assistance. At the time of rule proposal, The Department estimated it would be able to provide approximately $57,000 per county but has been able to increase that amount to, on average, $100,000 per county using additional Corporate Business Tax funds. The Department will continue to seek additional funding to further assist WMP agencies.

646. COMMENT: All required information may not be readily available and additional time should be allotted to obtain and create mapping in the desired format. (18, 42, 44, 45, 61)

RESPONSE: Most of the requirements for mapping are for features that are already available as a GIS coverage. Other information is required only if the mapping of the feature is available. In an agency initiated change, the Department is clarifying that the requirement to provide steep slopes mapping as part of a WMP only applies if this information is available. Zoning, the physical extent of wastewater and water lines, and undeveloped/underdeveloped areas may not already be mapped and are required to complete the WMP analyses. As previously discussed, a GIS tool has been developed by the Department to identify undeveloped/underdeveloped areas using existing GIS coverages. Where zoning and the physical extent of wastewater and water lines are not currently available, the funding provided by the Department can be used to develop the information. While the Department does not anticipate that additional time will be needed to develop the required mapping, in appropriate circumstances, extensions of the schedule can be negotiated in accordance with N.J.AC. 7:15-5.23.

647. COMMENT: The requirement for submission of maps in digital form at N.J.A.C. 7:15-5.20(b) is supported. N.J.A.C. 7:15-5.20 states that agencies may submit maps in addition to those at the scale of 1:24000 or 1:12000. The Department should also require, not just accept at N.J.A.C. 7:15-5.20(b) and (c), maps depicting sewer service areas at a much more detailed resolution so that much smaller areas of environmentally sensitive areas (such as those smaller than the 25 acre threshold of environmentally sensitive at N.J.A.C. 7:15-5.24(b)) can be shown and excluded from the sewer service area. Limits of data resolution should drive the scale of the maps. (22, 76)

RESPONSE: Removing additional areas or areas smaller than required under the rule would result in sewer service areas that are fragmented and filled with small areas that would have to be excluded from the sewer service area. This pattern of sewered development would hinder the application of municipal zoning powers to achieve a consistent and orderly pattern of development, and would not facilitate center-based development, thus making it difficult to achieve the objectives of local master plans. The requirements for sewer service area delineation were developed to allow a repeatable and relatively simple means to delineate a sewer service area that sufficiently excludes those areas that are not suitable for development at densities requiring sewer service. Municipalities have the option to be more stringent than the rule requires, so, if they choose to exclude areas from sewer service such that a different scale of mapping is warranted, then they may do so. However, the Department does not believe it would be appropriate to require a finer resolution everywhere. The data quality standards are reflective of those that apply for all data layers in the State and are sufficient for a planning exercise. Paper copies are required in order to provide a back up to the digital information and in the event access is requested under OPRA.

648. COMMENT: At N.J.A.C. 7:15-5.20(b) the proposed rules should address the metadata for the data and maps. (85)

RESPONSE: N.J.A.C. 7:15-5.20(b) establishes the data standards that must be met with regard to data layers and maps submitted as part of a WMP.

649. COMMENT: At N.J.A.C. 7:15-5.20(b) paper maps at 1:24000 should not be required for plans prepared for multiple municipalities. This requirement will discourage counties and others from preparing WMPs covering multiple municipalities because producing paper maps wider than 36-inches, especially in color, is complicated, expensive and unnecessary given the electronic submittal requirements. Rather, the WMP should include maps at any convenient and legible scale. (38)

RESPONSE: There is a need to have a paper copy of the wastewater management plan submission in the event of failure of electronic information or failure of equipment needed to access it. There is no paper size requirement for the printed maps therefore, if printing maps wider than 36-inches is cost prohibitive, a series of smaller maps printed to scale could be submitted instead.

650. COMMENT: At N.J.A.C. 7:15-5.20(b)2 service areas mapped in urbanized municipalities at the end of the 20-year period should be based on zoning classifications in the municipalities requiring service and not on development projections. Wastewater management planning agencies cannot determine which portion of an area requiring service will actually need service at some time over the next 20 years. (38)

RESPONSE: The sewer service area in urbanized municipalities is expected to reflect the requirements at N.J.A.C. 7:5.24. The wastewater demands of sewer service areas in urbanized municipalities are required to reflect development projections, which may be informed by zoning, as well as any information available on redevelopment plans, as these may provide

information regarding the need for wastewater service that is not reflected in trend projections or zoning.

651. COMMENT: N.J.A.C. 7:15-5.20(b)3 requires the various features at proposed N.J.A.C. 7:15-5.17 to be depicted and further states that these features "may be subject to special regulation under Federal or State statutes or rules." The Department should substantiate its authority to regulate these features, particularly steep slopes greater than 20 percent. (18, 42, 44, 45, 61)

RESPONSE: The language referenced at N.J.A.C. 7:15-5.20(b)3 is intended to alert users of WMP features mapping that it is not intended to represent jurisdictional boundaries for regulatory purposes in cases where features mapped are also regulated by other Federal or State laws or regulations, which have separate authority to regulate these features. For example, wetlands are regulated under Freshwater Wetlands Act, riparian zones are regulated under Flood Hazard Area rules and steep slopes are regulated under the Highlands rules. Steep slopes protection through the ordinance requirement at N.J.A.C. 7:15-5.25(g)6 is included in the rule to help address nonpoint source pollution associated with disturbance of steep slopes. This requirement is included to advance the legislative intent contained within the WQPA and the other authorities under which the rule is adopted.

N.J.A.C. 7:15-5.22

652. COMMENT: In addition to the various governmental units listed for mandatory consultation in N.J.A.C. 7:15-5.22, the Department should also consult with business and trade

organizations that represent the regulated community. These are interested parties who should be kept apprised of the regulated wastewater management planning process, particularly as they would be immediately and directly affected by the withdrawal of wastewater service area designation. (18, 42, 44, 45, 61)

RESPONSE: The appropriate opportunity for consultation with non-governmental agencies is during the public comment period, which is provided for at N.J.A.C. 7:15-3.4(g)6. The Department believes the public participation requirements provide an adequate opportunity for input as they occur prior to decision making with regard to an amendment proposal.

653. COMMENT: Is there a mechanism by which a municipality or authority can object or appeal the plan developed by the county if they disagree with the plan? (37)

RESPONSE: Under N.J.A.C. 7:15-5.22(a), every WMP agency that prepares a WMP or WMP update shall during such preparation notify and seek comments from and offer to confer with all governmental units that have regulatory or planning jurisdiction over wastewater, water supply, or land use in the WMP area. Thus, municipalities and sewerage or utilities authorities would be given the opportunity to review and comment on WMP proposals while in development to work out disagreements that may arise. Additionally, under N.J.A.C. 7:15-3.4(g)4, the Department will require the WMP agency to request written statements of consent from affected governmental entities and sewerage agencies on the proposed WMP prior to rendering a final decision on the WMP. If a municipality and sewerage or utilities authority opposes the WMP or WMP update, this will provide an opportunity for them to object to the WMP. Lastly, if a

municipality and sewerage or utilities authority wants to appeal a Department decision to adopt a WMP, an appeals process is provided at N.J.A.C. 7:15-3.8.

654. COMMENT: At N.J.A.C. 7:15-5.22(a) wastewater management planning agencies should be required to not only notify, seek comments and confer with other entities, but to also provide proof of such notification. (22, 76)

655. COMMENT: The rule proposal should be re-proposed to include a provision requiring municipalities to hold public hearings before adopting the WMP. At N.J.A.C. 7:15-5.22(a) where municipalities are the government entities notified that a WMP is being prepared, the municipality should be required to provide proof that a public hearing was held. Municipalities are not required to hold public hearings for wastewater management plans and as a result, the Department receives demands for public hearings. (22, 76)

RESPONSE TO COMMENTS 654 AND 655: See Response to Comment at 352. While the rule does not require that wastewater management planning agencies provide proof of the consultation requirements at N.J.A.C. 5:15-5.22(a), the Department does request this information as part of a WMP application and applicants are asked to identify how many entities they contacted to meet this requirement. When there is a question raised as to whether the required consultation has occurred, the Department has required applicants to submit proof of consultation. The Department does not require that the form of notification include public hearings at the local level, as this would be an unnecessary burden to require in every

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amendment situation. A public hearing option is offered in the proposal of a wastewater management plan or other amendment.

656. COMMENT: N.J.A.C. 7:15-5.22(a)1 states that the wastewater management planning agency is required to confer with all governmental units that have planning or regulatory jurisdiction over wastewater, water supply, or land use to include among others county planning boards. This provision is in the current rule. In the past, the Department failed to ensure that all county planning boards were conferred with in the wastewater plan development and amendment process as required in both the current and proposed rule. (14)

RESPONSE: As stated by the commenter, consultation with relevant government units is required in the development of a WMP. As counties are now the WMP agencies, counties will play an integral role in WMP development and the Department is confidant that they will ensure consultations are performed in the process.

657. COMMENT: At N.J.A.C. 7:15-5.22(a)1 the Office of Smart Growth should be added to the list of governmental entities that shall, during the preparation of a WMP or WQM plan amendment, be notified and have comments sought from or consultation with regarding the proposal. This would help provide a stronger link between the delineation of sewer service areas and the State Plan. (77)

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RESPONSE: This list of entities to be consulted with is not an exclusive list, so it is not necessary to revise it to include the Office of Smart Growth. The Department will ensure that coordination with the Office of Smart Growth occurs in the development of WMPs.

N.J.A.C. 7:15-5.23

658. COMMENT: A provision should be included that the existing WMP remains fully effective until the Department acts upon the renewal application. (18, 42, 44, 45, 61)

RESPONSE: The rule already provides that the underlying WQM plan, including WMPs, WMP updates and other amendments or revisions that have been adopted remain in effect until superseded by a subsequently adopted WMP, WMP update, amendment or revision except that: if the WMP is out of date, sewer service area will be withdrawn in accordance with N.J.A.C. 7:15-8.1(a). All the provisions of a WQM plan continue in effect with a timely submission unless and until the application is disapproved or returned.

N.J.A.C. 7:15-5.23(a)

659. COMMENT: The timing of plans is important. All the wastewater management plans of all towns in a county must fall on the same six-year schedule. To start the process, the six year calendar should be adjusted to begin when the first Water Quality Management Plan for a county is approved after the adoption of this rule. Has the Department contemplated this issue of timing? (6, 7)

660. COMMENT: The timing of wastewater management plans is important and the plans of all the towns within a county, should fall on the same six year schedule. To start the process, the six year calendar should be adjusted to begin when the first Water Quality Plan for a county is approved after adoption of this rule. Six years after that, the wastewater management plans of all the municipalities in the county should be due. However, this approach will mean that all 21 WQMPs will need to be amended in six years for wastewater planning purposes. Perhaps the Department should set up a schedule that staggers the due dates of the wastewater management plans and provides for attention to three or four counties per year over a six year period. (18, 32)

RESPONSE TO COMMENTS 659 AND 660: Even though the initial round of plan submittals is similar State-wide, it is likely that the review and approval process will result in staggered approvals as some plans will undoubtedly experience more complications than others to arrive at a satisfactory plan. Further, the six year update is likely to be a simpler task than compilation of the initial plan.

661. COMMENT: The Department should only require WMP updates every ten years instead of the proposed six year interval, given the extent of time to prepare and adopt WMPs. If WMPs are to be valid for only six years, the Department should set a deadline by when all wastewater management planning agencies must submit requests for renewals. (18, 42, 44, 45, 61)

RESPONSE: The six-year timeframe for update is continued from the previous rule and was selected to conform to the timeframe for periodic updates of municipal master plans in accordance with the MLUL. A deadline for submission of subsequent WMP updates is built into

the schedule at N.J.A.C. 7:15-5.23. The update will be due six years from the date of adoption of the previous WMP. Consequently, the WMP agency will have adequate time to prepare a timely submission of an update.

N.J.A.C. 7:15-5.23(b)

662. COMMENT: The nine-month timeframe for WMP submission needs to be re-evaluated. Much of the GIS data that is required does not exist in digital format and will have to be created. (19)

663. COMMENT: If the Department's database cannot be updated within nine months, for example, sewer wetland data are already old, the time frame for WMP compliance must be extended. (54)

RESPONSE TO COMMENTS 662 AND 663: As described in Response to Comment 606, most of the information required to develop a WMP is available as GIS data layers. Digital zoning is one component that is identified as possibly requiring development. This information is not available in all areas, but is available in many areas. Digital zoning and digital parcel mapping exist in 13 and 19, respectively, of the 21 counties. These are key coverages that will allow a rapid completion of the environmental build-out analysis. Where this data requires enhancement or must be created, it is suggested that the financial assistance provided by the Department be used to complete this work.

664. COMMENT: The timeframe of nine months to complete a WMP upon the date that the rules are promulgated is unrealistic and should be extended. The best way of accomplishing this is to develop a dialogue with the counties to determine a realistic timeframe. (81)

665. COMMENT: Nine months after the effective date of the rule does not provide adequate time to develop, revise, finalize and adopt a WMP. (85)

666. COMMENT: A more reasonable timeframe for completing county WMPs is needed. Some counties are working with the Department in establishing a timely, efficient and doable wastewater management planning process and are participating in a pilot study for developing a model county WMP that will help implement the new WQMP rules statewide This work is already underway and great strides have been taken to coordinate this work with the State Development and Redevelopment Planning Process through Cross-Acceptance and Plan Endorsement and with the Draft Highlands Regional Master Plan.

An agreement between the Department and county WMP entities should precede the commencement of work. The agreement should set forth an achievable timeline that is unique to each county. The timeline should have two components, the preparation of the county WMP and adoption of implementation ordinances. The timeline must include adequate allowances for public involvement, public notice and hearing requirements. Determination of the timeline for completion of each county WMP should take into consideration the following factors: the number of municipalities involved; the availability, quality and update status of county-specific GIS datasets; county staff resources, GIS technical capabilities and whether or not the county has

access to consultant services; prior county WMP experience; county funding support; overall complexity of the WMP (such as the need to coordinate the WMP with other counties, and the Highlands Act); and type of analyses and analytical methods involved, many of which will be unique to each county WMP (i.e. whether or not a point source loading analysis is involved will significantly affect the timeline and cost). Overall availability of consultant services is also a concern, since there are a limited number of firms with appropriate technical expertise and resources for counties to tap into. (9, 19)

667. COMMENT: At the outset of the WMP process, the Department and counties should agree upon an individualized scope of work and timeline for WMP plan creation and adoption that allows time for public involvement, public notice and hearing requirements, based on conditions in each county. An absolute time limit could be included in the rule as well. This process could be modeled on the Office of Smart Growth's plan endorsement "Action Plan" process. (78)

668. COMMENT: The proposed rules require counties and municipalities to gather data, project future flows, perform a variety of analyses, identify conflicts, create solutions and alternatives to solutions, implement solutions, and provide evidence of compliance in order for wastewater management plans to be adopted. This includes performing extensive zoning analysis, rezoning, and the drafting and implementing of new ordinances. Local ordinances and master plans must consider the cumulative and secondary impacts of proposed development and the complex interrelationships of water quality, quantity, and ecosystem health. The rules propose that a wastewater management plan shall not be approved unless documentation has

been submitted to the Department, which demonstrates that municipal ordinances have been adopted and conformed to the requirements of proposed rules.

The Department assumes that "the information required in these sections should be readily available to these entities as part of their normal operations; therefore, supplying this information to counties to facilitate wastewater management planning should be a nominal cost at best." However, it is possible that even the most sophisticated municipality might not have all of these items readily available and would take time and money to acquire them. Due to the work and costs associated with creating a wastewater management plan, the municipalities and counties will have difficulty completing all that is required within the proposed nine month time frame. The Department should consult with the counties to arrive at a more realistic time frame for the WMPs to be developed. Also, the planning and implementing components should be segregated into two separate phases and offer realistic time frames to accomplish both phases. (19, 28)

669. COMMENT: It will take some counties closer to a year and a half to actually produce a wastewater management plan, rather than the estimated nine months allowed in the rule proposal. Some counties have a large number of wastewater management utility authorities right now so gathering those all together and processing this information is going to take more than nine months which will be a problem. (3)

670. COMMENT The nine month time frame to submit a WMP or WMP update under N.J.A.C. 7:15-5.23(b) is untenable since the rule requires substantial new data and mapping requirements, coordination with local wastewater and water supply authorities, coordination with

local governments and with state agencies, and significant new analyses addressing build-out, water supply and other required analyses. For Highlands Region counties, this is particularly problematic since the Highlands Regional Master Plan conformance activities will be required in roughly the same time frame. The extremely aggressive nine month window to develop and submit WMPs should be expanded to at least 18 months. (88)

671. COMMENT: In the proposed rules, the Department is seeking to expand the role of county governments by designating the counties as the wastewater management planning agencies. Although some counties have traditionally served in this capacity, an analysis of the proposed regulations reveals an increase in the responsibilities of county governments, both during the development of the WMP and in its implementation. While some counties are not opposed to bearing some of the responsibility for Water Quality and Wastewater Management planning, there are a number of areas of concern that preclude endorsement of the regulations as written.

Under N.J.A.C. 7:15-5.23(b) the rules propose a nine-month period from the effective date of the rule proposal during which current sewer service area designations will remain in effect while WMPs or updates can be prepared for submission to the Department. Given the technical nature of the document, limited county staffing and insufficient grant funds from the Department, the nine-month timeframe is unreasonable. Most local levels of government do not have sufficient staff to undertake such a comprehensive plan update. It is anticipated that the development of composite zoning layers, vacant/underutilized property analysis, and build-out analysis, all requirements under the new regulations, would take approximately 12 to 18 months from the date a consultant is hired. Further, given the existing public contracting laws (pay-to-play), the

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process of hiring a consultant could take upwards of 3 months. Therefore, it is likely that just the process of drafting a request for proposals to hire a consultant, receiving and evaluating such proposals, making a consultant selection and securing funds in the local budget (which may extend into the next fiscal year) to pay for such services will take all if not more than the nine month timeframe for plan completion and submission.

In addition to the technical aspect of planning, it will take a great deal of time for the intergovernmental relations aspect to be addressed. Currently, there is no mechanism in place to facilitate the planning process between and among county and municipal governments. During the time that the Watershed Management Area planning program was operating, there was a Government Advisory Committee (GAC) that met regularly to discuss regional issues. Unfortunately, the Department discontinued funding for the program and the GAC was disbanded, therefore a great deal of time will be necessary to create the contact base required for the WQMP initiative.

Counties are not equipped with adequate staffing or economic resources to successfully implement this size of a project within the allotted timeframe of nine months. Only 12 of the 161 planning agencies have up to date plans therefore, it is recommended that the Department expand the timeframe for plan development to 24 to 36 months. Significantly higher grant awards should also be provided so that counties will be able to hire qualified consultants to assist in the development of the WMP. (33, 60)

672. COMMENT: Wastewater service area designations in non-compliant wastewater management plans and a sewer service area designation where a wastewater management plan had never been prepared would remain effective for nine months (as a grace period) from the effective date of the WQM planning rules, by which time a wastewater management plan should have been submitted. This timeframe should be extended to at least two years, as nine months is insufficient time to compile the necessary information and prepare a wastewater management plan, particularly for those areas where one has never been created. (18, 42, 44, 45, 61)

673. COMMENT: The proposed regulations require that the plan be submitted by the county to the Department within nine months of adoption of the regulation. This would be extremely ambitious even in those areas where significant information and data have already been compiled. This is not sufficient time for each municipality or wastewater authority to compile the necessary information for their service area, adopt appropriate ordinances or regulations, submit all this to the county, and leave time for the county to then submit the compiled information to the Department. (87)

674. COMMENT: Gathering data and creating materials for the creation and updating of Master Plans provides experience that the nine-month period to update WMPs is grossly insufficient. Before the WMPs are prepared, counties will need to meet with municipalities and municipal utilities authorities and gather, create, and unify data sets that represent water quality planning on a county level. An inventory of existing data required in various analyses at the regional scale will be required. It is expected that some level of data will be required to reformat paper data into a digital format for use in GIS. Some counties will initially require the assistance

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of outside consultants to bring WMPs up to date and to upgrade computer hardware and software in order to store and maintain data. All of which have corresponding financial implications. Further, the rules should address the impact on time and resources needed to compile zoning data to produce "composite zoning" as defined in the rules. (51)

675. COMMENT: The current time frame of nine months, allotting two weeks per municipality as the proposed rules suggests, is impossible to meet. Nearly every county has more than 18 municipalities.

The proposed schedule should account for time needed to meet with the MUAs regarding data collection; the municipalities to verify zoning and build-out; collection and analysis of data; the creation of a comprehensive plan to address concerns; and working with municipalities to revise existing zoning ordinances and sewer service areas. (53)

676. COMMENT: The proposed rule amendments are unrealistically aggressive in that they require each county to furnish a WMP to the Department within nine to twelve months of the effective date of the proposed rule changes. Further, each municipality is required to supply all the necessary documents and data to their respective counties within ninety days of the effective date of these proposed rules. The counties and municipalities must be given a reasonable amount of time to properly fund, staff and discharge their responsibilities under these rules. (15, 21, 67)

677. COMMENT: If the new regulations are adopted in the format currently proposed, the allocated time frame for the DPA to prepare the new WMP is far too short. Most, if not all, of

the impacted governmental entities will have to procure consultants to assist them with the preparation of the new WMPs and they will be obliged to undertake a procurement process, which could alone take 60-90 days. The schedule should be extended to 18 months. (46)

678. COMMENT: The provision which requires planning agencies either without WMPs or that have outdated WMPs, to submit a WMP or WMP update within nine months if the planning agency is a county or within 12 months if the WMP agency is a municipality, is an unrealistic and overly ambitious deadline which cannot be met and, therefore, should be lengthened. Indeed, as the proposed rule is currently just a "proposal," there can be no expectation that entities will commit monies and resources in advancing towards compliance goals that: (1) may ultimately change in the end; or (2) may never come to be.

Accordingly, at a minimum, the deadlines should be doubled in length (extended to 18 months and 24 months, respectively, for counties and municipalities) to permit sufficient time to digest the new and comprehensive regulations, perform necessary budgeting and obtain commitments, and to prepare WMPs or WMP updates that will be compliant with the new regulations. Extending the deadline also will have the benefit of providing some additional protections to developers or projects that might otherwise have approved site-specific WQMP amendments suspended due to nothing more than an unreasonably ambitious deadline that cannot be met by counties or municipalities. Proposed N.J.A.C. 7:15-5.23(b) should be revised to provide that counties and municipalities have 18 months and 24 months, respectively, to prepare WMPs or WMP updates that are compliant with the new regulations. (40)

679. COMMENT: At N.J.A.C. 7:15-5.23(b), the Department is proposing a one year period from the effective date of this rule proposal during which sewer service area designations will remain in effect while wastewater management plans or updates can be prepared by municipalities through the alternative assignment process for submission to the Department. It is unreasonable for the State to provide only one year for the preparation of such documents. Most local levels of government do not have sufficient staff to undertake such a comprehensive plan update. Therefore, it is likely that the process of drafting a request for proposals to hire a consultant, receiving and evaluating such proposals, making a consultant selection and securing funds in the local budget (which may extend into the next fiscal year) to pay for such services will take the majority of the one year timeframe for plan completion and submission. A significantly longer period of 36 months should be afforded to municipalities to prepare comprehensive updates in accordance with the adopted rules. (60)

680. COMMENT: While acknowledging the desire to get approved plans in place as soon as possible, based on experience with WMP preparation, the nine-month window does not appear realistic, particularly at a county-wide level. A significant effort will be required to meet the proposed regulations including contracting of consultants, significant data collection and analysis, the crafting and approval of local ordinances and endorsements. A collaborative effort between several agencies and public meetings to develop consensus will be required. Although there does appear to be a provision whereby the Department can extend the compliance schedule based upon of show of good faith, it is not appropriate to start with a schedule that cannot be realistically met. (31, 63)

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681. COMMENT: The Department has proposed timeframes for the submission of new or updated WMPs at N.J.A.C. 7:15-5.23. The proposed submission deadlines are not realistic in that they do not provide the wastewater management planning agency with sufficient time to gather the required information and submit it using the required format. An alternate submission approach should be developed, including a phased approach of deliverables by the WMP agency. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 664 THROUGH 681: The Department has considered the issues raised by the commenters in the development of the rule requirements for WMP development. The WMP components and analyses are predominantly based on existing GIS mapping layers and data that is readily available. The Department has developed GIS tools to delineate sewer service area and complete the environmental build-out. The Department is currently working with some counties to develop WMP components, has developed models and will provide technical assistance on request for sewer service area delineation and environmental build-out. Model ordinances have also been developed to assist municipalities in complying with the rule. The Department is committed to working proactively with each county to accomplish the objectives of the rule. Financial assistance is also being made available to the counties to accomplish WMP development. If, despite all of this forethought in developing the rule requirements and providing technical and financial assistance, counties or municipalities are able to demonstrate that a schedule extension is warranted, this option is provided. Digital zoning and parcel mapping are available in most counties, as described in Response to Comments 662 and 663. With this information, the environmental build-out analysis calculations can be rapidly completed, including the identification of undeveloped and underdeveloped areas. It should be

noted that the nine-month timeframe is for submittal of the WMP. If the technical aspects of the WMP are complete but the municipal ordinances are still in the process of being adopted, this can be identified as a component of the WMP that will be submitted by a specified date. This will allow review of the technical aspects of the WMP by the Department and allow for public participation while the ordinances are adopted. Once technical issues are addressed, final Department approval would follow the adoption of the applicable ordinances. As a point of clarification, the Department does not envision that a county would work with one municipality at a time at two-week intervals but will work with all municipalities concurrently in the solicitation and compilation of the data for the WMP.

682. COMMENT: The nine month timeline provided in the regulation for the submittal of updated plans by the counties is inadequate based upon the history of the preparation of plans by currently designated wastewater management planning agencies, including the counties. Another example of the magnitude of time required to prepare such an extensive water quality protection document is the Highlands Regional Master Plan. The original 18 months for preparation was extended, more than 2,000 comments were submitted and no dates were established for its revision and adoption. The scope of the environmental analysis of these two plans is quite similar.

The time frame to be established for the preparation of the county wastewater management plans needs to consider county budgeting of the required resources, county and municipal staffing or retention of consultants, municipal financing for the planning effort, county evaluation of the data submitted by municipalities and sewerage and utilities authorities and county identification

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of the need for zoning and/or land use control changes in municipalities. Those land use and control strategies will then have to be implemented by the municipalities. Additionally, in Highlands areas, once a WMP is completed, it will additionally have to be submitted to the Highlands Council for review and consideration prior to submittal to the Department.

The Department is currently making a substantial effort to inform the counties of this program and to encourage them to provide funding for the necessary work. However, nine months to produce a WMP is still not reasonable and the Department in conjunction with the affected parties should develop a realistic schedule. (4, 35, 73)

RESPONSE: As described in Response to Comments 664 through 681, a suite of measures are in place to assist in the timely submittal of satisfactory WMPs. With regard to comparability of developing WMPs to development of the Highlands Regional Master Plan (HRMP), the Department believes that the HRMP represents a more extensive effort than is required for a WMP. This is because the HRMP was required to consider a host of other plan elements, such as transportation and transfer of development rights, and was developed with the HUC 14 as the unit of analysis.

683. COMMENT: Under the proposed rules, the Department is suggesting that existing WMPs not currently updated or areas that do not have an adopted WMP submit an application for a WMP amendment within nine months of adoption of the proposed rules (tentatively date of adoption is October, 2007). This timeframe is completely impractical due to the extensive amount of work required in the preparation of WMP amendment or revision applications

including the time-consuming environmental analyses and assessments that must be completed by professional consultants. With over 500 municipalities within the State, there still remain many townships that either do not have individual WMPs or currently have outdated WMPs. Furthermore, the Department typically takes approximately two years for the review and approval process under the current rules. The nine-month deadline should be extended to at least 12-18 months. (34)

RESPONSE: As described in Response to Comments 537 through 547 a suite of measures are in place to assist in the timely submittal of satisfactory WMPs. In addition, because the Department is and will continue to be proactively engaged in the development of the WMPs, it is expected that the review component will be more efficient and effective.

684. COMMENT: At N.J.A.C. 7:15-5.23(b), there is concern with the nine month timeline given for the establishment of WMPs. Given the extreme changes in this proposal, many of the designated WMP agencies do not have any experience in writing such plans and the coordination required by county and municipal entities, the nine month compliance schedule is unrealistic and would result in a de facto moratorium on development statewide. The effects of such could be catastrophic to New Jersey's economy. It may also prevent use of efficient land development tools such as TDR and clustering, and foster scattered 5-unit developments across the landscape as landowners exercise sprawl as the default form of development. (58)

RESPONSE: As described in Response to Comments 664 through 681 a suite of measures are in place to assist in the timely submittal of satisfactory WMPs. With regard to the concern about

fostering sprawl, the rule recognizes municipal authority to specify the detailed zoning of local land use. The analyses and standards for sewer service area delineation, environmental build-out, and assessing wastewater management and water supply needs and means to address them will identify where existing zoning is not compatible with natural resource constraints. Zoning adjustments are only required where this incompatibility cannot be addressed through other means identified in the rule. The specifics of the adjustments are at the discretion of the municipality, within the natural resource constraints, and do not foreclose clustering and TDR.

685. COMMENT: Perhaps the most time consuming and controversial role counties are being asked to assume will be requiring municipalities to amend their zoning if the build-out analysis shows that future flows will exceed capacity and no feasible option exists to build a new plant or expand the existing one. If several municipalities are sending flows to one treatment plant negotiating changes could be unattainable task. If the zoning and Master Plan calls for economic development and/or higher density housing, it is unlikely that any municipality will agree to change zoning. As a result, the nine-month submission period will be in danger of not being met and the planned sewer service areas revoked. (14)

RESPONSE: If a municipality fails to comply with the requirements for the municipal chapter, the county plan can proceed without that municipality. The consequence for failing to up date the WMP will only apply to the noncompliant municipality. It is possible that difficulty may be encountered if there is competition for a limited resource, such as wastewater treatment capacity.

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686. COMMENT: For areas of the State within the Highlands Regions, preparation of a WMP or WMP update should be undertaken once the Highlands Master Plan has been adopted. Expenditures for preparation of the required mapping and technical evaluations cannot be done in a cost effective manner without knowing with certainty the rules by which a final WMP will be evaluated by the Highlands Council. It may be an over-simplification to assume that no more sewers can occur and that all technical evaluations and allowable development guidelines within the Highlands preservation area are known at this time. If this weren't the case then there would be no need for a Highlands Master Plan.

Similarly, until the proposed WQMP rules are adopted, there can be no certainty as to the rules by which a final WMP will be evaluated by the Department. It is recommended that the deadline for [WMPs and] WMP updates be extended to 18 months after the adoption of both the Highlands Master Plan and the proposed WQMP rules. (63)

RESPONSE: The draft Highlands Regional Master Plan has been released and includes sufficient detail to guide development of WMPs in that area. The timeframe for finalizing the HRMP suggests that the final plan will be available as WMP development in compliance with this rule is undertaken. Where the outcome of the concurrence process results in an outcome different than the WMP, an amendment to the WMP can be processed.

687. COMMENT: N.J.A.C. 7:15-5.23(b) conflicts with N.J.A.C. 7:15- 5.13(c). Do municipalities have 90-days or one year to complete the plan if the county does not? For counties, a nine-month time frame as provided in the rule is too short, especially when a build-

out analysis by watershed and zoning changes will need to be made. The Department should discuss a more realistic time with the counties and municipalities. (14)

688. COMMENT: Proposed N.J.A.C. 7:15-5.13(c) indicates that municipalities that assume responsibility for wastewater management planning would have "90 days after the date of adoption of the revision assigning it responsibility." This provision differs with the language of proposed N.J.A.C. 7:15-5.23(b) that the municipality must submit the WMP by "(one year from the effective date of these rules) or in accordance with the schedule" of N.J.A.C. 7:15-5.23(e). The Department should use consistent language throughout the rules to minimize confusion and differing interpretations. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 687 AND 688: The intent of these two sections is that the counties would have nine months from the effective date of the rule in which to submit a WMP. A municipality would be expected to have provided the information required of it at N.J.A.C. 7:15-5.8 to enable a county to meet this deadline. Thus, if the county then fails to submit the WMP, a municipality is given 90 days from the date of assignment of WMP responsibility to compile the additional information from other sources relevant to that municipality in order to submit a complete WMP for the municipality.

N.J.A.C. 7:15-5.23(c)

689. COMMENT: What happens if the county does not meet the nine month deadline to produce the county-wide Water Quality Management Plan? It is likely that it will take longer. (37)

RESPONSE: The rules provide that a municipality may submit a WMP for its area if the applicable county fails to develop the required WMP. If neither the county nor the municipality provide an updated WMP compliant with the rule, then the rule provides at N.J.A.C. 7:15-8.1(a) that sewer service area will be withdrawn and, that with few exceptions, site specific amendments and revisions will not be accepted. However, where there is demonstration of a good faith effort, a schedule revision may be approved by the Department.

690. COMMENT: N.J.A.C. 7:15-5.23(c) should state in plain English that where there is not an up to date WMP, no permits from any Department program will be issued. (22, 76)

691. COMMENT: The October 2005 Water Quality Management Planning 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 the towns do not update within one year of the scheduled date, the Department shall not issue any permits for land use, water allocation and water pollution control. (86)

692. COMMENT: The rules can be strengthened and interim protections can be put in place; for instance, large land sewer extensions and allocations could not be approved until these rules are in place. We don’t want to be in a position of closing the door to development on sewers after all the sewers are already in place. (59)

RESPONSE TO COMMENTS 690 THROUGH 692: The Department believes that the rule provisions, which establish the schedule for WMP updates and the consequence of sewer service area withdrawal and loss of the ability to process sight specific amendments represent the appropriate balance of requirement and regulatory response to encourage timely update of WMPs. To disallow all land use, water allocation and water pollution control permits where plans are not up to date was considered and was determined to be impracticable as some public purpose projects need to move forward, other proposals that lie within areas designated for growth would be unfairly penalized, and it would result in the Department's permitting process becoming unpredictable.

693. COMMENT: Proposed N.J.A.C. 7:15-5.23(c) provides that if the wastewater management agency does not adhere to the WMP submission schedule, then the sewer service areas and the general service areas for facilities with planning flows of less than 20,000 gallons per day or 2,000 gallons per day would be withdrawn. The Department should not adopt rules mandating this drastic step of withdrawal as it only punishes innocent parties and does not obtain the full information necessary to make environmental and water quality decisions. (18, 42, 44, 45, 61)

RESPONSE: The Department believes that the lack of consequences for failure to maintain an up to date WMP has been a significant factor in the failure to submit WMPs. The withdrawal of sewer service area where a plan is not up to date is warranted because, where wastewater management plans have either never been adopted or are more than six years old, the assumptions concerning wastewater treatment capacity, water supply and nonpoint source pollution, if provided at all, may no longer be accurate as a result of subsequent master plan or

zoning changes at the local level. By compelling those affected wastewater management planning agencies to comply with the requirements of this chapter, the Department will assure that all projects discharging more than 2,000 gallons per day of wastewater will receive a comprehensive analysis of environmental impacts to assure that approvals aren't based upon outdated information, thereby allowing areawide WQM plans to achieve their statutory mandate and enhancing the effectiveness of continuing planning process. The Department recognizes that, even with the consequence of sewer service area withdrawal, there may be some instances where WMPs are not timely or are cannot be approved. However, the Department is focusing efforts to minimize this consequence by working proactively with counties to ensure that WMPs are submitted on time and that they meet the standards set forth in the rule.

694. COMMENT: The provision at N.J.A.C. 7:15-5.23(d) may have potential unintended consequences. For example: a county does not assume jurisdiction and fails to prepare a WQM plan and a municipality assumes responsibility under N.J.A.C. 7:15-5.13 and submits a compliant WMP. Then, years later but within the six-year schedule for an update, the county does assume jurisdiction, prepares a compliant county-wide WMP, and the municipal "chapter" is incorporated into it (in effect, adding another six-years of validity to the municipal chapter's update schedule). Has the Department considered that this situation could create municipal WMPs that aren't re-examined for as many as 10-11 years? Is there any mechanism for a re-examination at any earlier time in these instances? (64)

RESPONSE: Refer to Response to Comments 659 and 660. Where a county completes a WMP after the deadline the then valid municipal or other WMPs will be folded into the county WMP.

Valid WMPs will be able to rely on the findings in that WMP for the intended six years. The next update would need to comply with the current rules. As subsequent update cycles occur, the entire county plan will conform to the rules in effect.

695. COMMENT: Proposed N.J.A.C. 7:15-5.23(g) decreases the timeframe by when WMP agencies must submit written progress reports on the development of the WMP from 90 days to 30 days. If such written progress reports have been rarely requested by the Department, then this provision should be deleted. Preparation of written reports would presumably be time-consuming and would distract the WMP agency from the preparation of the WMP itself. If the Department determines to maintain this policy, then it should grant the agency 60 days to submit the progress report. (18, 42, 44, 45, 61)

RESPONSE: The Department has not typically required written progress reports under the previous rule; however, because one of the objectives of the rule revisions is to ensure that plans are updated in a timely fashion, it may be appropriate to request such a progress report. The 90 day time frame is long relative to the preparation timeframe anticipated with the streamlined process and suggests an elaborate process. The 30 day time frame is a more appropriate timeframe under the adopted rule and suggests a concise update is intended, which will enhance the overall efficiency of the process.

696. COMMENT: At N.J.A.C. 7:15-5.23(i) proof that a public hearing took place should be required when a wastewater management planning agency submits a WMP prior to the period when such submission is required. (22, 76)

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RESPONSE: The Department does not believe a public hearing should be a required form of public participation in the event of a submission of a WMP prior to the six year update deadline. Requirement of a public hearing would be an unnecessary burden to require but is an option in the proposal of a wastewater management plan or other amendment.

N.J.A.C. 7:15-5.24

697. COMMENT: The failure to incorporate key data that the Department has is a major concern. The Department has previously advocated including high aquifer recharge areas, surface water intakes and ground water data, in the State Plan, or to rely on this data when several of those criteria are indicated. There is a lot of overlap between that data and the areas that are going to be considered endangered species habitat. There is a lot of important acreage that is in the endangered species habitat that should be kept from harm in this rule. (65)

RESPONSE: The Department believes the commenter is suggesting that additional features be among the environmentally critical areas that are excluded from sewer service. The Department does not believe that excluding areas from eligibility for sewer service is the appropriate means to afford protection to all types of features. With regard to the addition of other environmental constraints, such as aquifer recharge areas, although the rule does not explicitly exclude these areas from sewer service, the Department believes that the rule, as a whole and through other provisions, is protective of water quality. Beyond the WQMP rule, direct protection of these areas is more appropriate and in already exists in Department initiatives. For example, ground water quality is protected through ground water discharge permitting under NJPDES and through

the nitrate planning standard at N.J.A.C. 7:15-5.25(e). Aquifer recharge is maintained in terms of quantity through provisions of the Stormwater Management Rule, N.J.A.C. 7:8. Surface water intakes are protected through various programs, including NJPDES, and the highest level of protection from further degradation is afforded by designating such areas as Category One waters. Nevertheless, the option remains for municipalities or counties to identify these or other additional areas for exclusion from sewer service. It should be noted that, as a result of the composite geographic information systems (GIS) analysis noted in this section of the rule, at least 90 percent of environmentally sensitive features, including patches ranked 3, 4, or 5 by the Landscape project will be excluded from the sewer service area. The Department has also evaluated water supply impacts to encourage the selection of an alternative that will allow for future development while minimizing decreases in stream flow resulting from consumptive or depletive water losses. Lastly, the Department has assessed encroachment on habitats for threatened and endangered species as the result of specific projects or activities and future sewer service area designations and has attempted to avoid or minimize encroachment into threatened and endangered species habitats designated as Rank 3, 4 or 5 on the Department's Landscape Project Maps.

698. COMMENT: Historically and traditionally, mapping conventions used by local and regional planning entities for delineating the boundaries of land use plans, zoning districts, redevelopment areas, sewer service areas and other "land use policy areas" involved the use of parcel boundaries (tax lots and blocks), roads and other significant landscape features such as rivers, railroads and utility lines. At the same time there has been an on-going effort to align the State Plan Policy Map, county and municipal master plans, zoning districts and sewer service

areas. The process of enhancing the alignment of these "land use policy areas" has been taking place over the course of many years, and continues to occur through the State Plan Cross-Acceptance Process, county and municipal Plan Endorsement, the development of the Highlands Master Plan, updates of county and areawide wastewater management plans and other land use planning venues at various jurisdiction levels. GIS technology and parcel-based data have made it possible to further enhance the coordination of land use plans at various jurisdictional levels and improve their spatial accuracy. The alignment of mapped "land use policy areas" at many jurisdictional levels is especially significant since it represents a growing public consensus on the type, intensity and location of development and redevelopment; resource conservation efforts and public investment priority areas necessary to achieve smart growth.

Mapped "land use policy areas" such as zoning districts and sanitary sewer service areas are intended to provide communities and stakeholders with a framework for guiding the types and intensities of land use activities that can potentially occur. "Land use policy areas" are distinct from mapped "environmental features" in that environmental features represent the physical characteristics and conditions of the landscape. Some mapped "environmental features" also represent environmental resources that should be protected from the impacts of development and other human activity in order to assure environmental sustainability, and are subject to State other Federal regulations. The mapped environmental features should indicate where special precautions must be taken to assure environmental features are protected, regardless of which "land use policy area" they are located within. The new WQMP rules must allow and support the application of performance-based, environmentally sensitive design and green building techniques so that growth can occur in accordance with "land use policy areas." The new rules

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must support development consistent with surrounding land use patterns, but in ways that avoid impacts to environmentally sensitive features, and even restores or enhances these features within previously developed areas.

Mapped "environmental features" are an important consideration, but should not be the only consideration, when refining the boundaries of existing sanitary sewer service areas, zoning districts, the State Plan Policy Map, and county and municipal land use plans. Furthermore, environmental feature boundaries should not replace existing map delineation conventions based on lot and block parcel, roads, and other features traditionally used for mapping "Land Use Policy Areas."

Re-delineation of sewer service areas and zoning districts to align with approximate locations of environmental feature boundaries is impractical from an implementation and cost perspective. Existing development patterns and community supported smart growth initiatives must be taken into consideration as well. The Department's proposed approach for mapping sewer service areas (and zoning districts if alignment with sewer service areas is necessary to demonstrate conformance with the WMP) will lead to confusion in interpreting how zoning and sanitary sewer service policies should be applied at the site specific level. Planners and property owners will have to confer with the individual environmental feature data layers to determine which regulations apply in what locations on any given site. Furthermore, the complex process and cost of re-mapping master plan, land use and zone district boundaries if required to demonstrate WMP conformance, represents a significant burden for most municipalities, and could deter their cooperation and participation in the development and implementation of county WMPs. (9, 19)

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RESPONSE: The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2.a.). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A. 58:11A-5.) that accomplish this objective. These areawide plans are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5.a.) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5.e.). This set of rules does not rely on the State Planning Act nor implement the State Planning Act or the State Development or Redevelopment Plan developed pursuant to that act. Through the continuing planning process the Department will seek to integrate the SDRP, regional and local land use plans where those plans do not interfere with the restoration and maintenance of water quality. However, the Department cannot abdicate its statutory obligation in reliance on those plans where they conflict with the legislated mandate of the Department.

The Department does not agree that sewer service areas must necessarily align with property boundaries. Property boundaries are a human invention created for the purpose of ownership and have no relationship to environmental features or sensitivity, which are paramount considerations in achieving the statutory objectives outlined above. The Department does recognize that relating sewer service areas to recognizable geographic features may be necessary to improve the certainty of the sewer service area boundary. The rule makes an allowance at N.J.A.C. 7:15-5.24(g) for minor inclusions of environmentally sensitive features in a sewer service area as necessary to accomplish this purpose. However, particularly in the case of large lots where part of the lot is environmentally constrained and part is not, the Department believes it may be more appropriate to define a sewer service area that bisects a lot, rather than including or excluding the entire lot from the sewer service area.

To assist the counties in revising sewer service areas, the Department is providing draft sewer service area revisions to each county. The Department has composited the environmental features as required by the rule and assessed where conflicts exist between existing sewer service areas and large contiguous environmentally sensitive areas. The Department has attempted to relate the proposed revised sewer service area to parcel lines or known geographic features in the development of this draft. The rule also allows local planning considerations to be applied to remove other areas deemed unsuitable for sewer service, for example by excluding agricultural areas in order to preserve rural character.

The rule also provides an opportunity, at N.J.A.C. 7:15-5.24(h), to align sewer service areas in a manner that supports center based development that has received plan endorsement from the state Planning Commission. However the Department must make the finding that: 1) any environmental features included in the sewer service area are not critical to a local population of threatened and endangered species, the loss of which would reduce the survival or recovery potential of the specie in New Jersey, 2) the endorsed plan adequately addresses the protection of environmentally sensitive areas outside of the center; and 3) that a wastewater treatment alternative has been identified with adequate capacity to support the center.

The Department supports green building design, and nothing in these rules would serve as an impediment to such designs. However, the Department does not believe that green building design is satisfactory mitigation for the destruction of environmentally sensitive resources. A green roof cannot compensate for the loss of habitat for the federally endangered bog turtle.

Where local planning and zoning has failed to consider environmental protection and natural resource conservation, those plans would never likely be realized. The wastewater management planning process should avoid the inefficient and inconsistent extension of infrastructure to support development that may not and should not be permitted. The intent of the continuing planning process is to integrate federal, State, regional and local land use plans so as to improve consistency. The redelineation of sewer service areas, and where necessary changes to local zoning as required to protect water quality, through the wastewater management planning process is essential to accomplishing that purpose.

N.J.A.C. 7:15-5.24(a)

699. COMMENT: The provisions at N.J.A.C. 7:15-5.24, where environmentally sensitive areas are removed from sewer service areas is supported. This provision makes it clear that there are no rights to have sewer service in a manner that will negatively impact New Jersey's environment. (64)

700. COMMENT: The proposed WQMP rule amendments that provide for additional protections for threatened and endangered species habitat and restrictions new sewer service areas in environmentally sensitive areas is supported. (82)

RESPONSE TO COMMENTS 699 AND 700: The Department acknowledges these comments in support of this rule provision.

701. COMMENT: Proposed N.J.A.C. 7:15-5.24(a) should be simplified and rephrased as "Sewer service may not be provided to environmentally sensitive areas at (b), coastal planning areas listed at (c), or special restricted areas at (d) below, except as provided at (e) through (h) below." (18, 42, 44, 45, 61)

RESPONSE: The simplification suggested by the commenter fails to capture key elements of the rule language, wherein WMP agencies are allowed to exclude areas beyond those that must be excluded from sewer service to meet local planning objectives or in consideration of resource constraints.

702. COMMENT: Regarding sewer service areas, assure that these designated areas are modified to eliminate environmentally sensitive areas where sewers are not in the ground. This change will strengthen the State's ability to protect and improve water quality. (86)

RESPONSE: The Department believes that the composite geographic information systems (GIS) analysis required at N.J.A.C. 7:15-5.24(b) of the rule will have the desired effect that is indicated by the commenter.

703. COMMENT: State agencies are subject to numerous State and Federal environmental regulations. Typically, State agencies would not be required to abide by local ordinances or requirements. Stricter local (county or municipal) standards should not be imposed on a State agency. Assurances should be made to avoid arbitrary stringent requirements from being developed at the local level in areawide WQM plans. (30)

704. COMMENT: Under these proposed regulations, municipalities that are wastewater management planning agencies may incorporate more stringent regulations other than what would be established under the proposed new rules, which is an open opportunity for these municipalities or the counties, where they are responsible, to use the proposed rules upon adoption to control growth rather than address wastewater management planning. The proposed rules should be modified to stipulate that more stringent regulations may not be passed by the wastewater management planning agency without compelling reasons and environmental justification and also that said modifications must reviewed and approved by the Department. (34)

RESPONSE TO COMMENTS 703 AND 704: The Water Quality Management Planning Act directs the Department to implement a continuing planning process to integrate and unify water quality management planning processes, assess water quality and establish water quality goals and standards, and develop a statewide implementation strategy to achieve the water quality standards (N.J.S.A. 58:11A-7). Further, the Department is to "coordinate and integrate the continuing planning process with related Federal, State, regional and local comprehensive, functional and other relevant planning activities, programs and policies" (N.J.S.A. 58:11A-7c). The Department has established the minimum requirements that must be met to satisfy the objectives of the rule. However, there are other considerations that may be important in a particular region or locality when designating sewer service areas. For example, it may be important regionally or locally to designate agricultural areas for rural development and exclude such areas from sewer service areas, even in the absence of the minimum environmentally critical areas. Municipalities must have the flexibility to exercise their authority to control local land use, as long as it is consistent with the objectives of the rule. These choices may not be based on environmental protection and would, therefore, not require a justification on this basis. As such, the Department believes, in an effort to coordinate planning, that it is appropriate to note that this rule does not prevent local planning agencies from exerting their existing authority to determine land use as they deem appropriate, so long as it is consistent with this rule. This point notwithstanding, with regard to transportation projects, there is nothing in this rule that would affect the applicability or non-applicability of local ordinances to such projects.

705. COMMENT: N.J.A.C. 7:15-5.24(a), which clarifies that just because an area does not meet the criteria for exclusion from a sewer service area does not mean the municipality must provide centralized sewer service there, is supported. A municipality's goals, vision and planning are paramount, and if a municipality does not want sewers and wants to use individual septic systems instead they should be able to do so without justification based on the provisions of this section. This is particularly important if the counties are the wastewater management planning agency. Municipal planning and watershed characteristics are the foundation of wastewater management planning, not top-down imposition of sewer service areas by counties or other non-municipal agencies, provided the municipality implements the requirements of this rule that provide protection to water and ecological resources. This section is very important and should be highlighted further to express how the decision-making about sewer service areas is to play out on the ground. (10, 80)

RESPONSE: The Department acknowledges this comment in support of this rule provision. In exercising this provision, municipalities are extended flexibility and to maintain this, the Department does not believe additional rule language is needed to describe this option. To exercise this option, local governments would identify the additional types and locations of areas to be excluded. Provided such exclusion is not simply to avoid fulfilling other legal mandates, such as the need to provide a fair share of affordable housing, and is otherwise consistent with the rule standards, the further modifications to sewer service area would be acceptable.

706. COMMENT: At N.J.A.C. 7:15-5.24(a) exclusion of environmentally sensitive areas from sewer service area is strongly supported but mapping requirements should not require just GIS

technology at the large scale of this proposal, e.g. 1:24000 or 1:12000. Reliable GIS coverage for steep slopes and scenic resources does not exist but despite this deficiency, excluding these areas from sewer service is desirable. Mapping from sources other than GIS should be suggested. (22, 76)

RESPONSE: The Department acknowledges this comment in support of this rule provision. The Department believes that use of geographic information systems (GIS) is not only the most accessible approach for wastewater management planning agencies but is also appropriate for the scale of planning required in this rule. Because GIS coverages are readily available, have a high degree of accuracy, and can be viewed at various scales, they provide a means to simplify the plan development process that will help ensure plans are developed, kept up to date and serve the purpose for which they were intended. More detailed, or site by site analysis, is more appropriate for regulatory programs (i.e. site plan review or land use permitting) and is infeasible at a planning level. However, as noted in the rule text, the planning agency may exclude additional areas from sewer service based on local planning objectives, the lack of wastewater treatment capacity or other environmental concerns, including, but not limited to, source water protection. Regarding steep slopes, the Department does not require steep slopes or scenic resources to be excluded from the sewer service area. The environmentally sensitive areas specifically noted at N.J.A.C. 7:15-5.24(a) are those which the Department considers critical and that are already mapped and thus, readily available for use in the composite GIS analysis required by the rule. Steep slopes are not available for all areas as a GIS layer. The development of additional GIS data layers for this analysis may be costly and infeasible for individual agencies. Further, the Department believes that it is more appropriate to address

protection of steep slopes through local ordinances, see N.J.A.C. 7:15-5.25(g)6. Protection of areas that have scenic resource value that are otherwise developable is not enhanced by exclusion from sewer service.

707. COMMENT: The proposed WQMP rule amendment that withdraws sewer service areas in environmentally sensitive areas where sewers are not yet in the ground is supported. (82)

708. COMMENT: The protection of threatened and endangered species habitat and other environmentally sensitive areas within new and proposed sewer service areas including areas served by septic systems in wastewater management plans is supported. (22, 76)

709. COMMENT: The exclusion of sewer service areas from environmentally sensitive areas, coastal planning areas and special restricted areas as defined at N.J.A.C. 7:15-5.24(b)1 through 4 and N.J.A.C. 7:15-5.24(c) and (d) is strongly supported. (10, 17, 80)

RESPONSE TO COMMENTS 707 THORUGH 709: The Department acknowledges these comments in support of this rule provision. As a point of clarification, threatened and endangered species habitats are not excluded from receiving service within the discharge to ground water less than or equal to 2000 gallons wastewater service area.

710. COMMENT: At N.J.A.C. 7:15-5.24(a) through (d), the Department is proposing to restrict those locations to which sewer service may be provided by identifying vast areas of the State as environmentally sensitive. While some of these areas are of significant environmental

importance, and therefore, it may be appropriate for Department regulation to discourage development, many areas designated for sewer service area exclusion by the rule have not been demonstrated as resource areas in need of protection and should be potentially sewerable. For example, some areas included on the State's GIS as Natural Heritage Priority Sites are already fully developed, as verified by aerial photography, and therefore would not provide a suitable potential habitat for threatened or endangered plants or wildlife. Excluding such locations from a sewer service area could cause environmental degradation to occur from septic systems thereby affecting areas of environmental significance in that subwatershed area. It is recommended that this proposed regulation be revised to discourage sewer service areas only in those large contiguous areas that have been clearly demonstrated to be of significant environmental importance. (60)

RESPONSE: The four environmental features identified for exclusion from the sewer service area, threatened and endangered species habitats, Natural Heritage Priority Sites, Category One water riparian zones, and wetlands, are unique and sensitive features whose protection is central to the Department's mandate to protect ecological integrity and water quality and are consequently, similarly protected in other Department rules. At N.J.A.C. 7:15-5.24(b)2, the Department has identified Natural Heritage Priority Sites as areas into which the extension of sewers is inappropriate, however, an exception is included, to acknowledge that some areas included in the database may actually be developed. Exclusion of such areas from sewer service would not benefit Natural Heritage Priority habitats. Therefore, areas within Natural Heritage Priority Sites that are denoted as "Urban Lands" according to the Department's 1995/97 and 2002 Land Use/Land Cover GIS coverage are not to be excluded from sewer service areas. Also

note that Natural Heritage Priority Sites are not limited to habitats for rare plant and animal species but also include natural community assemblages, so suitability for threatened or endangered plants or wildlife may not be the reason for designation as a Natural Heritage Priority Site.

N.J.A.C. 7:15-5.24(b)

711. COMMENT: Application of the provisions of N.J.A.C. 7:15-5.24 in the Pinelands Area could result in conflicts between the proposed WQMP rule and the Pinelands CMP, because of the exclusion of areas targeted for growth pursuant to the requirements of the Pinelands CMP. Such an inconsistency could render the proposed WQMP rule void in accordance with N.J.S.A. 13:18A-27. The proposed rules need to be clarified to provide a more predictable outcome in sewer service boundary delineations, perhaps by requiring sewer service area boundaries to coincide with parcel lines and by relying on existing land use regulation programs, including the Pinelands Protection Program contained within the Pinelands CMP, to exclude sewer service only where such regulatory programs would otherwise preclude development. (84)

712. COMMENT: Excluding habitat for threatened and endangered species from sewer service areas at N.J.A.C. 7:15-5.24(b)1 and for differentiating between tracts of land that are viable habitat for threatened or endangered species from those that merely meet the 25 acre threshold is supported. There is, however, scientific uncertainty relating to threatened and endangered species habitat requirements that could result in significant disputes between WQM planning agencies, land owners, and the Department in determining whether or not to include within a sewer service area tracts of land that contain “suitable” habitat but that, in reality, are too small

to function to support a viable population. The rules need to be clarified to provide a more predictable outcome in sewer service boundary delineations, otherwise, areas in portions of the Pinelands Area targeted for growth could be excluded from sewer service areas because they contain "suitable" habitat but which are incapable of supporting a viable population. Such conflicts or inconsistencies between the proposed rules and the requirements of the Pinelands CMP could render the proposed rules void in accordance with N.J.S.A. 13:18A-27. Given that there is no need for an additional set of rules to cover what is already addressed by the Pinelands CMP, the rules should be amended to either exempt the Pinelands Area from these provisions or to state explicitly that the Department cannot designate sewer service areas or exclude areas from such designations that are inconsistent with the CMP. (84)

RESPONSE TO COMMENTS 711 AND 712: The Department views the Pinelands CMP and the WQMP rules as intending to accomplish the same basic objectives with regard to protection of natural resources. Given the common objectives, the Department believes that coordination and integration during WMP development will lead to outcomes, including sewer service area delineations that are mutually supportive of the Pinelands CMP and the WQMP rule objectives. The rule provisions at N.J.A.C. 7:15-5.26 identify the means to resolve any questions about habitat suitability.

713. COMMENT: A positive of this rule proposal is it removes sewer extension areas in environmentally sensitive areas with greater than 25 acres. However, the 25 acre exemption that allows environmentally sensitive areas smaller than 25 acres to remain in sewer extension areas might be too big. (59)

714. COMMENT: At N.J.A.C. 7:15-5.24(b) allowing sewer service areas to include environmentally sensitive areas smaller than 25 acres is supported. (38)

715. COMMENT: There is adamant opposition to N.J.A.C. 7:15-5.24(b) which defines environmentally sensitive areas as contiguous areas of 25 acres or larger of Landscape habitat, Natural Heritage Priority Sites, Category One buffers, wetlands and certain coastal features. Such a definition could decimate many open space areas in urbanized locales. It also excludes vernal ponds, which as isolated wetlands, can easily be permitted for use. The rule proposal should be re-proposed to eliminate the 25 acre threshold for protection of environmentally sensitive areas. (22, 76)

716. COMMENT: N.J.A.C. 7:15-5.24(b) where environmentally sensitive areas are defined as 25 acres or greater in size is strongly opposed. The Department's analysis to arrive at this number is understood and appreciated as well as understanding the usefulness of the layered approach that produced the polygon approach which is useful for planning. However, the minimum threshold of 25 contiguous acres in order to mandate protection of "environmentally sensitive areas" in sewer service areas severely limits that protection to many important environmental features and sub-ecosystems. There are critical habitats that support a healthy ecological system for a plant or animal species that do not require large acreage. This is especially true for wetlands, vernal pools, plants and plant communities, as well as small-sized habitats such as those utilized by birds that move from small woodland to small woodland in order to survive in a fragmented forest area.

Past practice and the lack of effective buffering in existing rules indicate that the other permit programs will not adequately protect the environmental resources left within the 25 acre area that can be identified within the sewer service areas. These exempted areas will eventually erode in terms of water quality and their ability to support healthy habitats. The 25 acre size limit for environmentally sensitive areas should be deleted. (10, 80)

717. COMMENT: There is no sound environmental or technical rationale to support a blanket policy of allowing sewers in environmentally sensitive areas of less than 25 acres. Protecting only that land greater than 25 acres where threatened or endangered species are found is inconsistent the Department's stated goals of environmental protection. Given that New Jersey has hundreds of thousands of acres of developable land within sewer service areas, such a broad policy is unnecessary as well as entirely contrary to the Department's mission. Even if New Jersey were running out of developable land in sewer service areas, the sacrifice of environmentally sensitive land under this threshold would be inappropriate. (11)

718. COMMENT: Proposed N.J.A.C. 7:15-5.24(b) limits the definition of environmentally sensitive areas, and thus, the protections to these areas, to <u>any contiguous area of 25 acres or larger</u> consisting of any of the following features, either alone or in combination: areas mapped through the Department's Landscape Project as endangered or threatened wildlife species habitat; areas mapped as a Natural Heritage Priority Site and, thus containing rare plant or animal species; special water resource protection areas along Category One waters and their tributaries

as established under the Stormwater Management Rules; and Wetlands as mapped under the Wetlands Act of 1970 and the Freshwater Wetlands Protection Act.

Any of these features that are less than 25 acres in size are simply not considered to be "environmentally sensitive areas" and will not be protected. The threshold of 25 acres for environmentally sensitive areas is simply too large. The summary section of the proposed rules explains that the Department analyzed the impact to existing sewer service areas based on a threshold of 5, 25, 50 and 100 acres, and, of these four choices, determined that 25 acres was the most appropriate in that it "would be large enough to permit the reasonable application of zoning." However, the Department should have considered additional thresholds in between the 5 and 25 acre levels, such as 10 or even 15 acres, to determine whether that might also be appropriate and reasonable. In that the Department did not consider these other potentially reasonable and less environmentally damaging thresholds, it should do so before it adopts the proposed rules. (17, 49)

719. COMMENT: As a result of the 25 acre threshold for excluding environmentally sensitive lands, many areas throughout the State will be eligible for inclusion in sewer service areas despite their environmental sensitivity. Currently, there are tens of thousands of acres of environmentally sensitive land in patches smaller than 25 acres included within sewer service areas and even more that overlap with sewer service areas. While the rules suggest that these patches may be protected through municipal ordinances or other statewide regulation, it is unlikely that sufficient protection will be accorded upland species unless and until critical habitat protection is part of the regulatory landscape.

The exclusion of environmentally sensitive lands from sewer service areas appears only to apply to sewer service areas delineated after the effective date of the proposed rules. Sewer service areas in up to date WMPs or those in pending applications will not be required to exclude environmentally sensitive areas. Assuming the 25 acre threshold, this includes a significant amount of environmentally sensitive area. While it is suggested that these sensitive acres will be removed from existing sewer service areas, it is unlikely that sufficient protection will be afforded these areas. (49)

720. COMMENT: The enhanced protection of the waters in the pullback of sewer service area in areas that have threatened and endangered species under the Landscape Protection Designations of 3, 4, and 5 is applauded. However, while the pull-back of sewer service areas based on environmental sensitivity of land, endangered species, the protection of Category One stream buffers and so forth, is applauded, the scale of the pull-back makes no sense when only sites over twenty-five acres are reviewed. The technical criteria used to pullback sewer service area in areas that have threatened and endangered species under the Landscape Protection Designations of 3, 4, and 5 leave a fairly substantial and arbitrary loophole by only having the rules apply to areas that are 25 acres or greater. The Department's GIS system can go down to one acre or five acres or less, so why was 25 used? This loophole was deliberately inserted to allow for more development in urban areas where there are isolated pockets of environmentally sensitive land and to take large areas that are environmentally sensitive and allow them to be developed. This loophole will encourage more fracturing of small threatened and endangered species areas. (65, 79)

721. COMMENT: Even when the rule is implemented, there is by the Department's own estimate, sixty to eighty thousand acres of endangered species habitat will remain in sewer service areas because these habitats are under twenty five acres which causes major concern. (65)

722. COMMENT: Is it true that environmentally sensitive areas would only be protected if they are present in contiguous blocks of 25 acres or greater? (See N.J.A.C. 7:15-5.24(b)) Does this mean, if there is an environmentally sensitive area that meets the environmentally sensitive attributes and it is under 25 acres, that it is regulated, sewer service can be provided, it can be part of an expanded sewer service area, it must be deleted from an existing sewer service area, or a permit can be issued under these rules for disturbance or development of those environmentally sensitive areas? The twenty five acre threshold should be deleted. (86)

723. COMMENT: The 25 acre threshold in the definition of "environmentally sensitive area" at N.J.A.C. 7:15-5.25(b) is objectionable because the 25 acre limit is arbitrary and lacks any technical justification. Landscapes and habitats in New Jersey are variable. While a 25 acre threshold in one region may have some technical justification in terms of protecting the sensitive environmental resource, it may be unreasonable in another location due to difference in topography, hydrology, geology, soils and the like. The 25 acre threshold in the definition of "environmentally sensitive areas" should be revised so that it is a function of actual environmental factors rather than an arbitrary cut off point. Alternatively, if the Department

insists on an arbitrary threshold number of acres for the definition of "environmentally sensitive area," the Department must provide a scientific basis for that threshold. (42, 44, 45)

724. COMMENT: The use of 25 acres as the area to determine environmental sensitivity is questioned. Where does this number come from and what justifications are there for it? (58)

RESPONSE TO COMMENTS 713 THROUGH 724: To clarify, any combination of the designated environmentally sensitive areas that equals 25 acres or more must be excluded from the sewer service area. It is not necessary for there to be a contiguous block of a single environmentally sensitive area. For example, if a 25 acre polygon contained (non-overlapping) 3 acres of Special Water Resource Protection Area (SWRPA), 15 acres of threatened and endangered species habitat, and 7 acres of wetlands, it would be excluded from the sewer service area. Including areas with patches of environmentally sensitive areas smaller than this threshold in the eligible sewer service area serves to "smooth" the sewer service area, but does not suggest that any given patch will receive local or State approval for development. For example, if there is a three acre patch of SWRPA that is not contiguous with any other environmentally sensitive area and would, therefore be eligible for and is included in a sewer service area, development subject to the Stormwater Management rules, the Flood Mitigation rules, or the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. , must still meet those rule requirements in order to proceed to construction and connection to sewers. Further, the environmental build-out analysis presumes that wetlands and riparian zones are not developable and excludes them from the analysis of wastewater generation, on the assumption that, by and large, the environmentally sensitive areas will not actually be developed/generate wastewater. By excluding

environmentally sensitive areas from the initial delineation of sewer service the rule seeks to avoid the appearance of supporting development at a density inconsistent with conservation of those areas. The Department considered simply removing all threatened and endangered species habitats, Natural Heritage Priority Sites, wetlands and special water resource protection areas from sewer service areas. However, simply removing these features using the Department's GIS data layers results in sewer service areas that are fragmented and filled with small areas that would have to be excluded from the sewer service area. This pattern of sewered development would not enable the application of municipal zoning powers to achieve a consistent and orderly pattern of development, and would not facilitate center-based development, thus making it difficult to achieve the objectives of local master plans. The 25 acre clip provides a balance between the objective of a facilitated planning process and avoiding the illusion that development of environmentally sensitive areas is supported. As a point of clarification, sewer service area delineations in WMPs developed after EO109(2000) generally reflect the requirements of this rule regarding exclusion of environmentally sensitive areas from sewer service areas.

725. COMMENT: Under N.J.A.C. 7:15-5.24(b), the process by which sewer service boundaries are delineated will change. One part of this process is to exclude environmentally sensitive areas greater than 25 contiguous acres from sewer service area. The Department assumes that this standard of 25 acres will protect approximately 90 percent of the environmentally sensitive area habitat in New Jersey. At the same time, the proposed rule would place residential density in the same areas around 4-7 acres per unit. This level of density tends to destroy more habitat than nearly any other development pattern. Some have even called this pattern "sprawl by septic."

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Protecting land from sewers will not necessarily protect it from development. How can the Department show that 90 percent of the designated environmentally sensitive areas will be protected, given the type of development associated with the residential density it is requiring? (5)

RESPONSE: The density in terms of equivalent dwelling units established through the analysis at N.J.A.C. 7:15-5.25(e) is not intended to be translated directly into a zoning requirement. Instead, the density represents a loading that cannot be exceeded within the HUC 11 drainage area. Municipalities have the authority to designate the land use intensities that will meet local planning objectives, including center-based development or clustering. To offset these denser zones, zones of offsetting lower density would be designated. This pattern of development, with centers and environs protection, are consistent with habitat protection. Through the endorsed plan process, municipalities will be encouraged to use these approaches to land use planning and zoning.

726. COMMENT: Pursuant to proposed N.J.A.C. 7:15-5.24(b), an environmentally sensitive area means "any contiguous area of 25 acres or larger consisting of" particular environmental resources. It is not clear whether the Department means to limit "environmentally sensitive areas" subject to the sewer connection ban to areas in which ***all*** 25 or more acres contain sensitive environmental resources or to designate the entire 25 or more acre area as "environmentally sensitive" even if only a ***portion*** of the property contains a sensitive environmental resource. Any ban on sewer service area designations based on threatened and endangered species is objectionable, but if the Department intends the former interpretation, then

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the wording of the regulation must be revised to clarify that. If the Department intends the later interpretation, then that proposal would be objectionable due to lack of any scientific justification. Taken to its extreme, this definition would mean that sewer service connection would be prohibited on any portion of a 300-acre parcel simply because 0.10 acre contains wetlands. (42, 44, 45)

727. COMMENT: Was it the Department's intent to exclude from sewer service areas those tracts of land that are comprised of at least 25 acres of contiguous area if, on any portion of that tract an environmental feature, as defined at N.J.A.C. 7:15-5.24(b)2, is present? It would not appear that there was intent to eliminate 100 acres of uplands from a sewer service area merely because of the presence of one acre of wetlands thereon. (84)

RESPONSE TO COMMENTS 726 AND 727: The sewer service area delineation criteria do not lead to painting a given parcel as eligible for sewer service or not eligible for sewer service. The polygon approach set forth in the rule is not dependent on property ownership. Thus, if a 300 acre area within the municipality contained some polygons that were required to be excluded from the sewer service area in accordance with N.J.A.C. 7:15-5.24 and some that did not, only the polygons that comprise composites of at least 25 acres of the areas listed at N.J.A.C. 7:15-5.24 are excluded from sewer service area, not the whole tract.

728. COMMENT: The removal of 25-acre or greater contiguous areas that are constrained due to environmental features from sewer service areas under N.J.A.C. 7:15-5.24(b) is supported as

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this will help demonstrate adequate wastewater capacity by not overestimating future development. (1)

729. COMMENT: The removal of sewer extension areas in "environmentally sensitive areas" greater than 25 acres in size is applauded. (49)

730. COMMENT: Protecting landscape habitat by excluding it from sewer service areas for much of the State is a step forward. (65)

RESPONSE TO COMMENTS 728 THROUGH 730: The Department acknowledges these comments in support for this rule provision.

731. COMMENT: The concept of having county entities prepare build-out analysis to assess existing and future wastewater and water supply capacities as part of their wastewater planning process is supported. However, delineation of sewer service areas using the 25+/- acre delineation that considers only four environmental features in not supported. It would be much more productive to review these environmental features when considering other significant planning factors such as economic development, agriculture and farmland retention, recreation, urban and suburban redevelopment, historic preservation, public facilities and services, transportation, housing, and educational facilities. These planning objectives are considered during the State Planning Commission's Plan Endorsement Process. (66)

RESPONSE: The sewer service area delineation criteria are intended to specify the maximum amount of area that would be eligible for inclusion in sewer service areas. The Department recognizes that other areas may warrant exclusion in support of regional or local priorities and provides for this. For example, where rural characteristics and/or agricultural land use are valued, areas that comport with these features could also be omitted from sewer service areas at the local government's discretion, in recognition of the fact that development at a density warranting sewer service is inconsistent with conserving such resources.

732. COMMENT: The Department has made known its intention to propose substantial amendments to its Endangered and Threatened Species rules. Those amendments may significantly affect the scope and/or interpretation of the proposed WQMP regulations and, therefore, may require re-opening of this rule for further comments. (18, 42, 44, 45, 61)

RESPONSE: The Department will determine with any subsequent rule proposals if there are any conflicts with existing rules and address them appropriately. Further, as with any rule that may be proposed subsequent to the adoption of N.J.A.C. 7:15, opportunity will be provided for public comment and to resolve any perceived discrepancies between N.J.A.C. 7:15 and a subsequent rule proposal.

733. COMMENT: At N.J.A.C. 7:15-5.24(b) in excluding environmentally sensitive areas of 25 acres or more based on Landscape Maps, Natural Heritage Priority Sites, Special Water Resource Protection Areas along Category One waters and their tributaries, and wetlands that are mapped by the Department, the Department does not balance the existing land use planning in

municipal and county master plans and the SDRP, and the existing developed nature of areas of the State with environmental features. Prior public sector land use planning, investments in infrastructure and capital facilities, and existing homes and commercial and industrial facilities have to be taken into consideration along with environmental features. (18, 42, 44, 45, 61)

RESPONSE: The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2.a.). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A. 58:11A-5.) that accomplish this objective. These areawide plans are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5.a.) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5.e.). This set of rules does not rely on the State Planning Act nor implement the State Planning Act or the State Development or Redevelopment Plan developed pursuant to that act. Through the continuing planning process

the Department will seek to integrate the SDRP, regional and local land use plans where those plans do not interfere with the restoration and maintenance of water quality. However, the Department cannot abdicate its statutory obligation in reliance on those plans where they conflict with the legislated mandate of the Department.

Further, where investment in the extension of infrastructure was made without consideration of the environmental constraints that could limit the development that might avail itself of that infrastructure, that investment was ill-advised and poorly planned. The Department cannot ignore its environmental protection mandates in order to "bail out" poor investment decisions. One of the significant achievements of wastewater management plans under this rule will be a clear recognition of environmental constraints in the delineation of sewer service areas and the avoidance of the public expense associated with the inefficient extension of infrastructure in the future.

734. COMMENT: Since counties were not involved in the development of these rules, the Department should consider additional input from counties to incorporate other priorities, not just the landscape mapping coverage, in deciding areas appropriate or inappropriate for sewer service. (55)

RESPONSE: The Department disagrees that “counties were not involved in the development of these rules” and in support of their position notes the following correspondence and meetings with counties throughout the State.

On November 17, 2006 and April 20, 2007 Lawrence J. Baier, Director, Division of Watershed Management, met with the County Planners Association regarding this rule.

On May 2, 2007 a letter was sent out from Commissioner Lisa P. Jackson to all Directors of the Board of Chosen Freeholders regarding this rule and proposed county designation to wastewater management planning agencies.

In addition, in 2007, Director Baier met with or presented to the counties as noted below:

April – Monmouth and Cumberland

May – Cape May and Bergen

June – Middlesex, Gloucester, Somerset and Mercer

July - Morris, Hunterdon, Sussex and Warren

August - Camden

Further note that the rule provides that with respect to the establishment of sewer service areas "nothing in this section shall preclude the wastewater management planning agency from excluding additional areas from sewer service based on local planning objectives, the lack of wastewater treatment capacity or other environmental concerns, including, but not limited to, source water protection."

735. COMMENT: A municipality has concerns as to whether or not the new more stringent criteria for wastewater management plan approvals as proposed are necessary or justified in light of the science used in drafting the rules. The proposed WQMP rules include provisions for the protection of environmentally sensitive areas including: threatened and endangered species

habitat, wetlands, and Category One waterways. The rules will prevent new sewer service infrastructure or expanded sewer allocation from being permitted in areas that are considered to be environmentally sensitive. There is an important need to protect the State's environmental resources, however the science used to determine which areas qualify as environmentally sensitive, especially in regards to those areas which would not be included in the delineated sewer service areas due to the "presence" of threatened and endangered species habitat or a Category One waters designation, is flawed and in question. (74)

736. COMMENT: There are already numerous regulations in place throughout the Department that protect the quality of surface water and ecological habitat. The proposed WQMP rules go beyond what is necessary or scientifically justified to continue to maintain the State's important natural resources. The federal government has established through the courts that if the Department is to adopt the standards proposed, they must demonstrate the need for such a restrictive approach. However, with the inadequate science and undocumented occurrences of threatened and endangered species it would seem unlikely that this approach would be justifiable under the federal guidelines.

The Department should provide evidence in relation to the necessity for overlapping protections in view of the wide variety of Department and Federal rules, regulations, and programs that already exist to provide protection for threatened and endangered species and habitat. (74)

RESPONSE TO COMMENTS 735 AND 736: The importance of wetlands and riparian zones to the protection of water resources is well established through scientific study, as described in the

summary for the rule proposal. The natural resource importance of habitat patches known to support threatened and endangered species, established through sightings of individuals by qualified professionals, is also clear. Therefore, the Department disagrees that there is insufficient scientific support for the rule provision which eliminates these areas as eligible for sewer service. Further, it is important when assessing wastewater management and water supply needs and the appropriate means to address them in a holistic planning construct, to recognize the protections provided to the identified environmentally sensitive areas so that a clear, consistent and transparent framework for decision making is established.

737. COMMENT: The original 201 Facility Plans received formal approval and funding after the completion of extensive environmental studies. The grants executed with the USEPA contained conditions that prevent sewer service to environmentally sensitive areas as restricted by the sewerability maps. These grant conditions are honored and enforced. Therefore, the Department's proposal to withdraw wastewater service areas and effectively preclude the use of this publicly funded capacity for alleged environmental concerns is unnecessary since development into environmentally sensitive areas is already prohibited as a result of the above noted grant conditions. (33, 60)

RESPONSE: The areas excluded from sewer service in accordance with the rule include areas that are not addressed by the grant conditions referenced in the comment, particularly threatened and endangered species habitats as identified in the rule. In the Cape May Region, areas other than wetlands and floodplains were mapped and subject to the grant condition, including some areas important as habitat for threatened and endangered species. However, the mapping upon

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which the grant condition was based is dated. Therefore, it would be inappropriate to exclude areas studied under 201 Facilities Plans from the criteria and analyses in accordance with the rule.

738. COMMENT: Basing decisions on old and inaccurate Department data ignores such things as new existing development, development approvals, redevelopment plans and approved COAH sites. The Department must update and correct its data and be open to accepting data from the municipalities and counties that are more up to date and accurate. (19, 28)

RESPONSE: Where new, more accurate information is available to local entities regarding development, WMP agencies are encouraged to use it to enhance the GIS data layers the Department provides on its webpage. The Department periodically updates the GIS data layers, for example, the land use/land cover layers.

739. COMMENT: The Department should acknowledge and clarify the spatial accuracy and identify the limitations of the data sets to be used in the determination of environmentally sensitive areas, as defined in the rules, prior to receiving final public comment on the new rules.

The reliability of the original source data and the original methods used to develop both Landscape Maps and the wetland data compromises the integrity of these layers within their application as proposed in the new rules; especially if they are analyzed in conjunction with data of superior spatial accuracy such as parcel data. The integrity of the existing sewer service area data is uncertain. (51)

RESPONSE: This rule is a planning rule and therefore site-by-site analysis is not feasible. As such, the use of geographic information system data is considered the best available data for water quality management planning. Detailed information regarding the source and methods used to develop the data layers that the Department requires a planning agency to use for analyses pursuant to this rule is provided in the Metadata, which conforms to State standards, and is available at http://www.nj.gov/dep/gis/. Also note that, N.J.A.C. 7:15-5.24(e) allows a wastewater management planning agency or an applicant for a site specific Water Quality Management plan amendment to demonstrate that the Department's GIS information is incorrect. The Department acknowledges that GIS mapping of environmental features on a Statewide basis relies on remote sensing techniques such as aerial photographic interpretation. Where a more detailed analysis of a particular site or area demonstrates that the Department's GIS coverage does not reflect actual conditions, the Department will consider that information in determining the appropriate wastewater management alternative for that area. For example, if the Department's digital wetlands coverage indicates an area as wetlands, but the applicant has a Department issued Letter of Interpretation for the site that concludes the site is not jurisdictional wetlands under the Freshwater Wetlands Protection Act, the Department will consider that site specific information and adjust the sewer service boundary accordingly. Similarly, where a site or area is identified as endangered or threatened species habitat on the Department's Landscape mapping, but a more thorough investigation of the habitat demonstrates through a Habitat Suitability Determination pursuant to N.J.A.C. 7:15-5.26 that one or more of the critical habitat components for the identified specie is absent, the Department will consider adjusting the sewer service area boundary.

740. COMMENT: At N.J.A.C. 7:15-5.24(b) the use of special water resource protection area and wetlands for sewer service area delineations is validated through corresponding Department regulations. Considering that the Department does not have regulations regarding threatened and endangered species habitat or Natural Heritage Priority Sites, there is concern about the validity of using these criteria for the delineation of sewer service areas. The Department should create standards for areas mapped as Natural Heritage Priority sites and where threatened or endangered species habitat occur. This would provide guidance in land use planning and the protection of those mapped areas. There is a longstanding agreement between the Department and the Office of Smart Growth that only landscapes three, four and five would be considered for the State Plan Mapping criteria. This Department's regulations should reflect this. (77)

RESPONSE: The Department believes that the exclusion of these areas from sewer service areas is already "is validated through corresponding Department regulations", although, we note that further regulation of these areas in future is also a possibility, where and when appropriate. Further, the Department believes that the four environmental features identified for exclusion from the sewer service area (threatened and endangered species habitats, Natural Heritage Priority Sites, Category One stream buffers, and wetlands) are unique and sensitive features whose protection is central to the Department's mandate to protect ecological integrity and water quality.

With regard to guidance for Natural Heritage Priority sites and endangered and threatened species habitat, the Department believes that the peer-reviewed and publicly noticed Landscape

Project maps and the mapped Natural Heritage Priority sites, both of which are available at http://www.nj.gov/dep/gis/ already provide guidance for land use planning for these areas.

With regard to areas ranked 3, 4 and 5 according to the Landscape Project maps, please note that the rule only excludes from sewer service area those "areas mapped as endangered or threatened wildlife species habitat." A rank of 3, 4 or 5, is only assigned to areas that are habitat for endangered and/or threatened species. Areas ranked 1 and 2 on the Landscape Project maps are not associated with endangered or threatened species and therefore are not excluded from sewer service area.

741. COMMENT: The landscape mapping should not be used as one of the environmental features. This is the mapping layer that is known by some as the BIG Red Map many years ago. The landscape mapping layer does not rise to the stature of some of the other documented environmental features that are used and should be used. In some cases, the landscape mapping is a GIS exercise that is helpful, but it should not be the last word on what is sensitive and not. The landscape mapping has a very real impact on what the potential sewer service areas will look like. The landscape mapping should go through an additional layer of review so that potential habitat can be measured against other responsibilities of towns, counties, and state government. Jobs, housing, schools, roads, as well as human existence itself have real impacts on the environment. The key is to minimize that impact by planning accordingly and arriving at the most appropriate balance. Once we have agreement on areas for future growth, sewer service areas should be amended accordingly. Sewer service should not be withdrawn solely on the basis of a potential habitat. (55)

742. COMMENT: An issue with the way the Landscape Project information is being used is that the Department is treating the 3, 4, and 5 rankings identically. However, by definition, these classifications have varying potential value. It is logical to assume that the Department places a comparatively higher value on Rank 5 than Rank 3, yet the WQMP rules do not make any such distinction, there is just an automatic denial of sewer extension for any lands ranked 3, 4, or 5. It is recommended that the Department refrain from incorporating Landscape Project data into the WQMP regulations and rely on well established mapping layers such as freshwater wetlands maps to determine environmental suitability. (33, 60)

743. COMMENT: The proposed regulations impose unreasonable obstacles to persons seeking sewer service designation in areas that are environmentally sensitive. There is a nearly complete ban on sewer service in areas that are environmentally sensitive based on maps prepared by Department. The ban on sewer service in areas with threatened and endangered species lacks technical justification. If the goal of the Department is to prohibit or restrict development in areas with threatened and endangered species or their habitats, then that goal should be addressed through land use planning programs at the State and local levels and through the Department's threatened and endangered species program. By using threatened and endangered species as an element of wastewater management planning, the Department is attempting to vest itself with land use planning authority. That is outside the scope of the Department's authority under the Water Pollution Control Act and other applicable law. (42, 44, 45)

RESPONSE TO COMMENTS 741 THROUGH 743: This rule is a planning rule and therefore site-by-site analysis is not feasible. As such, the use of geographic information system data, such as the Landscape Project maps, is considered the best available data for water quality management planning. Detailed information regarding the source and methods used to develop the data layers that the Department requires a planning agency to use for analyses pursuant to this rule is provided in the Metadata, which conforms to State standards, and is available at http://www.nj.gov/dep/gis/. Threatened and Endangered species habitat is protected through existing Department regulations, such as the Coastal Zone Management rules (N.J.A.C. 7:7E), the Freshwater Wetlands Protection Act rules (N.J.A.C. 7:7A), the Flood Hazard Area Control Act rules (N.J.A.C. 7:13) and the Highlands Water Protection and Planning rules at (N.J.A.C. 7:38) and the Landscape Project maps are used in identifying the habitat regulated pursuant to these rules. In addition, the method used in developing the Landscape Project maps was both peer-reviewed and publicly noticed and therefore is considered by the Department to be appropriate for use in this and other rules. Further, the Department believes that the protection of these areas is central to the Department's mandate to protect ecological integrity However, despite the fact that the Landscape maps have been recently updated and will continue to be amended periodically, the Department recognizes that the Landscape Project maps represent a snapshot in time and that subsequent legal alterations to the landscape may have occurred that affect the suitability of species habitat, the rule at N.J.A.C. 7:15-5.26, does establish a Habitat Suitability Determination. This determination provides agencies the ability to rebut the presumption of habitat in an area where it can be demonstrated that the area, through legal alteration, is no longer suitable habitat for the relevant endangered or threatened species.

Where planning agencies wish to encroach into environmentally sensitive areas for "other responsibilities", note that N.J.A.C. 7:15-5.24(h) allows new sewer service area within environmentally sensitive areas as necessary to accommodate center-based development under the New Jersey State Planning Act, N.J.S.A. 52:18A-196 et seq.

Finally, the commenter should also note that the composite geographic information systems analysis includes four environmental features, not threatened and endangered species habitats. The other features include, Natural Heritage Priority Sites, Category One stream buffers, and wetlands. Thus, sewer service area is not being "withdrawn solely on the basis of potential habitat".

744. COMMENT: The proposed regulations relating to sewer service area designations in environmentally sensitive areas are overbroad and arbitrary and capricious. The ban on sewer service area designation in areas with threatened and endangered species habitat is unduly broad. Although any ban on sewer service area designations based on threatened and endangered species is objectionable, any such ban should be limited to areas with habitat patches of Rank 3, 4 and 5. Habitat patches of Rank 1 and 2 are areas that do not contain threatened and endangered species, and as such are not entitled to any presumption that development in those areas will endanger any animal species of concern. (42, 44, 45)

745. COMMENT: At proposed N.J.A.C. 7:15-5.24(b)1, the Landscape Maps should be clarified to specifically refer to areas that are Rank 3, Rank 4 and Rank 5, in place of the broad reference to the "areas mapped as endangered or threatened wildlife species habitat on the Department's

Landscape Maps of Habitat for Endangered, Threatened or Other Priority Species." (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 744 AND 745: The rule only excludes from sewer service area those "areas mapped as endangered or threatened wildlife species habitat". A rank of 3, 4 or 5, is only assigned to areas that are habitat for endangered and/or threatened species. Areas ranked 1 and 2 on the Landscape Project maps are not associated with endangered or threatened species and therefore are not excluded from sewer service area.

746. COMMENT: The Department is proposing to use their "landscape project" to severely limit development of land if it has suitable habitat for Threatened and Endangered Species (T&E), even if none are present. This policy should be considered carefully and provisions should be made for variances in certain cases where projects need to be advanced and the T&E species are not already present. Has the Department contemplated disputes over the needs of municipalities to secure new ratables versus potential T&E habitat designations? Furthermore, has the Department considered the ability to provide waivers in certain cases? (6, 7)

747. COMMENT: The Department has enacted and proposed a sweeping array of rules designed to reduce the impact of development on State water resources. The goal of preserving and protecting water supplies is supported and it is understood that development strategies previously considered acceptable are no longer considered to be so. Sussex County prepared its Strategic Growth Plan over a period of several years, culminating in the endorsement of that Strategic Growth Plan by the State Planning Commission. The Department, through years of

staff consultation, had a fundamental role in the final Plan submitted to the State Planning Commission for Plan Endorsement. The Department specifically stated that the approach to development and resource protection in the Strategic Growth Plan is fully consistent with the goals of the Department and the SDRP. As an outgrowth of that Endorsed Plan, a Vision 2020 Plan was developed that seeks to identify the types of business, potential sites for retention and establishment of those businesses and required infrastructure support that must be encouraged in order to sustain long term economic viability. Accordingly, Sussex County comes to the discussions of Department rules as a partner in the effort to balance the need for resource protection with equity and the strong emphasis on infrastructure economic development as a means to keep New Jersey competitive in the global market.

Performance standards, complemented in the Department's Stormwater Management rules and the Department of Community Affairs' Residential Site Improvement Standards, are a key element to this approach and provide that once a project is complete, standards be set that yield an improvement over past practice. The understanding of the function and effectiveness of the wide range of available environmental protection techniques as well as the existing character of the resource to be protected is essential and where science is clear and the underlying data is verified, all parties can fairly consider the range of options.

There is a major concern with the Surface Water Quality Standards C1 proposal and the Water Quality Management rules which assume, in the absence of any verified sightings, threatened and endangered species habitats exist throughout the county. Streams and lakes are proposed for classification on the basis of "suitable" rather than verified habitat. Where known populations of

threatened or endangered species exist, they are fully deserving of protection and where they do not, there are clearly elements, even in the absence of additional development, that render the habitat unsuitable.

The restrictions put in place to govern development and attenuate its impact on protected water bodies are not an array of techniques but only provide for linear setbacks ranging from 300 feet from water bodies to 1000 feet from vernal pools. As the intent is to protect overall water quality, there must be a provision in the rules for verification of habitat and use of alternative techniques. The former is the responsibility of the Department and the latter the responsibility of prospective developers.

Finally, in the matter of equity, there are frequent and correct reminders that everyone is expected to be stewards of the land. In the Federal, State and local effort, that means all, not just farmers, those who have not taken profits out of land or those who wish to develop some portion within clearly established standards. Prior to the adoption of new rules that severely restrict the use of lands of State-wide or region-wide importance, a practical and immediately available means to transfer development rights to appropriate locations (e.g. centers) must be in place. Additional funding for farmland and open space acquisition or easement purchase must be immediately available to local governments and non-profit groups to fairly compensate land owners for the value of their lands. (75)

748. COMMENT: There is concern about the proposed rules regarding the provisions for the protection of water dependent threatened and endangered species. The proposed rules will

exclude any area of 25 contiguous acres or larger that contains threatened and endangered species habitat from an approved sewer service area. While the science may find that there is suitable habitat for T&E species, there is no science or documentation available that verifies that there are actual occurrences of the species within these areas. Excluding area from the sewer service area based on inadequate science is unwarranted and should be reconsidered before adopting the proposed WQMP rules.

The fact that the T&E designation is not based on the verified presence of the species but rather only finds the waterways to be a "suitable habitat" based on existing conditions does not guarantee that the proposed rules will do anything to further protect the habitats of threatened and endangered species. The science used may allow for a general idea of the habitat suitability in the area but it is not sufficient enough to determine that the species actually exist. The proposed rules are prohibitory and will have a wide-spread impact despite the fact that there is no scientific evidence that proves that they will protect existing T&E species. The fact that the proposed rules are based on weak science and a lack of documentation brings the validity of the proposed rules into question. (74)

749. COMMENT: The rules propose that a presence of potential habitat for threatened or endangered species may be considered when deciding whether to allow sewer service in a particular area. It seems that the Department considers a suitable environment enough of a deterrent to development and is using this criteria without confirming the presence of any threatened or endangered species. While the Department's responsibility to protect the State's natural resources is recognized, a waiver process should be implemented to best achieve a

balance between the environment and development. If there is no evidence of the presence of a threatened or endangered species within a radius of a piece of property, development should be allowed. (29)

750. COMMENT: The Department is proposing new N.J.A.C. 7:15-5.24 which utilizes a variety of environmental data layers to identify the conditions where extension of sewer service is inappropriate. One such source of information is the Department's Landscape Project, particularly rankings 3, 4, and 5. There are several problems with the inclusion of this data set. First, the Landscape Project maps are speculative in nature. Unlike freshwater wetlands maps which describe the physical nature of the site, these maps indicate where threatened and/or endangered species could potentially exist. If a site outside of a designated center is ranked as Landscape Project 3, 4, or 5, it is deemed "unsuitable" for sewer service. If a landowner desires to counter this designation, a Habitat Suitability Determination analysis must be conducted. This is a costly and time-consuming process that involves investigating the vegetative, topographical, geographical, hydrological, and ecological conditions on the site. In some instances, due to the seasonality of particular animal and plant species, the study can take more than one year to complete, resulting in an undue burden on the property owner. (33, 60)

RESPONSE TO COMMENTS 746 THROUGH 750: One of the central purposes of the Water Quality Planning Act is to coordinate and integrate water quality management planning with related federal, State, regional and local land use plans, programs and policies through a continuing planning process (N.J.S.A. 58:11A-2.b.). The goal of the rule is not to prohibit all development in threatened and endangered species habitats. The rule intends to eliminate

significant conflicts between the Department's natural resource protection mandates and the extension of centralized sewer service, consistent with the intent of the continuing planning processes required under Section 208 of the federal Clean Water Act and reinforced through the New Jersey Water Quality Planning Act. In places where sewer service is not provided the rule allows individual subsurface sewage disposal systems (septic systems) as an appropriate wastewater management alternative. In general septic system development will occur at a lower density than development that would be supported by public sewers. This lower density development is more consistent with the conservation of these sensitive environmental resources. However, the real emphasis of the rule is to eliminate the encouragement and public subsidy of development in environmentally sensitive areas such as wetlands, category one stream buffers, Natural Heritage Priority Sites and threatened and endangered species habitats.

The Department is charged with the protection of the ecological health of the State and with the protection of threatened and endangered species. In just the last three decades 40 percent of the remaining critical migratory bird stopover habitat on the lower third of the Cape May Peninsula has been lost. During the same period, approximately 50 percent of the state's bog turtle habitat has disappeared. The continued extension of sewers into critical habitats for threatened and endangered species encourages, and where public money has been used in constructing wastewater infrastructure subsidizes, which is inconsistent with the Department's land use planning objectives.

The Landscape Project is a pro-active, ecosystem-level approach for the long-term protection of imperiled species and their important habitats in New Jersey. The N.J. Division of Fish and

Wildlife's Endangered and Nongame Species Program (ENSP) began the project in 1994, to protect New Jersey's biological diversity by maintaining and enhancing imperiled wildlife populations within healthy, functioning ecosystems. Landscape Project critical habitat maps were developed to provide users with peer-reviewed, scientifically-sound information that is easily accessible via the internet and hard copy (paper maps). Critical habitat maps were designed for use by anyone, but especially those individuals and agencies who have the responsibility for making land-use decisions, i.e., municipal and county planners and local planning boards, state agencies, natural resource and lands managers, the general public, etc. the critical information Landscape Project products provide can be used for planning purposes before any actions, such as proposed development, resource extraction (such as timber harvests) or conservation measures, occur. Proper planning with accurate, legally and scientifically sound information will result in less conflict, less wasted time and less wasted money, attempting to address endangered and threatened species issues. Wastewater and water quality management plans are the types of land use plans that the Landscape Project was developed to assist, and therefore it is an appropriate consideration in determining future wastewater service areas.

The Landscape project is science based, has been peer-reviewed and publicly noticed and therefore is considered by the Department to be appropriate for use in this and other rules. The method for delineating habitat areas is relatively straightforward. First, the relevant classes for each habitat type (forest, grassland, forested wetland, emergent wetland and beach) are extracted from the Department’s LU/ LC data layer. Dissolving the different LU/LC classes for each habitat type creates contiguous habitat polygons. Using boundaries between habitat types and major roads (county level 500 and above), contiguous patches for each habitat type are

delineated. Each patch is then assigned a unique link ID. Imperiled species occurrence areas are then intersected with habitat patches. Landscape Project data is reviewed to determine whether a particular site contains "documented habitat" for State or federally listed species. Within areas of documentation, ground surveys are typically conducted to confirm actual site suitability for a specifically documented species. Therefore, contrary to the commenters' understanding, Landscape ranking of habitat is based on verified sighting information. However, commenters must understand that the majority of these species are motile and transient. Therefore, the absence of a particular specie on a particular site and survey date cannot result in a conclusion that the specie does not rely on the habitat. It is more appropriate to assess the habitat characteristics through a habitat suitability determination to determine whether the habitat has been altered in such a way as to render it unsuitable for that specie. The rule recognizes that the Landscape Project maps represent a snapshot in time and that subsequent legal alterations to the landscape may have occurred that affect the suitability of the habitat. The rule at N.J.A.C. 7:15-5.26 establishes a Habitat Suitability Determination procedure for rebutting the Landscape data. This determination provides agencies the ability to rebut the presumption of habitat in an area where it can be demonstrated that the area, through legal alteration, is no longer suitable habitat for the relevant endangered or threatened species. If successfully demonstrated that the habitat is not suitable for the specie(s) identified through the Landscape project, then the Department will allow the addition of that area to the sewer service area. Therefore, the Department, through this determination, provides that the Landscape Maps are not the "last word" concerning threatened and endangered species habitat.

The Department has made a distinction between Landscape Ranks 1 (suitable habitat that does not intersect with known occurrences of threatened and endangered species) and 2 (habitat for non-listed priority wildlife species), which are not in the general exclusion from sewer service area designation. The rule at N.J.A.C. 7:15-5.24(b)1. specifies that only areas mapped as threatened or endangered species habitat on the Department's Landscape map is to be considered in determining sewer service area designation. When read together with the definitions of "Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife" only habitat Ranked 3, 4 and 5 meet this requirement. The Department disagrees with the suggestion that threatened and endangered species habitat should receive different consideration under this rule based on whether the habitat supports federal or State listed species and whether the specie is listed as threatened or endangered. Rank 3 landscape provides habitat for State endangered species, Rank 4 landscape provides habitat for State endangered species and Rank 5 landscape provides habitat for federally listed species. The commenter suggests that the Department provide lesser protection to Rank 3 habitat than Rank 4 and lesser protection for Rank 4 habitat than Rank 5. The Department believes that this is completely inappropriate and reminds the commenter that endangered species are those whose prospects for survival in New Jersey are in immediate danger because of a loss or change in habitat, over-exploitation, predation, competition, disease, disturbance or contamination. These species are in danger of extinction in New Jersey. Threatened species are those who may become endangered if conditions surrounding them continue to deteriorate. The Department cannot embrace a policy that would promote the destruction of habitat for any specie so as to place it on the brink of extinction before taking measures to eliminate the public subsidy of that destruction.

Several commenters also suggest that other legitimate land use planning considerations such as jobs, schools, and housing must be balanced against the need for environmental protection. The Department recognizes that in some parts of the State, conflicts between environmentally sensitive areas and other land use planning considerations may be significant and total avoidance may not be possible. At N.J.A.C. 7:15-5.24(h) the rule will permit centralized sewer service areas in these cases to support center-based development that achieves resource protection objectives in the environs outside of the agreed upon center, thus achieving the protection of sufficient habitat to support the continued viability of threatened and endangered species while providing for housing, schools and economic growth. Other limitations to the extension of sewers into environmentally sensitive areas are identified under N.J.A.C. 7:15-5.24(h) include a demonstration of adequate wastewater capacity, and a finding that the areas included within the sewer service area are not critical to a population of threatened or endangered species the loss of which would decrease the likelihood of the survival or recovery of the species in the State.

Additional information on the Landscape project can be found at: http://www.state.nj.us/dep/fgw/ensp/landscape/lp_report_2_1.pdf. Detailed information regarding the source and methods used to develop the data layers that the Department requires a planning agency to use for analyses pursuant to this rule is provided in the Metadata, which conforms to State standards, and is available at http://www.nj.gov/dep/gis/.

Regarding the concern about stewardship and equity, the Department believes that this proposal in consistent with the concepts and requirements of Transfer of Development Rights programs. The rule supports local land use planning goals in addition to environmental protection goals by

integrating local land use plans into the wastewater management plans. If a municipality intended to accomplish center based development and property value equity through a Transfer of Development Rights program, then it would make sense to direct public sewage infrastructure and public water infrastructure to that TDR receiving area as necessary to support the increased density in the receiving area. These local planning objectives including TDR receiving areas are to be identified in the wastewater management plan. The State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq., requires that a municipality receive Plan Endorsement by the State Planning Commission prior to enactment of the adoption or amendment of any development transfer ordinance (N.J.S.A. 40:55D-140e). This rule at N.J.A.C. 7:15-5.24(h) allows sewer service area designations in environmentally sensitive areas to support center based development that has received Plan Endorsement, provided the area doesn't include an area critical to a local population of endangered or threatened species, environs protection is adequately addressed and an adequate wastewater management alternative is identified. Therefore, a TDR program as suggested by the commenter would be supported by the rule.

The availability of public funding for open space and farmland preservation is outside of the scope of this rule; and is dependent upon public referenda or other appropriations made available by the Legislature. However, the Department notes its continued support of these important programs.

751. COMMENT: Countywide, imposition of water quality rules and Category One waters designations for unverified habitat will make new centers a nearly impossible uphill battle,

eliminating the ability of many municipalities to redirect growth to compact centers requiring sewer and water supply infrastructure. (75)

752. COMMENT: The Department continues to use the Landscape Map data beyond the purview of its intended purpose. Has the Landscape Map project data and its use in rules ever been legally tested to see if a nexus currently exists between it and other related State statues? (51)

753. COMMENT: At N.J.A.C. 7:15-5.24(b)1, there is concern with the use of the Landscape Mapping technology system as it is far reaching, error-prone and still has never undergone any official public comment or scrutiny. Additionally, the use of "Other Priority Species" as criteria for exclusion from sewer service areas is questioned. Only the presence of species that have undergone a formal, scientific, and public process to be listed should be used as the basis for prohibiting any development in sewer service areas. If septics and all types of community wastewater systems are to be included in the sewer service area planning, then no efficient forms of development will be possible. Permitting of these developments could provide even more habitat for wildlife species of all kinds with proper layout and design. (58)

754. COMMENT: The methodology used for the mapping of threatened & endangered species habitats is the Landscape Map, use of which will automatically exclude from sewer service thousands of acres that are in reality not threatened and endangered species habitat. The Landscape Map should be used as a planning tool, not as a regulatory tool. (54)

755. COMMENT: Restriction should apply to critical habitat only, not suitable habitat. (54)

756. COMMENT: The rule proposes to use the "landscape project" to subtract out un-developable lands. Does this include suitable habitat for T&E species, even if none are present? This policy should be considered carefully and provisions should be made for a variance to the policy in cases where public projects need to be advanced and the T&E species are not already living on the land. (18, 32)

RESPONSE TO COMMENTS 751 THROUGH 756: Threatened and Endangered species habitat is protected through existing Department regulations, such as the Coastal Zone Management rules (N.J.A.C. 7:7E), the Freshwater Wetlands Protection Act rules (N.J.A.C. 7:7A), the Flood Hazard Area Control Act rules (N.J.A.C. 7:13) and the Highlands Water Protection and Planning rules at (N.J.A.C. 7:38) and the Landscape Project maps are used in identifying the habitat regulated pursuant to these rules. In addition, the method used in developing the Landscape Project maps was both peer-reviewed and publicly noticed and therefore is considered by the Department to be appropriate for use in this and other rules. Further note that areas mapped by the Landscape Projects maps are based on documented sitings. For more information on the Landscape Project visit http://www.nj.gov/dep/fgw/ensp/landscape/index.htm. Thus, the areas noted in the Landscape Project maps warrant protection. Further, the Department believes that the protection of these areas is central to the Department's mandate to protect ecological integrity and recover endangered and threatened species. However, in recognizing that the Landscape Project maps represent a snapshot in time and that subsequent legal alterations to the landscape may have

occurred that affect the suitability of species habitat, the rule at N.J.A.C. 7:15-5.26, does establish a Habitat Suitability Determination. This determination provides agencies the ability to rebut the presumption of habitat in an area where it can be demonstrated that the area, through legal alteration, is no longer suitable habitat for the relevant endangered or threatened species.

The Water Quality Management Planning Act directs the Department is to "coordinate and integrate the continuing planning process with related Federal, State, regional and local comprehensive, functional and other relevant planning activities, programs and policies", therefore the Department believes that the exclusion of endangered and threatened species habitat is appropriately being addressed through this State level planning program.

With regard to "waivers," while this rule does not establish a waiver, note that where planning agencies wish to encroach into environmentally sensitive areas for "other responsibilities," note that N.J.A.C. 7:15-5.24(h) allows new sewer service area within environmentally sensitive areas as necessary to accommodate center-based development under the New Jersey State Planning Act, N.J.S.A. 52:18A-196 et seq.

757. COMMENT: Preventing sewer service area establishment in environmentally sensitive areas is supported, but the rule proposal is unclear as to what "Threatened and Endangered Species Habitat" will be used to describe excluded environmentally sensitive areas. Does this designation include suitable habitat according to the Landscape Project Data or does the existence of T&E species have to be verified by Department personnel before this exception is

applied? This section should include appropriate habitat for T&E species regardless of whether sightings have been confirmed. (68)

RESPONSE: The Department acknowledges the comments in support of this rule provision. With regard to endangered and threatened species habitat that will be excluded from sewer service areas, the rule only excludes from sewer service area those "areas mapped as endangered or threatened wildlife species habitats" and that are selected as a result of the composite geographic information systems (GIS) analysis noted in this section of the rule. A rank of 3, 4 or 5, is only assigned to areas that are habitat for endangered and/or threatened species. Areas ranked 1 and 2 on the Landscape Project maps are not associated with endangered or threatened species and therefore are not considered for exclusion from sewer service area. The Landscape Projects maps are based on documented sightings that have been verified by the Department. For more information on the Landscape Project visit http://www.nj.gov/dep/fgw/ensp/landscape/index.htm.

758. COMMENT: Existing sewer service areas currently contain one or more of the four environmental criteria to be used in determining the environmentally sensitive areas. In addition, in most instances, the current sewer service areas correspond to appropriate State Planning areas. Many of these areas contain fragmented environmental features. Removing sewer service from these areas to preserve what little habitat remains may not be a fair trade-off. Sewers exist in urbanized municipalities which have priority sites, meaning successful habitats can exist in urban areas with sewer. The Department should identify and establish a baseline of successful T&E habitats in urbanized areas. (51)

RESPONSE: At N.J.A.C. 7:15-5.26(b), the rule states that environmentally sensitive areas shall be defined based on a composite geographic information systems (GIS) analysis, as any contiguous area of 25 acres or larger consisting of any of the indicated four features alone or in combination. As a result of this approach, the resulting environmentally sensitive areas to be removed are neither fragmented nor little. The Department also believes that habitat within urban areas is no less critical or deserving of protection.

759. COMMENT: The Natural Heritage Priority Sites mapping is being incorporated into regulation, presumed to be valid and reliable, without being subject to a full public review and comment process. The metadata for the Natural Heritage Priority Sites on the Department website does not warrant the accuracy of the data and provides disclaimers. The wastewater rules are being used to promote the agenda to protect habitats instead of proposing a separate set of habitat protection rules that would be subject to public comment. For this reason, the Natural Heritage Priority Sites mapping should not be used as a valid and reliable source for regulatory purposes. In addition, using the Natural Heritage Priority Site maps would be duplicative of the Landscape Maps. (14)

760. COMMENT: The Department should clarify the decision used in adding Natural Heritage Priority Sites to the other categories (i.e., wetland, threatened and endangered species habitat, C1 Buffers), the presence of which twenty-five or more contiguous acres precludes the project from a sewer service area. Natural Heritage Priority Sites are a very subjective category. (54)

RESPONSE TO COMMENTS 759 AND 760: Through its Natural Heritage Database, the Office of Natural Lands Management (ONLM) identifies critically important areas to conserve New Jersey's biological diversity, with particular emphasis on rare plant species and ecological communities. The database includes detailed information on rare species and ecological communities. Using the database, ONLM has identified Natural Heritage Priority Sites that represent some of the best remaining habitat for rare species and rare ecological communities in the State. If these sites become degraded or destroyed, we may lose some of the unique components of our natural heritage. Thus, the exclusion of these sites from sewer service areas is entirely appropriate.

The boundaries of each Natural Heritage Priority Site are drawn to encompass critical habitat for the rare species or ecological communities. Often the boundaries extend to include additional buffer lands that should be managed to protect this critical habitat. A justification for the boundary is provided for each site in the GIS data.

761. COMMENT: N.J.A.C. 7:15-5.24(b)3 ties the Surface Water Quality Standards and the Stormwater regulations together. While there are provisions in the wastewater rules for justifying why an area within a 300-foot buffer should be located within the sewer service area, the question is why should an existing urbanized place have to justify sewering areas within 300 feet of a waterway currently proposed for Category One waters status? Waterways in urban areas traverse developed properties. (14)

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RESPONSE: Where buffers are already developed they are not restricted from receiving sewer service.

762. COMMENT: One hundred year floodplains should be included in the list of environmentally sensitive areas that cannot be developed as part of a sewer service area. Development of floodplains leads to increased flooding potential, stream destabilization, water quality degradation, and ecosystem and habitat degradation. Development in the floodplain causes predicable adverse affects such as increased flood stages, increased velocities, erosion and sedimentation, water quality degradation and habitat loss. In the event of a flood, these cumulative affects which disturb naturally vegetated riparian corridors often threaten the safety of both residents and emergency personnel. (10, 80)

RESPONSE: The Department believes that the concerns summarized by the commenters are more appropriately addressed through the more detailed analysis involving site plans and hydrologic calculations that is performed as part of the flood hazard permitting process for development that applies in most of the State's floodplains. Accordingly, elimination of these areas from the sewer service area is not necessary.

763. COMMENT: The special water resource protection areas identified at proposed N.J.A.C. 7:15-5.24(b)3 should not be subject to automatic exclusion from a sewer service area. There are many miles of streams wrongly classified as C1 due to the developed nature of the area, existing sewer infrastructure, classification as State Plan Planning Area 1 or 2, and designated as an area in need of redevelopment or rehabilitation.

The summary states the following regarding the protection of riparian corridors waters: "The importance of both wetlands and special water resource protection areas in maintaining water quality, and the existing regulatory constraints applied to development in these areas, makes dense development inappropriate and thus these areas are not appropriate for designation as sewer service areas." The Department should rely on specific regulatory constraints and not exclude these areas from sewer service areas. (18, 42, 44, 45, 61)

RESPONSE: Surface water classifications, including Category One designations, are established through the Surface Water Quality Standards (N.J.A.C. 7:9B). The designation of any stream as Category One waters is based upon their exceptional water quality, exceptional ecological and fishery significance, importance as a public water supply, or their outstanding recreational or scenic value. Some of these attributes may exist despite existing adjacent land uses or may exist downstream of a developed area. These adjacent land uses do not render the designation "wrong" as suggested by the commenter.

Where a Category One water flows through an existing urbanized area, this rule will not exclude existing sewered areas from sewer service designation. The Department encourages the redevelopment of existing developed areas rather than developing new sites. The sewer service area delineation criteria at N.J.A.C. 7:15-5.24 will not be used to undermine this objective. This intent is evidenced in the rule at N.J.A.C. 7:15-5.25(g)3i. which allows the redevelopment within the limits of existing impervious cover within a riparian zone. Further the Department's regulatory programs that establish riparian buffers along Category One waters, including the

Stormwater Management Rules (N.J.A.C. 7:8) and the Flood Hazard Area Control Act Rules (N.J.A.C. 7:13), make a similar allowance for the redevelopment of existing impervious areas within those buffers.

764. COMMENT: Only lands that are regulated freshwater wetlands and regulated riparian lands, meaning either stream encroachment permit regulated or stormwater special resource area buffer lands, are regulated. Those are only a subset of environmentally sensitive areas as defined by the Department. If, going forward, the Department is going to eliminate environmentally sensitive areas from sewer service areas that should have never received sewer service area designation because it was inappropriate environmentally, then do it wholeheartedly and not just for a subset of the features that are defined as environmentally sensitive. (86)

RESPONSE: The Department seeks to reduce the conflicts between sewer service area delineations and large, generally 25 acres or larger, contiguous environmentally sensitive areas. The Department has identified several environmentally sensitive areas in addition to wetlands and riparian zones that are to be considered in the establishment of sewer service areas (N.J.A.C. 7:15-5.24). These include, threatened and endangered species habitats, Natural Heritage Priority Sites, beaches, dunes and coastal high hazard areas. The Department selected these features because good geospatial data exists for these features. As the Department envisions wastewater management planning to be performed on a county-wide basis, it is important that the data needed to perform an environmental sensitivity assessment be available. N.J.A.C. 7:15-5.24(a) specifically states that other land types may be excluded from sewer service at the discretion of the wastewater management planning agency.

Removal of areas smaller than 25 acres would result in a fragmented pattern of sewerage that would frustrate typical zoning precepts. For these smaller areas the Department relies on its regulatory powers to address resource protection on a site-by-site basis. The Department believes that the commenter may be confusing the environmental build-out analysis criteria at N.J.A.C. 7:15-5.25(c)1 with the sewer service delineation criteria at N.J.A.C. 7:15-5.24 discussed above. When performing an environmental build-out analysis of the resulting sewer service areas, wetlands and riparian buffers are removed from that analysis because it is assumed that the Department's regulatory programs will severely limit the amount of development that can be accommodated within those areas. Simply applying local zoning over the gross undeveloped land areas without taking into consideration the actual development potential would over predict the amount of development and the wastewater generation potential of the sewer service area. This in turn would result in over sizing the wastewater infrastructure and treatment works necessary to support the sewer service area. The over sizing of treatment works is a wasteful expenditure of public funds that this rule seeks to avoid through responsible planning.

765. COMMENT: In order to avoid confusion, the Department should specify in the rules at N.J.A.C. 7:15-5.24(b)4 that the most current wetland data should be used for the development of the countywide WMPs. At present, the most current wetland data would be the 2002 Land Use/Land Cover data available for download from the Department's website. (88)

RESPONSE: The Department expects the best available GIS information will be used to develop WMPs. The GIS layers are regularly updated and will include the most current

information that has been subject to a quality assurance check. See also Response to Comment 766.

766. COMMENT: Regarding the proposed provision at N.J.A.C. 7:15-5.24(b)4, the Department should not rely upon the presence of wetlands as a basis to eliminate lands from a sewer service area. Patches of wetlands are found throughout New Jersey, subjecting many areas to no sewer service. Further, the Department's mapping of wetlands should not be used as experience has shown that the Department maps are highly inaccurate for freshwater wetlands. (18, 42, 44, 45, 61)

RESPONSE: The rule does not require the elimination of all areas mapped as wetlands from the delineated sewer service areas. Only those wetlands that in combination with the other environmental features identified at N.J.A.C. 7:15-5.24 encompass a contiguous area of 25 acres or more. While the Department agrees with the commenter that there is some inaccuracy in the GIS mapping of freshwater wetlands, and that the regulatory jurisdictional boundary under the Freshwater Wetlands Protection Act (N.J.S.A. 7:9B) must be established in the field and verified through a Letter of Interpretation. This level of detail is unavailable Statewide. The Department performed significant amount of field verification when the New Jersey Freshwater Wetlands Maps were developed and the Department is satisfied that their accuracy is sufficient for planning purposes. When more accurate site specific information is provided, in the form of a Letter of Interpretation, the rule at N.J.A.C. 7:15-5.24(e), a modification of the sewer service area boundary may be granted.

The commenters should also be aware that in addition to the Department's statutory obligation to protect wetlands, much of the sanitary sewer infrastructure funded through the federal grant program authorized by Section 201 of the federal Clean Water Act included grant limitations. Most common among these 201 grant limitations was a prohibition against providing sewer service in wetland areas and flood plains. Therefore, it is necessary to consider the location of wetlands in defining future sewer service areas.

767. COMMENT: The rules establish criteria for delineating sewer service area boundaries in consideration of environmentally sensitive areas. The Department should clarify where the rules establish criteria for delineating sewer service area in consideration of potable drinking water supplies, including individual drinking water wells. The emphasis of the policies and recommendations in the rules should be on well water capacity and drinking water quality in determining sewer service area, not on environmental criteria alone for sewer service area delineation, as currently proposed. (51)

RESPONSE: The rule allows WMP agencies to delineate sewer service areas excluding other areas, in consideration of local planning objectives. This could include important aquifer recharge areas. The standards at N.J.A.C. 7:15-5.25(f) are intended to ensure that WMPs reflect sustainable use of water supplies in the State.

768. COMMENT: The criterion set forth in the rule at N.J.A.C. 7:15-5.24 for the delineation of sewer service areas is insufficient to protect the character of the State’s rural and environmentally sensitive areas. While N.J.A.C. 7:15-5.24 attempts to clearly define areas that

are not appropriate for sewer infrastructure, it leaves open opportunities to approve pockets of buildable area that from an environmental perspective may be suitable for sewer, but are not necessarily suitable from a comprehensive planning perspective. There should be a stronger link between the delineation of sewer services and the State's land use policy guide, and the State plan.

In addition to the criteria described at N.J.A.C. 7:15-5.24(b), (c), and (d), the sewer service areas should only be provided to areas not identified as the following State Plan Policy Map planning areas: Fringe Planning Area (PA3), Rural Planning Area (PA4), Rural/Environmentally Sensitive Planning Area (PA4b) and Environmentally Sensitive Planning Areas (PA5).

There should be an exception to the exclusion of the Fringe Planning Area (PA3), the Rural Planning Area (PA4), the Rural/Environmentally Sensitive Planning Area (PA4b) and the Environmentally Sensitive Planning Area (PA5) where the area is included either to allow infill development, or to remove undulations in the sewer service area boundaries as necessary to create a linear boundary that relates to recognizable geographic features as allowed by N.J.A.C. 7:15-5.20(b), and where the State Planning Commission determines that sewer service area delineations in these areas are consistent with the State Plan. (77)

RESPONSE: In *N.J. Builders Assoc. v. Dept. of Environ. Prot., 306 N.J. Super. 93 (App. Div. 1997),* the Appellate Division found that the State Development and Redevelopment Plan has no independent regulatory effect, and thus the Department could not use the Plan for determining regulatory compliance. By extension the Department does not believe that it can rely solely on

the State Development and Redevelopment Plan in determining appropriate sewer service areas absent environmental protection concerns. The Department has been directed by the Legislature to perform specific functions and responsibilities to protect certain of the State's resources such as its water quality and related public health impacts. The Department has and will continue to perform these functions. While the information and regulatory framework the Department has developed in performing its statutory mandate will necessarily affect activities that may have an impact upon those State resources: the Department has not and will not attempt to exercise any function not assigned to it by the Legislature.

The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2a). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A. 58:11A-5) that accomplish this objective. These areawide plans are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5a) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution

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regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5e).

This set of rules does not rely on the State Planning Act nor implement the State Planning Act or the State Development or Redevelopment Plan developed pursuant to that Act. Through the continuing planning process the Department will seek to integrate the SDRP, regional and local land use plans where those plans do not interfere with the restoration and maintenance of water quality. The Department is aware that the State Plan cross acceptance process has been on going for quite some time. Counties have played a central role in the cross acceptance process. Under this rule counties are also designated as the wastewater management planning agencies. The rule at N.J.A.C. 7:15-5.24(a) clearly allows wastewater management planning agencies to exclude otherwise unconstrained areas from sewer service areas as necessary to achieve local planning objectives. Therefore, counties are keenly positioned to reduce friction and improve consistency between the State Plan and wastewater management plans.

This proposal also allows environmentally sensitive areas to be included in sewer service area to allow for infill development, or to remove undulations in the sewer service area boundaries as necessary to create a linear boundary that relates to recognizable geographic features, pursuant to N.J.A.C. 7:15-5.24(b). Finally, N.J.A.C. 7:15-5.24(h) also allows sewer service area in environmentally sensitive areas to support center based development when endorsed by the State Planning Commission provided that: 1) the area to be included is not critical to a local population of threatened or endangered species the loss of which would not jeopardize the recovery potential of the specie in New Jersey; 2) the endorsed plan adequately addresses resource

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protection in the environs outside of the center; and 3) an adequate wastewater management alternative has been identified.

N.J.A.C. 7:15-5.24(c)

769. COMMENT: The restriction on extension of sewer service areas in coastal planning areas 3, 4 and 5 is strongly supported. (17)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

770. COMMENT: The proposed rules will require that certain environmentally sensitive areas be avoided or excluded from proposed sewer service areas or other designations that may conflict with regulatory protections afforded those areas under current law or regulation, as well as within specific project amendments or revisions (proposed N.J.AC. 7:15-3.5). There is strong support for this policy. (17)

RESPONSE: The Department acknowledges this comment in support of the rule.

771. COMMENT: It is recommended that the rule be amended to include special areas identified under the CZM rules as areas to be avoided or excluded from sewer service areas, similarly to the other areas under consideration (threatened and endangered species habitat, Natural Heritage Priority Areas, wetlands). (17)

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RESPONSE: The Coastal Zone Management rules describe special areas as areas that are so naturally valuable, important for human use, hazardous, sensitive to impact, or particular in their planning requirements, as to merit focused attention and special management rules. Not all special areas should be excluded from sewer service areas. Examples of special areas where sewer service may be appropriate are Public open space, which includes parks; Special hazard areas, which include contaminated sites; Special urban areas, which are distressed urban areas; and the Hudson River waterfront area and Atlantic City, which are densely developed areas. In accordance with N.J.A.C. 7:15-5.24, the Department has restricted sewer service in the most sensitive special areas that are readily mapped, as noted by the commenter, as well as in Beaches, Dunes and Coastal high hazard areas. The listing of these specific areas does not preclude the wastewater management planning agency from excluding additional areas from sewer service based on local planning objectives, the lack of wastewater treatment capacity or other environmental concerns, including, but not limited to, source water protection. In addition, any specific regulated development will be required to meet all applicable Coastal Zone Management rules. Accordingly, the Department does not concur that all special areas should be listed as areas to be avoided or excluded from sewer service areas.

772. COMMENT: Plans and proposals subject to the proposed WQMP amendments, in addition to being compliant with specific rules and policies in N.J.A.C. 7:7E, will need to demonstrate compliance with what is commonly referred to as the “Section 10 Findings,” which embody some of CAFRA’s regional objectives. Some of these requirements, which are also specifically in the CZM rules, may require other areas to be protected as exclusion areas (e.g.

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ground water recharge areas might need to be protected to meet the requirement that the plan demonstrate no significant harm to the regenerative capacity of coastal aquifers). (17)

RESPONSE: Section 10 of CAFRA (N.J.S.A. 13:19-10) requires that the Department make positive findings prior to issuance of a CAFRA permit. Among the issues addressed in this section of CAFRA are air and water quality; surface and ground water supply; natural functioning of plants and animals; public health, safety and welfare; unique, historic and scenic areas. The findings of Section 10 have been incorporated into the Coastal Zone Management rules at N.J.A.C. 7:7E-1.5(a). The WQMP rules specify at N.J.A.C. 7:15-3.6 that the Department's Coastal Zone Management rules provide the basic policy direction for WQM planning in New Jersey's coastal zone. Accordingly, the findings referred to by the commenter, along with the remainder of the Coastal Zone Management rules, are already considered in WMP development. In addition, these findings are specifically required prior to the issuance of a CAFRA permit for a proposed development.

773. COMMENT: Proposed N.J.A.C. 7:15-5.24(c)4 prohibits delineation of sewer service in the Coastal Fringe Planning Areas, Coastal Rural Planning Areas and Coastal Environmentally Sensitive Planning Areas. However, the basis document states that the "[r]ules on Coastal Zone Management at N.J.A.C. 7:7E-5B.2(d) through (f), encourage center based development and low intensity development in each of these planning areas." Subsequent statements (and the basis for provision of N.J.A.C. 7:15-5.24(c)) then contradict this statement: "The extension of public sewers into these planning areas is inconsistent with the policy direction included in the Rules on Coastal Zone Management and therefore designation of sewer service area in these planning

areas, where sewers do not already exist, is prohibited in these rules." The Department must reconcile these statements and modify N.J.A.C. 7:15-5.24(c) to support the inclusion of center based development in sewer service areas. (18, 42, 44, 45, 61)

RESPONSE: The Department does not view the policy direction for designation of sewer service area in certain Coastal Planning Areas as inconsistent with center based development. The descriptions and policy objectives for the Coastal Planning Areas are set forth in the Coastal Zone Management rules at N.J.A.C. 7:7E-5B.2. For purposes of determining impervious cover limits and vegetative cover requirements in the CAFRA area, pursuant to N.J.A.C. 7:7E-5B.4 and 5B.5, the Department determines whether a site is located in a CAFRA center, CAFRA core, CAFRA node, coastal center, or a Coastal Planning Area. Although various portions of a site may be in more than one of these areas, the rules do not contemplate overlap of the areas. Accordingly, although a site may be surrounded by a Coastal Environmentally Sensitive Planning Area, in which the extension of public sewers is inconsistent with policy objectives, the site may be located within a CAFRA center, where sewers are acceptable.

N.J.A.C. 7:15-5.24(e)

774. COMMENT: Proposed N.J.A.C. 7:15-5.24(e) provides that an applicant for a WQMP amendment including WMPs, WMP updates and site specific amendments may submit data to rebut the presumption that the environmental map data from N.J.A.C. 7:15-5.24(b) is correct. The Department should not limit this rebuttal to only the amendment process, as that is a very cumbersome and time consuming process. (18, 42, 44, 45, 61)

RESPONSE: The Department assumes the commenter means that, if the assumption of the presence of habitat is successfully rebutted, that this would carry forward to other uses of the Landscape Maps, for example in permitting. The Department expects that new information, such as that generated through a HSD that successfully rebuts the presumption, would be reflected in revised Landscape Maps, as they are periodically updated, and in other permit decisions for the same site.

N.J.A.C. 7:15-5.24(f)

775. COMMENT: N.J.A.C. 7:15-5.24(f) refers to N.J.AC 7:15-5.24(d) which requires that special coastal restricted areas be excluded from the extension of new sewer service. It is unclear why N.J.A.C. 7:15-5.24(f) then requires a formal amendment or revision when those areas are excluded in the mapping of sewer service areas. (22, 76)

RESPONSE: N.J.AC 7:15-5.24(d) identifies additional areas that must initially be excluded from the sewer service area. Where these areas have been excluded from sewer service by virtue of an EPA grant condition or narrative language in an existing Water Quality Management Plan, N.J.A.C. 7:15-5.24(f) specifies the means by which such areas could be added to the sewer service area. For example, if EPA makes a grant condition determination which corrects the mapping relied upon to identify the excluded area such that it is appropriate to include it or waives the prohibition on extending sewer service, then this action is sufficient to allow inclusion in the sewer service area, provided the exclusion was based on a narrative description in the WQMP/WMP only. If the exclusion was reflected in the sewer service area mapping, then

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an amendment or revision, whichever applies given the nature of the area in question, is required to effect the change.

776. COMMENT: The rules should provide that if the only reason for exclusion is environmental conditions, that are proven to be in error, then the WQMP should automatically be amended. In case of map errors, the Department should ensure that the revision process is simpler than the amendment process; applicants should not be subject to the same prolonged period of review. (54)

777. COMMENT: Proposed N.J.A.C. 7:15-5.24(f) provides how the specially restricted areas of N.J.A.C. 7:15-5.24(d) may be added to the sewer service area. While areas that are excluded by narrative criteria need only to submit the specified information at N.J.A.C. 7:15-5.24(f)1 and 2, areas that are excluded by mapping must undergo a formal amendment or revision process to the "wastewater management plan and areawide WQM plan." Rather than require this time-consuming and unwieldy formal amendment or revision process, the Department should simplify the sewer service delineation process. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 776 AND 777: The rule provides at N.J.A.C. 7:15-5.24(f) that where an area is excluded from sewer service due to a grant condition and relief from the grant condition is granted by EPA, that area can be included within the sewer service area upon submission of proof of the relief. N.J.A.C. 7:15-5.24(f) further provides that beaches, dunes and coastal high hazard areas can be included in a sewer service area upon receipt of a CAFRA permit issued by the Department for a specific site and use approved under the Rules on Coastal

Zone Management, N.J.A.C. 7:7E. Beyond these circumstances, errors in data must be demonstrated and subject to the amendment process in order to provide the opportunity for public input with respect to the information submitted in support of an error in mapping the resource.

778. COMMENT: The Department should remove the separate grant condition process. The Department does not need a separate EPA 201 grant condition, but rather a blanket agreement with EPA. (54)

RESPONSE: The Department has no authority to eliminate the grant condition provisions. This is a contractual agreement between the EPA and the grant recipients and EPA has their own procedures for determining if mapping of the covered environmentally sensitive areas was inaccurate and when waivers should be granted.

N.J.A.C. 7:15-5.24(g)

779. COMMENT: N.J.A.C. 7:15-5.24(g) provides a loophole allowing infill development in environmentally sensitive areas. This large loophole needs to be addressed. Could the wetlands rule or the C1 buffer stormwater rules be waived for infill? (86)

RESPONSE: The definition of infill development in the rule limits infill development to that which would generate less than 2,000 gallons per day of wastewater flow in an area which already has infrastructure, therefore the impacts should be de minimus. Additionally, any other Department rules regulating environmentally sensitive areas would continue to apply.

780. COMMENT: What does "not critical" to threatened and endangered species mean at N.J.A.C. 7:15-5.24(g)? There is no scientific standard or criteria to explain what the term "not critical" means with relationship to threatened and endangered species. This seems like a huge loophole in the threatened and endangered species protections because there is no biological explanation of what "not critical" means. There should either be a definition of the term "not critical" or this loophole should be eliminated, preferably the latter. (86)

781. COMMENT: N.J.A.C. 7:15-5.24(g) allows sewer service in environmentally sensitive areas that are not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery of the species in the State. This subsection is strongly opposed. The loss of any endangered or threatened species should be avoided and data on endangered and threatened species is not comprehensive enough to enable Department staff to make such decisions. (22, 76)

RESPONSE TO COMMENTS 780 AND 781: The rule language at N.J.A.C. 7:15-5.24(g) allows for the inclusion of environmentally sensitive areas that would otherwise not be included in the sewer service area, either to allow infill development, or to remove undulations in the sewer service area boundary only if the loss of the area would not decrease the likelihood of the survival or recovery of the species in the State. As such, boundary modifications that would encompass an area critical to the survival of a known population of an endangered or threatened species cannot be approved. For example, if the boundary modification were to encompass a known nest site for an endangered species, then the development of that sewer service area

would likely eliminate that breeding habitat. Facilitating the destruction of habitat known to be critical to the survival of a listed species through the extension of sewer service is inconsistent with the Department's environmental protection mandate. Also note that this provision does not allow the take of an individual species as implied by the commenter but rather applies to the extension of sewer into an area of habitat. The take of an individual species is not regulated pursuant to this rule.

782. COMMENT: At N.J.A.C. 7:15-5.24(g), the Department is proposing that sewer service areas may include environmentally sensitive areas under very limited conditions. It is recommended that those conditions be expanded to include: areas not otherwise included as infill development where the collection system infrastructure has been installed but not yet connected; areas where federal or State agency funding has been or will be secured to install collection system infrastructure both prior to and after the effective date of these rules; developed areas, not otherwise included as infill or contiguous development, which utilize septic systems that would benefit environmentally from expansion of the sewer service area by eliminating a source of pollution; undeveloped or underdeveloped areas which facilitate an orderly and contiguous pattern of development and therefore provide for the cost effective installation of sewer infrastructure; and economic or societal hardship that would result from the withdrawal of previously approved sewer service areas.

Given the potential for hardships that will result from the withdrawal of previously approved sewer service areas, the Department must expand the conditions under which exceptions will be made to provide more flexibility and fairness in its rulemaking. Furthermore, the Department

should commit to defend and hold harmless local levels of government from any litigation that may result from such service withdrawal. (60)

783. COMMENT: N.J.A.C. 7:15-5.24(g) lists conditions under which sewer service areas may include environmentally sensitive areas. One area that is not included is the condition upon which a sewer service area is in need of expanding to address a public health/welfare concern. The proposed rule should be expanded to specifically indicate that sewer service areas may include environmentally sensitive areas where the identification of such area is proposed to correct a deficiency associated with the protection of public health and welfare. For example, many lake communities are in areas with varying degrees of failing septics. These are not necessarily defined as "centers" or likely to have "endorsed plan" status. (88)

RESPONSE TO COMMENTS 782 AND 783: The concept of infill is used with respect to sewer service area delineation to allow minor adjustments that accomplish a more logical, readily identifiable boundary for a sewer service area and with respect to the withdrawal of sewer service area where a wastewater management plan is not up to date. In the latter case, the purpose of the infill provision is to recognize situations where public investment in sewage infrastructure has already been made with the expectation that its cost would be offset by future connections along its immediate route. A significant expansion of circumstances under which sewer service area delineation can be adjusted or to forgo sewer service area withdrawal, as suggested in the comment, would circumvent the purpose of the requirements related to sewer service delineation and withdrawal. Therefore, the Department has determined that the requested change is not consistent with achieving the objectives of the WQPA. With regard to the issue of

litigation, the Department does not foresee counties being a target of litigation over WMP development, as several counties have already developed WMPs. With regard to the comment about public health and safety, the rule at N.J.A.C. 7:15-3.5(b)4ix includes a revision category to address failing septic systems.

784. COMMENT: The proposed rules focus on revision to the sewer service area, especially in removing it from areas that meet defined environmental criteria in the rules. The Department should consider a requirement to demonstrate the possibility of sewer service extension in areas that would otherwise be served by septic (i.e., areas to be withdrawn from sewer service based on environmental criteria) if it can be shown that existing land use conditions and existing municipal policies prevent high density development where it is clearly inappropriate. This analysis should also show where areas currently served by septic can potentially connect to sewer service. (51)

785. COMMENT: The provisions of N.J.A.C 7:15-5.24(g)1 may result in significant disputes between the WQM planning agencies and the Department in determining whether to include within a sewer service area, tracts of land which contain areas of environmental sensitivity if their inclusion would eliminate undulations in the sewer service area boundary. (84)

786. COMMENT: With respect to the smoothing of areas along property lines, logic needs to be applied. What is the definition? Will it be used to enable development to stay within the sewer service area? Are there maximum dimensions that ought not to be “smoothed”? (54)

RESPONSE TO COMMENTS 784 THROUGH 786: The Department acknowledges that, in situations where judgment must be used, the potential for disagreement exists. However, the Department purposely included flexibility in this provision because it would be impossible to characterize all of the circumstances that might warrant a smoothing of the sewer service area in order to achieve the objective of a logical and identifiable sewer service area boundary that also excludes environmentally critical areas from the type of wastewater management that is associated with development densities incompatible with their protection. In general, the Department expects that a "smoothed" sewer service area boundary will require an averaging along the boundary line that would include more unconstrained land than environmentally sensitive area within the sewer service area as compared to a similarly smoothed line positioned to avoid all environmentally sensitive areas. Another determining factor could be that once a sewer service boundary line is pushed so far back into a habitat area as to essentially be running predominantly through that habitat, the resulting sewer service area would be unacceptable. However, where an existing lot is small generally an acre or less and predominantly not environmentally sensitive, the Department will allow the sewer service area boundary to snap to the lot line. Similarly, where a reasonable development envelope cannot be achieved without encompassing mostly environmentally sensitive areas in the discretionary smoothing, it would be more appropriate to exclude the entire site from the sewer service area. In any case the Department will not allow smoothing to intrude on any habitat critical to a population of threatened or endangered species, the loss of which would decrease the likelihood of the survival or recovery potential of the species in the State.

787. COMMENT: Basing wastewater service areas on environmental data alone is problematic because it ignores such things as parcel boundaries and sewer service to recreational areas. All parks should not be removed from sewer service areas as there may be existing facilities or future plans to provide facilities. In analyzing sewer service areas with the proposed environmental features removed, it was determined that sewer service area boundaries would bisect parcels in an arbitrary fashion, making it difficult for a landowner to identify which part of the parcel is within, outside of, or eligible for the sewer service areas. It would also remove land that would be eligible for sewer service due to its proximity to a sewer main. Category One stream buffers and wetlands GIS data layers portray only a general estimate of their location so should be used for informational purposes and not removed from sewer service areas. Consideration of environmental features only, at the proposed level of site-specific detail, is best left to site planning and permitting and should not be a requirement of a regional county-wide WMP. The Department should consider expanding the permitting process to incorporate the site-specific controls being sought through the WMP process. (19, 28)

RESPONSE: The data sources identified to be used for WMP development allow for rapid plan development at a level of precision suitable for planning. This does not preclude the use of more accurate or refined information where it is available and at the discretion of the WMP agency. Parcel mapping is widely available and can be useful to provide greater definition, but is not required. However, even if parcel mapping is used, it would not follow that entire parcels should be either included or excluded from sewer service areas. This is because some parcels can encompass large areas that may include environmentally sensitive areas that exceed the "smoothing" threshold. It would be inconsistent with the objective of the rule to allow sewer

service area delineation to be guided by parcel boundaries without regard to location of environmentally sensitive areas within the parcels. On the other hand, as suggested by the commenter, portions of a parcel may be appropriate for inclusion in a sewer service area and should not be excluded simply because environmentally sensitive areas exist within the parcel. Recreational areas are not automatically excluded from sewer service areas. It is recognized that comfort stations and concessions are common in recreational areas and connection to a wastewater treatment facility may be the appropriate choice for wastewater management. Expanding permitting programs would not be a viable option to consider cumulative and secondary impacts, as is possible through water quality management plans as provided under this chapter.

N.J.A.C. 7:15-5.24(h)

788. COMMENT: Proposed N.J.A.C. 7:15-5.24(h) provides for sewer service in environmentally sensitive areas for center-based development under certain conditions. While center-based development is supposed to protect surrounding environmentally sensitive areas, the effect has been to allow increased development in centers while also permitting development and indirectly encouraging development outside of centers. Except in extreme circumstances, no new sewer service areas should be permitted in environmentally sensitive areas. (64)

789. COMMENT: Opposition is expressed to N.J.A.C. 7:15-5.24(h) which allows sewer service extension into environmentally sensitive areas for center based development as an element of an endorsed plan. The background information for this subsection states that the idea behind increased densities in centers is that in exchange for concentration of development in localized

areas, there would be decreased development density in the environs and that such an exchange would occur through the endorsement process. However, there is no guarantee that the endorsement process will have the predicted result. It may be the practice of the current Department Commissioner, but there is no guarantee that it will continue to be the practice of future Commissioners or State Planning Commission. (22, 76)

790. COMMENT: Aside from and in addition to the legal framework, the State Plan has serious flaws in policies and mapping that make the SDRP an inappropriate technical basis for the WQMP rules. (86)

RESPONSE TO COMMENTS 788 THROUGH 790: The State Plan does not serve as a technical basis for this proposal, and there is no reference to the State Plan Policy Map with regard to the identification of appropriate sewer service areas. However, the goals and policies of the State Plan are generally consistent with this proposal, including, but not limited to: Goal #2: Conserve the State's Natural Resources and Systems; Goal #4: Protect the Environment, Prevent and Clean Up Pollution; and the Statewide Policies for Water Resources (#11), Open Lands and Natural Systems (#12), and Coastal Resources (#16). Where these resources have been properly considered in developing the State Plan Policy Map, the Department expects consistency between wastewater management plans and the SDRP will be achieved.

The Department agrees that in some instances in the past Center Designations via the SDRP have been unsuccessful in meeting the goals of center-based development as well as protecting the surrounding environs. However, the Department believes that the environmental benefits of

center-based development, in conjunction with comprehensive environs protections, are preferable to destructive, sprawling development across the State and should be allowed.

The Plan Endorsement Guidelines adopted by the State Planning Commission at its November 17, 2007 meeting, are an improvement on past attempts to encourage center-based development coupled with environs protections. These Guidelines, and the Department's involvement in the Plan Endorsement process through its representation on the State Planning Commission, do not allow for sewer service areas, Center Designations, or growth areas in environmentally sensitive areas without sufficient, comprehensive resource protections at the municipal, county, or regional scale.

The Department acknowledges that it possesses only one of seventeen votes on the State Planning Commission and shares the commenters' concerns that there is no guarantee that it will continue that to be the practice of future Commissioners or State Planning Commission to honor these agreements. Therefore, the Department included qualifying language at N.J.A.C. 7:15-5.24(h) that the Department must determine that: 1) environmentally sensitive areas included in the sewer service area are not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery of the species in the State; 2) the endorsed plan adequately addresses the protection of environmentally sensitive areas located outside of the designated sewer service area; and 3) the wastewater management planning agency has identified an adequate wastewater management alternative in accordance with N.J.A.C. 7:15-5.25(a) through (c). These requirements eliminate the presumption that an endorsed plan that does not advance an overall environmental benefit must necessarily be

supported by a wastewater management plan. Sewer service areas will only be allowed, environmentally sensitive areas, when it will provide net-positive protections to the State's environmental resources.

791. COMMENT: The removal of references to the State Plan, with the exception of N.J.A.C. 7:15-5.24(h), which provides exceptions to restrictions on sewer service areas in environmentally sensitive areas for "center based development," is applauded. (49)

RESPONSE: The Department acknowledges the commenter's support of this provision.

792. COMMENT: A positive of this rule proposal is that it removes any reference to the State Plan except that the loosely defined link to center-based development is a loophole that could lead to overdevelopment of centers. That needs to be refined a bit. (59)

793. COMMENT: N.J.A.C. 7:15-5.24(h) provides a large loophole that allows State Plan centers and endorsed plans to destroy environmentally sensitive areas. Everything designated under the State Plan, the criteria and legal framework that the State Plan operates under is weaker than the Clean Water Act. The protections put in place under the Clean Water Act can not be weakened. The Clean Water Act does not allow other entities to overrule the Department regulatory determinations, therefore, allowing the State Planning Commission to designate areas as centers, or allowing the State Planning Commission to overrule the Department's authority, is a violation of the Clean Water Act. N.J.A.C. 7:15-5.24(h) should be eliminated with respect to State Plan centers and endorsed plans. (86)

794. COMMENT: There is concern and strong opposition to any reliance of the Water Quality Management Planning rules on the State Plan. The WQMP rules are proposed pursuant to the Water Quality Planning Act (WQPA) and the Water Pollution Control Act (WPCA), not the State Planning Act. Enactment of the WQPA and WPCA were legal conditions of New Jersey receiving formal delegation by EPA of federal Clean Water Act water quality standards, planning and permitting programs. The WQPA and 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 to comply with the procedural and substantive protections of state and federal clean water laws in adopting the State Plan. (86)

RESPONSE TO COMMENTS 792 THORUGH 794: The Department agrees with the commenter that it is operating under different statutory authority than the State Planning Commission. The rules do not tie wastewater management plans to the State Development and Redevelopment Plan (SDRP) directly, and do not include any reference to the State Plan Policy Map. The rules establish sewer service areas based on environmental and capacity constraints. The Department believes that these constraints should be acknowledged by the State Planning Commission in the development of the SDRP. Where it has done so, the SDRP and wastewater management plans should be in general agreement.

The rules do allow wastewater management plans to support center based development, where that center based development has gone through the more detailed analysis of the Plan Endorsement process. The Department included the exception in sewer service area delineation

for municipalities that have successfully received Plan Endorsement from the State Planning Commission, because the Department may be able to obtain environmental protections outside of the approved centers beyond those of these adopted regulations, resulting in further, comprehensive, protections for the State's water quality and environmental resources.

It should be noted that an Endorsed Plan allows consideration of certain environmental features for inclusion in a sewer service area in a wastewater management plan, but does not automatically entitle the extension of sewer service area in environmentally sensitive areas. The Department must make the findings at N.J.A.C. 7:15-5.24(h) that the plan does not jeopardize a local threatened or endangered species population or the recovery potential of the specie(s), that the plan accomplishes adequate protection of other sensitive areas outside of the center boundary and that a wastewater management alternative exists with sufficient capacity to support the center. At no time, are adopted regulatory standards administered by the Department weakened or altered, due to a Center Designation or Plan Endorsement by the State Planning Commission. The statutory and regulatory standards administered by the Department's programs – including, but not limited to, those of the Water Quality Planning Act, Water Pollution Control Act, Freshwater Wetlands Act, Flood Hazard Area Control Act, and the Surface Water Quality Standards– remain in effect for all regulated activities, regardless of their location within a sewer service area, Designated Center, or Plan Endorsement community. The inclusion of a regulated resource, or regulated activity, within any of these designated areas, does not result in a lesser, or altered, regulatory review.

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795. COMMENT: With regard to the relationship between the State Plan and these rules, the State Plan did not incorporate the recommended data layers from the Department in the last round of assessment. Not only were these data layers not incorporated, but the Department's recommended data layers for environmental sensitivity were in addition to those that were in the definition of environmentally sensitive areas in the proposed rule, and the data layers were expressly rejected by many of the municipalities and counties, along with the State Planning Commission, which affirmatively rejected them. So there was an attempt by the Department to work with the State Plan to insure that the State Plan protected environmental values and that effort was rebuffed.

It is totally appropriate for this set of rules to drive the issue of assuring the protection of water resources and how land is used, dictating the terms, conditions and standards that the towns, counties and State Planning Commission have to meet in terms of their land use planning functions. (86)

RESPONSE: The Department acknowledges and appreciates the commenter's support.

796. COMMENT: For the same reason that the rule incorporates the landscape data as one data layer of environmentally sensitive area, upon adoption the Department should delete the section that allows the plan endorsement process to overrule the environmentally sensitive areas where sewer service would be limited otherwise. Center based growth and plan endorsement should not overrule environmentally sensitive areas. It seems that the rule is trying to offer a

compromise in how it gets approached to the State Plan. It would be helpful for the State Plan to proceed on its own as authorized under the statute. (86)

RESPONSE: This rule describes environmental and capacity constraints that must be considered in the delineation of sewer service areas. In areas where sewer service is not provided by the rule, the rule defaults to discharges to ground water less than 2,000 gallons per day (septic systems) as the wastewater management alternative and establishes densities for these discharges based on the dilution available within a HUC 11 watershed so as not to degrade ground water quality. The Department believes that this standard is adequate to protect water quality, however, it may not be sufficient to accomplish other environmental protection objectives, such as threatened and endangered species habitat protection. The Plan Endorsement process offers an opportunity to concentrate the allowable development in discreet centers, while decreasing the density of development in sensitive environmental areas outside of the center. This affords an opportunity to achieve environmental protection objectives beyond water quality. The Department will not extend sewer service areas to centers that do not accomplish a greater environmental good as required by N.J.A.C. 7:15-5.24(h).

797. COMMENT: The rule is proposed in accordance and pursuant to not just the Water Quality Planning Act which talks about planning, but also to the Water Pollution Control Act, which is the State's delegated authority to meet the objectives and goals of the Clean Water Act. This is important because those standards trump land use decisions made under the Municipal Land Use Law and what the State Planning Commission can do under the State Planning Act. These subordinate entities have complied with the Department's standards, so the Department's

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standards under this rule serve as constraints for the planning process and are enforced through the Department's various planning and permitting programs. This is very important, but is only touched upon and the public needs to understand that clean water legally and obviously importantly come first. (86)

798. COMMENT: With the exception at proposed N.J.A.C. 7:15-5.24(h) which provides exceptions to restrictions on sewer service areas in environmentally sensitive areas for "center based development," the rules removing any reference to the State Plan, is supported These exceptions set forth in proposed N.J.A.C. 7:15-5.24(h) are unacceptable and must be removed from the proposal. An important part of the proposed rules are the restrictions it places on the delineation of sewer service areas in environmentally sensitive areas. The rules state that sewer service may only be provided to areas that are not identified as "environmentally sensitive areas." The rules define "environmentally sensitive areas" to be any contiguous area of 25 acres or larger consisting of any of the following features, either alone or in combination: areas mapped through the Department's Landscape Project as endangered or threatened wildlife species habitat; areas mapped as a Natural Heritage Priority Site and, thus containing rare plant or animal species; special water resource protection areas along Category One waters and their tributaries as established under the Stormwater Management Rules; and, wetlands as mapped under the Wetlands Act of 1970 and the Freshwater Wetlands Protection Act.

Of great concern are the exceptions provided to this important provision. Specifically, this subsection provides that a sewer service area may include environmentally sensitive areas "provided it is designed to accommodate center based development" and is an element of an

endorsed plan approved by the State Planning Commission where: The Department determines that the environmentally sensitive areas are not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery of the species in the State; the Department has determined that the endorsed plan adequately addresses the protection of environmentally sensitive areas located outside of the designated sewer service area; and the wastewater management planning agency has identified an adequate wastewater management alternative in accordance with N.J.A.C. 7:15-5.25(a) through (c), which sets forth the evaluation criteria for wastewater management plans and amendments.

Such an exception is fundamentally wrong for several reasons. To begin with, the last two of the above-stated three "criteria" that must be met in order for a sewer service area to be eligible for this exception are entirely irrelevant for the simple reason that these requirements must be met by an applicant anyway. Regardless of whether "environmentally sensitive areas" are located outside of the designated sewer service areas, a plan endorsement applicant must always adequately address such areas or plan endorsement cannot be acquired.

Irrespective of the status of environmentally sensitive areas as determined in N.J.A.C. 7:15-5.24 of the proposed rules, all applicants must meet the evaluation criteria set forth in N.J.A.C. 7:15-5.25. In fact, that provision begins by stating that "the Department will only adopt a wastewater management plan, wastewater management plan update or wastewater management plan amendment if the applicant demonstrates compliance with the requirements in this section..."

The first criteria is more problematic in that it completely disregards important regulatory protections established for wetlands and Category One waters. At the same time, it creates a new standard for allowing development in areas that are habitat for threatened and endangered species and vastly lowers the bar for the protection of such species. Further, it creates this lesser standard as a reward for those who participate in the plan endorsement process, a notion that is completely at odds with the concepts of smart growth and sound planning. Thus, in addition to its total disregard for the protection of wetlands and Category One waters, this provision allows the extension of sewer service, and thus, more concentrated development, in areas where endangered and threatened species apparently exist, but for which the Department has made a determination that this habitat is "not critical" to a population of endangered or threatened species because the loss of this habitat and, by implication, the particular population of species at issue, would not "decrease the likelihood of the survival or recovery of the species in the State." How, in fact, is the Department going to make such a determination? Does the Department possess a reasonably accurate count of the number of each endangered and threatened species population that is remaining as well as the carrying capacity associated with each? Has the Department been keeping track of these numbers as they inevitably decrease with each development permit that is issued in threatened and endangered habitat?

The Department does not possess a reasonably accurate count of the number of each endangered and threatened species population that is remaining as well as the carrying capacity associated with each and therefore, can never render a determination as to whether the loss of a particular habitat or species population will "decrease the likelihood of the survival or recovery of the species in the State." Accordingly, this provision sets up a standard that can never be met and it

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presents that standard in such a way that the Department can never definitively say "no" to an applicant that has undergone the plan endorsement process and wants to extend sewer service areas into environmentally sensitive areas. (17, 49)

799. COMMENT: There is strong objection to N.J.A.C. 7:15-5.24(h) which allows sewer service areas in environmentally sensitive areas for center-based development that is part of an endorsed plan approved by the State Planning Commission. This provision undermines the ability of the WQMP process to meet its goals and mandates. The locations of centers designated in the State Plan are often places where some development already exists and that were historically not located on the basis of avoiding of environmental impacts. In fact, these previously developed areas often are located in places where there were environmentally sensitive resources. Some of these already built (but still not overbuilt) areas are located where high value resources are still intact because the hamlet or small town presently has low density and little traffic (such as Category One stream), but without the low density nature of the existing development those resources may not be able to co-exist. To assume that center-based development will by its nature give more back in benefit than it costs in degradation is a wrong assumption. It could just as well be that the "sins of the past" (the location of human development in environmentally sensitive areas) will be now repeated and compounded further due to this provision. Some of these environmentally sensitive areas may not at present be able to support endangered and threatened species, but further development will forever remove any chance for such restoration. The requirement that the areas outside the designated sewer service area are in some way protected is not enough—the area will erode regardless due to proximity to

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the activities inside the service area that are given up. This subsection should be deleted. (10, 80)

800. COMMENT: Allowing municipalities that engage in the plan endorsement process to meet a lesser standard than other applicants is unacceptable. It should be of the highest priority that, as part of New Jersey's "smart growth" initiative, each and every entity that goes through the plan endorsement process is aware of the environmental regulations that apply in their planning area, understands the reason behind these regulations and that they plan with the intent to comply with these regulations. Under no circumstances should the regulations be lessened or weakened as a means of enticing municipalities to participate, or rewarding them for their participation in the plan endorsement process. The very purpose behind the restriction of sewer service areas in environmentally sensitive areas is to ensure that development occurs in areas where development is most appropriate and sustainable and that it does not occur where it does not belong. These and other similar regulatory requirements not only expressly link decisions about existing and planned growth to natural resource carrying capacity and the analysis of secondary or cumulative impacts, but also define specific geographic limits on where centers and other growth areas should be located taking into consideration sensitive environmental resources. To lessen these standards for entities that engage in the alleged "smart growth" based plan endorsement process goes against everything that the planning process is supposed to achieve. (17, 49)

801. COMMENT: At N.J.A.C. 7:15-5.24(h),there are serious concerns regarding the reduced protection of environmentally sensitive areas for center based development so long as that development is "an element of an endorsed plan approved by the State Planning Commission."

It is particularly disturbing that the proposed WQMP rules seek to establish a lesser standard of protection for municipalities that have participated in the plan endorsement process by allowing such center based developments to be located in an environmentally sensitive area if "the Department determines that the environmentally sensitive areas included in the sewer service area are not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery of the species in the State." The language that would allow center based development to be located in environmentally sensitive areas should be deleted from the final rules. (82)

802. COMMENT: The loophole that would allow expansion of sewers in environmentally sensitive areas that have been designated for growth under the State Plan's Plan Endorsement Procedures would undermine the protection of New Jersey's waters. The State Planning Commission does not have the expertise or concern necessary when it comes to protecting New Jersey's waters and this procedure will serve as a rationalization to allow for more development in environmentally sensitive areas. The State Plan itself does not look at water quality, water quantity, water supply intakes, or well-head protection areas. Under Plan Endorsement, sewers could be extended outside of centers for development of the environs of environmentally sensitive areas, contrary to the State Development and Redevelopment Plan Rural Wastewater Policy 22. (65, 79)

803. COMMENT: There is a back-door loophole into this whole process where at one end sewer service areas are being pulled back, trying to get the counties to do better planning, but then if Plan Endorsement is requested from the State Planning Commission, new sewer service

areas can be created or old sewer service areas reinstated through that process. The State Plan is disconnected from water and environmental sensitivity and this is a loophole and back-door way to allow certain people to get certain developments in certain places. It is not just centers in Endorsed Plans that can get sewers, but any part of a town or county. The State Planning Rural Zone Wastewater Policy states that sewers should be confined to centers. There are those in the Department that think sewers can go into other areas. (65, 79)

RESPONSE TO COMMENTS 797 THROUGH 803: One of the primary purposes of this rule, in addition to the protection of water quality, is to eliminate conflicts between sewer service areas and environmentally sensitive resources. Allowing the extension of sanitary sewers into these areas not only encourages the development of resources the Department is charged with protecting but supports development at a density that is wholly inconsistent with the protection of those resources. The elimination of these conflicts is central to the purpose of the continuing planning process required by the Water Quality Planning Act, which requires integration of federal, State, regional and local land use plans.

However, the Department cannot deny all wastewater management alternatives to these areas, as doing so would likely constitute a taking of property under the Fifth Amendment of the United States Constitution. Under this rule areas where sewer service is inconsistent with environmental sensitivity are designated for discharges to ground water less than 2,000 gallons per day (septic systems). The rule then requires that septic system density in these areas not exceed the dilution capacity of the HUC 11 watershed. This density is more in keeping with the protection of these resources, but because zoning authority in New Jersey is reserved to its municipalities under the

Municipal Land Use Law, may not achieve the best environmental result. The Plan Endorsement process affords an opportunity to negotiate with municipalities to concentrate the allowable septic development in a discreet center supported by centralized wastewater, in exchange for reductions in allowable density and other environmental protections in the environs outside of the center, such as through a transfer of development rights program.

The endorsement of a plan by the State Planning Commission does not automatically require that the wastewater management plan be aligned to support that plan. The Department agrees with the commenters that sewer service areas should be located in the least environmentally sensitive areas and should avoid these areas all together when possible. The rule at N.J.A.C. 7:15-5.24(h) requires the Department to make independent findings that: 1) the environmentally sensitive areas to be included in the sewer service area are not critical to a population of threatened or endangered species the loss of which would decrease the survival or recovery potential of the species in the State; 2) that the endorsed plan adequately addresses the protection of environmentally sensitive areas located outside of the designated sewer service area; and 3) that the wastewater management planning agency has identified an adequate wastewater management alternative. In general, it would make sense that an affirmative vote by the Department representative on the State Planning Commission would be seen as an indication that the Department is satisfied that the endorsed plan has met these requirements.

One commenter questioned how the Department will make the determination required concerning threatened and endangered species. As specified in the rule, threatened and endangered species habitats, for the purposes of establishing sewer service areas are determined

on the basis of the Department's Landscape Project. The Landscape Project defines suitable habitat based on modeling that intersects confirmed threatened and endangered species sightings, with the habitat requirements, and known behavior of the particular species sighted. The Landscape Project identifies areas that provide potential habitat for a particular species based on these requirements. In determining whether an area proposed for inclusion in a sewer service area is critical to critical to a population of threatened or endangered species, the loss of which would decrease the survival or recovery potential of the species in the State, a more detailed assessment of the habitat and sighting information will be required. An area that provides actual reproductive habitat for a threatened and endangered specie, such as a breeding pond a nest site, or an area that provides habitat during a critical stage in the life cycle of a threatened or endangered specie, such as den sites or hibernacula would meet this test. This is not intended to be an exhaustive list, but is intended to give the commenter some idea of what criteria will be applied by the Department. The Department does not anticipate requiring an accurate population count or carrying capacity of the landscape for each listed specie in making this determination. The Department acknowledges that the septic density allowed under this rule could result in a pattern of development that would be inconsistent with the protection of threatened and endangered species, particularly those that require large contiguous habitats and/or are particularly sensitive to human disturbance. The rule would allow sewer service area to be established in a portion of threatened and endangered species habitat as identified by the Landscape Project in exchange for a pattern of development and other special management considerations should they be required, in areas outside of that sewer service area that will ensure the viability of the remaining habitat to support threatened and endangered species.

It must also be understood, that at no time are adopted regulatory standards administered by the Department weakened or altered, due to a Center Designation or Plan Endorsement by the State Planning Commission which is supported by a sewer service area designation. The statutory and regulatory standards administered by the Department's programs including, but not limited to, those for Category One waters, and wetlands, remain in effect for all regulated activities, regardless of their location within a sewer service area, Designated Center, or Plan Endorsement community. The inclusion of a regulated resource, or regulated activity, within any of these designated areas, does not result in a lesser, or altered, regulatory review.

The Department does not believe that allowing sewer service areas in environmental sensitive areas, in limited circumstances to support center based development as part of an endorsed plan, subject to review and approval by the Department, is a lesser standard of protection. The Plan Endorsement process requires a wide range of resource protections, where appropriate, and allows the Department to obtain resource protections, as described above, that supplement direct regulation and resulting in further, comprehensive, protections for the State's environmental resources.

The Department also agrees with the commenter's statement that sewer service areas should generally be designated only in areas that support the State Plan, including limiting the designation of rural areas as sewer service areas. However, the rule does not specifically require that sewer service areas be excluded from areas for reasons other than environmental protection. The rule is clear in stating that an area is not entitled to sewer service simply because it is not environmentally sensitive, and that other local and regional planning objectives must be

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considered in delineating sewer service areas. The Department anticipates that consistency with the SDRP can and will be achieved by working with the Office of Smart Growth, the counties, and the municipalities in the development of wastewater management plans.

804. COMMENT: There needs to be better coordination with the State planning process. The desire for coordination at all levels of government as mentioned in the rule proposal is understood, but this is the same responsibility that the State Planning Commission has. There are significant concerns that land use changes are being mandated through this rule proposal that would be inappropriate. The Department should not be requiring changes to zoning or other ordinances, which are inherent powers of local governments. Changes to zoning or other ordinances should be done through the State Planning processes where there can be agreement between all parties. This rule proposal appears to outline a duplicate planning process, but is being made without other agencies at the table. There is a desire for the new rules to work with the State Planning Commission in some ways and support for the one provision that permits sewer service in center based developments as approved for plan endorsement. Plan endorsement itself requires an extensive amount of data collection analysis and agreement with all participants including the Department. (55)

RESPONSE: The Department believes that the appropriate level of coordination with the State Planning Commission, as it relates to water quality concerns associated with wastewater management plans, is included in this proposal.

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The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2a). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A. 58:11A-5) that accomplish this objective. These areawide plans are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5a) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5e). This set of rules does not rely on the State Planning Act nor implement the State Planning Act or the State Development or Redevelopment Plan developed pursuant to that act. Through the continuing planning process the Department will seek to integrate the SDRP, regional and local land use plans where those plans do not interfere with the restoration and maintenance of water quality. However, the Department cannot abdicate its statutory obligation in reliance on those plans where they conflict with the legislated mandate of the Department.

It is the Department's mandate to protect the ecological integrity and natural resources of New Jersey, including water, threatened and endangered species, wetlands and unique and rare assemblages of plants. As such, extension of sewer service areas into areas identified as containing these resources, is not appropriate. These policies are generally consistent with the goals and policies of the State Development and Redevelopment Plan. The Department will not designate environmentally sensitive areas, that it is mandated to protect, as sewer service areas. Doing so would be contrary to the intent of the continuing planning process, as the provision of sewer service would encourage and in cases where infrastructure has been built with public funding, subsidize the destruction of environmental resources to the benefit of private development. The Department will allow the designation of sewer service areas in environmentally sensitive areas only where a comprehensive land use plan has been prepared through the Plan Endorsement process that results in center based development that affords greater protection of environmentally sensitive areas outside of the center.

Further, the Department cannot allow the designation of sewer service areas where the future development of that sewer service area will exceed the reasonable capacity to treat the wastewater generated without causing water quality degradation. Both of these constraints should be recognized in regional and local land use plans and by the SDRP. Where local zoning would permit future development at such a density that the wastewater generated would exceed the capacity to treat it without causing water quality degradation, then that development would be inconsistent with the water quality management planning and a change in zoning would be indicated as necessary.

805. COMMENT: The Department should explain the relationship of Plan Endorsement under the State Planning rules to WMP adoption and clarify how unresolved Plan Endorsement issues could delay the adoption of WMPs, potentially halting development by rescinding sewer service area. Also, the Plan Endorsement process should be made clear to counties and municipalities prior to adoption of these rules so that the rules are coincident with respect to sewer service and planning areas. (51)

RESPONSE: This rule seeks to reduce conflicts between sensitive environmental features that the Department is mandated to protect and sewer service areas. To that end the rule generally excludes contiguous areas of environmentally sensitive features encompassing 25 or more acres from designated sewer service areas. The Department expects that existing adopted sewer service areas will have to be adjusted to accomplish this requirement. The Department will allow environmentally sensitive areas to be included in sewer service areas in places where conflict is unavoidable, provided that the sewer service area supports center based development as part of a comprehensive land use plan that results in additional protection of environmentally sensitive features located outside of the center. The Plan Endorsement process provides an existing framework to accomplish the comprehensive planning necessary to achieve this result. Depending on how slowly the Plan Endorsement process proceeds, it may be necessary to adopt an interim wastewater management plan and amend that plan once Plan Endorsement has been achieved. The Department will work closely with counties and municipalities to determine the most efficient course of action where Plan Endorsement has not been achieved.

The Plan Endorsement process is generally coordinated by the Office of Smart Growth (OSG) in the Department of Community Affairs. OSG's web site includes a wealth of information concerning the Plan Endorsement requirements and process at:

http://www.state.nj.us/dca/divisions/osg/plan/pe.html.

806. COMMENT: Plans at all levels, the State Development Plan, Smart Growth, county planning and local planning, must be integrated. If it takes the Department to heighten sensitivity to the water quality aspects of that planning process and to unify and get this planning process on the right track, then go for it. (13)

RESPONSE: The Department acknowledges and appreciates the commenter's support.

807. COMMENT: The Department should clarify its authority in future center designation (consideration of the State Plan and Plan Endorsement process) for existing and proposed centers located in environmentally sensitive areas and its coordinating role in these matters. (51)

RESPONSE: The Department is represented on the State Planning Commission and reviews every Plan Endorsement petition (which is the process within which centers are designated) for consistency with both Department regulatory and planning policies, and the State Plan. Through its role in the plan endorsement/center designation process, the Department works to ensure that appropriate environs protections are included. If the Department doesn't believe adequate protections are in place, it will neither vote in favor of plan endorsement or allow expansion of sewer service into environmentally sensitive areas. Where a proposed center does not conflict

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with environmentally sensitive areas a sewer service area will be established to support that center provided that a wastewater management alternative with adequate capacity to treat the wastewater to be generated by the center is identified. Designation of a center or sewer service area where no reasonable wastewater management alternative with the capacity to treat the projected future wastewater demands of that center or sewer service area would be doomed to fail.

The Department's requirements for approving future sewer service areas in environmentally sensitive areas are part of this rule at N.J.A.C. 7:15-5.24(h). In addition to the above, these requirements are that the proposed sewer service area does not include an area critical to the survival of a population of threatened or endangered species the loss of which would decrease the likelihood of the survival or recovery potential of the species in the State and that the endorsed plan addresses the protection of environmentally sensitive areas located outside of the designated sewer service area.

808. COMMENT: This rule undermines the state planning process rather than providing much needed support for its many policies. Regulation is not a substitute for good planning, nor should it drive growth that is counter to that provided by the SDRP statewide planning process and the Office of Smart Growth. (58)

RESPONSE: The Department notes that the process established by this set of rules is a planning process and not a regulatory process. The Department believes that this rule embodies good

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planning as it relates to both environmental and capacity constraints that will limit the realization of the vision of the State Plan if not properly acknowledged.

The Department is adopting this rule as directed by the New Jersey Water Quality Planning Act (N.J.S.A. 58:11A) and pursuant to the authority and responsibility granted to the Department under the Water Pollution Control Act, (N.J.S.A. 58:10A), and the enabling legislation for the Department of Environmental Protection (N.J.S.A. 13:1D) among others. The Water Quality Planning Act provided the mechanism for the State of New Jersey to comply with the requirements of the federal Clean Water Act (33 U.S.C. 1251 et seq.). The Legislative objective of Water Quality Planning Act is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State (N.J.S.A. 58:11A-2a). The Act requires the Department to establish a continuing planning process that integrates federal, State, regional and local land use plans in the preparation of areawide Water Quality Management Plans (N.J.S.A. 58:11A-5) that accomplish this objective. These areawide plans are required to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the designated area (N.J.S.A. 58:11A-5a) and to establish a regulatory program to provide for the control and treatment of all point and nonpoint sources of pollution regulate the location, modification and construction of any facilities within such area that may result in any discharge (N.J.S.A. 58:11A-5e). This set of rules does not rely on the State Planning Act nor implement the State Planning Act or the State Development or Redevelopment Plan developed pursuant to that act. Through the continuing planning process the Department will seek to integrate the SDRP, regional and local land use plans where those plans do not interfere with the restoration and maintenance of water quality. However, the Department

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cannot abdicate its statutory obligation in reliance on those plans where they conflict with the legislated mandate of the Department.

It is the Department's mandate to protect the ecological integrity and natural resources of New Jersey, including water, threatened and endangered species, wetlands and unique and rare assemblages of plants. As such, extension of sewer service areas into areas identified as containing these resources, is not appropriate. These policies are generally consistent with the goals and policies of the State Development and Redevelopment Plan. The Department will not designate environmentally sensitive areas, that it is mandated to protect, as sewer service areas. Doing so would be contrary to the intent of the continuing planning process, as the provision of sewer service would encourage and in cases where infrastructure has been built with public funding, subsidize the destruction of environmental resources to the benefit of private development. The Department will allow the designation of sewer service areas in environmentally sensitive areas only where a comprehensive land use plan has been prepared through the Plan Endorsement process that results in center based development that affords greater protection of environmentally sensitive areas outside of the center.

Further, the Department cannot allow the designation of sewer service areas where the future development of that sewer service area will exceed the reasonable capacity to treat the wastewater generated without causing water quality degradation. Both of these constraints should be recognized in regional and local land use plans and by the SDRP.

This proposal is generally consistent with the goals and policies of the State Plan. Among the legislative requirements of the State Plan are the protection of natural resources and qualities of the State, including, but not limited to, agricultural development areas, fresh and saltwater wetlands, flood plains, stream corridors, aquifer recharge areas, steep slopes, areas of unique flora and fauna and areas with scenic, historic, cultural and recreational values (N.J.S.A. 52:18A-200). As a member of the State Planning Commission, the Department will continue to identify environmental constraints to be considered in the SDRP, will assist the State Planning Commission in identifying any infrastructure limitations and work with the State Planning Commission to address those constraints in a manner that protects water quality. To the extent that these constraints receive fair consideration in the SDRP, the Department expects that wastewater management plans will provide support for the State Plan.

Further, where conflicts between the SDRP and environmentally sensitive areas are unavoidable, the rule allows the designation of sewer service areas to support center based development that has been approved through the Plan Endorsement process, pursuant to N.J.A.C. 7:15-5.24(h).

809. COMMENT: The rules support of appropriate center-based development by relying on the State Plan endorsement process to allow for the designation of new centers is supported. (78)

RESPONSE: The Department acknowledges and appreciates the commenter's support for this provision of the rule.

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810. COMMENT: This rule, under N.J.A.C. 7:15-5.24(h) allows for "centers" to be built in environmentally sensitive areas that are approved through State Plan Endorsement. It is unclear how those "centers" will relate to either the surrounding environmentally sensitive areas or sewer service areas. Given the uncertainty surrounding Endorsement, it is unclear how centers will be planned for at all, let alone monitored for results. Center-based development to provide for appropriate jobs and housing growth in otherwise rural areas is supported as it is the only way to protect the land from sewers and from sprawl development. However, how large should these endorsed centers in environmentally sensitive areas expect to be? How many will be allowed? In what ways, might growth from the "non-growth" (septic) areas be re-directed into the centers, through programs like Transfer Development Rights, mandatory clustering, conservation zoning, or lot averaging? (5)

811. COMMENT: The Department should be congratulated on its support of center-based development. However, the exemption for sewer service in environmentally sensitive areas that are designated for center-based development requires clarification. The exemption would apply if the Department determines that the endorsed center-based development plan "adequately addresses the protection of environmentally sensitive areas located outside of the designated sewer service area." This proposed language leaves unclear the standards that the Department will be applying in evaluating whether the endorsed plan "adequately addresses the protection of environmentally sensitive area." The Department should revise this regulation so that it articulates the standards that the Department would apply in making this determination. (42, 44, 45)

812. COMMENT: The current rule proposal was developed by the Department to support the concepts developed by the Office of Smart Growth including center-based development which directs growth to appropriate areas and away from environmentally sensitive lands. However, as proposed, the WQMP coordination process with the SDRP could be subjectively applied. In N.J.A.C. 7:15-5.24(h), it states that "new sewer service area will be permitted within environmentally sensitive areas as necessary to accommodate center-based development." The purpose of this is to concentrate development in localized areas in order to preserve the surrounding outlying area. A degree of subjectivity is introduced by the caveat that states that the sewer service area eligibility of environmentally sensitive land will be permitted as long as the "area to be included is not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery of the species in the State." It is presumed, then, that these areas would be treated the same as environmentally sensitive areas outside of the center boundary, thus triggering the requirement of conducting a Habitat Suitability Determination analysis (a lengthy and expensive process). An even greater degree of subjectivity is introduced when the regulations go on to say that "a Department vote supporting an endorsed plan will generally lead to a finding that the endorsed plan meets the environmental requirements in a WMP…" however, due to the broad nature of items evaluated as part of the plan endorsement process, further evaluation may be warranted if the Department feels that WMP issues were not adequately addressed through Plan Endorsement. It would seem that in the self-proclaimed interest of coordinating levels of planning, the Department should take a more clear-cut approach by accepting the center boundaries and allowing other regulatory programs (i.e. freshwater wetlands) work to ensure the environmental suitability of a specific site. (33, 60)

RESPONSE TO COMMENTS 810 THROUGH 812: The Department appreciates the commenters' support for the allowance in the rule to provide sewer service area to support centers approved through the Plan Endorsement process.

In response to questions regarding the relationship of centers to the environs and the number and sizes of centers anticipated, the Department agrees with the commenters' reiteration of the intent behind center designation: accommodation of an increased concentration of development in localized areas, as a means to accomplish decreased development density and pressure in the environs outside of the center. To accomplish this objective, the Department assumes that centers would not become the dominant feature of the landscape. However, it is not possible to predict with any certainty the absolute size or number of centers that could be permitted. These two factors will depend on the amount of development expected to be transferred to the center from the environs and the availability and type of infrastructure available to support each center.

The Department encourages the use of the plan endorsement process and the flexibility afforded at N.J.A.C. 7:15-5.24(h) concerning the delineation of sewer service areas to support the redirection of growth from environs into the centers through means such as the Transfer of Development Rights, lot averaging and conservation zoning outside of the center.

One commenter questions the Department's interpretation of language from the rule that requires a finding by the Department that the inclusion of environmentally sensitive areas in a sewer service area to accommodate center based development approved through the Plan Endorsement

process at the State Planning Commission are "not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery potential of the species in the State." As specified in the rule, threatened and endangered species habitats, for the purposes of establishing sewer service areas are determined on the basis of the Department's Landscape Project. The Landscape Project defines suitable habitat based on modeling that intersects confirmed threatened and endangered species sightings, with the habitat requirements, and known behavior of the particular species sighted. The Landscape Project identifies areas that provide potential habitat for a particular species based on these requirements. In determining whether an area proposed for inclusion in a sewer service area is critical to critical to a population of threatened or endangered species the loss of which would decrease the survival or recovery potential of the species in the State, a more detailed assessment of the habitat and sighting information will be required. It seems obvious to the Department that any area that provides actual reproductive habitat for a threatened and endangered specie, such as a breeding pond a nest site, or an area that provides habitat during a critical stage in the life cycle of a threatened or endangered specie, such as den sites or hibernacula would meet this test. This is not intended to be an exhaustive list, but is intended to give the commenter some idea of what criteria will be applied by the Department. These areas are of such critical importance to the survival of a local population of threatened or endangered species and thus to the recovery potential of those species that the Department will not consider these areas for inclusion as sewer service area. In fact, the Department will attempt to secure greater protection of these areas through the plan endorsement process. The Department expects that these areas are known and well documented and it is unlikely, except in unusual circumstances, that a habitat suitability determination will alter the Department's opinion concerning the importance of these areas. The

Department does not anticipate requiring an accurate population count or carrying capacity of the landscape for each listed specie in making this determination.

To reiterate the intent of this section, the Department acknowledges that the septic density allowed under this rule, while protective of ground water quality, could still result in a pattern of development that would be inconsistent with the protection of threatened and endangered species, particularly those that require large contiguous habitats and/or are particularly sensitive to human disturbance. The rule would allow sewer service area to be established in a non critical portion of threatened and endangered species habitat in exchange for a pattern of development, and other special management considerations should they be required, in areas outside of that sewer service area that will ensure the viability of the remaining habitat to support threatened and endangered species. The Department cannot specify in this rule exactly what concessions might be sought in the environs outside of the center as those requirements would depend on the particular habitat requirements of the species present and their tolerance to human disturbance. For example, the habitat requirements of an interior forest specie will likely require protection of core forest areas from clearing which will be significantly different from a grassland specie where a periodic and well timed mowing regimen would be required to maintain the viability of the habitat.

One commenter suggests that a greater degree of subjectivity is introduced by language in the rule states that a Department vote supporting an endorsed plan will generally lead to a finding that an endorsed plan meets the environmental requirements in a wastewater management plan. The Department points out that this language was not proposed as part of this rule making and is

not codified in the rule at N.J.A.C. 7:15-5.24(h). Rather, this language appeared in the summary statement supporting and clarifying the intent of the rule. However, the Department continues to support this statement. Essentially, the center boundaries and the environs protection exchanged for center designation will be negotiated through the plan endorsement process. Where the environmental protection needs have been addressed through that process such that the Department affirmatively supports the endorsed plan in its capacity as a voting member of the State Planning Commission, it would seem to follow that the Department would also approve the wastewater infrastructure necessary to support that plan.

The commenter suggests that the Department should simply accept all center boundaries endorsed by the State Planning Commission and allow its regulatory programs to achieve environmental protection. The Department disagrees with the suggestion that it should blindly accept and support all center designations through the identification of sewer service areas in wastewater management plans. Foremost, the Department has but one vote on the seventeen member State Planning Commission. Where the Commission has simply overridden the Department's legitimate environmental protection concerns, it cannot acquiesce to the Commission's plan. For example, if the State Planning Commission were to include a bald eagle nest site in the designated center, the Department cannot assist in the destruction of that nest by affording sewer service to the site. Similarly, if centers were designated without regard to the existence of wetlands as suggested by the commenter, leaving their protection to the regulatory process, the designated center would be unable to fulfill its intended purpose because permits could not be issued. Failure to plan around to these environmental constraints will doom the State Planning Process to failure. This is not to say that the Department will insist that every

regulated feature be meticulously removed from a center, but that large areas of environmental conflict must be avoided in the planning for centers. For small regulated features, generally less than twenty-five acres in size, the Department that remain within sewer service areas the Department will continue to apply its regulatory programs as required by statute.

The Department is optimistic that the State Planning Commission will acknowledge environmental constraints through the plan endorsement process and plan accordingly, thus minimizing any tension between wastewater management plans and the State Plan. Toward this end, the State Planning Commission adopted Plan Endorsement Guidelines at its November 17, 2007 meeting, which included the Department's Plan Endorsement Program and Process Guide. This Guide provides a general listing of items that may be required during the Plan Endorsement process to adequately address the protection of environmentally sensitive areas. Due to the unique circumstances of the 566 municipalities that may petition the State Planning Commission for Plan Endorsement, the Department believes that a more specific list of standards is inappropriate at this time and must be tailored to each as plan endorsement is sought.

813. COMMENT: What kinds of sewage treatment technologies will be allowed in State Plan endorsed "centers?" Will the Department expect regional management of these sewage treatment facilities? (5)

RESPONSE: The Department does not specify the manner in which the wastewater management needs of any center must be met. Where existing regional wastewater treatment facilities exist locally with the capacity to serve the needs of the center, this would generally be

preferable, except when to do so would cause other environmental consequences such as a depletive water loss to a stressed watershed. The Department expects that some centers will be proposed in relatively remote locations. In these circumstances it is unlikely that an existing wastewater treatment plant will exist. It may be necessary to support the wastewater management needs of the center by constructing a new centralized wastewater treatment works, most likely with a discharge to ground water. The Department will approve as part of a wastewater management plan, a wastewater management alternative that has the reasonable potential to satisfy the wastewater treatment needs of the center. Thus the Department will require that a site be identified to support the treatment works that is large enough to meet the anticipated demand and a degree of certainty that that wastewater management alternative will be available when needed.

814. COMMENT: In N.J.A.C. 7:15-5.24(h)2 where the proposal states that "The Department has determined that the endorsed plan adequately addresses the protection of environmentally sensitive areas located outside of the designated sewer service area.", by definition, an endorsed plan has been thoroughly reviewed by the Department and should be assumed to meet this standard. Sewer service area boundaries established to be consistent with endorsed plans should be automatically approved, not just approvable. (75)

RESPONSE: The commenter suggests that the Department should simply accept all center boundaries endorsed by the State Planning Commission and allow its regulatory programs to achieve environmental protection. The Department disagrees with the suggestion that it should blindly accept and support all center designations through the identification of sewer service

areas in wastewater management plans. Foremost, the Department has but one vote on the seventeen member State Planning Commission. Where the Commission has simply overridden the Department's legitimate environmental protection concerns, it cannot acquiesce to the Commission's plan. For example, if the State Planning Commission were to include a bald eagle nest site in the designated center, the Department cannot assist in the destruction of that nest by affording sewer service to the site. Similarly, if centers were designated without regard to the existence of wetlands as suggested by the commenter, leaving their protection to the regulatory process, the designated center would be unable to fulfill its intended purpose because permits could not be issued. Failure to plan around to these environmental constraints will doom the State Planning Process to failure. This is not to say that the Department will insist that every regulated feature be meticulously removed from a center, but that large areas of environmental conflict must be avoided in the planning for centers. For small regulated features, generally less than twenty-five acres in size, the Department that remain within sewer service areas the Department will continue to apply its regulatory programs as required by statute.

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815. COMMENT: It is unclear as how to coordinate the static WMP plan with the SDRP Map, which will be changing as cross-acceptance is completed and/or municipalities achieve Plan Endorsement. The regulations should include specific directions on how this coordination of different state regulations will be accomplished in a timely and efficient manner. (33, 60)

RESPONSE: Wastewater management plans are an integral part of the continuing planning process required by the Water Quality Planning Act and are not static. Wastewater management plans are required to be updated in comprehensive fashion every six years. In addition a current wastewater management plan may be amended at any time. The Department is aware that the State Plan cross acceptance process has been on going for quite some time. Counties have played a central role in the cross acceptance process. Under this rule counties are also designated as the wastewater management planning agencies. Therefore, counties are keenly positioned to reduce friction and improve consistency between the State Plan and wastewater management plans. However, the commenter is reminded that this set of rules are developed under different legal authority than the State Plan (see Response to Comment 808). The requirement to protect water quality and the environmental cannot be trampled by the State Plan. However, the Department does not believe that the goals of the State Plan and water quality management planning are mutually exclusive, and where environmental and capacity constraints are used to inform the State Plan consistency should not be an issue.

N.J.A.C. 7:15-5.25

816. COMMENT: The proposed “more explicit standards for protection of water resources in the wastewater management process” “intended to replace the requirements to conduct an

alternatives analysis under Executive Order 109 (2000)" at N.J.A.C. 5:15-5.25 are not more explicit but, rather, are more ambiguous, require extensive guidance from the Department and make it impossible to obtain approvals for site specific amendments. Further, the proposed framework for evaluating WMPs and WMP amendments will not expedite the process, but will entail significant expenditures of resources (financial and human) by both the affected governmental entities and the private sector.

The applicant must meet the standards set forth at N.J.A.C. 7:15-5.25 to demonstrate that "adequate capacity exists to treat all wastewater that will be generated in each wastewater service area without degrading water quality. The patterns and types of development permitted, as well as the wastewater management alternative selected, must be assessed in terms of the availability of water supply to meet the needs of projected future development." Evaluating future development needs is, as a matter of constitutional law and public policy, a function of statewide planning, as encapsulated in a duly adopted SDRP. It is impermissible for the Department to shift to the WMP agencies an obligation that the constitution and statutes assign to the State. All of the proposal's attempts to do so, including those at section N.J.A.C. 7:15-5.25, must be removed. (18, 42, 44, 45, 61)

RESPONSE: The Department is charged with improving, enhancing, and protecting the quality of New Jersey's natural environment, as well as to ensuring equitable and beneficial uses of the State's waters. Today's problems require more creative and comprehensive solutions - solutions that take into account not only today's needs, but result in a sustainable water resource to meet the needs of future generations. A sustainable economy must conserve environmental quality,

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while taking into account the economic and social costs and benefits of development.

Sustainable development calls for comprehensive planning through an inclusive public process that involves citizens, businesses, scientists, government agencies and other stakeholders.

One of the tools the Department utilizes to attempt to assure that both current decision making and future planning adequately take into account protection of water quality and quantity is the Water Quality Management Planning rules, N.J.A.C. 7:15. The Department develops and administers the Water Quality Management Planning rules in conjunction with the Statewide Water Quality Management Plan, which is part of the Continuing Planning Process required pursuant to the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and as required by Sections 303(e) and 208 of the Federal Clean Water Act. The rule requirements are necessary to ensure that local and regional plans are soundly based on the natural resource and environmental infrastructure considerations that apply within the planning area. Failure to adequately consider resource constraints when planning for and executing development has led to adverse impacts to water quality. Revisiting existing development to retrofit remedies is expensive and options are limited by irreversible commitments of land use such that efforts are not always successful, resulting in permanent loss of designated uses.

Executive Order 109 (2000) directed that the alternatives analyses identified at N.J.A.C. 7:15-5.18(a)2 were required because over the past three decades, New Jersey has experienced unprecedented development and sprawl, which has resulted in decreases in open lands, wetlands, farmland and other areas that previously served a variety of beneficial environmental functions, including the protection and restoration of the State’s water resources; and which, if not properly

managed, pose a threat to the preservation and integrity of the water resources of the State by both increasing the volume of stormwater runoff that alters the stream hydrology and degrading the water quality. The rule prior to adoption of these amendments at N.J.A.C. 7:15-5.18(a)2 stated:

> On a case-by-case basis, the Department may require wastewater management planning agencies to examine specific wastewater management alternatives as part of the preparation of the wastewater management plan. The Department may require such examination to include analysis of critical economic, social, environmental, or institutional factors pertaining to such alternatives.

While EO 109 (2000) included some examples of the critical economic, social, environmental, or institutional factors, including, but not limited to, an evaluation of depletive and consumptive water use, detailed land use, environmental build-out and pollutant loading, the direction provided in the rule and the executive order did not elaborate on the nature or extent of the factors that could be required to be considered and included no standards that would allow applicants to assess whether a particular proposal would be acceptable. The Department provided guidance to assist in performance of the analyses regarding nitrate dilution, threatened and endangered species, environmental constraints/build-out, nonpoint source pollutant loading/hydromodification, point source pollutant loading, depletive/consumptive water use, and riparian corridor and provided model ordinances for riparian zone protection and stormwater control. The adopted amendments to the rule specify the required analyses and the standards that will be considered in the decision process in the provisions at N.J.A.C. 7:15-5.24 through 5.26. This will aid affected parties by establishing a transparent process for developing, evaluating and approving WMPs and site specific amendments. The Department agrees that guidance and tools

are important aides to applicants and has provided tools and guidance to assist in development of WMPs and amendments that will comply with the requirements at N.J.A.C. 7:15-5.24 through 5.26. These include directions for developing the eligible sewer service area delineation using GIS coverages, a GIS model for completing the environmental build-out analysis, nitrate dilution models, and model ordinances. To further assist WMP agencies, the Department will provide an initial eligible sewer service area that can be further refined to meet local needs and objectives, will assist in calculating the environmental build-out analysis and is providing financial assistance to counties to develop the WMPs.

817. COMMENT: It is appropriate that the Department is adopting regulations to formalize requirements for wastewater management planning and water quality management plan amendments. The current method clearly does not function due to a lack of clear coherent regulations and the means of implementation through Department policies and Executive Orders. (87)

818. COMMENT: The clarification of standards for WMP preparation and adoption, including the location of sewer service areas is supported. (78)

819. COMMENT: The inclusion of environmental analyses to address impacts from secondary impacts from development facilitated by increased wastewater infrastructure is strongly supported. (22, 76)

820. COMMENT: The proposed requirement that, in addition to existing and future wastewater jurisdictions, wastewater service areas and treatment works, wastewater management plans must also demonstrate compliance with evaluation criteria for existing and future wastewater treatment needs, water supply demands and nonpoint sources of pollution is supported. (17)

RESPONSE TO COMMENTS 817 THROUGH 820: The Department acknowledges these comments in support of these provisions of the rule.

821. COMMENT: The current Executive Order 109 review requirements will expire upon adoption of new Water Quality Management Planning rules, so the Department must adopt enforceable standards in the WQMP rules to implement Executive Order 109 review requirements. (86)

RESPONSE: The rule does include provisions that set forth the specific analyses that will replace the previous more generalized rule language at N.J.A.C. 7:15-5.18(a)2, which was brought into focus by Executive Order 109 (2000). Specifically, the revised language at N.J.A.C. 7:15-5.18(a)2 refers to the criteria at N.J.A.C. 7:15-5.25 as directing the analysis of alternatives in the development of wastewater management plans.

822. COMMENT: The word “standards” should be included in the heading at N.J.A.C. 7:15-5.25 because, in addition to “evaluation criteria,” there must be standards. Including the term “standards” will make it clear that the proposed criteria are, in fact, enforceable and can be the basis for legal determinations. (86)

RESPONSE: The word "standards" does not afford more (by inclusion) or less (by exclusion) force and effect of the rule provisions at N.J.A.C. 7:15-5.25. The currently used term "criteria" properly conveys the contents of the section and will be retained.

823. COMMENT: While an improvement, the proposed regulations continue the practice of "reverse planning" using wastewater facilities. These regulations continue using restrictions on wastewater to limit or eliminate development, rather than regulate development through appropriate environmental regulations. Elimination of wastewater treatment systems does not limit residential development, it only causes development to be built with septic systems. (87)

RESPONSE: The comment incorrectly suggests that the rule's purpose is to restrict wastewater treatment options so as to limit or eliminate development. The rule requires that wastewater treatment alternatives consistent with environmental constraints be identified in a wastewater management plan for the development that is planned under the environmental build-out (or projections in urbanized municipalities). This includes both centralized wastewater treatment facilities and septic systems and evaluation criteria are identified for each type. Where currently planned development exceeds the capability to manage the wastewater that would be generated, one option provided is to adjust the development types, intensity or location to conform with the ability to manage the wastewater generated.

824. COMMENT: How will small almost fully-developed municipalities that provide sanitary sewer service continue to provide this important infrastructure upgrade to homes that are

dependent on septic systems? Will existing homes serviced by septic systems be denied the opportunity to obtain sanitary sewer service? (21)

RESPONSE: There is no provision in the rule that would categorically restrict the connection of existing development served by septic systems to wastewater treatment facilities, except to the extent that extension of sewers may be limited as the result of other rules, such as the Highlands Water Protection and Planning Act Rule, N.J.A.C. 7:38. Otherwise, if in the course of wastewater management plan development, areas served by septic systems are included in sewer service areas in accordance with the rule, then connection would be consistent with the rule, subject to other State and local approvals that may apply.

HUC 11 vs. HUC 14

825. COMMENT: The build-out analysis is necessary. However, the requirement that the build-out analysis be developed on a HUC 11 basis is not supported. The correct scale for analysis in HUC 14 rather than HUC 11 because this scale would ensure consistency with other regulatory schemes, such as the Phase II Stormwater regulations, which already require a majority of municipalities to develop build-out analyses at the HUC 14 level and would provide a consistent basis throughout the state. The analysis at HUC 11's would lead to sprawl and/or would allow localized degradation when used in the nitrate dilution analysis. Further, those planning entities that have already completed a build-out analysis either, at the time of the submission of their initial Plan or when their Plan requires updating, can take the analysis one step further and conduct a nitrate dilution study, also known as a capacity analysis. This is especially critical to planning areas that rely on septic systems to manage their wastewater so

that they can plan based on the carrying capacity of the resource. A build-out analysis alone will not provide this critical information. (17, 49)

826. COMMENT: The area of a HUC 11 is too large for meaningful analysis and should not be incorporated or used in the proposed rules. (49)

827. COMMENT: At N.J.A.C. 7:15-5.25(c) the requirement for an environmental build-out analysis is strongly supported but this build-out analysis should not be done on a HUC 11 basis. The rule proposal should be re-proposed using HUC 14s to determine environmental build-out. The water supply information in a large part of the State (in the Highlands and in the Pinelands) is available on the HUC 14 level. Municipal disaggregation will still have to occur, but will be much facilitated at the HUC 14 scale. (22, 76)

828. COMMENT: The analysis related to the nitrate standard should be based primarily on a HUC 14 basis to provide more details and also take advantage of the work and efforts put forth under the Stormwater rules. (12)

829. COMMENT: It would be more appropriate if the nitrate dilution standards were based on HUC 14 as a planning unit and not HUC 11, to make the proposed rule more consistent with existing policies as well as USEPA reporting, to better evaluate and plan for resource protection within disparate areas of the watershed, and to better ensure that cumulative effects are not significant. (68)

830. COMMENT: Opposition to the use of the HUC 11 basis for nitrate calculations was expressed. Nitrate calculations should be performed on a HUC 14 rather than HUC 11 basis. Most water resource agencies, including many state programs and GIS-applications use HUC 14s as the basis for calculations and consistency with these other agencies and programs is very helpful in terms of planning. The HUC 14 provides a more refined analysis and has less "wiggle room" for providing the dilution of nitrates and is therefore more protective. While it may seem reliable to calculate nitrate dilution over a HUC 11, there could be more "hot spots" that would get ignored within a HUC 11 rather than within a HUC 14, which could negatively impact water quality and ecological resources locally. (10, 80)

831. COMMENT: Proposed N.J.A.C. 7:15-5.25(e) relates to the evaluation of future wastewater treatment needs of a planning area, specifically, those not covered by N.J.A.C. 7:15-5.25(d). To carry out the evaluation, it proscribes several methodologies, including a determination of the development density that can be accommodated that will result in an attainment of two mg/L nitrate in the ground water and by running a simplified model utilizing recharge values. The provision further requires that these analyses be performed on a HUC 11 basis. These and all other analysis and evaluations performed under the rules should be performed on a HUC 14 basis. (17)

832. COMMENT: The requirement that septic systems meet the two mg/L level is supported. However, it is inappropriate to establish septic density based on a HUC 11 area which could easily lead to densities of 4 to 7 acres and large lot sprawl proliferation. This is far too large a hydrological unit and in a large number of instances involves several different physical features.

Because of widely varying character, use of HUC 11 areas would cause overdevelopment in some areas and totally unjustified results. Selection of a HUC 11 was to match studies of water supply availability done at that scale. However, in a large part of the state, the Highlands and the Pinelands, water supply availability was done at the HUC 14 scale. (22, 76)

833. COMMENT: The Department has the explicit statutory authority and responsibility to protect the environment and through that authority, to impact land use decisions. The Department should use this authority. Virtually every regulatory framework designed by the State, whether related to transportation, environmental protection or another legislative charge, will have some influence on land use.

The Department should promulgate rules that measure septic degradation at the HUC 14 level as this is the level necessary to protect the environment. The use of HUC 11s as the standard in septic areas will create sprawl by septic and will degrade the environment by allowing for smaller geographic areas to become badly polluted while still achieving the target average for the HUC 11 watershed as a whole. HUC 14s should be the standard used to measure septic degradation. (11)

834. COMMENT: The Department's decision to reduce the nitrate standard in ground water from 5.2 mg/L to two mg/L is endorsed. This reduction will serve to protect drinking water and ecological health. However, the manner in which nitrate levels are calculated to determine septic densities causes concern. The proposed rules call for nitrate to be calculated on a HUC 11 level, which is inconsistent with other existing state and regional policies that calculate nitrate levels on

a HUC 14 basis, such as the 2006 Integrated List; water allocation planning in shallow aquifer areas; the Office of Smart Growth in the cross acceptance process; water supply analysis in the Highlands; and both the Pinelands Commission and Highlands Council nitrate analysis. In addition, conducting nitrate analysis at the HUC 14 level will complement municipal planning and zoning that support the proposed two mg/L nitrate standard and will provide more refined data to support local planning and zoning efforts. Most municipalities have completed build-out analyses as a requirement of the Stormwater Regulations, and these build-out analyses should be used to calculate nitrate dilution at a HUC 14 level. Nitrate dilution analyses at the HUC 14 level involves fewer municipalities and will therefore increase the likelihood of those municipalities working together to develop feasible regional solutions to meeting the new nitrate standard. HUC 11 areas are simply too large and increase the likelihood that municipalities will defer responsibility to other municipalities in the HUC, which will complicate the counties' role as coordinating entities. Requiring nitrate analysis based on HUC 14 watersheds will align the WQMP rules with existing state, regional, and local policies, and is therefore a minor change to the current proposal. The proposed regulations should be amended to require nitrate calculations on a HUC 14 rather than the HUC 11 basis. (82)

RESPONSE TO COMMENTS 825 THROUGH 834: The HUC 14 drainage area, or subwatershed, is a breakdown of a HUC 11 drainage area, or watershed, thus there are a number of HUC 14 subwatersheds within each HUC 11 watershed, which results in there being 151 HUC 11 drainage areas in the State, but over 900 HUC 14 drainage areas. The HUC 11 basis was selected for the analyses because it allows consideration of impacts of wastewater management and water supply use on a holistic, watershed basis, while keeping the scale of the analyses

manageable. In addition, the HUC 11 drainage area provides a means to balance the need to consider impacts on a watershed basis without unnecessarily limiting flexibility of local government to make land use decisions that support local planning objectives. In order to effectively incorporate watershed-based analyses and considerations, disaggregation of the watershed findings to the municipal/county level will have to occur on either a HUC 11 or HUC 14 scale, and while the HUC 14 scenario would require coordination among fewer municipalities, it would also greatly limit the options available to implement the watershed findings related to pollutant loading and is more likely, rather than less likely to encourage sprawl. This is because, the smaller the area within which the standards must be met, the fewer options would be available to implement center-based and cluster development that would avoid sprawl and maximize environs protection. Further, while the Department recognizes that this approach may lead to uneven inputs of pollutant loadings to the ground water, this outcome is compatible with the antidegradation standard for ground water discharges that are not regulated under NJPDES. This antidegradation standard was established using nitrate as a surrogate and set at two mg/L because that concentration represents the ambient concentration of nitrate in ground water when considering the State as a whole. However, the existing nitrate levels are both higher and lower than two mg/L at individual locations. Ensuring the ambient concentration is maintained within the HUC 11 drainage area is consistent with the basis for determining the ambient concentration.

The Department recognizes that some relevant information has been developed in response to the Stormwater Management rules and within the Highlands and the Pinelands, which represent special resource areas within the State for which comprehensive protection plans have been or

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are being developed. Information developed at a finer scale can be used in the HUC 11 analyses, thereby leveraging these efforts to serve multiple purposes.

835. COMMENT: There should be some consistency in the way the rules are developed with regard to HUCs. Standards are applied at both the HUC 11 level in this rule and at the HUC 14 level for stream-side buffers. Reviewing at the HUC 11 level could lead to overdevelopment in subwatersheds. C1 designations should not be limited to HUC 14's, while HUC 11's are used in these rules. Either apply HUC 14 here or apply HUC 11 in the C1 designations. (59)

836. COMMENT: Another major concern is that subwatershed level over-development will occur because of looking at a HUC 11 instead of a HUC 14. How can development be restricted for the C1 buffer at the HUC 14 level when only the HUC 11 level is looked at? Couldn't this permit over-development within a HUC 14 subwatershed? If HUC 14s are to be protected and not just HUC 11s, then the analysis should apply to HUC 14s and not HUC 11s. (65)

RESPONSE TO COMMENTS 835 AND 836: The HUC 14 drainage area with respect to C1 waters is to define and limit the extent of the drainage area of a C1 water that would require a Special Water Resource Protection Area to protect water quality, in accordance with the New Jersey Stormwater Management Rules at N.J.A.C. 7:8, or a 300 foot buffer in accordance with the New Jersey Flood Hazard Area Control Act Rules at N.J.A.C. 7:13. This is quite different than the application of the HUC 11 drainage area in the WQMP rule. In the WQMP rule, the HUC 11 drainage area is the basis for assessing compliance with standards regarding wastewater and water supply. As described in the Response to Comments 825 through 834, this scale was

determined to be suitable for a planning analysis that would be applied Statewide and was selected to balance the need to consider impacts on a watershed basis without unnecessarily limiting flexibility of local government to make land use decisions that support local planning objectives. The HUC 11 scale used for analysis is protective of ground water quality and is compatible with work done at the HUC 14 scale, as HUC 14 drainage areas are a subset of HUC 11 drainage areas.

837. COMMENT: One problem with using the HUC 11 as the assessment level is that if one HUC 14 within the HUC 11 develops more quickly than the others, all other development within that HUC 11 may be prevented. This is a flawed first-come-first-served approach that fails to address the cumulative impact of development and fails to prioritize development that is needed to reach goals and ignores the benefits that land use planning can provide. How can the Department show that this rule will maintain water quality that meets the nitrate standard within individual HUC 14s, some of which may be extremely important to overall water supply and water quality standards? How can the Department show that this rule will not <u>increase</u> pressure on the “ratables chase” encouraging towns to pursue commercial development everywhere and obstruct housing where needed? (5)

838. COMMENT: The proposed rule requires that a nitrate dilution standard be maintained across each HUC 11 which is far too broad an area. This kind of averaging across such a large area means water quality within a HUC 14 may not meet the water quality standard, while the overall HUC 11 does. This is another example of trying to protect land from development by

taking it out of sewer service areas, which is a false protection. It does little but encourage sprawl and does nothing for environmental protection.

The proposed rule should have a more transparent, direct and effective approach to set the land use standards by assessing the impervious cover of each HUC 14, a simple enough analysis, and examining the zoning build-out within that HUC 14 area, another simple analysis using tools such as PlanSmart NJ's GOZ model. This would allow the Department to connect the build-out analysis to effective wastewater management plans that would reflect identified growth areas, encourage growth in them, reduce sprawl and protect natural resources, including water supply and water quality. (5)

RESPONSE TO COMMENTS 837 AND 838: The antidegradation standard for discharges to ground water is two mg/L of nitrate, which was selected because that concentration represents the ambient concentration of nitrate in ground water when considering the State as a whole. However, the nitrate levels are both higher and lower than two mg/L at individual locations. Thus, demonstrating that two mg/L of nitrate will be maintained over each HUC 11 drainage area will ensure the State-wide ambient concentration is maintained. In addition to protecting ground water quality, using the HUC 11 scale for this demonstration provides flexibility to accommodate local planning objectives and smart growth principles, such as center based development and clustering. Because the analyses of wastewater and water supply needs and availability are conducted for the environmental build-out condition and zoning is required to align with the outcome of the planning exercise, there is no danger that development in one HUC 14 will preempt development in another HUC 14, provided development proceeds according to

the zoning that was established consistent with the WMP findings. Regarding the concern that municipalities will favor commercial zoning over residential housing, a municipality retains authority to determine land use through zoning, consistent with local planning objectives, provided that the municipality also meets its fair share housing obligation, as required by law. The rule provisions at N.J.A.C. 7:15-5.24 and 5.25 are designed to align planned future growth with sustainable use of natural resources and identify the analyses and standards to do so. These provisions identify where development at an intensity requiring sewer service is suitable and where it is not, ensure that development outside of sewer service areas occurs at a density that protects water resources, ensure new or expanded wastewater dischargers conform with antidegradation requirements, ensure sustainable use of water supply and require that development meets standards with respect to stormwater management and protection of riparian buffers and steep slopes in order to address nonpoint source pollution.

839. COMMENT: The Department's efforts to finally include development on septic systems in water quality planning is supported however, the proposed rules will only serve to further the status quo. Looking at a region as large as HUC 11 for water quality impacts undermines the purpose and scope of the rules because HUC 11s have so much dilution coming from public lands and other sources that it obscures any real carrying capacity model. The purpose of a nitrate dilution model is to come up with a lot size that is protective of both public health and the environment. The only way to determine appropriate densities and protect against ground water pollution to wells is to look at the subwatersheds. When using the broad scale currently proposed, it is possible to meet the water quality for a vast region but still have polluted wells and localized areas to surface pollution. (65, 79)

840. COMMENT: The biggest issue, dealing with septics, is something that is long overdue, that is strongly desired and must be included. But, there is a two-fold concern; first, the purpose of having a nitrate model is for wells and septics. Nitrate dilution models were worked on in Ringwood. There was a Supreme Court case on nitrate dilution models in 1982, Countryside v. Ringwood, where the Court accepted a model, making Ringwood a conservation area. This decision exempted Ringwood from sewering affordable housing obligations at that time because Ringwood was the reservoir for northern New Jersey.

The purpose of the nitrate dilution model is to protect individual people, but instead the proposal is looking at a broad HUC 11, which is huge, and pollution is being picked up from parks, reservoirs and lakes and localized impacts are not being looked at. The purpose of the nitrate dilution model is to look at the localized impacts, but by using HUC 11s, the whole purpose of the septic issue is being undermined. Housing on quarter acre lots will still be allowed and homeowners are going to be drinking their own septage because, with dilution, the overall HUC 11 might meet the model or the goal, but the individual lots won't. Go back and look at what nitrate dilution is supposed to do; protect the environment, streams, and lakes, as well as public health. (65, 79)

RESPONSE TO COMMENTS 839 AND 840: As described in Response to Comments 825 through 834, the HUC 11 based analysis of nitrate dilution will provide protection of ground water quality, consistent with the basis for establishing the antidegradation standard while providing flexibility to accommodate local planning objectives and smart growth principles, such

as center based development and clustering. Design standards for designing and locating septic systems and wells are the appropriate means to ensure public health is protected on a site specific basis. For example, county health codes dictate requirements regarding minimum distances between wells and disposal fields based on site specific percolation tests.

N.J.A.C. 7:15-5.25(a)

841. COMMENT: The provision at N.J.A.C. 7:15-5.25(a), which provides that this section establishes the minimum standards required and specifically states that "WMP planning agencies or municipalities may incorporate more protective standards" is supported. This is a vital statement. (64)

842. COMMENT: N.J.A.C. 7:15-5.25(a), the setting of environmental standards in these rules and their assessment early in the process; the approach to only process amendments if compliance with these standards is demonstrated; and that the standards are the minimum required and a wastewater management plan can set more protective standards are strongly supported. This last provision has proven to be a key component in other State rules and allows more locally appropriate and stricter standards to be applied. This allows, for instance, a more locally protective nitrate dilution standard that is calculated based on a model accurate for specific geology. (10, 80)

RESPONSE TO COMMENTS 841 AND 842: The Department acknowledges these comments in support of these provisions in the rule.

843. COMMENT: Proposed N.J.A.C. 7:15-5.25(a) specifies that applications for WMPs, WMP updates, WMP amendments and revisions must demonstrate compliance with the requirements "for existing and future wastewater treatment needs, water supply demands, and nonpoint sources of pollution." Further, the Department permits WMP planning agencies or municipalities to "incorporate more protective standards." The basis document provides examples of such standards, including "more conservative water quality target for the nitrate dilution standard, a wider buffer for riparian protection or provide protection for slopes with a grade less steep than 20 percent." In this rule proposal, the Department is establishing the standards for wastewater management planning in New Jersey, the overall intent of which is to have uniform sewer planning standards throughout the state. As such, other alternatives should not be suggested and this provision must be deleted from the proposal. (18, 42, 44, 45, 61)

RESPONSE: The rule clearly states that the standards are the minimum standards and specifically allows local entities to establish more stringent standards as needed to meet local objectives. Therefore, it is not the objective of the rule to establish uniform statewide standards that do not allow consideration of local priorities that are consistent with the objectives of the rule. For example, the provision allowing other areas, besides those specified, to be excluded from sewer service recognizes that designating centralized sewer service as the wastewater management alternative may not be compatible with attaining certain local planning objectives. For example, areas that are simply rural or used for agriculture need not be excluded from sewer service to achieve the objectives of the rule, but exclusion of such areas would be appropriate where preservation of these land uses is locally important, as development at densities requiring centralized sewer service would not support preservation of such land uses.

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N.J.A.C.5:15-5.25(c)

844. COMMENT: Does the build-out requirement, with a reliance on municipal zoning, go beyond the purview of adopted Federal and State laws and regulations? (51)

RESPONSE: A build-out analysis is a requirement common to several rules, including the Stormwater Management rules, N.J.A.C. 7:8, and the Wastewater Treatment Facilities Assistance rules, N.J.A.C. 7:22, as it is a necessary basis for understanding the challenges to natural resources and environmental infrastructure that will result from future development. It is a common means for assessing cumulative environmental impacts on a large scale, in that, if the build-out situation can be demonstrated to be consistent with environmental standards on a regional scale, then the cumulative impact of the incremental development activities that comprise build-out will be consistent with those environmental standards.

845. COMMENT: Standard methods for preparing the environmental build-out analysis and estimating population projections should be established, and both should be flexible and able to incorporate local and regional conditions. (19)

846. COMMENT: Specific methodologies and criteria for the performance of the required build-out analysis should be provided so as to avoid disputes of findings once WMP plans are submitted for review. In addition, the required analysis should be of a level achievable by all counties in the State, with provisions permitting counties to provide more detailed analysis where their technical ability allows. (88)

847. COMMENT: The proposed rule should provide consistent and timely guidance on how to perform the environmental build-out analysis. The methodology must be flexible enough to allow the proposed 21 WMP entities to perform the analysis in a manner which reflects the myriad land uses and conditions present throughout the State. (88)

RESPONSE TO COMMENTS 845 THROUGH 847: The Department believes that the rule identifies the basic parameters for wastewater management plan components needed to ensure the objectives of the rule, while specifying the ways in which regional and local concerns can be accommodated. The rule establishes those areas that must be excluded from sewer service areas, but provides that other areas, besides those specified, may be excluded from sewer service. The rule recognizes that designating centralized sewer service as the wastewater management alternative may not be compatible with attaining certain local planning objectives. For example, areas that are simply rural or used for agriculture need not be excluded from sewer service to achieve the objectives of the rule, but exclusion of such areas would be appropriate where preservation of these land uses is locally important, as development at densities requiring centralized sewer service would not support preservation of such land uses. The minimum information required for the environmental build-out is specified at N.J.A.C. 7:15-5.25(c) and is designed to allow completion of the analyses at N.J.A.C. 7:15-5.25(d) through (f), at which the pertinent values to continue the analyses are specified. The minimum analyses are designed to be completed largely through the use of GIS and available GIS coverages, in addition to zoning information expected to be available locally. Nevertheless, the Department concurs that guidance in preparing components, such as sewer service area delineations and the

environmental build-out analyses, would be a useful aid for municipalities and counties. The Department is prepared to provide assistance upon request in performing these tasks and has developed a GIS tool to complete the environmental build-out calculations, as discussed in Response to Comments 537 through 547. The Department has provided a web-based WMP format to guide WMP agencies, but also allows flexibility in how the information can be presented, recognizing that regional differences preclude establishing a single format. Further, the Department would not preclude the use of more sophisticated or detailed methods to carry out the environmental build-out analysis, where information and capability allow, provided the time frames established in the rule are still met.

848. COMMENT: The proposed rules should acknowledge the fact that regional, county and local master plans often identify proposed redevelopment areas, centers, Transfer of Development sending and receiving areas, Transit Oriented Development areas and other smart growth land use initiatives for which studies may be underway, but for which ordinances have not yet been developed. These initiatives should not be ignored within county WMPs on the grounds that they are not yet reflected in adopting zoning ordinances if build-out is to be the basis of county WMPs. Clear guidance on how these planning initiatives should be addressed should be provided in the new rules. (9, 19)

849. COMMENT: It is important to note that there are emerging trends in planning and zoning in the areas of redevelopment and smart growth. The calculation of population projections stemming from future urban redevelopment needs to be taken into account as such projects become realized. (81)

RESPONSE TO COMMENTS 848 AND 849: The rule does provide, at N.J.A.C. 7:15-5.18(b)6, that the proposed wastewater management plan may account for future land use that is inconsistent with zoning ordinances for compelling reasons, for which adequate documentation is provided. The intent of this provision is to allow consideration in the planning for redevelopment or approved variances that have an impact on wastewater generation that may not be reflected in existing zoning.

850. COMMENT: The build-out methodology at N.J.A.C. 7:15-5.25(c) should be developed on a HUC 11 model and this information must be further disaggregated by the municipality. Existing up to date build-out methodologies being used at the county level for other projects should be accepted by the Department. The use of the HUC 11 parameter, as required by the proposed rules, creates a format that is substantively different and unduly complicated as compared to proposed methodologies developed by other agencies. If modifications need to be made, i.e., if zoning categories need to be refined and more detailed in nature, the WMP agency should be required to work with the Department's recommendations to produce a mutually agreed upon approach, but one that as far as possible builds on the county's existing build-out model. (81)

851. COMMENT: N.J.A.C. 7:15-5.25(c) requires that the "build-out analysis shall be developed on a HUC 11 basis." The HUC 11s are to be further disaggregated by municipality and "broken down between areas within and outside of public water supply service areas." In New Jersey, land use planning and regulation that establish permitted land uses and intensity of

development are done at the municipal level, a geopolitical unit, not by watershed. As none of the land use planning and implementation has been done by watershed, it makes no sense to require that the environmental build-out analysis be done by HUC 11 or some other level of watershed. Very simply, none of the information needed to prepare an environmental build-out analysis is available by watershed. In most cases, information on municipal planning, zoning, and developed conditions is not available by GIS or other electronic means. Nor is information for pubic water supply service areas readily available, let alone by watershed or electronically.

Most municipalities and all counties are in multiple HUC 11s. HUC 11 boundaries are not displayed on municipal planning and regulatory ordinances. The time and cost to determine environmental build-out by HUC 11 far outweighs any conceivable benefit of having such information by HUC 11. In fact, any potential use of this information by HUC 11 is illusive. Given that wastewater management plans are to be prepared by counties, which are geo-political units, the Department requirement for information by watershed is nonsensical. The proposal must be revised to base its analyses and plans on geopolitical (not HUC) boundaries. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 850 AND 851: The Department recognizes that land use zoning conforms with political subdivisions, yet must assess water resources impacts in accordance with scientific realities. The reality is that water resources impacts are appropriately assessed in terms of watershed delineations, which in many cases do not align with political boundaries. Therefore, the build-out, wastewater and water supply analyses must be disaggregated into watersheds, as well as political subdivisions, so that the component pieces can be rolled up into a

watershed for overall assessment. The reliance on GIS as the basis for the analyses allows this disaggregation to occur relatively simply by joining GIS coverages, such as for land use/land cover or soils that are supplied on a county basis, and then clipping these combined coverages by municipal and/or HUC11 areas. The Department will assist WMP entities in preparing compliant sewer service area delineations and has developed a GIS tool that can provide the environmental build-out analyses. Technical assistance will be provided upon request.

852. COMMENT: State agencies now require a countless number of build-out methodologies in their various individual rules and requirements. The proposed WQMP rules add a new environmental build-out variant different from the recently adopted stormwater management permit requirements. The Stormwater Management Rules at N.J.A.C. 7:8-4.2(c)9 require a build-out analysis by HUC 14 if there is more than one square mile of vacant or farmland assessed land remaining in a municipality. The COAH requirements at N.J.A.C. 5:94-2.2(b) also require future growth projections utilizing a different methodology that may or may not be consistent with these proposed rules for environmental build-out. State agencies and sections within agencies should coordinate build-out requirements to reduce inconsistencies and conflicts in numbers and the need for municipalities and counties to undertake a multitude of build-out analyses. (88)

853. COMMENT: Conducting a build-out analysis at N.J.A.C. 7:15-5.25(c) constitutes a duplication of effort, since these analyses are also required under other State initiatives including the Stormwater Management, Plan Endorsement, and Council on Affordable Housing Certification programs. The requirement by several State agencies to conduct build-out analyses

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for multiple purposes constitutes a duplication of effort on behalf of the municipality/county. State agencies should be required to develop a standard methodology for build-out analyses and should afford municipalities/counties the benefit of utilizing completed analyses for multiple purposes.

In July of 2002, the State Legislature set aside over $2.2 million for the Cape May County Water Supply Study to be conducted by the New Jersey Department of Environmental Protection. A portion of the project entailed a comprehensive build-out analysis of Cape May County. As of August 2007, this build-out analysis has not yet been completed and made available to the county. In the meantime, the WQMP rules are requiring an additional build-out analysis. As the county does not have adequate staffing or expertise to conduct this type of study, it is likely that consultants will be utilized. As such, the State of New Jersey will have funded the same type of initiative two times in approximately five years, first as part of the Water Supply Study and second through the grant funds that will be provided for WQMP purposes. This is neither efficient nor effective utilization of State funds. Better coordination between State agencies and programs is required. (33, 60)

854. COMMENT: The Department should clarify whether the use of composite zoning, the prescribed data-set for county-wide zoning to be used in build-out analyses, will produce results that are compatible with other existing plans, such as storm water management and COAH plans, as required by statute. In addition, the Department should address the implications of this method especially when storm water management, COAH, and water quality management plan recommendations are submitted for municipal and county plan endorsement through Cross

Acceptance. More specifically, the rules should address how cluster zones will be factored into the build-out calculations proposed under composite zoning. The Department should explain how the calculation method for build-out is affected by cluster zone density standards. (51)

855. COMMENT: Local municipalities and counties have a long and varied list of requirements to meet through the permitting and cross-acceptance processes. One way for State government to reduce this burden is to streamline and coordinate some of these steps. One simple step the Department could take is to advocate the standardization of the build-out analysis used by all agencies, ensuring that all the necessary impacts (wastewater flows, housing units, traffic, etc) were included to suit various departmental requirements. Build-out does not have to be expensive, but when a municipality or county must perform different analyses for different agencies the total expense can increase quickly. Build-out methodology should be consistent for all State agencies to provide data that can be compiled and cut for different purposes. Standardizing build-out will not only make for a more efficient process, it is the only way the Department will be able to add up municipal build-out analyses and cut it by HUC 14s, HUC 11s, or any other way it needs to analyze the land use impacts on natural resources. Why has the Department chosen a methodology for the wastewater rule that is different from both the Department's stormwater rule and that of the Office of Smart Growth? (5)

856. COMMENT: A standard approach for performing environmental build-out analyses should be defined, and should be applicable for wastewater management planning, Plan Endorsement and for evaluating municipal COAH Round 3 Affordable Housing Plans and obligations. (9, 19)

857. COMMENT: The build-out requirements must also satisfy the requirements of other State processes, including State Plan endorsement and COAH substantive certification. (78)

RESPONSE TO COMMENTS 852 THROUGH 857: The Department recognizes that there are other rules that require build-out analyses, promulgated by both the Department and others, and concurs that aligning the various requirements so that a single analysis could serve all needs would be an efficient outcome. However, it is important to note that the purpose for and intended use of the output from the build-out analyses required under other rules differ, which leads to the difference in the criteria for the build-out analysis for each. Several of the inputs to a build-out analysis are common, such as the identification of developable land and determining the development yield of developable land according to zoning. Therefore, other work can and should be leveraged for efficient use of resources. One commenter questions if the use of composite zoning will yield an outcome compatible with the other build-out analyses. A composite zoning approach, like all approaches, requires some assumptions be made about development yield of zoning, as most zoning designations offer a range of yield, depending on certain conditions, such as availability of infrastructure, clustering or inclusion of a mix of housing types. Discretion is left to the WMP agency to determine the details of composites, if used, because the range of local zoning to be grouped into composites will vary by locality. For the purpose of the WQMP rules, if development yield of zones has been determined for another build-out analysis, it would be acceptable to use that information in the environmental build-out analysis; it is not necessary to create a composite zoning coverage. The rule allows, but does not require, a composite zoning approach in an effort to simplify the analysis. To the extent that

another study, such as the Cape May Water Supply Study (which has not yet been finalized or released) referenced by one commenter, provides elements that can be used to meet the population projection (urbanized municipalities) or environmental build-out requirements in the WQMP rule, it is encouraged that existing work be utilized to avoid duplicative work. Please refer to Response to Comments 825 through 834 regarding the HUC 11 basis for analysis.

858. COMMENT: Municipal master planning and wastewater management planning have in the past been conducted with a 20-year planning horizon. The proposed rule requires that a build-out analysis approach be utilized for the non-urbanized communities. A build-out analysis based on current environmental constraints and zoning is not an appropriate or realistic indication of the maximum development that might occur. More intense development can occur through re-development, which is supported in town centers and transit centers by the Smart Growth initiative and through the Highlands Plan transfer of development rights. It should also be recognized that there will be a continuing need for construction of low and moderate cost housing through the Council on Affordable Housing requirements. (4, 35, 73)

859. COMMENT: The rules propose that wastewater needs must be projected to build-out, with exception of a 20-year scope for urbanized areas. The requirement to plan for build-out is troublesome due to the unpredictability of development trends and zoning changes into the future. Many unknown variables cannot be considered when projecting that far into the future such as adjusting for changing technology that will improve wastewater treatment and reduce water consumption. Planning even 20-years into the future will involve a “best guess,” though it is more of a realistic probability than predicting build-out. Since the wastewater management

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plans need to be updated every six years, a shorter planning horizon of 10-years, or at most 20-years, would be more reasonable. Do not require wastewater planning projections at build-out. (19, 28)

860. COMMENT: Both build-out and flow projections within interim years are necessary for developing county WMPs. Investment decisions regarding enhancements of sanitary sewer infrastructure components such as treatment plants are governed in part by projected flows anticipated to occur within a foreseeable timeframe. It is unlikely that the wastewater utility providers will be able to rely on build-out results alone for planning and programming sanitary sewer system improvements. The timeline associated with achieving build-out will vary from municipality to municipality, and differ significantly among treatment plant service areas. Build-out is influenced by many factors that are difficult to predict using spatial build-out models. Local market conditions, which are increasingly influenced by national and global forces, have a direct bearing on the rate of residential and economic growth that will occur. The availability of public land acquisition funding, and shifts in environmental regulations can divert lands previously available for development to public open space and preserved farms. This is another factor difficult for spatial models to predict, but, if not factored in, build-out results will overestimate growth potential. Growth potential will be under-estimated if proposed future centers, redevelopment areas, TOD, TDR and smart growth initiatives as reflected in regional, county and local master plans are not taken into consideration, even though these initiatives may not be easily represented in spatial build-out models.

Projection and build-out thresholds should be established to reflect the inherent margin of error in predicting both future water supply/wastewater capacity and water consumption/wastewater flows. If wastewater flow and water demand projections and/or build-out results lie within a reasonable range (i.e. above or below 10 or 15 percent of estimated capacity) no changes to zoning should be required. (9, 19)

861. COMMENT: Predicting build-out is an imperfect science. Actual build-out depends on many factors, including market forces, future land regulations, future land preservation, and so forth, and is an important but expensive task. The Department should incorporate a margin of error when comparing build-out to wastewater capacity, before requiring action by the WMP agency. (78)

862. COMMENT: Proposed N.J.A.C. 7:15-5.25(c) requires an environmental build-out for each existing or proposed wastewater service area, yet this analysis is not required for sewer service areas in urbanized municipalities. The basis document states that an environmental build-out "considers the development potential of an area given existing development and environmental constraints. The environmental build-out is used with and to inform the analyses in the rule related to future wastewater and water supply needs." A definition for "environmental build-out" should be provided to allow for meaningful comment on this requirement.

The proposal treats urbanized municipalities differently than non-urbanized. For non-urbanized municipalities, one would assume that the build-out analysis requires a determination that the municipality will be fully built out under current land use master plans and development

regulations. There is no timeframe for this analysis. Will there be full build-out in 20 years, 50 years, or 100 years? Assumptions beyond a 10-year timeframe at the municipal level have a huge margin of error. A specific planning analysis horizon should be established for all municipalities. There should not be different methodologies and planning horizons for urbanized and non-urbanized municipalities. The timeframe for the analysis should be no longer than ten years, as the analysis would be more reliable. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 858 THROUGH 862: The environmental build-out is fully and appropriately defined in the rule provision at N.J.A.C 7:15-5.25(c) that requires it. Build-out does not carry a timeframe; it is the full development yield of the land. The Department recognizes that a build-out analysis is not a precise science and that the outputs from such an analysis may vary from what is ultimately realized in terms of development over the long term. Yet it is imperative to establish a baseline against which to assess the sustainability of the operative development blueprint. The environmental build-out analysis is intended to identify where there are significant discrepancies between what is currently allowed by zoning and what can be sustained given environmental considerations in order to trigger an appropriate response to realign the distribution of resources or the development blueprint to be within the sustainable use of the environment. The build-out analysis will serve to identify where resource constraints are becoming a limiting factor, thereby informing the need to reserve remaining resources to accommodate priorities such as affordable housing. It is not necessary to build the additional capacity if the need is not imminent, only to show that providing the capacity is feasible within the natural resource constraints. As plans are to be revised every six years, the environmental build-out and responses can be refined to reflect actual development experience, changing

conditions and improvements in technology. The rule also incorporates flexibility to account for the unique circumstances of urbanized municipalities and locations where redevelopment is proposed. The rule allows for deviations from existing zoning for valid documented reasons and replaces the build-out analysis requirement with a projection basis in urbanized municipalities to accommodate circumstances such as redevelopment. The degree of accuracy in the required analyses is expected to reflect that it is a planning exercise. Therefore, no stipulated margin of error is needed.

863. COMMENT: The Department has centered portions of this regulatory proposal around impacts to watershed and subwatershed areas, which have been identified as a key planning concern, yet the Department previously abandoned its watershed initiative to work with counties when it withdrew funding for such programs. Now, through this rulemaking proposal, the Department is attempting to force local governments to complete an environmental build-out analysis and other work begun under the abandoned watershed program without providing sufficient funding or an adequate timeframe to complete such detailed work. The rule proposal also fails to provide any reasonable level of flexibility to enable local governments to tailor such analysis to suit their needs. (60)

RESPONSE: In the Fall of 2000, the Department awarded two years worth of grant funding to 16 lead entities to serve as an extension of the Department to facilitate watershed management planning activities in all 20 watershed management areas (WMAs) throughout the State. The lead entities varied from water purveyors to county agencies. The watershed initiative referred to by the commenter had as its goal the development of a Watershed Management Area (WMA)

Plan. Specific deliverables for the WMA Plan included the development of a public advisory committee to represent watershed stakeholders. Watershed stakeholders were to establish a vision with goals and objectives that would prioritize and focus actions to achieve clean and plentiful water. The WMA Plans were to include characterization of the watershed to establish a baseline. Two short term tasks included development and implementation of "Action Now" projects to improve water quality and development of a water budget. Finally, to advance the goal of creating and enhancing stewardship, the plans were to include a plan for education and outreach. The requirement to develop areawide WQM plans and to maintain a continuing planning process predates the watershed initiative and is still in effect. The WMA Plans were intended to be consistent with and advance the objectives of the Water Quality Planning Act, but would not supersede the requirement to prepare WMPs. Under the Water Quality Planning Act, water resource planning is conducted based on areawide WQM plans. The areawide WQM plans identify treatment works necessary to meet the anticipated municipal and industrial waste treatment needs, including an analysis of alternative waste treatment systems and any requirements for the acquisition of land for treatment purposes; and the identification of the necessary waste water collection and urban stormwater runoff systems (N.J.S.A. 58:11A-5a). In addition, the areawide plan is to include a regulatory program to “provide control or treatment of all point and nonpoint sources of pollution, including in-place or accumulated pollution sources, to the extent practicable,” and “to regulate the location, modification and construction of any facilities within such area which may result in any discharge in such area” (N.J.S.A. 58:11A-5c(1) and (2)). Moreover, the areawide plans are to include a process to identify, among other things, construction activity related sources of pollution and to set forth procedures and methods, including land use requirements to control, to the extent feasible, such sources (N.J.S.A. 58:11A-

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5h). All projects and activities affecting water quality in any planning area must be developed and conducted in a manner consistent with the areawide WQM plan adopted for that planning area (N.J.S.A. 58:11A-10). WMPs are the means to periodically update the WQM plans. The Department believes that sufficient flexibility to address regional and local needs has been incorporated into the rule requirements. These include provisions that allow the WMP agency to further refine sewer service area delineations to reflect local planning objectives and stipulating standards that are more stringent than those contained in the rules. Further, the Department is making both technical and financial assistance available to counties to accomplish the wastewater management planning tasks.

864. COMMENT: The provision at N.J.A.C. 7:15-5.25(c) that requires an environmental build-out analysis is supported. This is a vital tool in protecting the State's resources. (64)

865. COMMENT: The proposed rule in beginning to address land use issues through the requirement of zoning build-out analyses is supported. (5)

866. COMMENT: The proposed requirement for an environmental build-out analysis for non urbanized areas identifying existing and future development expected to connect to sewers based on current zoning, excluding wetlands and riparian zones in sewer service areas is supported. (17)

RESPONSE TO COMMENTS 864 THROUGH 866: The Department acknowledges these comments in support for these provisions of the rule.

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867. COMMENT: The Department should clarify how the results of the build-out analysis will affect General Development Plan designs and developer's approvals already in place with municipal governing bodies. These approvals are vested for extended periods. Therefore land may appear available when in fact; it has approved development. Will new or revised developer's agreements for General Development Plans or other municipal agreements related to land use, now include the county governing body as a party in the agreement? (51)

RESPONSE: Where a municipality has already approved a development plan for a parcel, the development plan will either be consistent with zoning or it will differ from existing zoning because a variance was granted. If the development approval is consistent with zoning, then the yield for the parcel will be adequately reflected in the overall build-out analysis. If the development approval allowed for a deviation from zoning, the relevance will depend on the degree of difference. The rule at N.J.A.C. 7:15-5.18(b) provides that inconsistency with local zoning can be factored into the plan for good cause and with appropriate documentation. Therefore, the municipality would be expected to identify any land development approvals that would substantially alter the output from the build-out analysis. Minor deviations will not have a material bearing on the outcome, given the imprecise nature of a build-out analysis and can be ignored. This rule does not affect the manner in which municipalities enter into general development agreements or the appropriate parties to any such agreements. The Department does not envision a county government will insert itself into the General Development Plan process as a result of this rule.

868. COMMENT: The rule proposal bases the amount of development that will be allowed on local zoning, not on true capacity analysis. When it comes to sewers and water quality, the current problems have occurred because local zoning and parochial interests have been allowed to drive sewer planning, rather than the protection of water quality, water supply, and natural resources. This model will only increase the problems. (65, 79)

869. COMMENT: There is still too much of the planning being driven by local zoning. This could mean a capacity-based analysis. What infrastructure is available, how much capacity is left, how much water is available, what are the impacts to the ground water, stream surface waters, endangered species, and so forth, should be the basis of the plan versus looking at the local zoning and then trying to figure out a system. This process is more backwards then it should be. (65, 79)

RESPONSE TO COMMENTS 868 AND 869: The approach suggested by the commenters is reflected in the rules as written. The rules require consideration of both natural resource constraints and water supply and wastewater capacity constraints in the development of a wastewater management plan. The requirements for sewer service area delineation, environmental build-out, wastewater and water supply needs analysis, and standards for nonpoint source pollution impacts must be considered as a whole when formulating the overall wastewater management plan. Zoning is one factor that initially informs the analyses, but if development allowed by current zoning cannot be accommodated given the natural resource and infrastructure constraints, alternatives must be pursued, including revising zoning, in order for a plan to be approved.

870. COMMENT: For areas with existing septic systems outside the sewer service area, a capacity analysis should be conducted for existing development, in addition to proposed development as stipulated in the proposed rules, to demonstrate that ground water and other natural resources are not jeopardized under existing conditions. If these resources are at risk due to existing conditions, especially for public health reasons, then extension of sewers should be considered. Capacity analysis should also demonstrate that new septic systems will not jeopardize or further degrade existing resources. (51)

RESPONSE: The antidegradation target of two mg/L nitrate was established because it reflects the Statewide ambient nitrate concentration, which is an outcome of existing nitrate inputs from existing development. Therefore, the effect of existing conditions on a large scale has already been accounted for. It is recognized that specific locations will have nitrate levels higher or lower than the ambient. Where these levels exceed standards because of the density of existing septic systems or where the specific circumstances of septic system reliant development present a public health danger, it is expected that alternatives, such as provision of sewer service, will be considered to alleviate the condition. The standards at N.J.A.C. 7:15-5.25(e), which require a demonstration that the antidegradation target is maintained within each HUC 11 area and that satisfying water supply needs is consistent with the New Jersey Water Supply Plan are among the provisions of the rule that ensure new development on septic systems protect water resources.

871. COMMENT: The decision to exempt municipalities that are already built out from the requirements of completing a build-out analysis under N.J.A.C. 7:15-5.25(c) is strongly

supported. WMPs should be based on 20-year flow projections across the board, just as it is proposed for the planning term of "urbanized municipalities" for consistency reasons. The 20-year flow projection is also consistent with the term for design of wastewater systems as stipulated in Federal law. (18, 32)

RESPONSE: The Department acknowledges support for this provision of the rule. The reliance on a 20-year projection for estimating wastewater and water supply needs in place of performing an environmental build-out analysis in urbanized municipalities was intended to reflect the expectation that urbanized municipalities will be a focus for redevelopment, which cannot be characterized in the environmental build-out methodology. In areas with significant developable areas, the environmental build-out analysis is needed in order to assess the associated wastewater management and water supply needs and ensure that they are aligned with sustainable use of water resources.

872. COMMENT: If the WQMP rules are to be utilized to actually plan for future development, redevelopment and preservation (of natural resources) in New Jersey, then all municipalities should provide population and employment projections and demonstrate how they will be attained in the overall county plan. As proposed, the majority of municipalities will calculate their build-outs, identify their current wastewater and water supply capacities, and then simply downzone to stay within their existing capacities or to minimize their wastewater and/or water supply deficits. (66)

RESPONSE: The objective of the rule is to ensure that the location and magnitude of future development supports the protection of natural resources and is within the environmental infrastructure capacity that exists or can feasibly be developed. It is possible that some municipalities will not be able to realize the development yield of current zoning and will adjust zoning accordingly; however, the Department has no reason to expect that most municipalities will select the option of down zoning even where environmental infrastructure expansion is feasible.

873. COMMENT: Recognition that the build-out analysis of urbanized municipalities is inappropriate at N.J.A.C. 7:15-5.25(c) is supported. The threshold of urbanization should be set at 75 or 80 percent instead of the proposed 90 percent since the character of municipalities is essentially determined by the time 75 or 80 percent of the land has been developed. The 90 percent threshold more closely approximates the complete development of a municipality. (38)

RESPONSE: Only truly urbanized municipalities are appropriate to exclude from the environmental build-out analysis. Where more than 10 percent of a municipality is undeveloped, there is a need to assess implications of potential land use with respect to wastewater and water supply needs in order to ensure land use plans align with sustainable use of water resources.

874. COMMENT: The proposed rule amendments call for Designated Planning Agencies (DPAs) to develop flow projections on an ultimate build-out basis as opposed to the current regulations which require a 20-year projection. Even the 20-year term requires a great deal of educated guessing. Requiring projections to ultimate build-out renders the flow allocations in

the Wastewater Management Plan to be theoretically an academic exercise. The problem is that the DPAs have legal responsibilities and liabilities associated with the Wastewater Management Plans that they have prepared. The content of the Wastewater Management Plan is binding, to a degree, upon the DPAs, and so they cannot afford to significantly increase the guesswork associated with the flow allocations by going from the already problematic 20 year projections, to ultimate projections. (46)

875. COMMENT: The new requirement that bases each municipality's allocation on a lot by lot basis will be very onerous and expensive for the DPA. These evaluations will also be of very little value since it is mere guesswork as to what will actually be placed on each lot. The same commercially zoned lot could have a warehouse, or a laundromat, which would have a significant flow associated with it. Therefore, the lot by lot analysis would be expensive, time consuming and merely an academic exercise that may yield legally binding results upon the DPA, whether accurate or not. (46)

RESPONSE TO COMMENTS 874 AND 875: Based on the context of the commenters letter, the Department believes the commenter meant to say WMP agency wherever the term "Designated Planning Agency" was used. The Department disagrees that the build-out analysis is more speculative than a projection based on trends, as it reflects an actual holding capacity based on known variables of natural resource constraints, land available for development and existing zoning. This analysis is not required to be lot by lot; rather it is intended to be a GIS exercise. Further, the Department is prepared to assist wastewater management agencies by providing a tool to complete the analysis, direct assistance on request as well as funding. It

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should be noted that build-out analyses are required for the Stormwater Management rules, N.J.A.C. 7:8 and others, so much of the component information should be readily available. The Department recognizes that land uses allowed in a given zone may vary in the amount of wastewater that they will generate. Where actual intended uses are not known or specified in the zoning, default wastewater generation assumptions are provided in the New Jersey Pollution Discharge Elimination System rules at N.J.A.C. 714A-23.3 for projected flow criteria in sewer service areas, and in the Standards for Individual Subsurface Disposal Systems rule at N.J.A.C. 7:9A-7.4 for areas to be served by septic systems, which are the sources to be used for wastewater projections in accordance with the rule at N.J.A.C. 7:15-5.25(d) and 7:15-5.25(e), respectively. As actual development occurs, the uncertainties diminish and should be reflected in the updated plan, required every six years.

The Department's experience is that failing to consider the needs of the entire planning area has led to two problems: 1) sewer service areas delineated that promote sprawl because the wastewater that could be generated by build-out would far exceed the capacity of the associated treatment facility; and 2) building capacity where it cannot be realized because of natural resource constraints on development. Once lines are placed within the sewer service area, it is presumed that the intervening areas will be served, which can create problems if the waterbody to which the treatment facility discharges cannot assimilate any further load. The Department believes the frequently oversized sewer service areas have a greater potential to create an unrealizable obligation, whether contractual because of service agreements or implied, than one that is based on real constraints.

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876. COMMENT: The Department must ensure that build-out analyses incorporate the removal of environmentally sensitive areas from the proposed sewer service area, such as threatened and endangered species habitat and well head protection areas. (17)

RESPONSE: The Department selected four environmental features to be used in determining if centralized sewer service is appropriate for an area: threatened and endangered species habitat, Natural Heritage Priority Sites, Category One stream buffers, and wetlands. The spatial extents of each of these environmentally sensitive features can be determined through the application of an existing Geographic Information System (GIS) coverage provided by the Department. In developing these rules, the Department considered simply removing all of these features from sewer service areas, however, this would result in fragmented sewer service areas that could also additionally include smaller areas within them that would have to be excluded from sewer service. Such a pattern of sewered and unsewered development would not enable the application of municipal zoning powers to achieve a consistent and orderly pattern of development and would not facilitate center-based development, thus making it difficult to achieve the objectives of local master plans. Therefore, the Department developed a repeatable method for sewer service area mapping by merging the GIS coverages of the four selected environmental features, overlaying each coverage atop the other to form one spatial representation of all four environmental features together, and using the threshold of 25 contiguous acres to determine exclusion from a sewer service area. The 25-acre threshold was determined based on a policy decision that at least 90 percent of the environmentally sensitive features should be excluded from the sewer service area, but that the threshold should be large enough to permit the reasonable application of zoning. A comprehensive analysis that assessed a variety of potential

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thresholds was performed, considering areas of 5-, 25-, 50- and 100-acres, which based on the policy decision described above resulted in the selection of the 25-acre threshold.

Well head protection areas (WHPA), to the extent they may exist within areas delineated for sewer service, are not directed to be excluded. The Department believes that well head protection designation does not preclude development at an intensity warranting sewer service. As such, development that is consistent with well head protection may be appropriate to include in a sewer service area. A WHPA in New Jersey is a map area calculated around a Public Community Water Supply (PCWS) and/or a public noncommunity well that delineates the horizontal extent of ground water captured by a well pumping at a specific rate over a two-, five-, and twelve-year period of time for confined wells. The confined wells have a fifty foot radius delineated around each well serving as the well head protection area to be controlled by the water purveyor in accordance with Safe Drinking Water rules (see N.J.A.C. 7:10-11.7(b)1). WHPAs are ranked as Tier 1, 2 or 3, depending on the amount of time, 2, 5 and 12 years, respectively, it takes for water to reach a well. As required under the Safe Drinking Water Act, source water assessments were conducted for each of the many hundreds of public water supply systems in New Jersey, which included an inventory of the potential contamination sources within the source water assessment area. The assessments also determined the public water system source's susceptibility to regulated contaminants. The Safe Drinking Water Act does not direct the actions to be taken to reduce pollutant threats found during the assessment, but rather relies on municipalities to determine the best means to protect their water supply, including through voluntary or regulatory means, such as a wellhead protection ordinance. Therefore, inclusion or exclusion of a well head protection area in a sewer service area is not automatically appropriate

to protect well head areas. Instead, the development type and its potential threat to contaminate a water supply resource is important and is best accomplished through local land use regulation.

877. COMMENT: Does N.J.A.C. 7:15-5.25(c)1 pertain to land that will be eliminated or "clipped" from existing sewer service areas where there's not sewer lines in the ground as part of the going-forward planning process where sewer service is inappropriate for environmental reasons? (86)

RESPONSE: N.J.A.C. 7:15-5.25(c)1 by its terms applies to undeveloped and unconnected portions of sewer service areas as they may be delineated in accordance with N.J.A.C. 7:15-5.24, specifies the areas, including wetlands, Natural Heritage Priority Sites, threatened and endangered species habitats and Special Water Resource Protection Areas, to be eliminated as part of the delineation process. The build-out analysis that applies to areas not designated for sewer service is addressed at N.J.A.C. 7:15-5.25(c)2 and does not require removal of wetlands and riparian zones when calculating build-out. In the portions of the planning area that are outside of distinct sewer service areas, it is not necessary to exclude wetlands and riparian zones in the environmental build-out analysis. While development on wetlands and in riparian zones is regulated inside and outside of sewer service areas, given the lower densities of development expected outside of sewer service areas, it is more likely that the development of these areas can avoid wetlands and riparian zones that are on the development site. Therefore, excluding the wetlands and riparian zones in this case would potentially underestimate the development potential, and, therefore, the number of allowable equivalent dwelling units that can be planned for by each municipality. The extent to which wetlands and riparian zones appropriately limit

the density of development using individual subsurface sewage disposal systems (ISSDSs) is already incorporated in the nitrate dilution analysis at N.J.A.C. 7:15-5.25(e). Further, underestimation of future development would affect the outcome of the proposed water supply analysis at N.J.A.C. 7:15-5.25(f).

878. COMMENT: If lot sizes are averaged over a HUC 11 watershed for septic systems, how are sewered areas, farm preservation areas, wetlands, and other areas without septic systems counted? Are all these areas averaged or are they excluded from the determination? (37)

RESPONSE: The determination of allowable individual subsurface sewage disposal systems (ISSDSs) or equivalent dwelling units per HUC 11 applies only outside of sewer service areas. Therefore, areas that are connected to sewers or intended to be connected to sewers do not figure into the analysis. In determining the environmental build-out in areas outside of sewer service areas, the allowable density must first be determined in accordance with N.J.A.C. 7:15-5.25(e). This density represents that which is consistent with maintaining the overall Statewide ambient concentration of two mg/L of nitrate. The allowable number of additional units is calculated by applying this density, in terms of a total number of sustainable ISSDSs for residential areas and equivalent dwelling units per acre for areas other than residential, e.g., commercial, industrial, etc., to the total number of acres that are currently undeveloped or underdeveloped. This would include farmland, whether or not it is preserved, and wetlands. This does not mean that development of wetlands or preserved farmland is expected, just that these areas are not excluded when determining the supportable number of units. The total number of units that can be supported in the HUC 11 are then distributed according to zoning decisions consistent with

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local planning objectives and may include higher density development in some portion of the HUC 11, which are then offset by lower density development in other parts of the HUC 11.

879. COMMENT: N.J.A.C. 7:15-5.25(c)1 requires a delineation of all existing and "future development that can occur under existing zoning in undeveloped areas and is expected" to be connected to sewers under existing zoning, "after removing wetlands and riparian zones." Further, the rules grant the municipality the "option" to remove "other areas … if they are not expected to connect to sewers." N.J.A.C. 7:15-5.25(c)1 makes clear that areas depicted as being environmentally constrained (i.e. by wetlands and riparian zones) are not suitable for development and therefore would not generate wastewater. However, the rules should provide a process to refute zoning maps that may incorrectly depict these environmentally constrained features.

The basis document for N.J.A.C. 7:15-5.25(c)1 states the purpose is "to avoid overestimating future development and associated wastewater and water supply needs." Thus, it is unclear why the rules extend the authority to towns to subtract "other areas" from the build-out analysis. This discretion could easily be abused by municipalities (including those seeking to circumvent their *Mount Laurel* obligations). Any "other areas" removed at the will of the municipalities should be subject to the approval of the Council on Affordable Housing (COAH), after review and verification by the Department. (18, 42, 44, 45, 61)

RESPONSE: The primary purpose of a wastewater management plan is to determine the most appropriate and efficient wastewater management alternative considering environmental

sensitivity and the projected intensity of development, and then to determine whether adequate wastewater treatment capacity and water supply exists to accommodate that growth. The Department has defined four environmental features that it is mandated to protect and for which a geographic information systems (GIS) coverage exists: wetlands, Natural Heritage Priority Sites, threatened and endangered species habitats and riparian zones adjacent to Category One waters and their tributaries. The rule proposes to generally exclude large contiguous areas encompassing one or more of these features from centralized sewer service, because the extension of sewers into these areas would encourage if not subsidize their destruction by development. However, the Department acknowledges the limitations of its spatial GIS coverages of these environmental features and at N.J.A.C. 7:15-5.24(e) allows an adjustment of sewer service areas based on site specific information that demonstrates that the spatial data is incorrect.

Once the appropriate wastewater management alternative has been identified, the next part of the analysis requires a demonstration that adequate capacity exists to meet the future wastewater treatment needs without compromising water quality. The determination of how much wastewater could potentially be generated by future development is pivotal to assessing whether adequate capacity exists to treat that wastewater. Over predicting the amount of development and thus the potential future wastewater could lead to an identified deficiency in wastewater treatment capacity that would then result in either a reduction in the allowable planned development or unnecessary expenditures to expand treatment works to accommodate wastewater that will not be realized. Two factors affecting the amount of development that will occur are environmental regulations and local zoning. The Department's regulatory programs

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governing freshwater wetlands (See N.J.A.C. 7:7A) and riparian zones (See N.J.A.C. 7:13) are very restrictive when considering the construction of new wastewater generating structures in these areas. Simply applying local zoning to these areas would grossly over predict future development and future wastewater treatment needs. Therefore, the Department has required the removal of these areas from the build-out analysis.

The rule at N.J.A.C. 7:15-5.25(c)1 allows municipalities to remove other areas if they are not expected to connect to sewers including, but not limited to, agricultural lands and public open space. Similarly, where local ordinances would prevent the development of an area due to steep slopes, set back requirements or other local concerns, the Department must afford an opportunity to adjust the future development forecast to acknowledge these restrictions and avoid an over estimation of future wastewater treatment needs. In a home rule state, such as New Jersey, the primary power to zone rests with the municipalities. A municipality requesting an adjustment of the future development potential that would otherwise be predicted by a simple application of its zoning, will bear the burden of demonstrating that its ordinances do in fact reduce that potential so as to ensure that the future wastewater projections are not understated and that the treatment capacity exists to meet the full future demand. The Department has the responsibility to coordinate with municipalities to ensure that local land use planning will not cause undue environmental harm, such as causing water quality impairment due to the discharge of pollutants. This chapter helps a municipality determine the maximum sustainable development potential under current conditions and allows the municipality to determine the ways that available potential should be allocated, including to the municipality's affordable housing obligation. With regard to information on the sustainable development potential, it has been and remains the

municipality's responsibility to assure that capacity is used in accordance with local interests and obligations. The Department will review the build-out analysis submitted as part of a WMP for accuracy. The WMP will also be publicly noticed, which will provide the public with the opportunity to comment on the accuracy of the analysis. However, the Department does not believe that it is necessary to approve the accuracy of these submissions as part of this rule.

880. COMMENT: An inconsistency exists between citations, N.J.A.C. 7:15-5.24(b) and N.J.A.C. 7:15-5.25(c)1. N.J.A.C. 7:15-5.24(b) restricts the sewering of areas 25 acres or more containing endangered or threatened wildlife species habitat, Natural Heritage Priority Sites, Category One waters, special water resource protection areas, and wetlands. However, N.J.A.C. 7:15-5.25(c)1, requires that only riparian zones and wetlands be removed from future sewer service areas in calculating build-out. (…*as well as the future development that can occur under existing zoning in undeveloped areas and is expected to connect to sewers, after removing wetlands and riparian zones*). Because endangered or threatened wildlife species habitat and Natural Heritage Priority Sites must be removed from consideration for future sewer service, the lack of sewers for undeveloped areas containing endangered or threatened wildlife species habitat and Natural Heritage Priority Sites should be factored into build-out. (88)

RESPONSE: Except as provided under N.J.A.C. 7:15-5.24(g) and (h), threatened and endangered species habitat is not eligible for sewer service because development at the density requiring sewer service is not compatible with conservation of threatened and endangered species. However, as development in habitat of threatened or endangered species is not prohibited (except as otherwise regulated through land use permits), the development potential

associated with such areas within sewer service areas cannot be ignored when calculating the potential wastewater that will be generated. Outside of sewer service areas, the development potential is determined without removal of any of the environmentally sensitive areas. This is because, at the lower densities associated with the septic system wastewater management alternative, location of development on a parcel so as to avoid regulated areas cannot be precluded.

881. COMMENT: The New Jersey State Water Supply Master Plan is being done on a HUC 11 basis. The proposed WQMP rules at N.J.A.C. 7:15-5.25(c) require information be analyzed at the municipal level which is more finite than HUC 14 delineations. Departmental participation and guidance is needed to insure that each county is accurately disaggregating the water supply information at N.J.A.C. 7:15-5.25(c)3. Without this step, the county WMPs could face disapproval resulting in needless costs. (88)

RESPONSE: The environmental build-out at N.J.A.C. 7:15-5.25(c) is required to be disaggregated among municipalities and HUC 11drainage areas as well as among wastewater service areas and areas inside or outside of public water supply service areas. The Department recognizes that these areas will not be confined within a given governmental unit. The required disaggregation is needed to allow the environmental infrastructure needs to be broken down and rolled up as needed to allow the capacity analyses to be completed considering the drainage area, the service area and the municipality. The Department has prepared a GIS model to generate the environmental build-out, which can sort the required information to disaggregate it among any of the necessary areas and will provide technical assistance in its use upon request.

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882. COMMENT: In order to avoid delays in the review, the Department should provide specific guidance as to what format is needed for the tables and maps required at N.J.A.C. 7:15-5.25(c)3. (18, 42, 44, 45, 61)

RESPONSE: The Department provides mapping standards at N.J.A.C. 7:15-5.20. The Department has purposely provided flexibility in the format to be used to present the environmental build-out information in recognition that there will be variability in the level of detail that will be appropriate depending on the area that is the subject of the plan. The Department has provided a web based WMP outline that can be used as an example format. Further, the Department is working with some counties now and plans to work with all to formulate satisfactory WMPs as efficiently as possible.

N.J.A.C. 7:15-5.25(d)

883. COMMENT: In its proposed amendments to the Surface Water Quality Standards, the Department proposes to impose "maximum protection" (i.e., development restrictions) on tributaries and feeder streams of reservoirs serving a population greater than 100,000. The basis document justifies the proposal on the anticipated increases in the State's population: "The population in New Jersey is expected to increase by nearly one million in the next 20 years and by nearly two million in the next 40 years. Some of this population increase can be expected to be in close proximity to the reservoirs and their feeder streams."

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While it is clear that the Department anticipates significant population growth in the future, it is not apparent how the growth will be addressed in its proposed planning process, which builds upward from current municipal plans, depending on whether or not they are urbanized. Given the proposal's premise that current capacity is a "cap," then many areas will not be able to accommodate any future increases in employment or population, while local planning may leave some WMP areas with planned capacity that may not be needed. Since the proposal does not provide for inter-area capacity transfers, the Department must answer how the projected increase in those workers and households will be allocated via the planning process. Absent a withdrawal of the rule proposal, the Department must advise each WMP agency of the projected population and employment increases for its area so that it can assure that there will be sufficient wastewater treatment capacity when it is needed in the future.

There are two complicating factors with respect to the proposal's capacity planning relating to the urbanized areas: (1) the assumption that "infill and redevelopment will generally have a *de minimus* impact on the existing wastewater facilities serving these areas;" and (2) the lack of a standardized population projection model. If the assumption is that growth will be pushed-down in the non-urbanized areas and pop-up in the urbanized municipalities, the assumptions regarding the capacity of wastewater facilities serving the urbanized areas are substantially in need of revision. Based upon recent trends, over 50 percent of new housing has been or will be provided through redevelopment. Redevelopment is also a major tool for cleaning up and redeveloping Brownfield sites. The proposed regulations fail to specifically address redevelopment, which could severely curtail redevelopment efforts.

The redevelopment statute (N.J.S.A. 40A:12A) requires a specially tailored redevelopment plan complete with a new zoning ordinance for the redevelopment area, which is required to be part of a redevelopment plan. By law, the redevelopment plan and the zoning ordinance contained in the plan either supersedes the preexisting zone for the redevelopment area or constitutes an overlay zoning district within the redevelopment area. The redevelopment plan and redevelopment ordinance will be the means of revitalizing the State's older metropolitan areas. Given the importance of redevelopment to New Jersey's future prosperity, there should be special provisions declaring that new redevelopment plans and the ordinance contained therein occurring after the county WMPs are submitted to the Department shall be automatically included into the county's WMP without a complex and lengthy application process. Any other approach would lead to extensive delays throughout the State for redevelopment projects and result in the abandonment of many of these projects. (18, 42, 44, 45, 61)

RESPONSE: The rule does not establish existing wastewater capacity as a cap or automatically disallow wastewater treatment capacity transfers, nor does it assume that growth will be pushed down in non-urbanized areas and pushed up in urbanized areas. The objective of the rule is to determine the sustainable development potential of each area, particularly ensuring that wastewater management and water supply capacity are sufficient to support the identified development potential. Where build-out development exceeds the existing infrastructure, feasible increases must be identified or zoning yield adjusted. One means to address insufficient capacity in one area would be to shift available capacity that is in excess of local demands to the area in need. This option will not be available in all areas and the Department would need to

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assess the impacts of such a transfer relative to water quality and water quantity impacts within the affected basins in order for such an option to be approved.

The importance of redevelopment in urbanized areas has been considered in rule development. The needs of urbanized areas are to be estimated using population projections, as well as information available about development plans and the rule allows for use of development information inconsistent with zoning where documentation is provided regarding a valid reason for the discrepancy. While the rule envisions and supports redevelopment as a development type, it would be inappropriate to deem such plans automatically included in a WMP. The Department needs to assure that adequate treatment capacity and water supply exist to address both the development that had been envisioned in the WMP as well as the changed needs created by a redevelopment plan compared to what was originally envisioned. This may require adjustments in the development potential of other areas or the identification of additional infrastructure capacity to maintain the overall sustainable total. WMPs are documents that change over time to reflect not only changing land use priorities of the municipalities, but also improvements in technology. As plans are updated, they will reflect these changes and the changes in the types of development that will be capable of satisfying the environmental standards and concerns protected under these rules.

884. COMMENT: How do counties determine areas that should get allocations and those that do not, when the land is zoned for development but treatment capacity isn't sufficient? Will there be any guidelines established? (37)

RESPONSE: The allocation of wastewater treatment capacity is information required to be provided by the entity responsible for the treatment facility, as provided at N.J.A.C. 7:15-5.6(a)4. Where multiple municipalities are currently or proposed to be served by a single treatment facility, as has been the practice in the past, the Department expects that the allocation of capacity will be specified by the entity responsible for the treatment facility based on the service arrangements that exist or are developed between the treatment facility entity and the customer municipalities.

885. COMMENT: Basing the rules on capacity-based planning to better understand where infrastructures should be capped and where they should be expanded is supported. (5)

RESPONSE: The Department acknowledges this comment in support of this provision of the rule.

886. COMMENT: The reliance on wastewater *capacity* as a key component of evaluating land use regulations is supported however, the proposed capacity-based approach needs refinement. Where wastewater capacity is inadequate to handle projected building, the rule requires a course of action that could include redrawing sewer service areas or directing municipalities to adjust zoning. The rule should prescribe a transparent process to determine how to adjust sewer service areas and/or municipal zoning that requires consideration of the State Plan and the county master plan. (78)

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RESPONSE: The Department acknowledges the qualified support for this provision of the rule; however, the number of variables and possible options to align infrastructure capacity and development potential would make setting forth a specific process in rule impossible. The Department believes the affected local governments should be afforded the flexibility to select a response that conforms to the rule standards while allowing them to determine a method that best meets the unique needs of their particular area.

887. COMMENT: Consistency of zoning and wastewater capacity at N.J.A.C. 7:15-5.25(d) is an important goal but it is infeasible to match future build-out that may, or may not, occur at some distant point with current actual wastewater facility capacity. For example, one cannot build capacity for the year 2030 now and expect to be able to pay for it; conversely, down zoning now would send the wrong signal and imply that land should be used inefficiently. Moreover, such long-term projections by their nature are incapable of accounting for future technological advances in wastewater treatment efficiencies. Instead, what should be sought is a mechanism to achieve concurrency like the mechanism set forth in the Pinelands Commission's Municipal Reserves rules, N.J.A.C. 7:50-5.62. (84)

RESPONSE: The rule at N.J.A.C. 7:15-5.25(d) does not require that the wastewater treatment capacity calculated to be needed through development of a WMP actually be built. Rather, there must be a sufficient demonstration that any new or expanded treatment facilities needed to accommodate the wastewater to be generated can be built when needed. Alternatively, if new or expanded facilities cannot be built and still attain water quality standards, then it is appropriate to adjust zoning accordingly. Plans are to be updated every six years for precisely the reason that

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changing circumstances, new information, better technology, etc. can be factored into the plans. This six year timeframe for updates was derived from the requirement that municipalities should revisit master plans and zoning every six years.

The Municipal Reserve rules cited by the commenter allow areas slated for lower density development to have density increased if specific criteria are met. The Municipal Reserve rules also allow for a transfer of development rights scenario. The WQMP rule similarly provides flexibility to municipalities to designate the types, intensities and locations of future development within the municipality, provided the wastewater and water supply needs associated with the development and areas designated for sewer service are within the natural resource constraints determined through WMP development.

888. COMMENT: The planning process in the rule proposal conflicts with the Municipal Land Use Law (MLUL). The MLUL provides for specific substantive land use decisions to be made on a local level. The proposed planning process with its reliance on the HUC 11 designation boundaries that do not recognize municipal or county lines is not consistent with the existing statutory scheme. (23)

RESPONSE: The rules do recognize municipal and, therefore, county lines. The environmental build-out that will be the basis of the wastewater capacity analysis is to be disaggregated at the municipal and HUC 11 level so that distinctions on both political and watershed boundaries can occur. The rules do not change the authority of local governmental units to make substantive land use decisions. Instead, the rules require that available capacity for sustainable development

be determined taking into account wastewater treatment capacity, water supply and environmental constraints. Determinations as to the most appropriate way to allocate available development capacity within the counties and municipalities continue to be made at the local level, as envisioned by the Municipal Land Use Law.

889. COMMENT: Having the proposed Water Quality Management Planning rules in conjunction with the proposed Surface Water Quality Standards Category One waters regulations, N.J.A.C. 7:9B, will impose regulations that will severely restrict the development potential of municipalities throughout the state and will effectively turn over the authority to make land use decisions to the county wastewater management planning agency and the Department. (74)

RESPONSE: Land use is regulated by many authorities. The authority for zoning remains with municipalities, but the precise form that development can take must conform to site development requirements at both the local and State level. The purpose of the WQMP rules is to identify where natural resources constraints have not been factored into local land use plans. Aligning local land use plans with the natural resource constraints will benefit all parties by providing a degree of confidence that the development yield suggested by zoning can in fact be accommodated and will not be overruled by permitting decisions after a development project is proposed.

890. COMMENT: State law gives zoning and land use authority to municipalities and proposed changes to the existing WQMP rules does not change that fact. (19)

891. COMMENT: What authority does the county have to change municipal zoning? How can they require changes to municipal zoning necessary for implementation of these new rules? (37)

892. COMMENT: A key issue not addressed by the proposed rules is the county's ability to change, adjust and or enforce local zoning. (85)

893. COMMENT: There is no mechanism for zoning at the county level. The power of zoning is the power to control development, and in New Jersey, that power lies with the municipalities, not the counties. The proposed rule does not establish any implementation for zoning changes. This puts the responsibility upon the counties that they cannot carry out. (53)

894. COMMENT: Do county boards of chosen freeholders have the legal authority to ultimately decide and approve modifications to sewer service area boundaries of which those modifications would be based on municipal zoning data altered for the purposes of build-out analyses? (51)

895. COMMENT: Prior to adopting the rule, the Department must determine whether these rules give counties the *legal* authority to prescribe municipal down-zoning, and if not, what statutory changes are needed. (78)

896. COMMENT: Under the Municipal Land Use Law (MLUL), counties as the WMP agencies, do not have the authority to make municipal zoning changes. In addition, under

circumstances where the other options are not feasible under N.J.A.C. 7:15-5.25(d)2, how can the WMP agency force a municipality into making zoning adjustments? A framework should be provided for coordinating county recommendations and municipal home- rule authority, such as a county-municipal MOA, or a cross acceptance process to ensure that the county recommendations align with municipal will and authority. (49)

897. COMMENT: Is a municipality obligated to change its zoning to comply with a county WMP? Does the Department have authority to make a municipality change its zoning? (53)

RESPONSE TO COMMENTS 890 THROUGH 897: The Department recognizes that zoning responsibility lies with municipalities and does not expect this to be accomplished by counties. Development of wastewater management plans in accordance with the rules may lead to the need to adjust zoning in some municipalities. This is one of the responsibilities attributed to municipalities in the rule at N.J.A.C. 7:15-5.8(a)5ii. If a municipality fails to make adjustments necessary to ensure compliance with water quality standards, then the chapter for that municipality in the county WMP would not be adopted and the provisions of N.J.A.C. 7:15-8.1(a) with respect to sewer service area withdrawal and at N.J.A.C. 7:15-5.1(a) with respect to ineligibility for amendments would apply in that municipality.

898. COMMENT: Municipalities should have the ability to control their land use by using zoning authority in conjunction with wastewater and stormwater management. The proposed rule is in direct conflict with that objective. (62)

RESPONSE: The Department believes that municipal authority to control land use has been preserved, while recognizing the objectives of the Water Quality Planning Act. The rules do not change the authority of local governmental units to make substantive land use decisions. Instead, the rules require that available capacity for sustainable development be determined taking into account wastewater treatment capacity, water supply and environmental constraints. Determinations as to the most appropriate way to allocate available development capacity within the counties and municipalities continue to be made by municipal entities, as envisioned by the Municipal Land Use Law. The rule will provide the municipality with the tools to exercise their zoning authority considering all impacts, including appropriate stormwater management, with the knowledge that their decisions on allocation of available development will result in a sustainable long-term outcome.

899. COMMENT: Wastewater management planning should be done on an overall countywide basis, but the proposed rule mandates changes to municipal zoning and other ordinances without negotiation. This forceful top-down approach to municipal planning supersedes Home Rule and significant opposition should be expected. The Department should revise the proposal so that a wastewater management plan actually focuses more generally on countywide wastewater planning issues and leaves municipal planning and zoning to the municipalities. At a minimum, a municipally acceptable negotiation process that allows the municipality to offer their own solutions the Department's proposed ordinance changes should be created. (19, 28)

900. COMMENT: The proposed rules will significantly change the role of existing sewerage or utilities authorities in wastewater facility planning. While some of these entities do not object to

having the wastewater management planning agency designation withdrawn by the Department, there are a number of concerns with the proposed rule amendments.

The proposed amendments will change the relationship between the wastewater management plans and land use controls, which are currently regulated under the Local Public Contracts Law. The current regulations require WMPs to identify the need for wastewater treatment plant capacity based on current zoning and/or anticipated future development, but there are no requirements to change the zoning. Under the proposed regulations and procedures, the WMP will have a direct influence upon zoning and land use and the limitations of wastewater treatment capacity or water supply availability will require that zoning density be reduced. (4, 35, 73)

RESPONSE TO COMMENTS 899 AND 900: Local land use decision making has been, and will continue to be, made in accordance with the Municipal Land Use Law. As indicated in Response to Comment 898, above, the rules do not change this responsibility, they only assure that land use decisions made by the municipality are based upon current, accurate information as to the maximum sustainable level of development that can occur in that municipality taking into account wastewater treatment and water supply capacities. The commenter correctly states that the environmental infrastructure needs of development enabled by existing zoning may not, in all cases, be able to be realized consistent with the objective of the Water Quality Planning Act, which will necessitate adjustments in zoning in order to achieve alignment. As a result, planning that incorporated development projections that are not supportable by maximum available wastewater and potable water capacity will be replaced with development plans, tailored by the

municipality to its particular circumstances, which are fully achievable and can fully achieve the build-out vision of that municipality as reflected in the plan.

901. COMMENT: The proposed regulations do not have a strong mechanism for long range planning of sewer service areas and development of increases in wastewater treatment capacity. Defining the build-out potential of a sewer service area using existing wastewater treatment capacity is not planning as it pertains to the development of future infrastructure. Do the proposed regulations in any way require counties to plan for future growth and upgrades needed to support that growth? (37)

RESPONSE: The comment incorrectly suggests that existing infrastructure defines the build-out. The Department believes the rules help ensure that there is long range planning for future growth by requiring that the water supply and wastewater treatment needs of the build-out be identified, either as the result of existing infrastructure capacity or by establishing that new or expanded infrastructure can be made available, in accordance with rule provisions at N.J.A.C. 7:15-5.25(c) through (f).

902. COMMENT: The Department has made a strong effort to identify and approve alternate wastewater management systems. This needs to be further encouraged as there are existing sites that can no longer support the traditional systems and are inappropriate and land challenged for larger systems. There are also new lots being formed around wetlands that would benefit from options for septic systems. (36)

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RESPONSE: The permitting of alternate wastewater management systems is addressed under the Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A-3.11. At the discretion of local authority and consistent with these rules, alternative systems may be proposed for approvable development.

903. COMMENT: There is disagreement with the requirement that regional authorities plan for expansion of wastewater treatment plants because highly theoretical flow allocations could total a flow that exceeds the plant capacity. The ultimate build-out figures are arbitrary because they are based solely on guesswork and it would not be responsible to make any capital decisions based on them. Instead, the DPAs should continue to closely monitor flows and the allocations on an ongoing basis and make costly capital decisions about their treatment plants on a more grounded, real time basis. (46)

RESPONSE: Based on the context of the commenter's letter, the Department believes the commenter meant WMP agency instead of "DPA." The Department believes that the current situation, in which sewer service areas have the potential to generate wastewater far in excess of the wastewater treatment facility leads to sprawl development. For example, sewer service areas delineated to include entire municipalities treat all areas as equally appropriate to connect to the centralized treatment facility, whether they are adjacent to areas that are already densely developed or several miles distant from existing development centers. As a point of clarification, it is not required to construct the build-out capacity, it is only required to demonstrate that it is feasible to provide the capacity attributed to the treatment facility in the plan, within water quality and water supply constraints.

904. COMMENT: What are the assumptions on which the flow for redevelopment is based? Urban municipalities are exempt from build-out analysis based on 20-year population projections. (54)

RESPONSE: N.J.A.C. 7:15-5.25(d)ii provides that flow generated by any known non-residential redevelopment is to be added to flow associated with the 20-year population projections when determining the future wastewater management needs of an area. The salient aspect of this rule provision is that the redevelopment is known. This means that the nature of the redevelopment project, including the wastewater projected to be generated, will be known and this will form the basis for this component of the wastewater capacity analysis.

905. COMMENT: The proposal summary explains that the "term 'committed flow' is used at N.J.A.C. 7:15-5.25 in determining if adequate capacity exists to serve environmental build-out." Design flows are conservative and should not be used in build-out analyses to calculate the committed flow. (18, 42, 44, 45, 61)

RESPONSE: The flow numbers at N.J.A.C. 7:14A-23.3 and N.J.A.C. 7:9A-7.4 represent the best available information with which to assess the magnitude of flow that is expected to be generated from development that has not yet been realized. As development is connected, associated flow becomes actual flow and any adjustments in available capacity will be reflected in the 6-year update of the WMP.

906. COMMENT: The proposal fails to explicitly provide for treatment plant expansion through beneficial reuse and enhanced ground water discharge. These have the potential to improve overall water quality, not simply to mitigate increases in loading. (75)

907. COMMENT: The rule proposal should provide for alternative mechanisms to the strict application of delineated sewer service areas, such as, beneficial reuse and enhanced ground water discharge that will improve overall water quality without prohibiting beneficial development projects. (74)

RESPONSE TO COMMENTS 906 AND 907: The Department encourages RWBR to ease some of the demand on water supply for drinking purposes. However, such arrangements have the potential to be temporary. For example, where an arrangement for beneficial reuse of wastewater is made that "mines" the wastewater and diverts it from the treatment facility to a satellite treatment facility from which the effluent is used for irrigation of a golf course, capacity is temporarily freed up at the primary treatment facility. If subsequently the golf course land use is converted to residential development, the beneficial reuse arrangement would be terminated and the wastewater would need to be treated at the primary treatment facility. If the quantity of the "mined" wastewater had been made available for use by new development, the primary treatment facility may have reached capacity and be unable to receive the formerly "mined" wastewater.

908. COMMENT: An inconsistency exists between the use of the terms "existing flows" and "monthly flows" at N.J.A.C. 7:15-5.25(d)1i and definition of "actual flow" at N.J.A.C. 7:15-1.5.

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These terms and definition should only be used for build-out analysis and not for NJPDES permit calculations. Planning has historically been conducted on an annual average flow rate basis. (18, 32)

RESPONSE: While the terms "existing flows" and "monthly flows" at N.J.A.C. 7:15-5.25(d)1i are based on the monthly average over a 12 month period and "actual flow" is determined by the arithmetic average for the preceding period of three consecutive months, the term "actual flow" in not used within N.J.A.C. 7:15-5.25(d)1i therefore the Department does not believe there are any inconsistencies with how these terms are used. As discussed in Response to Comments 222 and 223, the NJPDES permitted flow is not determined by the design capacity of the treatment works or the average flow at a treatment works, although these factors may be considered in the determination. When issuing a NJPDES permit, the Department examines the allowable flow as determined in the applicable WQMP, the most recent TWA, the dilution, ambient and other water quality studies upon which the NJPDES limits were calculated, as well as impacts to antidegradation. Compliance with a permitted flow is determined by the maximum average monthly discharge, or as contained in the applicable NJDPES permit. Thus, these terms are only used for the build-out analysis and not for NJPDES permit calculations and no changes were made to the rule text.

909. COMMENT: There is objection to N.J.A.C. 7:15-5.25(d)1i that requires reporting of existing DTW flows as a monthly average over the most recent year which ignores the fluctuating, extended wet periods New Jersey historically experiences. Facility capacity planning should not ignore wet weather conditions while estimating future capacity. (22)

910. COMMENT: N.J.A.C. 7:15-5.25(d)1, the Department is proposing to evaluate the existing and future wastewater treatment needs of each sewer service area served by a NJPDES permitted facility based upon a determination of the existing flows that are connected to that facility. This determination of existing flows is proposed to be based on the peak monthly average flow over the most recent 12-month period for treatment facilities that experience a seasonal peak resulting from transient populations as reported in the Discharge Monitoring Reports for that facility. While utilizing the peak monthly average flow may provide reliable data from which to make such determinations, the rule proposal should be modified to require that the peak two-month average flow data over the last five years be utilized. Data from a single year may not capture true peak flows that would occur during a rainy period in the tourist season. (60)

911. COMMENT: N.J.A.C. 7:15-5.25(d)1i requires existing wastewater flows to be calculated based on the average monthly flow over the recent year. While this approach is preferable to using a three-month basis, it is recommended to apply the most representative average long-term flow over the past five years. (18, 42, 44, 45, 61)

912. COMMENT: At N.J.A.C. 7:15-5.25(d)1i the peak flow for any given month or the average for three highest months should be used to determine existing flows, not the peak monthly average flow over 12 months. (10, 80)

913. COMMENT: The manner in which the proposed rule characterizes existing wastewater flow under N.J.A.C. 7:15-5.25(d)1 is inadequate for the many wastewater facilities that are

impacted by substantial inflow and infiltration within their collection system. A clarification should be made on adoption that treatment facilities can characterize existing wastewater flow with and without inflow and infiltration using best available data, such as daily flow. This would allow facilities to address inflow and infiltration in accordance with the proposed N.J.A.C. 7:15-5.25(d)2iv.

The estimation of available wastewater capacity and future wastewater needs is critical to the proposed planning process. Existing wastewater flows are proposed to be based on the average of the most recent twelve months reported in the Discharge Monitoring Reports (DMRs). The Department highlights the important issue of inflow and infiltration in the summary by stating that "use of this method to establish existing flow will avoid an artificially high existing flow due to seasonal periods of high flows due to infiltration and inflow." However, using DMRs from the last twelve months, as proposed, does not address potential inflow and infiltration problems at all. Suppose the last twelve months happens to be unusually wet or unusually dry? This circumstance, which is not uncommon, would result in either underestimating or overestimating available wastewater capacity. It would be better to estimate the influence of inflow and infiltration on the 12-month average flow, and account for that influence in calculating the available wastewater capacity. While DMRs only report the average monthly flow, most dischargers record daily flows, which could be evaluated to estimate the influence of inflow and infiltration. If additional wastewater capacity were needed, a plan to address inflow and infiltration could be developed in order to recoup that flow. (1)

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914. COMMENT: At N.J.A.C. 7:15-5.25(d)1i, five years of data should be used to compute monthly average or actual flow in the same way the Department requires the computation of maximum month and annual flows for the Safe Drinking Water program since the one year period is too short given meteorological phenomena (which could yield a drought or a very wet year). The regulations should also clearly state that the monthly average flow, so computed, is for planning purposes and not permitting purposes; the permitted capacity needs to consider the "actual flow" over the last five years; and that the proposed "permitted flows" need to be consistent with "actual flows" but not necessarily with "planning flows." (38)

RESPONSE TO COMMENTS 909 THROUGH 914: Using the most recent 12 month average is most appropriate because it reflects the most current wastewater contributions. By using a full annual cycle, seasonal changes due to population or rainfall/ground water level fluctuations will generally be captured in establishing the existing wastewater flows. While this may not capture the most extreme fluctuations that may have occurred in prior years and may dampen extremes that occur over shorter timeframes, this means of estimating existing flows is sufficient for planning purposes, given the inherent uncertainties in estimating the future flows that will be used to determine if adequate capacity is available. Characterization of infiltration/inflow is important where capacity constraints are identified and addressing infiltration/inflow is one option in the rule to increase available capacity. No clarification is required to stipulate this characterization.

915. COMMENT: At N.J.A.C. 7:15-5.25(d)1ii the use of projected population increases over a 20-year planning horizon to calculate future wastewater flows in urban areas should be

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confirmed at the six-year update and revised if the projections are not accurate. Population projections can be very misleading and inaccurate over time depending on many factors outside of the WMP agency's consideration. (10, 80)

916. COMMENT: A 20-year timeframe, to determine actual growth, is too long. Although this timeframe matches that of the State Plan and Plan Endorsement it is impractical to use the timeframe in a rule that ultimately determines whether growth can occur based on withdraw or extension of sewer service area, sometimes on a case-by-case basis. (51)

917. COMMENT: Metropolitan Planning Organizations (MPOs) provide population and employment projections to counties on an annual basis. How often should sewer capacity analysis be performed to reflect these new statistics? (51)

RESPONSE TO COMMENTS 915 THROUGH 917: A 20 year planning projection was selected for urbanized municipalities because it is sufficiently forward looking to allow time to plan for needed infrastructure improvements. This planning time frame was envisioned in the WQPA and has been successfully used in facilities planning under the CWA. In municipalities that are not urbanized, an environmental build-out analysis, which is independent of timeframe, is required to assess needs. The rules require WMPs to be updated every six years, which is the opportunity to reflect upon what has transpired in the intervening time period, incorporate this information and accordingly revise the future projection at the time of the plan update.

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918. COMMENT: The inclusion of industrial flows and landfill leachate flows in the estimation of future wastewater flows by a municipality at N.J.A.C 7:15-5.25(d)1iii is supported. The inclusion of all leachate from superfund or RCRA permitted sites, which may not be captured as a landfill site but which also contributes to ground water or surface water discharges, should also be added. (10, 80)

RESPONSE: Leachate from superfund and RCRA permitted sites is adequately captured by the rule as written. To the extent that leachate from superfund and RCRA sites are conveyed to wastewater treatment facilities, it is expected that they will be included in the estimates of industrial flows under "new or expanded industries that do not conform to the categories at N.J.A.C. 7:14A-23.3." This provision would capture landfill leachate and septage, as well as discharges from superfund or RCRA sites.

919. COMMENT: At N.J.A.C. 7:15-5.25(d)1iii, the flow projections using N.J.A.C. 7:14A-23.3 are much too high. (18, 42, 44, 45, 61)

RESPONSE: The Department believes it is important to be consistent across the planning and permitting programs with regard to the flow projections used to estimate flows that will be generated from future development. The Department has historically updated the projections that appear at N.J.A.C. 7:14A-23.3 when there is an adequate basis to do so and will continue to do that when warranted. The numbers are necessarily conservative to ensure that sufficient capacity is available in conveyance and treatment facilities to protect water quality. Once the planned development is connected and flow generation demonstrated, there is a provision to

reduce the capacity reserved for the development in question, if warranted. Adjustments made as a result of this process would be captured in revised actual, committed and environmental build-out flow numbers for a facility in WMP updates, due every six years.

920. COMMENT: Protection is needed from zoning changes; rezoning should not trigger inconsistency or sewer service area rescission, provided flow is still within or close to capacity. (54)

RESPONSE: After adoption of a WMP, if zoning changes occur within a sewer service area that would result in a greater wastewater generation potential than the zoning upon which a WMP was based, the development seeking connection to sewer service would be inconsistent with the WMP. However, if it can be demonstrated that the wastewater treatment facility has sufficient capacity for the additional flow, without jeopardizing the ability of the treatment facility to meet the needs of the sewer service area, then the project can be accommodated through a revision. If the zoning change would result in a lesser wastewater generation potential than the zoning upon which a WMP was based, the development would be consistent with respect to connection to the treatment facility. The underutilized capacity would remain available for situations like the first scenario or to be allocated in accordance with the outcome of future WMP updates to meet changing information or circumstances.

921. COMMENT: The proposed alternative to upgrading the treatment plant, forcing the downzoning of municipalities, is unpalatable, considering the lack of solidity or factual basis to the ultimate build-out allocations. (46)

RESPONSE: The rule at N.J.A.C. 7:15-5.25(d) provides several options where the initial analysis of the wastewater generation potential of the sewer service area indicates that the wastewater that would be generated exceeds the capacity of the associated wastewater treatment facility. There are demonstrations related to the feasibility of the wastewater treatment facility to accept additional wastewater as well as means to reduce the wastewater attributed to the facility, either by adjusting the sewer service area or zoning within the sewer service area to align the wastewater generation potential with the available capacity. There is no requirement that zoning be adjusted in all cases, but this is an option available to the municipality to utilize if other options are not available.

922. COMMENT: The Governor's platform also addresses housing, specifically, housing affordable to median wage earners. Under the proposed rule, significant amounts of housing opportunities will be eliminated. For example, the way protected open space is handled in the calculation of build-out, sprawl is encouraged without improvements to the economy, equity or the environment. Municipalities can choose to consider land that is permanently protected from development as if it were available for development in their build-out analysis. This will result in a calculation of wastewater flow that is higher than is warranted. If the overestimate will exceed the existing treatment capacity, this will then lead to a municipality opting for one of four outcomes allowed in the proposed rule under N.J.A.C. 7:15-5.25(d)2; expand/build new treatment plants, which may not be needed in reality; reduce the area within the sewer service boundary, which may not be warranted; reduce the amount of development allowed by zoning, which is likely to be accomplished through down-zoning to sprawls levels, rather than

conservation levels; or perform an infiltration and inflow analysis to find ways to meet the needed capacity. The first three options do not serve any planning or environmental goals and the second and third choices would eliminate housing opportunities, simply because of a misrepresentation of development potential. Has the Department analyzed whether or not these regulatory hurdles and density changes will allow enough housing opportunities in New Jersey to meet the Governor's workforce targets? (5)

RESPONSE: Permanently preserved open space is an area that is optional for inclusion/exclusion with respect to sewer service areas because some areas that are dedicated open space have support facilities that require sewer service, such as comfort stations and food service concessions. Dedicated open space would not have development, other than relevant support facilities, that would generate wastewater. Therefore, the only wastewater capacity need attributed to open space would be legitimate and the potential outcomes outlined by the commenter are not expected. Concerns regarding the affordable housing are discussed in detail in Response to Comments 111 and 112.

923. COMMENT: There are many potential scenarios that could result from the capacity-based approach that requires immediate provision of wastewater capacity to match projected future build-out. This approach could have unintended consequences that should be anticipated in advance of rule adoption. For example, insufficient wastewater capacity combined with an inability to increase capacity (due to the antidegradation policy for example) could result in the need to redraw sewer service areas and/or downzone areas that are otherwise well located and appropriate for growth. How can WMP agencies address this situation? Another possible

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scenario is where total build-out requires a large plant expansion, that later turns out to be too big due to a change in market conditions. (78)

924. COMMENT: The Department's authority to require changes in zoning, as proposed at N.J.A.C. 7:15-5.25(d)2ii, offends both legal and constitutional principles. In its place, the Department should provide affected WMP agencies and municipalities with options that include increasing and reallocating the capacity to meet the needs of New Jersey's working households. (18, 42, 44, 45, 61)

925. COMMENT: N.J.A.C. 7:15-5.25(d)3 needs further clarification. If a determination has already been made that the land does not have any environmental constraints, then conceivably this is the area where development can take place and therefore growth should be encouraged. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 923 THROUGH 925: The purpose of the rule is to align future development with land and infrastructure based capacity. To accomplish this purpose, the infrastructure needs of development yield must be estimated. It is also necessary to determine, where additional environmental infrastructure is needed, that it is feasible to provide it, in consideration of Federal and State requirements to protect and restore water quality. It is possible that areas that have no land based constraints do have water resource constraints to development. Both potential constraints must be considered when identifying an area as "well located and appropriate for growth" or an "area where development can take place and therefore

growth should be encouraged." The rule provides multiple options for demonstrating wastewater management and water supply alternatives are sufficient to meet development needs, but does not require that the infrastructure be built. Where it is not feasible to provide for the level of development envisioned by current zoning and sewer service area delineations, then it is appropriate to revise these designations to avoid exceeding the sustainable use of the water resources of the State.

926. COMMENT: The requirements at N.J.A.C. 7:15-5.25(d)2i through iv to account for expected exceedances of permitted capacity are supported. (22)

RESPONSE: The Department acknowledges these comments in support of this rule provision.

927. COMMENT: At N.J.A.C. 7:15-5.25(d)2, the Department is proposing wastewater management plan evaluation criterion that provide that potential wastewater generation from each sewer service area shall not exceed the permitted capacity for each facility. While the Department provides that new or expanded domestic or industrial treatment works sufficient to address the difference between the permitted flow and wastewater generation potential may be utilized to address such excess generation, the Department should clearly state that it shall approve increases in permitted capacity for existing facilities to enable such facilities to operate at their planned build-out capacity as defined under the approved 201 Facility Plan.

Regional wastewater treatment facilities were constructed in a segmented fashion to accommodate the requirements for funding under the Federal Clean Water Act. All pumping

stations and pipes carrying influent to and from regional treatment plants were sized, constructed and funded with Federal and State grants to accommodate the wastewater flow projected to occur at full build-out within well-defined sewerable areas. The buildings, channels, pipes, gates, valves, etc. within the treatment plants were also designed and constructed to accommodate flows at full build-out. The Finding of No Significant Impact (FONSI) determinations issued by the Department/USEPA were based on flows to be generated at full build-out. However, the unit process tanks at each of the regional wastewater treatment plants were initially designed, sized and funded to occur in a phased approach. The permitted capacity (existing capacity) of the regional treatment plants are at the first phase flows, however, all the extensive environmental studies conducted under the 201 Facility Plan evaluated the impacts for wastewater flow at full build-out. It would be inappropriate to base any new restrictions and/or requirements solely on the currently permitted (existing) capacity as this would ignore the extensive infrastructure already approved and constructed to accommodate the flow at full build-out within the sewerable area, defined under the 201 Plan. The proposed regulations should allow consideration of wastewater flows beyond existing or permitted capacity whenever infrastructure has already been constructed for flows greater than the currently permitted capacity particularly when such infrastructure was constructed with funding under the Clean Water Act.

The proposed rules should allow consideration by the Department for expansion beyond current capacity when such infrastructure will be in compliance with specific criteria. For example, facilities constructed as part of an approved 201 Facility Plan and funded with Clean Water Act grants which contained a formal grant condition prohibiting the connection into the regional wastewater system of structures that would be developed on environmentally sensitive lands

should provide clear evidence that adequate consideration has already been given to the environmental impacts that would be created by the construction and planned expansion of a regional wastewater system. The issuance of such a grant condition could provide a trigger mechanism for the Department to allow plant expansions to accommodate previously approved wastewater flow beyond permitted and/or existing capacity under the proposed regulations. Hundreds of millions of dollars have been expended to plan, design and construct four regional wastewater handling and treatment facilities to abate water pollution in one county. A large portion of these expenditures were utilized to fund the construction of buildings and infrastructure to enable the wastewater treatment plants to be readily expandable for wastewater flows beyond the initial ten year planning period. The ability to continue and expand the wastewater system is relied upon, consistent with the original 201 Facility Plans approved by the United States Environmental Protection Agency (USEPA) and the Department to fully utilize all planned treatment system capacity to provide efficient and cost effective services for the service region. Municipalities not only depend upon regional utilities authorities to service their community's current wastewater needs, they also expect these authorities to provide, by virtue of previously executed Service Agreements, limited expanded capacity and ongoing services to meet the long-term needs of businesses, residents and vacationers while protecting the ocean water quality upon which our tourist economy depends.

For the past three decades, the Department has assured large regional utilities that planned capacity in 201 Facilities Plans could be utilized when needed. The Department needs to recognize the substantial sum of public funds already spent by modifying the rule proposal to

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enable this publicly funded infrastructure, constructed in accordance with approved 201 Facility Plans, to continue. (60)

RESPONSE: It is necessary to reassess the areas served by facilities that were built on the basis of facilities plans prepared under Section 201 of the Clean Water Act for the same reason that a WMP must be updated every six years. A WMP is a detailed planning document intended to ensure that adequate wastewater treatment capacity is available to accommodate the needs of existing and future development. These plans are essential to ensuring that the planned method of wastewater treatment is appropriate given local environmental constraints and that wastewater treatment facilities can accommodate the future needs of the wastewater management planning area.

An outdated WMP cannot be relied upon to accurately predict the future wastewater management needs of the WMP area. Similarly, where land use plans have changed, an outdated WMP may not accurately assess point and nonpoint source pollutant loading, hydro-modification issues, water supply sustainability, and the protection of sensitive environmental resources.

Furthermore, if the WMP is not updated, the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately reflected in the plan against which the project will be measured. For example, a recent designation of Category One waters and the associated antidegradation policies with respect to point and nonpoint pollutant sources may prevent the permitting of new or expanded wastewater treatment facilities that are identified in an outdated plan, leaving areas without a

suitable wastewater management alternative. Further, the lack of a comprehensive or updated WMP may lead to a greater density of development than is appropriate or sustainable in terms of water resources because the cumulative impacts of development in the WMP area have not been evaluated. The facilities plans are more than two decades old, with treatment facilities based on a 10 to 20 year planning period. Only conveyance facilities were sized for up to a 40 year planning period, but these facilities were not extended beyond the limits of the shorter term needs. As a point of clarification, the rule does not cap a facility at its existing flows. Expansion of a facility is allowed, provided the requirements of N.J.A.C. 7:15-5.25(d) are met.

928. COMMENT: The Department should extinguish the wastewater flows that would have been generated by planned development of lands in areas where wastewater service was eliminated in unsewered environmentally sensitive areas via amendment of the applicable WQMP and modify the NJPDES permits for the assigned receiving facility. Until such plan amendments and NJPDES permit modifications are made, the Department should prohibit site specific extension of sewer service to projects that would disturb environmentally sensitive areas. This change will strengthen the State's ability to protect and improve water quality. (86)

929. COMMENT: The rules neither restore nor protect water quality and do not allow for improvements. Water quality is not protected by rules that allow for deterioration of waterways simply because they are of better quality than the lowest acceptable standard. In these cases, the rules should maintain existing water quality and not allow for degradation through the grandfathering of existing/approved/planned pollutant loads. The result will be less pristine water in rural areas. (11)

930. COMMENT: Excess capacity for sewer transfer to other places when service areas are clipped should be retired not transferred to other areas. (59)

931. COMMENT: One of the biggest concerns is what will happen to the excess capacity at sewage treatment plants when sewer service areas are rolled back. Will excess capacity end up being extinguished, especially down in Monmouth County and down the Shore where there are over-built sewerage plants in Ocean County and others that are dumping many nutrients into the ocean? There is a connection between over-capacity and the sprawl and overdevelopment that is occurring. (65, 79)

932. COMMENT: The fate of the excess sewer capacity that is created as a result of the sewer service area that is going to be clipped as well as the excess capacity created as water conservation and reuse gets promoted is a concern. (65)

933. COMMENT: The existing planned and permitted flows/loads to sewage treatment plants should be reviewed. In 1990, a NJ Supreme Court case directed the Department to implement the antidegradation requirements. In conflict with that decision, several recent proposed revisions to the 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/loads were ever justified by legally required antidegradation or water quality reviews. To remedy this problem which has over-allocated 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, the 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." (86)

934. COMMENT: With respect to antidegradation, the term "new and expanded" domestic or industrial treatment works with discharge to surface water is used in N.J.A.C. 7:15-5.25(d)3, but is not defined. This provision allows grandfathering because tying antidegradation to new or expanded treatment works implicitly uses permitted flow as the baseline to define expanded when existing flow should be used to define "new or expanded." There has been internal correspondence with the Commissioner and the Attorney General and the Division of Water Quality on this question. This issue needs to be resolved on the record because it has been avoided for a long time and needs to be reconciled. (86)

935. COMMENT: The provision about permanent capacity of the NJPDES permits should be deleted. This rule functionally would grandfather the existing permitted flows and then say that the plan should be based upon and consistent with the permitted flow. This presumes that the permitted flow is valid, but this is wrong because in many cases, the permitted flow never withstood an anti-degradation analysis as is required by the Clean Water Act or water quality analysis, so the permitted flow may be way too high to maintain water quality standards. It seems that it is a direct contradiction to allow a larger permitted flow when lower existing flows

and loads are not meeting water quality standards, particularly in impaired watersheds. If there is going to be growth in flows, there needs to be some enhancement in treatment.

This rule proposal grandfathers the issue of permitted capacity very cavalierly without discussion and this issue must be addressed. Permitted capacity must not be buried as a regulatory provision without people understanding what is going on, because the numbers are huge. It was over three hundred million gallons a day in unutilized flow the last time the numbers were reviewed under the Whitman administration.

For the industrial discharge community to worry about an eight thousand gallon a day flow and whether or not they can get a permit, while ignoring this huge three hundred million gallon flow that is going to stimulate all forms of inappropriate growth is totally unacceptable. (86)

RESPONSE TO COMMENTS 928 THROUGH 935: The Department has deliberated on the issue of currently unused capacity in existing wastewater treatment facilities. The Department cannot simply extinguish all unused capacity, representing the increment between a wastewater treatment plant's actual flow and the permitted flow included in the current NJPDES permits. These flows have previously been approved by the Department and municipalities have relied on these previous Departmentally approved permitted flow values to plan for local growth and development for many years. In some areas, the sewerage capacity associated with these unrealized flows has already been 'sold' to developers or other municipalities within the sewer service area. In addition, Federal and State grants and loans have been awarded to construct the

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infrastructure and facilities that will generate these flows. Both permit and financing decisions have been subject to a thorough technical analysis and public review.

On the other hand, the Department does not guarantee any permittee that there will be development in a sewer service area that will generate the flows that would attain the permitted flow. For any number of reasons, including natural resource constraints, that level of development may not be realized. The Department will reevaluate an existing discharge upon permit renewal and may impose criteria as an "end of pipe" limit so that the discharge to an impaired water does not cause a violation of the water quality criteria.

The Department believes that development of WMPs in accordance with the rule is the best approach for assessment of wastewater management needs and identification of appropriate means to meet those needs, consistent with the objectives of the rule to protect and restore water resources. Any reduction in permitted flow for any facility will be evaluated on an individual basis in consideration of the findings of a WMP developed in accordance with the WQMP rules and a NJPDES permit action.

The requirements with respect to antidegradation are those that have been codified for many years in the New Jersey Surface Water Quality Standards (SWQS) at N.J.A.C. 7:9B. In accordance with the SWQS, Category One waters are non-degradation waters and any increase in permitted flow to these waters is not allowed to cause any measurable degradation, and there is no option for justifying degradation under any socio-economic evaluation. In Category Two waters, some degradation may be allowed if it can be justified by a socio-economic evaluation,

but any such degradation is not allowed beyond the point where it would cause the stream to violate the applicable surface water quality criteria in the SWQS. Antidegradation is a concept that applies where water quality is better than standards. Where water quality does not attain standards due to a pollutant, a TMDL is required and will determine if point source discharges are a source of the impairment that must be reduced to attain standards. It is not appropriate to cap a treatment facility at existing flows simply because there is an impairment in the receiving water body before it is known if and to what extent that treatment facility is a source of the pollutant causing the impairment.

936. COMMENT: The Department has stated that the intent of the regulations is that if the build-out analysis results in a lower flow than the current permitted treatment plant capacity, the current, permitted capacity may remain. It is not clear, however, that this indeed is how the regulations will be implemented. In the past, the Department has revoked capacity or where permitted flows existed was subject to regulatory approval based on water quality. The difference between build-out analysis capacity and existing permitted flows may be required to meet future needs of industrial users, redevelopment of Brownfield sites or affordable housing sites. (87)

RESPONSE: The WMPs are intended to address the wastewater management needs to the environmental build-out condition in the study area. It can be expected that some areas will have more treatment capacity than the build-out condition and others will need additional capacity to be developed, or will need to adjust the build-out condition. There is no one outcome with respect to excess capacity, should it be found to exist. Water resource objectives may warrant a

reduction in permitted loads in some areas, while in others it may be appropriate to reprogram capacity to accommodate smart growth/affordable housing objectives.

937. COMMENT: If there is increased capacity available in a sewer service area that available capacity should be allocated to existing projects that are consistent with the "Smart Growth" principles. (74)

RESPONSE: The Department believes the commenter is referring to a situation in which the sewer service area for a treatment facility would be revised to conform with the requirements for sewer service area delineation at N.J.A.C. 7:15-5.24 and the new sewer service area would generate less wastewater than there is capacity at the associated treatment facility. The allocation of capacity made available in this way would be a negotiation among the entity responsible for the treatment facility and the contributing municipalities, subject to any constraints that may be imposed through a scarce resource order. The Department would encourage the use of any uncommitted capacity in accordance with smart growth principles.

938. COMMENT: The proposed rule states that potential wastewater generation from each sewer service area shall not exceed the permitted capacity for each facility, but it is contradictory because there are provisions for addressing newer expanded domestic treatment works by conducting antidegradation analysis. (4, 35, 73)

RESPONSE: The rule at N.J.A.C. 7:15-5.25(d) does provide that the wastewater generation potential of a sewer service area must align with the permitted capacity, but identifies alternative

courses of action where this is not the case. These include identifying where existing facilities will be expanded or new facilities will be built to accommodate the additional need. The provisions do not conflict, but rather are to be taken together.

939. COMMENT: There should be a clear decision making process outlining how decisions to allow degradation are made. The rule proposal neglects to again address the very important issue of what constitutes a socioeconomic analysis for purposes of the antidegradation policy. In an urbanized state, regardless of maximum controls and the best technical equipment, there will be times when some water segments will not meet standards. (18, 32)

940. COMMENT: The antidegradation procedures indicate that current pollutants loading shall be maintained for new or expanded discharges, or that “no measurable” change in receiving water quality is allowed if existing loadings cannot be maintained. It is also indicated that where a discharge to Category Two waters will result in a measurable change, a demonstration to justifying lowering existing water quality is required, and where demonstrations cannot be made, a new or expanded capital domestic treatment works will not be approved, and the sewer service area will be adjusted. This restatement of the rule seems unnecessary, suggest delete.

The standard to achieve no measurable change should be clearly defined for each of the category waters, to provide a consistent basis for interpretation by the Department. The application of the standard of no measurable change to a Category Two water appears contradictory to the current antidegradation policies listed at N.J.A.C. 7:9B-1.5D. (4, 35, 73)

RESPONSE: The antidegradation standard in the rule is consistent with and refers to the antidegradation requirements which have been codified for many years in the New Jersey Surface Water Quality Standards (SWQS) at N.J.A.C. 7:9B. In Category Two waters, where no measurable change cannot be achieved, some degradation may be allowed, but only if certain conditions are met, including a socio-economic justification. In the socio-economic evaluation allowed for under the SWQS, the applicant must identify the ambient/in-stream levels of the pollutants which the treatment plant will likely be discharging. These ambient levels would have been determined via stream sampling in the vicinity of the proposed discharge. The applicant must also identify in the socio-economic evaluation the effluent limitations that the facility is proposed to meet. It must be demonstrated that the effluent limitations that will not result in a lowering of water quality are either technologically unachievable or at least exorbitantly expensive. EPA has provided guidance that can be used in evaluating the significance of the cost. In addition, the applicant must also demonstrate that the project associated with the increase in pollutant loading to the waterbody is of such a social importance that it should be allowed even if it causes the proposed degradation. The Department will not pre-authorize what level of degradation will be allowable, especially without even having a chance to review the socio-economic evaluation. Additionally, the Department's acceptance of the socio-economic evaluation is only the first part of the process. Once the Department accepts the evaluation, a draft NJPDES permit action would be proposed and open for public comment and that draft permit action could ultimately be denied based on information gathered during that process.

941. COMMENT: At N.J.A.C. 7:15-5.25(d)3, the Department proposes to require an antidegradation analysis for new or expanded domestic or industrial treatment works in

conformance with both the requirements of N.J.A.C. 7:9B-1.5(d), Surface Water Quality Standards, and the hierarchy proposed in this section. The expansion of a domestic treatment works that is consistent with a previous "Finding of No Significant Impact" under a federally funded 201 Facilities Plan for a wastewater flow greater than an existing permitted flow should be exempt from the requirements to conduct an antidegradation analysis. (60)

RESPONSE: The WQMP rule cannot categorically exempt an expansion of a domestic treatment works consistent with a previously issued "Finding of No Significant Impact". Such findings are dated, with the last FNSI having been issued in 1985, and circumstances, including stream classification, and applicable water quality standards, may have changed since a FNSI was issued. Each proposal for expansion of a wastewater treatment facility must be evaluated on its merits relative to the standards and rules that currently apply.

942. COMMENT: The antidegradation and water quality analysis is supported, but it is not clear that the build-out provisions in the rule (which are also supported) are actually tied to the pollutant loading and compliance with water quality standards. There should be a direct technical and regulatory tie between the projected growth of the build-out and the water quality impact of that build-out pattern. Then, whether or not that build-out pattern and projected water quality impact would meet the applicable water quality standards could be determined. That should be the way the build-out provision works, and there should be some kind of offset mechanism required for an impaired watershed. Where the existing development pattern is resulting in pollution loads that exceed the water quality standards, net reductions in pollutant

load must be found to support build-out in those watersheds. This probably can't be changed upon rule adoption, but the rule should say this. (86)

RESPONSE: N.J.A.C. 7:15-5.25(c) requires the environmental build-out analysis to be performed as the baseline for identifying wastewater management needs that conform with the water quality requirements set forth at N.J.A.C. 7:15-5.25(d) and (e). This includes demonstrating that any new or expanded wastewater discharges that require a NJPDES permit are feasible while complying with the applicable water quality standards, including the antidegradation requirements. For areas where wastewater needs will be met with discharges below the threshold for a NJPDES permit, a demonstration is required that future development will maintain the ambient nitrate concentration of two mg/L on a HUC 11 basis. Where waterbodies are listed as impaired on the List of Water Quality Limited Segments, a Total Maximum Daily Load (TMDL) is required, in accordance with the requirements at N.J.A.C. 7:15-6. A TMDL will specify the pollutant load reductions required to meet the surface water quality standards.

943. COMMENT: Regarding the evaluation criteria for WMPs and amendments, N.J.A.C. 7:15-5.25(d)3 requires that an antidegradation analysis be performed for any new or expanded discharge to surface water. It is unclear as to what would be required in this analysis. What satisfies an antidegradation analysis? This should be removed or clarified. (7, 20, 69)

944. COMMENT: N.J.A.C. 7:15-5.25(d)3iv references N.J.A.C. 7:9B-1.5(d) but does not provide the mechanisms to demonstrate a justification of lowering of water quality

(antidegradation analysis). More explicit guidance on the procedures to conduct antidegradation analyses, including the applicable social-economic impact analyses (such as those presented in the USEPA's Interim Economic Guidance Document for Water Quality Standards, March 1995, EPA-823-B-95-002.) should be included. Also, the rules should provide explicit criteria by which the Department will determine how much degradation will be allowed in receiving water as a percentage of the difference between existing water quality and the water quality standard. (38)

945. COMMENT: What is the socio-economic analysis called for in N.J.A.C. 7:15-5.25(d)3, which is in support of projects that may cause degradation of the environment? (37)

946. COMMENT: What is the definition of "socioeconomic justification"? (54)

947. COMMENT: The proposed WQMP rules describe the analyses that must be performed in order to address the antidegradation requirements at N.J.A.C. 7:9B-1.5(d) for new or expanded wastewater treatment needs. In situations where the antidegradation analysis determines that the new or expanded wastewater treatment needs cannot be satisfied without a measurable change in water quality, a lowering of water quality may be allowed (as long as water quality criteria are not contravened) where it is demonstrated to be necessary to accommodate important economic or social development, N.J.A.C 7:9B-1.9. The Department should clarify upon adoption that designation of a State Plan Center will provide an adequate socio-economic justification to lower water quality in a Category Two receiving water. No further demonstration of socio-economic

justification should be required. This clarification would provide an important additional link to the State Plan and help ensure adequate wastewater capacity for development centers. (1)

RESPONSE TO COMMENTS 943 THROUGH 947: At N.J.A.C. 7:15-5.25(d)3, the rule requires an antidegradation analysis for any new or expanded domestic or industrial treatment works. The analysis must conform to the requirements of the Surface Water Quality Standards at N.J.A.C. 7:9B-1.5(d). Compliance with the requirements at N.J.A.C. 7:9B-1.5(d) continues to be reviewed by the Department in the same manner it has always been, that is to utilize the USEPA interim guidance referenced in the comment, USEPA's Interim Economic Guidance Document for Water Quality Standards, March 1995, EPA-823-B-95-002.). As such, no further clarification or interpretation of this existing standard in necessary. While such an occurrence would not be anticipated to occur on more than a rare occasion, as it is possible that a State Plan Center could be designated without adequate consideration of environmental resource and capacity constraints, designation as a State Plan Center alone, is not appropriately considered to provide an automatically sufficient justification for the lowering of water quality pursuant to the antidegradation analysis referred to is this section.

948: COMMENT: The proposed WQMP rule amendments that require that any proposed new or expanded treatment works facility with discharge to surface water perform an antidegradation analysis in accordance with the Surface Water Quality Standards is supported. (17)

949. COMMENT: The antidegradation analysis required for proposed new or expanded domestic or industrial treatment works at N.J.A.C. 7:15-5.25(d)3 and 4 is strongly supported. (22, 76)

RESPONSE TO COMMENTS 948 AND 949: The Department acknowledges these comments in support for this provision of the rule.

950. COMMENT: Stream testing requirements seem to be stronger in this proposed rule and are well supported. (53)

RESPONSE: The Department believes commenter is referring to the requirements relative to antidegradation and acknowledges this comment in support for this provision of the rule.

951. COMMENT: N.J.A.C. 7:15-5.25(d)3i through v states that a new sewage treatment plant or one proposed for expansion must meet the antidegradation standards of the Surface Water Quality Standards. Where a sewage treatment plant is located in the Highlands preservation area along a water way proposed for Category One status, the ability for towns and surrounding areas to implement smart growth strategies and improve the economic well-being of the town will be hindered by the costly improvements to the sewage treatment plant in order to meet water quality standards. The cost of upgrading sewage treatment plants to meet antidegredation goals must be considered. (14)

RESPONSE: The Highlands rules at N.J.A.C. 7:38-3.4 do not allow new or expanded wastewater treatment facilities that require a NJPDES permit, except in very limited circumstances. Therefore, the scenario described in the comment is unlikely to arise.

952. COMMENT: At N.J.A.C. 7:15-5.25(d)3i, in accordance with the hierarchy proposed in this section, the Department plans to require that a study to evaluate the feasibility of reclaiming wastewater for beneficial reuse (RWBR) be conducted in accordance with the Department's RWBR Technical Manual prior to the consideration of any new or expanded facilities. The RWBR is supported and it is recommended that when RWBR studies have previously been completed or projects implemented by applicants seeking new or expanded domestic or industrial treatment works approvals, that feasibility studies need not be conducted again as expenditure of such public funds would be needless. (60)

RESPONSE: While the Department acknowledges the expense of these feasibility studies, it is not reasonable to exempt an application for a new or expanded facility based on a previously submitted study. Many circumstances can change which can impact the feasibility of implementing RWBR, which can change substantially over time. Additionally, long term planning should address facilities not having to perform these studies regularly. However, previously conducted studies should not be ignored and may be used by a facility as a starting point for any future studies, as appropriate. Use of this previously developed information as a starting point should minimize costs should minimize costs.

953. COMMENT: The requirement of a feasibility study at N.J.A.C. 7:15-5.25(d)3i and placement of the burden on the treatment works to demonstrate that a RWBR project is not appropriate is supported. (8, 71, 89)

RESPONSE: The Department acknowledges these comments in support of the RWBR program and requirements for reuse feasibility studies.

954. COMMENT: There is a procedural question regarding the proposed rules incorporation of the Technical Manual "as amended or supplemented" at N.J.A.C. 7:15-5.25(d)3i. Upon incorporation, what will be the review process for amendments or supplementations to the Technical Manual? (8, 71, 89)

RESPONSE: Amendments or supplements to technical manuals adopted under the NJPDES permit program are subject to N.J.S.A. 13:1D-111. N.J.S.A. 13:1D-111d provides that adoption of a technical manual, or of revisions thereto, are not subject to the notice and publication requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Upon determining that it is necessary to amend or supplement the Technical Manual for Reclaimed Water for Beneficial Reuse, the Department will notify the public of the change by posting a notice of the change in the DEP Bulletin and posting the amended technical manual on the Department's website.

955. COMMENT: N.J.A.C. 7:15-5.25(d)3 requires an antidegradation analysis for any proposed or expanded treatment work with discharge to surface water. This includes a feasibility

study to implement Reclaimed Water for Beneficial Reuse (RWBR) at N.J.A.C. 7:15-5.25(d)3i. The basis document supports the use of RWBR for consumption: "By taking what was once considered waste product and giving it a specialized level of treatment, that designated volume, either in totality or a specified portion, can then be used to replace or supplement a source of ground water or potable water supply." RWBR should not be counted as more flow. (18, 42, 44, 45, 61)

RESPONSE: All wastewater treatment facilities regulated under NJPDES must account for a permitted mechanism to discharge 100 percent of the incoming flow to the collection system, including wastewater that is also used in a RWBR activity. If quantities of water used for RWBR were not considered to be flow, the treatment facility would be hydraulically overloaded during times when RWBR is not feasible, such as in the case of irrigation activities which are seasonal, or when a facility utilizing RWBR closes or otherwise reduces its need for RWBR source water. Therefore, RWBR is not, nor has ever been, counted by the Department as more flow capacity that would allow for additional development beyond the existing permitted capacity of a wastewater treatment facility.

956. COMMENT: At N.J.A.C. 7:15-5.25(d)3i, the evaluation criteria for wastewater management plans and amendments reusing effluent must be evaluated. The expansion of reuse is supported. However, the Department is not supporting the concept by making it financially beneficial. There is no return on investment on the cost of implementing a reuse project. It was announced at the Department public hearing on the proposed permit rules that dischargers will not receive capacity credit for gallonage not discharged but reused. Without this credit, there is

no financial justification for investing in a reuse project. The private sector is not interested in reuse options unless they receive a financial benefit to use them. The majority of successful statewide reuses are funded by public permittees. (18, 32)

957. COMMENT: It is not clear whether there will be incentives for the reuse of effluent. There needs to be some form of incentive for effluent reuse projects due to the fact that many do not provide an adequate return on the initial investment. Can the Department clarify their position on this issue? (6, 7)

958. COMMENT: The proposed rules include and promote reusing of wastewater or Beneficial Reuse helping this practice become more mainstream, which is good. However, there are no provisions or discussion of funding or other means to institute this practice more widely. (53)

RESPONSE TO COMMENTS 956 THROUGH 958: The Department understands the financial issues involved in implementing reuse projects. In that regard, the Department has made $35 million in grant monies available for water supply demonstration projects, which includes RWBR projects. Currently, under those grants, several projects have been initiated to promote RWBR. The results of these projects are expected to help to inform future potential RWBR projects. Furthermore, the Department has identified RWBR projects as eligible for funding under the State Revolving Fund for low interest loans (refer to The New Jersey Environmental Infrastructure Financing Program document entitled, "Project Priority List and Financial Strategy" found at www.njeit.org/publications.htm), and provides certain RWBR project expenses to be exempt from sales tax (see N.J.A.C.7:14D).

In some cases, RWBR may not be financially feasible on a stand alone basis, but because it enables a project that is not feasible due to lack of necessary water supply, it allows construction of what would otherwise be an infeasible project. For example, in areas where treatment facilities discharge to saline water bodies, such as the ocean or bays, RWBR can be implemented to supply approved power generation facilities that use large amounts of water for cooling purposes without concern of depleting subsurface water supplies or drying out streams.

The Department will continue to explore other avenues to encourage RWBR through financial incentives. In analyzing the costs for instituting RWBR, not only should the short term costs be considered, but also the long term costs associated with not instituting RWBR. Instituting RWBR will have long term benefits both to the project applicant and the environment by eliminating or reducing the need to incur additional expense to create new potable water supplies in the future.

959. COMMENT: The requirement at N.J.A.C. 7:15-5.25(d)3iii that water quality based effluent limits be calculated based on stream quality and adopted TMDLs is supported. However, in order to achieve a non-degradation program compliant with Clean Water Act goals, there needs to be no measurable change in water quality and habitat and a mandate to improve water quality where there are water quality problems and degraded habitat beyond TMDL requirements. The mandate to enhance and restore is key to these rules and the goal should be to reach the highest attainable use for the waterway, which may mean a stricter program than that required by a TMDL program. (10, 80)

RESPONSE: The SWQS, GWQS, NJPDES, WQMP rules set forth the Department's program to ensure the requirements of the Federal Clean Water Act (CWA) and the State's Water Pollution Control Act are met, including provisions for nondegradation and antidegradation. Under Section 303(d) of the CWA, TMDLs are required to be developed for waterbodies that cannot meet the surface water quality standards after the implementation of technology-based effluent limitations. Where water quality is impaired, improvement to the standards is required. Because the surface water quality standards are established at levels that ensure that the designated uses of the waterbody are supported, it is not necessary to restore impaired waters to a level that is better than standards. The Department does not expect to use the TMDL approach to restore waters to better than standards. However, a TMDL can be prepared if a waterbody is assessed as being threatened, which means trends suggest the water body will become impaired in the future. In this case a TMDL would be prepared to assure standards are not violated, considering the trend.

960. COMMENT: N.J.A.C. 7:15-5.25(d)3iv should be removed from the proposed rules. If a treatment works is not able to avoid making a measurable change in receiving water quality, N.J.A.C. 7:15-5.25(d)3v would suffice since it would require the sewer service area to be adjusted. (8, 71, 89)

RESPONSE: The cited provision is needed in light of the current Surface Water Quality Standards, which provide that a lowering of water quality in Category Two waterbodies may be

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approved, if the applicant is able to demonstrate that it meets the standards contained at N.J.A.C. 7:9B-1.9.

961. COMMENT: The lowering of stream water quality for any discharge because of the lack of availability of technologies to provide removal of pollutants from discharges at N.J.A.C. 7:15-5.25(d)3iv is opposed. If technology cannot be implemented that reaches the goal of no degradation, then the amendment (STP expansion) should not be approved, regardless of demonstration under N.J.A.C. 7:38. (10, 80)

962. COMMENT: From a policy perspective, there should never be a circumstance wherein antidegradation requirements of the law can be circumvented, such as at N.J.A.C. 7:15-5.25(d)3iv. Applicants should have to prove with certainty that the proposed treatment works will not lower the water quality beyond that which the applicant is proposing and in no circumstances shall the water quality be allowed to result in the water body not reaching attainment. The Department should have a mechanism to confirm that the analysis provided by the applicant actually results in the projected outcome, i.e., that once the new or expanded facility is in place the actual discharges are what was anticipated or better, and if the actual discharges result in a reduction in water quality greater than what was anticipated, the facility must take corrective action to bring the discharges in line with what was approved. (64)

RESPONSE TO COMMENTS 961 AND 962: The Department believes the commenter was referring to a degradation standard under N.J.A.C. 7:9B and not the Highlands Water Protection and Planning Act rules, N.J.A.C. 7:38. The rule at N.J.A.C. 7:15-5.25(d)3iv does not allow a

circumvention of antidegradation requirements but rather requires conformance with those requirements, as set forth at N.J.A.C. 7:9B-1.9. These requirements do not allow a lowering of water quality below the surface water quality standards. In applying for a TWA permit for an extension of collection facilities, a certification is required that the proposed treatment will meet the WQBELs in the NJDPES permit. If the facility is unable to meet its WQBELs, the facility will be in non-compliance and subject to enforcement action.

963. COMMENT: At proposed N.J.A.C. 7:15-5.25(d)3iv a cost-benefit analysis would be prudent when considering impacts to Category Two waters that stem from public projects. The Department states that preventing degradation will save on restoration costs but then allows for further water quality decline in Category Two streams without requiring discussion of feasible alternatives or whether the benefits of social or economic development outweigh the environmental costs. (68)

RESPONSE: The cited provision does require a socio-economic justification for a lowering of water quality. The rule refers to those provisions, which are already described in the Surface Water Quality Standards rule at N.J.A.C. 7:9B-1.9. Because provisions in this regard already exist, there was no need to repeat them in this rule.

964. COMMENT: N.J.A.C. 7:15-5.25(d)3iv essentially requires that all waters would have to meet the same antidegradation standard as for Category One waters. The Department has not provided a rationale for utilizing this standard in place of permitting an appropriate level of discharge. Absent such justification, the subsection cannot be adopted. Since the proposal

already requires that the area be fully analyzed and excludes all environmentally or other constrained lands from development and redevelopment, the Department should not require this redundant justification. (18, 42, 44, 45, 61)

RESPONSE: The rule at N.J.A.C. 7:15-5.25(d)3iv does not require that Category Two waterbodies meet the same antidegradation standard as Category One waters. Instead, that provision indicates that, if a proposed discharge would have a measurable change on water quality, the discharge must satisfy the procedures for modifying water quality based effluent limitations for individual dischargers to Category Two waters, set forth at N.J.A.C. 7:9B-1.9 Similar, but more stringent provisions to qualify for a modification of water quality based effluent limits for Category One waters are specified at N.J.A.C 7:9B-1.8.

965. COMMENT: At N.J.A.C. 7:15-5.25(d)3v, if the Surface Water Quality Standards, N.J.A.C. 7:9B-1.9, cannot be met, then the Department will not approve the proposed new or expanded treatment plant and the sewer service area must be adjusted. This should not be adopted; it is inappropriate to require the antidegradation standard, particularly when there is no guidance provided. (18, 42, 44, 45, 61)

RESPONSE : Requirements to address antidegradation under the State's Surface Water Quality Standards (SWQS) have been effect since 1974. The most recent policy statements are set forth in the SWQS at N.J.A.C.7:9B-1.5 and the procedures at N.J.A.C. 7:9B-1.9. Assurance that antidegradation requirements are met with respect to permitted surface water discharges is a Federal requirement under the Clean Water Act and cannot be set aside. Please refer to

Response to Comments 943 through 947 for additional information on antidegradation requirements.

966. COMMENT: Ensuring adequate water supply for new or expanded DTWs at N.J.A.C. 7:15-5.25(d)5 is positive, but it is not certain that more up to date water supply data will be readily available. (22, 76)

RESPONSE: The Department expects that the most up to date information will be used in making this demonstration and will rely on this best available information in making a decision regarding the availability of water supply commensurate with a proposed new or expanded wastewater treatment facility.

967. COMMENT: At N.J.A.C. 7:15-5.25(d)5, the Department proposes to require that where new or expanded domestic or industrial treatment works are proposed, the applicant must demonstrate that water supply commensurate with the new or expanded capacity is available from a source that is consistent with water availability identified in the most current New Jersey State Water Supply Plan. The requirement to demonstrate the availability of water supply as a prerequisite for new or expanded treatment works is opposed as it assumes that the proposed increase in effluent volume will directly correlate to an increase in unutilized water capacity. The Department's assumption is that scenarios exist under which increases in effluent discharge do not equate to increases in water usage is opposed. For example, when extending sewer service to areas of existing development utilizing septic systems no additional water usage will result since effluent will simply be diverted from individual septic systems to the wastewater

collection and treatment system. It is likely that when developed areas serviced by individual septic systems are connected to sewer collection and treatment facilities water withdrawal rates could decline as a result of water conservation measures implemented to reduce sewer bills. Use of water conservation practices and the implementation and expansion of RWBR projects can also be utilized to offset any increases in water usage. (60)

RESPONSE: The demonstration of available water supply where new or expanded wastewater treatment facilities are proposed can be made by a showing that the new or expanded facility is serving existing development, which will already have a committed water supply. N.J.A.C. 7:15-5.25(f)2 already provides that a deficit between water supply needs and availability can be met through reuse or water conservation measures.

968. COMMENT: The water supply capacity at N.J.A.C. 7:15-5.25(d)5 should be consistent with the water availability as identified on the Department's internet site since the current New Jersey State Water Supply Plan is a decade old and does not contain the necessary data. (38)

969. COMMENT: N.J.A.C. 7:15-5.25(d)5 requires that the water supply to provide new or expanded capacity will be available from a source with water availability identified in the current New Jersey State Water Supply Plan. As the New Jersey State Water Supply Plan is not updated on a regular basis, this requirement is unreasonable. It is another example of the proposal's failure to implement the SDRP, the overall master plan of the State. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 968 AND 969: The provision of the rule at N.J.A.C. 7:15-5.25(d)5 directs use of the most current New Jersey State Water Supply Plan. An update of the New Jersey Water Supply Plan is currently in development and expected to be released later this year. As components of that plan are made available, they should be used as the best available information. Until that time, information derived from the previous New Jersey Water Supply Plan, such as the information provided on the Department's website, represents the best available information. It should be noted, that Chapter 6 of the 1996 Plan does include Recommended Initiatives for Planning Areas Anticipated to be in Deficit. Wastewater management plans developed under this rule must not conflict with those regional water supply recommendations and where specific actions are recommended, wastewater management plans should support their implementation. Commenter is referred to Response to Comments 1060 through 1069 for additional discussion of the existing New Jersey Water Supply Plan and the update under development.

N.J.A.C. 7:15-5.25(e)

970. COMMENT: The municipalities and counties do not have the databases available by HUC 11, and in many instances do not have a database at all, to supply the information required for the analyses and allocations that would be required in this rule proposal. Other than for areas designated in need of redevelopment, municipalities do not have a database of "underdeveloped" areas. A tremendous amount of very subjective field surveys would be needed to obtain any type of "very rough" estimate of underdeveloped areas. This work would be expensive, time consuming and subject to a wide margin of error. It is not reasonable to expect that there are resources available to do this work or that the results would be reliable or consistent across

municipalities. The requirement for this determination at N.J.A.C. 7:15-5.25(e)1 should be deleted from the rule. (18, 42, 44, 45, 61)

971. COMMENT: At N.J.A.C. 7:15-5.25(e)1ii and iii determining the number of undeveloped and underdeveloped acres per HUC 11 and the number of units at the HUC 11 scale would be a complicated task for municipalities to accomplish. (22, 76)

RESPONSE TO COMMENTS 970 AND 971: The rule does not require field verification of undeveloped or underdeveloped properties as we agree with the commenters that this would be overly burdensome. The Department envisions the build-out analysis to be an automated desk top analysis. To this end, the Department has developed a Geographic Information Systems (GIS) model builder application wherein existing available GIS layers are used to perform this analysis. The model uses data layers including parcel data, zoning data, land use / land cover, municipal boundaries, HUC 11 watershed boundaries, and environmental features including wetlands and streams. The model will subtract the urban land use / land cover from each parcel and apply zoning to the remainder to determine whether each parcel has any additional development potential under existing zoning. Those parcels that do not have enough undeveloped area are removed from consideration. Those parcels remaining after this analysis are considered to be underdeveloped or undeveloped. The model then applies zoning to these remaining parcels to determine their build-out potential based on existing zoning. The model uses the municipal boundaries and HUC 11 watershed boundaries to dissect the build-out data. The results of the build-out are presented in a pivot table that allows the user to sort the data on a HUC 11 basis, municipal basis, by development type or any combination thereof. In accordance

with N.J.A.C. 7:15-5.25(e) the HUC 11 build-out data is then compared against the calculated maximum number of septic systems for each HUC 11 to determine whether the two mg/L nitrate standard will be met. The Department notes that 17 of the 21 counties have digitized parcel data and two others have partial coverage. The Department is also working with counties to determine the compatibility of digitized zoning with the model builder application. The Department has made $2.1 million in grant funding available to the counties, and suggests that the grant funding first be used to develop these digital coverages where they are lacking. The Department believes that this methodology can be employed Statewide and will provide results adequate for the purposes of this planning exercise. Municipalities and counties may decide to make a closer inspection than that recommended here, but are not required to do so. The Department would reserve the decision to make a closer inspection until after the results of the analysis as outlined above are completed, and then target areas where problems have been identified.

972. COMMENT: The use of HUC 11s becomes even more onerous at N.J.A.C. 7:15-5.25(e), which applies to non-sewer service areas, where it is necessary at N.J.A.C. 7:15-5.25(e)1 to "determine the development density that can be accommodated in undeveloped and underdeveloped areas that will result in attainment of two mg/L nitrate in the ground water on a HUC 11 basis…" HUC 11s cross municipal and county borders. An allocation methodology has to be included in the rule if the Department persists in regulating septic usage by HUC 11s. As proposed, determination of septic allocation by HUC 11 will be fraught with inconsistencies and endless delays. Instead, the Department should allocate septic usage as part of this rule. The Department should make the rebuttable determination through its GIS system and land use/land

cover database of underdeveloped land and undeveloped land by HUC 11, and assign septic usage to be used by counties in the preparation of their wastewater management plans. The proposal must be revised to base the analyses and plans on geopolitical (not HUC) boundaries. (18, 42, 44, 45, 61)

RESPONSE: Models have been developed to determine the allowable septic density consistent with the antidegradation standard in each HUC 11. This allowable density is to be applied to undeveloped and underdeveloped land area within each HUC to determine the number of additional equivalent dwelling units that can be supported on septic systems without degrading ground water quality, determined by a nitrate concentration of two mg/L: the statewide average background concentration. As mentioned in the Response to Comments 970 and 971 above, the Department has also developed a GIS model builder application that will simply and effectively determine the area of undeveloped and underdeveloped land area, which can be sorted by municipality and HUC 11. Existing municipal zoning can then be applied to this same area through the model builder application and the results compared to the maximum sustainable equivalent dwelling units. Where this analysis demonstrates that the HUC 11 build-out based on zoning will not exceed the sustainable development, there is no need for further analysis. To dictate in the rule that each municipality may not exceed the dilution available within that municipality would be unnecessarily restrictive and cause zoning to be adjusted for no ground water quality benefit.

Where the results of this analysis predict future development that is not sustainable without degrading ground water quality, a closer inspection and verification of the model builder

assumptions would be a likely next step. Where even this closer inspection results in predicted development that cannot be supported without degrading ground water quality, some adjustment in the zoning will be necessary. The Department leaves it to the discretion of the wastewater management planning agency working in concert with the affected municipalities to determine how to accomplish this adjustment. Where consensus cannot be reached, two possible solutions are to apportion the allowable equivalent dwelling units on the basis of undeveloped and underdeveloped area within each municipality or to apportion the allowable equivalent dwelling units on the basis of available dilution within the septic area of each municipality. This second method may more fairly distribute the allowable units but is more complicated than the first because it would require an assessment of the soils and ground water recharge in each municipality. Therefore, the Department has left this decision to the discretion of the wastewater management planning agency. The Department has provided, and will continue to provide, technical assistance in determining the dilution available upon request.

973. COMMENT: The new regulations at N.J.A.C. 7:15-5.25(e) state that undeveloped and underdeveloped areas to be served by septic systems can only be developed at a density that will result in attainment of two mg/L nitrate in ground water on a HUC 11 basis. The development of a WMP is thus based on a detailed land use analysis, including the completion of a comprehensive build-out analysis. Simply, if the build-out analysis reflects that the current zoning will facilitate the two mg/L nitrate standard, no changes will be required. If the zoning allows more development that will result in a higher nitrate concentration, the regulations require that the zoning be changed to lower the density of development.

This requirement is problematic in that it results in the State effectively using municipal zoning authority as granted by the Municipal Land Use Law, N.J.S.A. 40:55D, to implement state environmental regulations. Whereas the MLUL states that municipalities are *able* to utilize powers granted within for environmental protection purposes, it does not specifically require that zoning be based on State environmental regulations. Consider the situation where there are freshwater wetlands in certain areas. A municipality can provide zoning accommodations to reflect that land characteristic, there is nothing requiring such action. Therefore, the new WMP requirements for alteration of municipal zoning is an unprecedented use of State regulations to effectuate land use change that is contrary to the legislated intent of the MLUL. This portion of the regulations should be altered to reflect that municipalities be counseled on zoning changes that would be beneficial for WQMP purposes; the municipalities should not be required to implement the changes in order to gain WMP approval. (33, 60)

974. COMMENT: Reduction of the ground water nitrate level from the current drinking water standard of 10 mg/L will remove local control for development and zoning from municipalities apparently in an effort to achieve the State's longstanding goal of preventing any significant new development in non-urban areas. (60)

RESPONSE TO COMMENTS 973 AND 974: The commenter fails to recognize an important distinction between the Water Quality Planning Act and the Freshwater Wetlands Protection Act. In the Freshwater Wetlands Protection Act the Legislature clearly stated: "…no municipality, county, or political subdivision thereof, shall enact, subsequent to the effective date of this act, any law, ordinances, or rules or regulations regulating freshwater wetlands and further, this act,

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on and subsequent to its effective date, shall supersede any law or ordinance regulating freshwater wetlands enacted prior to the effective date of this act, no municipality, county or political subdivision thereof shall enact any law, ordinance or rule and regulation requiring a transition area adjacent to a freshwater wetland…" (N.J.S.A. 13:9B-30). Therefore, not only are municipalities not required to zone for the protection of freshwater wetlands, they are expressly barred from doing so.

In the Water Quality Planning Act, the Legislature declared that the objective of the Act is, whenever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State, including ground waters, and the public trust therein (N.J.S.A. 58:11A-2b). The Legislature also recognized "that water quality is dependent upon factors of topography, hydrology, population concentration, industrial and commercial development, agricultural uses, transportation and other factors which vary among and within watersheds and other regions of the State and that pollution abatement programs should consider these natural and man-made conditions that influence water quality." (N.J.S.A. 58:11A-2a). The Act directs the Department to implement a continuing planning process to integrate and unify water quality management planning processes, assess water quality and establish water quality goals and standards, and develop a statewide implementation strategy to achieve the water quality standards (N.J.S.A. 58:11A-7). Further, the Department is to "coordinate and integrate the continuing planning process with related Federal, State, regional and local comprehensive, functional and other relevant planning activities, programs and policies" (N.J.S.A. 58:11A-2b). Therefore, the Legislature clearly expects water quality management planning to integrate local land use plans.

Under the Water Quality Planning Act, water resource planning is conducted based on areawide Water Quality Management (WQM) plans. The areawide WQM plans identify treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area including an analysis of alternative waste treatment systems and any requirements for the acquisition of land for treatment purposes; and the identification of the necessary waste water collection and urban stormwater runoff systems (N.J.S.A. 58:11A-5a).

This mandate does not differ significantly from municipal responsibility under the Municipal Land Use Law which requires where appropriate: "(5) A utility service plan analyzing the need for and showing the future general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities including any stormwater management plan required pursuant to the provisions of P.L. 1981, c. 32 (c. 40:55D-93 et seq.);" (8) A conservation plan element providing for the preservation, conservation and utilization of natural resources including to the extent appropriate energy, open space, water supply, forests, soil, marshes, wetlands, harbors, rivers and other waters, fisheries, endangered or threatened species wildlife and other resources and which systematically analyzes the impact of each other component and element of the master plan on the present and future preservation, conservation and utilization of those resources;" (N.J.S.A. 40:55D-28b). The Municipal Land Use Law further requires that an ordinance requiring the approval f a site plan or subdivision plat shall include provisions ensuring "(3) adequate water supply, drainage, shade trees, sewerage facilities and other utilities necessary for essential services to residents and occupants;" (N.J.S.A. 40:55D-38b).

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Wastewater management plans (WMPs) are central to the continuing planning process and provide the means for projecting future wastewater management needs and identifying wastewater treatment facilities that can meet those needs without degrading surface and ground water quality. Thus, WMPs must evaluate existing land use, current local zoning, and environmental constraints information to project future wastewater generation potential. This wastewater generation potential is then compared to the capacity of existing wastewater facilities to determine whether adequate wastewater treatment capacity exists. Where adequate existing wastewater treatment capacity does not exist, the WMP must identify proposed new or expanded wastewater treatment facilities and assess the impact of those new or expanded treatment facilities on surface and ground water quality. If new or expanded treatment facilities or capacity cannot be accommodated, then either the wastewater service area or the density of future development within that service area must be reduced.

The default wastewater management alternative in the State is discharge to ground water less than 2,000 gallons per day (GPD), commonly referred to as septic systems. However, septic systems are not without impact to water quality, and thus there is a limited capacity to support development on septic systems. N.J.A.C. 7:15-5.25(e) establishes the standard by which the Department can ensure that ambient ground water quality is maintained where individual subsurface sewage disposal systems are the selected wastewater management option. Where existing zoning would result in discharges to ground water that exceed the sustainable number of septic systems, ground water quality degradation will result. In these cases zoning must be adjusted before the Department can adopt a wastewater management plan into an areawide

Water Quality Management Plan. The Department has allowed flexibility by performing the nitrate dilution planning analysis on a watershed basis, rather than on a site-by-site basis. The intent is to allow municipalities to achieve other local planning objectives by decreasing lot sizes in appropriate places, such as near centers, while increasing them in areas planned for open space, conservation or agricultural uses. The rule does not require uniform minimum lot sizes and therefore does not intrude on local zoning decisions. The rule does require a recognition that there are limits to sustainable development.

The Department cannot force a municipality to make the necessary zoning adjustments, however, without these adjustments, the Department cannot make the finding that the WMP achieves the objectives of the Water Quality Planning Act, and cannot adopt the municipal chapter into the areawide Water quality Management Plan. Where a municipal chapter in a WMP is not adopted the Department will not be able to issue permits, pending adoption of a site specific revision, for development on septic systems generating 2,000 gpd or more of wastewater, as these development projects will be inconsistent with the areawide Water Quality Management Plan.

975. COMMENT: The requirement to change local zoning at N.J.A.C. 7:15-5.25(e) would be a financial burden to the municipalities. Given the potential litigation arising from reducing densities, the municipality would need to retain the presumption of validity of their zoning ordinance by having it consistent with their Master Plan. As the Master Plan document likely will not reference the new WQMP rules, a modification to that comprehensive document will be required. Therefore, municipalities will be forced to bear the time and expense of the revision of the Master Plan and zoning ordinances, all for the sake of implementing the Department's

regulations. This evokes the standard "state mandate – state pay" philosophy, thus any municipality engaging in zoning changes for WQMP purposes should be provided with financial backing from the State to support the costs associated with this endeavor. Further, the municipality should obtain a written agreement from the State that will hold the municipality harmless should any lawsuits arise from municipal zoning actions undertaken for WQMP purposes.

In short, if the State desires to enforce the density aspect of the WMP, then it should be the responsibility of the State to develop and fully fund the appropriate regulatory mechanism to do so. The State should not be in a position to require municipalities to effectuate changes on its behalf. Neither should the counties be asked to be involved in these types of negotiations. (33, 60)

RESPONSE: Pursuant to N.J.S.A. 52:13H-3(c), rules that repeal, revise or ease an existing requirement of mandate, or which reapportion the costs of activities between counties and municipalities are not unfunded mandates. Further, rules which stem from the failure to comply with previously enacted rules are not unfunded mandates. N.J.S.A. 52:13H-3(d). Here, the Department is assigning WMP responsibility to the counties. This assignment reapportions the costs already associated with the requirement to prepare WMPs from municipalities, sewerage authorities and counties to the counties to achieve better efficiencies in planning efforts. Further, this reassignment is necessary due to the wide spread non-compliance with the existing requirement to prepare WMPs. The Water Quality Planning Act envisioned that counties would be the most suitable entity to perform water quality management planning because they can

provide for a regional perspective. N.J.S.A.58:11A-4. The aforementioned notwithstanding the Department has made $2.1 million in grant funding available to counties to help offset their costs in preparing wastewater management plans. The Department has also developed a model builder application and an electronic wastewater management plan template to ease the burden on counties.

There is no direct cost to municipalities under these rules. The costs associated with master plan and zoning changes will only be necessary where a municipality has not accounted for wastewater management limitations in its existing plans. The responsibility to consider sewage disposal in municipal master planning and in its site plan and subdivision ordinances already exists in the Articles 3 and 6 of the Municipal Land Use Law (N.J.S.A. 40:55D-28 and 38), and thus is not a new mandate. Further, the Department cannot compel municipalities to alter their existing zoning through this rule. Failure to do so will result in the Department's inability to adopt those municipalities' individual chapters, and thus development within those municipalities will be subject to an additional level of review when permits are required from the Department.

976. COMMENT: At N.J.A.C. 7:15-5.25(e)1, a series of steps are required to determine the number of additional equivalent dwelling units that could be anticipated. If they exceed the allowable number for the HUC 11, then the number of units must be reduced. There is no administrative mechanism to make such decisions. (18, 42, 44, 45, 61)

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RESPONSE: As mentioned in the Response to Comments 970 and 971 above, the Department has also developed a GIS model builder application that will simply and effectively determine the area of undeveloped and underdeveloped land area, which can be sorted by municipality and HUC 11. Existing municipal zoning can then be applied to this same area through the model builder application and the results compared to the maximum sustainable equivalent dwelling units. Where this analysis demonstrates that the HUC 11 build-out based on zoning will not exceed the sustainable development, there is no need for further analysis.

Where the results of this analysis predict future development that is not sustainable without degrading ground water quality, a closer inspection and verification of the model builder assumptions would be a likely next step. For example, updating local open space and preserved farmland coverages may reduce the amount of future development on septic systems. Where even this closer inspection results in predicted development that cannot be supported without degrading ground water quality, some adjustment in the zoning will be necessary. The Department leaves it to the discretion of the wastewater management planning agency working in concert with the affected municipalities to determine how to accomplish this adjustment. Where consensus cannot be reached, two possible solutions are to apportion the allowable equivalent dwelling units on the basis of undeveloped and underdeveloped area within each municipality or to apportion the allowable equivalent dwelling units on the basis of available dilution within the septic area of each municipality. This second method may more fairly distribute the allowable units but is more complicated than the first because it would require an assessment of the soils and ground water recharge in each municipality. Therefore, the Department has left this decision to the discretion of the wastewater management planning

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agency. The Department has provided, and will continue to provide, technical assistance in determining the dilution available upon request.

977. COMMENT: The objective and to some extent the method for modeling nitrate dilution is supported. However, the Department's policy with regard to the reconciliation of the build-out under existing zoning compared to the build-out under nitrate dilution modeling is not supported. The proposed rule requires an adjustment in the zoning to achieve conformance between the equivalent dwelling units and the number that can be accommodated to assure that ground water quality will be protected. The nitrate dilution modeling should be an overlay requirement in addition to zoning compliance. (62)

RESPONSE: The adoption of an overlay ordinance that requires a demonstration that the nitrate dilution standard is met through the site plan and subdivision review is acceptable to, though not preferred by, the Department. The Department is concerned that requiring every subdivision demonstrate compliance with the two ppm nitrate dilution standard on a site-by–site will result in generally uniform lot sizes throughout the planning area, thus failing to achieve municipal planning objectives such as smaller lots concentrated around services and larger lots in areas designated for open space, conservation and agricultural uses. The Department does not recognize advanced septic treatment systems for two reasons. First nitrate is selected as a surrogate for a suite of chemicals that could be discharged into ground water from a septic system or applied to the land surface by the landowner supported by the septic system, including pharmaceuticals, cleaners, paints, solvents, herbicides, insecticides etc. Advanced nitrate removal systems may not serve to reduce the concentration of these contaminants. Secondly,

advanced septic treatment systems tend to be energy intensive and are prone to disconnection by the homeowner. For these reasons, advanced nitrate removal is only recognized for wastewater discharges regulated under an individual NJPDES discharge to ground water permit where effluent limits are established and monitored to ensure that ground water quality is not degraded.

978. COMMENT: That a nitrate dilution model must be utilized to calculate how much development density can be accommodated in areas to be served by individual septic systems and that standards should be established for this now unregulated cumulative impact is supported. The requirement of attainment of a two mg/L nitrate standard is also supported. Due diligence was applied in studying and explaining the use of the two mg/L standard and this standard is far more protective. (Souza, Princeton Hydro, draft Regional Sour land Mountain Stormwater Plan, 2006). (10, 80)

979. COMMENT: Commendation was expressed for the provision at N.J.A.C. 7:15-5.25(e) that establishes a two mg/L nitrate standard. This will allow a reasonable level of development while still providing some protection to the environment. (64)

980. COMMENT: The two ppm standard for nitrates is applauded. (49)

981. COMMENT: The proposed WQMP rule amendments that proposed the reduction of the nitrate standard in ground water to a target concentration of two mg/L, a level protective of ecosystem health is supported. (82)

982. COMMENT: The two part per million nitrate dilution requirement is one of the positives of this rule proposal. (59)

983. COMMENT: Recognizing that the proposed rules are an improvement over the existing rules, the proposed provision that requires in areas designated to be served by wastewater discharges to ground water, demonstration of compliance with a two mg/L nitrate planning standard is supported. (17)

984. COMMENT: The proposed strengthening of the standard down to two parts per million nitrate is a significant step forward. (65)

RESPONSE TO COMMENTS 978 THROUGH 984: The Department acknowledges these comments in support of the adopted rules.

985. COMMENT: Revisions to the Water Quality Management Planning rules should 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. (86)

RESPONSE: Requiring municipalities to establish land use densities based on the cumulative impacts of existing conditions, as suggested, would require municipalities to perform a detailed water quality monitoring and assessment program that would be onerous, costly and time consuming. It seems the commenter may be suggesting that in areas where the existing ground

water concentration of nitrate exceeds two mg/L no additional discharges to ground water should be permitted. The nitrate target of two mg/L represents the existing average ambient concentration of nitrate on a Statewide basis, which accounts for the cumulative effects of existing development. As an average, a comparison of individual ground water concentrations to this figure would result in roughly half of the sampling sites being over the standard and thus off limits for future ground water discharges. In conjunction with the limitations on the extension of public sewers, this would deprive vast areas of the State of any wastewater management alternative, which is not an intended outcome of the rule. Should a municipality or county wish to establish a more protective standard, N.J.A.C. 7:15-5.25(a) provides "The standards set forth in this section represent the minimum standards for approval of a wastewater management plan, wastewater management plan update or wastewater management plan amendment. WMP planning agencies or municipalities may incorporate more protective standards."

986. COMMENT: There are other pollutants in addition to nitrates that can be used to calculate safe septic density. Indeed, any disposed waste that is contributed to the system and not fully removed by treatment is a potential pollutant. Bacteria and pathogens are both potential contaminants to water resources from septic systems, and in some instances, are transported more easily and quickly through fractured bedrock than through sand and gravel media, posing a problem for certain geologic regions of the State if systems are too densely located. USEPA has cited bacteria as a ground water pollutant problem from septic systems and others reported typhoid fever moving from a septic system to a well 210 feet away during a seasonal high water table. Though there may not be the same level of data available to input these factors or use them in model calculations for septic density at this time, the Department is urged to research

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these factors as possible indicators in addition to nitrates in the planning of septic density. (10, 80)

RESPONSE: A properly constructed and functioning septic system, built in accordance with N.J.A.C. 7:9A, is required to include a septic tank that provides primary treatment of wastewater followed by distribution into at least four vertical feet of unsaturated soil. Along with distance setbacks from watercourses and wells, this soil treatment zone is expected to reliably eliminate nearly all the pathogenic bacteria and most other pathogens before they can reach the nearest receptor. Nitrate, however, is a byproduct of this aerated zone of treatment, and it is also a conservative contaminant that does not become attenuated by physical or biological processes such as soil adsorption or aerobic decay. Thus, it is considered to be a good basis for establishing human density for land planning purposes. Pathogens are, on the contrary, a good indicator of areas where poorly designed, poorly managed or poorly located septic systems occur that are considered to be malfunctioning or at least poorly functioning by the Department's regulations. Also, pathogens may be a particular problem where improperly constructed potable wells are common. These situations can be remedied when municipalities institute septic management districts that require routine inspections followed by mandatory upgrade of malfunctioning systems. The Department continues to evaluate this important issue and has instituted a long term study of shallow aquifers (Ambient Ground Water Quality Network Data; http://www.njgeology.org/geodata/dgs05-2.htm) that examines the occurrence of many human source pollutants as they relate to land use. As suggested by the commenter, the Department will consider these results and other scientific research from around the country to inform future rule making.

987. COMMENT: What study is the basis for the two mg/L nitrate (NO_3) criterion for ground water? (37)

988. COMMENT: Certain elements of the framework upon which the Department has based this rulemaking are flawed. At N.J.A.C. 7:15-5.25(e), the Department is proposing that undeveloped and underdeveloped areas to be served by septic systems at a density that will result in attainment of two mg/L nitrate in ground water on a HUC 11 basis. This requirement is opposed as it is onerous, arbitrary and not based upon a clearly defined, scientifically determined need.

The nitrate data from multiple sites, as presented by the State in the proposal narrative to justify the establishment of an antidegradation standard of two mg/L of nitrate, seems to indicate that there is no need for the drinking water standard of 10 mg/L. Even though current lot size requirements have been based, for many years, on the higher standard, the ground water quality statewide has not, on a consistent basis, been degraded for nitrates above the water quality standard. If the current standards are adequately protecting our ground water resources, there is no justification or need for a more stringent standard.

The selection of a single parameter, i.e., nitrates, as a standard for the protection of ground water under the guise of antidegradation is arbitrary and not scientifically well founded. Every new house on a septic system will cause some degradation of the ground water. Therefore, the strict

application of antidegradation to ground water would present the proposition that no more homes that would rely on onsite disposal systems should be constructed in the State. (60)

989. COMMENT: The Department should provide the scientific basis for utilizing the two mg/L standard, which is the standard used in the Pinelands. It is unreasonable to apply an antidegradation standard to the entire state, as is proposed. (18, 42, 44, 45, 61)

990. COMMENT: The two mg/L nitrate threshold at proposed N.J.A.C. 7:15-5.25(e)1 is excessive considering the drinking water standard is 10 mg/L. There are significant areas of the state where nitrate level is substantially higher as outlined in the Soil Remediation Standards at N.J.A.C. 7:26D. (66)

991. COMMENT: A point-source pollutant loading analysis is required to be completed for proposed individual subsurface sewage disposal systems (ISSDS) discharging to ground water. Under the instructions for completing a point-source pollutant loading analysis, a Recharge-Based Nitrate Dilution Model must be applied for all proposed ISSDS and must meet a nitrate dilution target of five mg/L. The Department is proposing to lower the nitrate dilution target to two mg/L under the adopted rules. The proposed nitrate dilution target is unreasonable, especially since the current Safe Drinking Water Standards for nitrate are 10 mg/L. (34)

RESPONSE TO COMMENTS 987 THROUGH 991: The United State Environmental Protection Agency (EPA) determined the 10 mg/L drinking water standard for nitrate based on the potentially harmful effects to human health. Nitrate toxicity is primarily due to its

conversion to nitrite by bacteria in the gastrointestinal systems of humans (and other warm-blooded animals). The nitrite oxidizes iron in the hemoglobin of red blood cells to form methemoglobin, which lacks the oxygen-carrying ability of hemoglobin and results in reduced oxygen transport to individual body cells, causing veins and skin to appear blue. "Blue baby syndrome," or *methemoglobinemia*, can affect both infants and the elderly, and is potentially fatal in extreme cases. Allowing ground water to be degraded to the point where it is unfit for human consumption is inconsistent with the Department's mandate to protect human health.

There are areas in the State that do exceed the 10 mg/L Federal standard for nitrate. These areas with high nitrate concentrations are most often influenced by either agricultural production and/or urban and suburban development. These are areas where efforts must be directed to improve ground water quality. These sources must be considered in addition to septic system discharges when considering impacts to ground water. Therefore, setting a nitrate dilution target for septic systems at 10 mg/L or even at a level that approaches10 mg/L would not be protective of human health when considering these potential additional sources.

The nitrate planning standard was established as an antidegradation standard in order to ensure that water quality that is better than standards is not degraded. The previous policy of allowing degradation of ground water from its existing nitrate concentration halfway to the drinking water standard was not an antidegradation standard. In addition, drinking water is but one of the potential uses of ground water. Ground water contributes significantly to surface waters in many areas of the State, particularly during low flow periods. Once ground water becomes surface water there are a number of additional environmental effects that must be considered. Among

them, nutrients such as nitrogen carried by ground water into surface waters can result in eutrophication of surface waters reducing dissolved oxygen and compromising the health of the aquatic community. Many surface waters are also used for drinking water supplies. Allowing nitrogen concentrations to increase in the base flow of these surface waters may compromise their continued availability as drinking water supplies, particularly where this ground water contribution is relied upon to dilute other direct discharges to surface. Lastly, as described in the rule proposal, nitrate is used as a surrogate for a suite of compounds that may be discharged from the septic system itself or onto the land surface by the land use supported by that septic system (See Nitrate as a Surrogate for Assessing Impact of Development Using Individual Subsurface Sewage Disposal Systems on Ground Water Quality; NJDEP, 2007). Certain ecological receptors are more sensitive than humans to these changes in water quality. Therefore setting nitrate concentrations to the human health criteria for drinking water would not achieve the Legislative goal "to restore and maintain the chemical, physical, and biological integrity of the waters of the State, including ground waters and the public trust therein." (N.J.S.A. 58:11A-2b).

As described in the rule proposal, and the Department's basis and background document entitled "Nitrate as a Surrogate for Assessing Impact of Development Using Individual Subsurface Sewage Disposal systems on Ground Water Quality" at http://www.nj.gov/dep/watershedmgt/DOCS/rule_doc/Tech-Report-FINAL-05-21-07.pdf the Department consulted a number of data sources to establish the average background concentration of nitrate in ground water at two mg/L, including the N.J. Geological Survey Open File Report 04-1, the Ambient Ground Water Quality Network, and the U.S. Geological Survey QWDATA system. Based on statistical analysis of all of the data reviewed the Department is

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confident that two mg/L is an accurate assessment of average background nitrate concentrations in New Jersey.

992. COMMENT: The concern with the Department's HUC 11-based approach is that the only nitrate contribution factored into the model is that of septic systems. Regional modeling should consider the effect of all sources of nitrate. (62)

993. COMMENT: The NJGS model for nitrate dilution does not look at background nitrates from farming or existing development. This feature could be strengthened. (65, 79)

RESPONSE TO COMMENTS 992 AND 993: The WQMP rule proposal does take into account contributions of nitrate from existing land use through the establishment of the two mg/L nitrate planning standard. This value is the average ambient nitrate concentration for the State as a whole and represents all land uses throughout the State. The Department agrees with the commenters that other potential sources of nitrate exist and are unaccounted for in the establishment of septic system density, but it has no reliable means to quantify these sources. As pointed out by the commenters, agriculture has historically been a significant source of nitrate concentration in ground water. Where agricultural uses are contributing to nitrate concentrations in excess of two mg/L the conversion to development with wastewater discharges to ground water, will likely result in eventual restoration in ground water quality. Where the Department clustered development is permitted as a means to maintain agricultural use, the rule at N.J.A.C. 7:15-3.5(b)4.x. requires the surviving agricultural operation to implement best management practices. The Department also recognizes that suburban land uses involving large manicured

landscapes may result in the application of fertilizers that could increase the nitrate load to ground water. The Department has recently entered into a memorandum of agreement with two of the three major fertilizer manufacturers to reduce the impact of improper fertilization on water quality. Part of the memorandum of agreement will focus on public education concerning proper fertilizer application methods and rates. The Department believes that these efforts will reduce other nitrate loads. The Department also believes that the two mg/L nitrate target is more conservative than the prior standard of allowing degradation of ground water halfway between the ambient concentration and the drinking water standard of 10 mg/L, which also did not consider other external nitrate loads, and thus offers an improvement over that practice.

994. COMMENT: The Department is proposing to incorporate a two milligram per liter nitrate standard that needs to be complied with in proposed development projects. The Department should consider revising that requirement to address a two milligram per liter total nitrogen standard as opposed to just nitrate. On-site wastewater systems typically discharge relatively low levels of nitrate and rather high levels of ammonia that can be quickly converted to nitrate in the aerobic environment. An applicant can make a convincing case that the nitrate standard is met when, in actuality significant quantities of ammonia are being discharged, which ultimately exceed that nitrate standard. The Department should regulate discharges on the basis of the total nitrogen parameter, as opposed to just nitrate, and calculate it as the sum of total nitrogen that contains both ammonia and organic nitrogen plus nitrite plus nitrate. (83)

995. COMMENT: The inclusion of the two milligram per liter nitrate standard is a definite improvement however, maybe this standard would be better off being a total nitrogen standard. (39)

RESPONSE TO COMMENTS 994 AND 995: Individual subsurface sewage disposal systems (ISSDS) constructed in accordance with N.J.A.C. 7:9A, the Standards for Individual Subsurface Disposal Systems (ISSDS), are required to include an aerated zone of treatment that is 4 feet thick, which provides the aerobic conditions under which ammonium is rapidly oxidized to nitrate (nitrification). Thus, a properly functioning ISSDS can be assumed to convert all total nitrogen to ammonium and inorganic nitrogen (nitrate and nitrite). Nitrite is a very unstable compound that also quickly converts to nitrate. As a result, it is reasonable to assume that the entire nitrogen load is discharged as nitrate for the purposes of calculating compliance with the nitrate planning standard. The model employed by the Department for the purpose of this calculation does in fact make that assumption in establishing the annual load of nitrate is 10 pounds per person per year.

996. COMMENT: The proposed regulations do not allow for the use of existing proven technology or future advances in technology, such as denitrifying filters, to allow greater density of development in septic areas. Will there be any opportunity to utilize technological upgrades in septic design to reduce nitrogen loading and thereby reduce the minimum lot sizes required? (37)

997. COMMENT: The proposed rule relies upon a mass balance nitrate dilution model to achieve water resource protections, but does not provide opportunities for the use of advanced on-site (decentralized) wastewater treatment technologies to provide equal or better protections. While it is acknowledged that nitrate was selected as a surrogate for all wastewater constituents of concern, it should also be acknowledged that denitrifying wastewater treatment technologies remove or significantly reduce many other wastewater constituents in addition to total nitrogen. Moreover, significant advances in wastewater treatment technology have made it economically feasible to provide tertiary treatment of wastewater to effectively renovate wastewater constituents for which nitrate has been selected as a surrogate. The proposed rule should be amended to permit and encourage the use of advanced on-site wastewater treatment technologies as a means to achieve water quality protections, as long as they are not used to increase the amount of permitted development. (84)

998. COMMENT: Developers should have the option of installing the number of conventional systems that can be supported by the natural conditions or by installing alternative systems that achieve higher levels of treatment. The Department's objective may be beyond conformance with nitrate dilution standards which should not be the case in wastewater management regulations. (62)

999. COMMENT: Alternative treatment units in rural areas would achieve greater water quality than conventional septic systems. The Department should consider means of encouraging the use of these systems. One way to encourage the use of these systems would be to give authority to the County Health Departments to permit alternative treatment units, previously approved by

the Department. The Department could establish specific criteria for the use of these systems based on the Pinelands demonstration project. (62)

RESPONSE TO COMMENTS 996 THROUGH 999: The adopted rule does not recognize advanced septic treatment systems for two reasons. First, as pointed out by the commenters, nitrate is selected as a surrogate for a suite of chemicals that could be discharged into ground water from a septic system or applied to the land surface by the landowner supported by the septic system, including pharmaceuticals, cleaners, paints, solvents, herbicides, insecticides etc. Advanced nitrate removal systems may not serve to reduce the concentration of these contaminants. Secondly, advanced septic treatment systems tend to be energy intensive and are prone to disconnection by the homeowner. For these reasons, advanced nitrate removal is only recognized for wastewater discharges regulated under an individual NJPDES discharge to ground water permit where effluent limits are established and monitored to ensure that ground water quality is not degraded.

Alternative design treatment works are, in fact, promoted by the Department and guidance documents and specifications on various innovative and alternate treatment systems, including approval requirements and applicable manufacturers are available on the Department's web page http://www.state.nj.us/dep/dwq/owm_ia.htm. However, the delegation of approval authority and the regulatory program for alternative treatment technologies is beyond the scope of these rules.

In establishing the nitrate planning standard as an antidegradation standard for ground water for ISSDSs, the Department determined that nitrate represented a conservative constituent that could

serve as a surrogate for the suite of pollutants that are discharged through septic systems. Therefore, because a greater removal efficiency for nitrate does not necessarily mean a corresponding decrease in other pollutants of concern, lot sizes may not be reduced based on currently available advanced technologies that reduce nitrate loading.

1000. COMMENT: The Department should encourage alternative layouts of conventional and innovative systems to achieve clustering in rural areas. For example, other states allow leach fields to be located on common open space. However, N.J.A.C. 7:9A stipulates that County Health Department's may not approve systems that serve more than one property or extend beyond the limits of the property. (62)

RESPONSE: The rule provides a revision process for clustering at N.J.A.C. 7:15-3.5(b)4x, provided 70 percent of the parcel is preserved. The rule does not limit the leach field location to the 30 percent of the tract that may be developed, provided that the leach field is compatible with the resource protection objectives on the balance of the site. For example, where the balance of the site is in agricultural use and wastewater can be discharged in those agricultural areas without elimination of the agricultural use that discharge may be allowed. However, where a tract is forested and that forest provides threatened and endangered species habitat, allowing the removal of additional forest, above the 30 percent of the site that may be developed, to accommodate the leach field would not satisfy the intent of allowing the cluster.

Regarding the reference to the Standards for Individual Subsurface Disposal Systems: N.J.A.C. 7:9A-1.6(c) specifies that "The use of a subsurface sewage disposal system for more than one

property is prohibited unless a treatment works approval or a NJPDES permit has been issued by the Department." Therefore, a single systems is allowed to serve more than one property, but such a system requires a Department approval. If the approval is a Treatment Works Approval (TWA), the Department requires documentation that the property owners are aware of and in agreement with the configuration. If the volume of sewage on a single property is greater than 2,000 gallons per day, a NJPDES permit is required. If the approval is a NJPDES permit, the rules at N.J.A.C. 7:14A-7 determine the requirements for approval. The approval limitations of N.J.A.C. 7:9A and regulatory requirements of N.J.A.C. 7:14A regarding shared infrastructure are beyond the scope of this rule and must be addressed through separate rulemaking under those chapters of the administrative code.

1001. COMMENT: As the rule proposal summary notes, some areas that are pristine will have less background nitrate in their natural condition and two mg/L will represent a degradation of ground water and, possibly, surface water in the form of base flows. These areas are being sacrificed locally by the use of two mg/L. The rule should make clear that locally-derived nitrate standards are allowed and encouraged in order to protect locally high quality ground and surface waters. For instance, some analyses indicate a nitrate target as low 0.03 mg/L could be the standard required for surface waters in order to protect ecological resources, particularly biota. (Souza, Princeton Hydro, draft Regional Sour land Mountain Stormwater Plan, 2006). (10, 80)

RESPONSE: The Department considers the standards included in this rule to be minimum standards. Where local governments have developed more detailed scientific assessments and analyses, and the wastewater management planning agency wishes to adopt standards that are

more stringent than those recommended in this rule, those requirements would be approvable under this chapter. This is addressed in the language at N.J.A.C. 7:15-5.25(a) which states: "The standards set forth in this section represent the minimum standards for approval of a wastewater management plan, wastewater management plan update or wastewater management plan amendment. WMP planning agencies or municipalities may incorporate more protective standards."

1002. COMMENT: One municipality has a model that requires developers to demonstrate that a nitrate target of 5.2 mg/L is achieved on a project specific basis. This target was established based on the Department's technical guidance (A Recharged Based Nitrate Dilution Model for New Jersey). However, the proposed regulations support a two mg/L target on the HUC 11 level. This municipality proposes that the 5.2 mg/L target level be achieved on a project site specific basis and that the two mg/L be achieved on the HUC 11 basis during complete build-out. This approach enables developers to take advantage of open space or other preserved lands that contribute to the dilution of the nitrate. (62)

1003. COMMENT: The Department should allow the planning agency to establish various zones of allowable density within each HUC 11 in order to satisfy the nitrate planning standard of two mg/L. (1)

RESPONSE TO COMMENTS 1002 AND 1003: The rule does not dictate that uniform minimum lot sizes must be created in order to achieve the two mg/L nitrate target. The septic density determined through application of one of the modeling approaches identified at N.J.A.C.

7:15-5.25(e) is to be applied to the undeveloped and underdeveloped areas within the HUC 11 to determine the total equivalent dwelling units that can be placed within that watershed and still meet the two mg/L nitrate target within the watershed. N.J.A.C. 7:15-5.25(e)v allows the distribution of this total allowable number of units at the discretion of each municipality, provided that the total number of units allowed is not exceeded, in order to ensure that the antidegradation standard will be met for the HUC 11 as a whole. For instance, 200 acres of undeveloped land with a 5-acre septic density would be allotted 40 ISSDSs, which could be distributed as 40 5-acre lots; or 15 10-acre lots and 25 2-acre lots; or 40 1-acre lots with 100 acres left as open space. It should also be noted that the rule is intentionally silent on whether the dilution from open space is available to offset future septic system density. The rule allows the WMP agency the discretion to decide whether the dilution available from public open space is included in calculating the maximum number of additional equivalent dwelling units. Therefore, the commenters suggestion that a higher development density should be allowed in part of a HUC 11 provided that the dilution exists on public open space to meet the overall nitrate dilution standard of two mg/L is allowable under the rule.

1004. COMMENT: While the Department acknowledges that the present concentration of nitrates in our ground water sources "...may not always pose a risk to human health..." there is an undefined concern about sensitivity to ecological receptors. The Department should scientifically quantify these ecological sensitivities before it imposes a stringent nitrate dilution standard. (60)

RESPONSE: The expressed Legislative objective in the Water Quality Planning Act "is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters and the public trust therein;" (N.J.S.A. 58:11A-2b). The nitrate planning standard is an antidegradation standard intended to satisfy the Department's obligation to prevent further degradation of water quality. The Department has established the Statewide average nitrate concentration in ground water to be two mg/L for nitrate.

Ground water contributes significantly to surface waters in many areas of the State, particularly during low flow periods. Once ground water becomes surface water there are a number of additional environmental effects that must be considered. Among them, nutrients such as nitrogen carried by ground water into surface waters can result in eutrophication of surface waters reducing dissolved oxygen and compromising the health of the aquatic community. Many surface waters are also used for drinking water supplies. Allowing nitrogen concentrations to increase in the base flow of these surface waters may compromise their continued availability as drinking water supplies, particularly where this ground water contribution is relied upon to dilute other direct discharges to surface. Lastly, as described in the rule proposal, nitrate is used as a surrogate for a suite of compounds that may be discharged from the septic system itself or onto the land surface by the land use supported by that septic system (See Nitrate as a Surrogate for Assessing Impact of Development Using Individual Subsurface Sewage Disposal Systems on Ground Water Quality; NJDEP, 2007). Certain ecological receptors are more sensitive than humans to these changes in water quality. These criteria are adopted in the Surface Water Quality Standards at N.J.A.C. 7:9B-1.14(d).

1005. COMMENT: Since the highest nitrate concentrations are typically found in agricultural areas, it would seem prudent to establish some means of control in those areas prior to lowering the limit for discharges from individual septic systems. (60)

RESPONSE: Where ground water quality exceeds the water quality standard for nitrate are most commonly areas influenced by either agricultural production and/or intensive urban and suburban development. Because the ambient nitrate concentration is reflective of existing land uses and the antidegradation standard applies to changes in land use, it is appropriate to regulate the changes in land use so that the ambient quality is not degraded. Therefore, where ground water has been impacted by existing uses, those uses are beyond the scope of this rule. The Department will employ appropriate regulatory and non-regulatory measures to reduce nitrate inputs from these sources. These may include implementing wastewater management alternatives that will reduce nitrate loading from septic systems and working with the Department of Agriculture to prioritize funding of nutrient management plans that optimize fertilizer application. The trend in New Jersey is toward the loss of agriculture to other forms of development. Where agriculture is maintained in addition to a clustered development under a revision at N.J.A.C. 7:15-3.5(b)4.v, the rule does require the development and implementation of a farm conservation plan that will address excessive nutrient inputs from the continuing agricultural use.

1006. COMMENT: The Department has applied an enormous margin of error to a model that has not been verified, and is based on unreliable data and conservative assumptions. (18, 42, 44, 45, 61)

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1007. COMMENT: In order to satisfy antidegradation standards for ground water quality, the Department proposes using nitrate dilution to demonstrate two mg/L on a HUC 11-scale for septic development. The use of nitrate to assess the impact of septic developments on ground water quality is well-supported. However, the application of a nitrate dilution analysis on a HUC 11 scale to determine the overall allowable density ignores the degree of suitability at individual sites that may properly justify smaller lot sizes (or require larger lot sizes). A single density on such a large scale may not be an effective planning tool. (1)

1008. COMMENT: The New Jersey Geological Survey nitrate dilution model identified to be used in N.J.A.C. 7:15-5.25(e) has been shown by geologists and planning boards across the state to greatly overestimate recharge in many areas of the state. One township planning board hired a geologist to show that the model did not work there due to local geology that varied from assumptions in the model and other townships have done the same. By greatly overestimating recharge value, dilution is greatly overestimated, thus increasing allowable density under the 2 milligram per liter standard. (86)

1009. COMMENT: The NJGS model for nitrate dilution is severely flawed and overestimates the amount of dilution available to deal with septic systems, which allows for much smaller lot sizes. By using HUC 11s as the basis for determining dilution levels for development on septic systems and using the flawed NJGS model that overestimates the amount of dilution available, ground water pollution will not be adequately reduced and ground water quality and streams will

not be adequately protected in New Jersey. The use of two mg/Liter as the target level of nitrates is supported, but this target will really not be met because of these two flaws. (65, 79)

1010. COMMENT: GSR-32 should not be used by wastewater management planning agencies in all parts of the state in order to calculate nitrate. The ground water recharge volumes in some geologic formations, such as the hard rock geology of the northern half of the State, are not accurately measured by GSR-32. GSR-32 commonly overestimates the volume of recharge available in these areas. So although the proposed rule provides for the use of a different nitrate dilution model by a municipality if they so choose, for wastewater management planning agencies that do use GSR-32 in inappropriate geologies, there could be a shortage of recharge available for adequate dilution of discharged nitrates. (10, 80)

1011. COMMENT: The proposed rule notes that recharge volume is an input to the model however, these volumes are not universally accepted as evidenced by the varying development densities allowed in municipalities that have applied a nitrate dilution model in hard rock geology. This is particularly a concern if the agency that is preparing the WMP is a county or any entity other than the municipality because outside agencies will not be as familiar with local geology as a municipality. The use of GSR-32 and higher recharge volumes by a county and then the use of a more accurate but perhaps more restrictive model at the municipal level, sets up a conflict that can be exploited by developers. (10, 80)

1012. COMMENT: With respect to the provision at N.J.A.C. 7:15-5.25(e), the nitrate dilution model proposed for use by the Department will result in discharges greater than the two mg/L

nitrate standard proposed. The Department is encouraged to re-examine the model upon which to base its analysis. (64)

1013. COMMENT: The rule proposal talks about regulating individual on-site septic disposal systems at two parts (per million) of nitrate dilution. That is taken right out of the pages of the Pinelands and they have a dilution model that they use for those calculations and lot sizes. The model that the Department has proposed is similar, but has some differences from the Pinelands version. The model is not easily understood or usable. There should be some standard model available to the public so that they would be able to determine how they can meet this water quality standard if that is truly going to be the standard throughout the state. (25)

RESPONSE TO COMMENTS 1006 THROUGH 1013: The Department offers three distinct nitrate-dilution methodologies. Three versions are offered to address three different modeling needs. *A Recharge-Based Nitrate-Dilution Model for New Jersey* and the *A Recharge-Based Nitrate-Dilution Model for Small Commercial Establishments in New Jersey* are geared toward a site specific approach and incorporate user interfaces that require a few data inputs to derive a result, while *A Recharge-Based HUC11-Scale Nitrate-Carrying-Capacity Planning Tool for New Jersey, MS Excel Workbook* is designed to rapidly calculate a septic density for a HUC 11. All of the models are based on the same mass balance, nitrate-dilution model developed by Trela in 1978, which was ultimately incorporated into the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-1 et seq.). The notable difference between the Department's models and the Pinelands model is the Department's incorporation of a ground water recharge modeling component developed by the New Jersey Geological Survey (NJGS): *A Method for Evaluating*

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Ground-Water-Recharge Areas in New Jersey (Charles, 1993). More commonly referred to as GSR-32, this ground water recharge model assesses both climate and soil type variations into its recharge estimations. Different soil types infiltrate water at different rates due to differing soil characteristics. Land use and vegetation also have a significant affect on recharge. Weather patterns throughout the State can also vary significantly and affect recharge. When considered Statewide, differences in precipitation can vary by as much as 10 inches. In the Pinelands nitrate-dilution methodology, there is a single value for recharge that is assigned for the whole region.

The Department's model, *A Recharge-Based Nitrate-Dilution Model for New Jersey* (Hoffman and Canace, 2001), utilizes the U.S. Department of Agriculture's (USDA) Technical Release-55 (TR-55, 1986), which correlates percent impervious cover based on established lot sizes, to adjust the area that can be relied upon for recharge. TR-55 calculates this correlation up to 2-acre lots based on analysis of typical suburban developments at the time of its development. NJGS developed an algorithm that extrapolates the TR-55 calculations for proposed lots larger than 2-acres, and incorporated it into *A Recharge-Based Nitrate-Dilution Model for New Jersey* (Hoffman and Canace, 2001). As mentioned, the model tool includes a user interface that requires only a few simple variables to be input and the model calculates the result.

A Recharge-Based Nitrate-Dilution Model for New Jersey requires breakout of the total area under study into parcels or units with unique soil types and by municipality. Each individual unit is then run through the model to derive how many acres are required per septic system for that soil unit per municipality. The results for each unit are then summed to produce the total of

sustainable septic systems for that study area, which is then divided into the total acreage to derive the overall septic density. For example, one soil type may require eight acres per septic system, while another more permeable soil may require four acres per septic system. If there were only these two soil types present and each encompassed an equal portion of the area of interest, the overall "septic density" for that area would be 6 acres per septic system.

A Recharge-Based Nitrate-Dilution Model for Small Commercial Establishments in New Jersey, again was designed for use with commercial development by converting the nitrate loading from pounds per person per year to a concentration of 40 mg/L, with flow assigned based on commercial development type to obtain a loading.

To facilitate the assessment of acceptable loading on a HUC 11 basis, NJGS developed a HUC11-scale version of its methodology: *A Recharge-Based HUC11-Scale Nitrate-Carrying-Capacity Planning Tool for New Jersey, MS Excel Workbook*. This user-friendly, HUC11-based model uses watershed-wide recharge estimates to eliminate the need to determine the area of each soil type within the HUC 11, as would be required in the first model. This model is best used for the regional planning analysis envisioned for WMP development.

The Department acknowledges that ground water recharge can be estimated using different techniques. GSR-32 is a soil water-moisture-budget approach that for a year of average monthly meteorological conditions, calculates how much rainfall will be evaporated, how much held in the soil, and how much infiltrates down through the soil. This approach was developed using reasonable estimates of New Jersey-specific values for all input parameters. The result is a

method that can be applied consistently across the State, using available data, and which yields reasonable estimates of ground water recharge. This approach also has the advantage of yielding values that reflect local conditions, such as different soils and land use. The Department selected this model because it has been peer reviewed, is scientifically defensible and can be applied Statewide to relatively large geographic areas such as HUC 11 watersheds.

Other methods may add refinements, such as considering the effect of wind speed on evaporation, or may use a more critical period to estimate precipitation, or may focus on streamflow to estimate recharge. Streamflow methods result in an average ground water recharge above the stream gage. These methods are better at providing planning numbers for net water supply in the watershed but do not reliably predict which soils produce more recharge and which less. Site specific data are necessary to do this.

Any selected methodology or modeling approach must make assumptions about meteorological, soil, and aquifer conditions. Some methods will yield watershed-average recharge values greater than 'average' GSR-32 numbers, while other methods may yield lower recharge values. The most accurate way to determine recharge is to install a sufficient number of soil-moisture probes and measure actual movement of water vertically downward through the soil. Numerous locations and measurements over several years would be needed to accurately characterize recharge. For the purposes of demonstrating maintenance of the antidegradation standard derived from a State-wide average of nitrate concentration, this level of accuracy does not warrant the expense and time that would be involved.

Where local governments or regional entities have developed more detailed scientific estimates of ground water recharge or have identified specific geologic conditions such as fractured rock aquifers that would result in a more protective standard, the wastewater management planning agency may adopt standards that are more stringent than those recommended in this rule. This is addressed in the language at N.J.A.C. 7:15-5.25(a) which states: "The standards set forth in this section represent the minimum standards for approval of a wastewater management plan, wastewater management plan update or wastewater management plan amendment. WMP planning agencies or municipalities may incorporate more protective standards."

Finally, the two mg/L nitrate antidegradation standard is a representative, Statewide average calculated from all available and contemporary data. The analyses that resulted in the determination of two mg/L is presented in detail in the proposed WQMP rule's summary narrative (See 39 N.J.R. 1902-1905).

1014. COMMENT: At proposed N.J.A.C. 7:15-5.25(e)1 the two ppm nitrate dilution model is proposed to be used statewide. However, the Department proposed models differ slightly from the Pinelands septic dilution model, codified in the Pinelands CMP. Therefore, the Pinelands Area needs to be exempted from using the Department models. The basis for such an exemption is that the Pinelands Area is protected both by watershed based ecological zoning as well as by a septic dilution model and that this combination is more than sufficient to ensure that the joint water quality goals are met. (84)

RESPONSE: The differences between the Department's nitrate dilution model and the Pinelands model are addressed in Response to Comments 1006 through1013. For site specific amendments, the rule does provide the option of utilizing an approved alternative analytical method to assess the impacts of nitrate discharged from individual subsurface sewage disposal systems at N.J.A.C. 7:15-5.25(h)2i(3). The Department has completed an initial comparison of the equivalent dwelling unit yield calculated using the HUC 11 model with our understanding of the yield allowed under the Pinelands Comprehensive Management Plan (CMP). With only two exceptions, the Pinelands development yield was less than that allowed under the HUC 11 analysis, because the Pinelands CMP considers issues other than ground water quality when establishing land use capability zones. Where the Department's yield is lower than the Pinelands yield, the Department will work with the Pinelands Commission staff to verify the assumptions used in our comparison. If differences remain after this closer inspection, the Department will work with the Pinelands Commission to ensure that ground water quality is adequately protected and the areawide Water Quality Management Plan and the Pinelands Comprehensive Management Plan are consistent. Where the Pinelands CMP is more restrictive than the Department's nitrate dilution results, those more restrictive standards may be adopted per N.J.A.C. 7:15-5.25(a) and no change would be required.

1015. COMMENT: Where the New Jersey Geological Survey nitrate dilution model identified to be used in N.J.A.C. 7:15-5.25(e) was initially used to implement the standard in the Highlands Act, which calls for recognition of deep aquifer recharge, lot sizes from six to 12 acres were produced. The Department recognized that the model was inappropriate for the Highlands; the model was abandoned and an alternative methodology was developed for the Highlands which

produced the lot sizes of 88 acres in forested areas and 25 acres in agricultural areas. This shows that the Department has already been on record recognizing the implicit flaws in that model.

(86)

RESPONSE: The Highlands Water Protection and Planning Act required the Department to establish a septic density standard "at a level to prevent the degradation of ground water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution." (N.J.S.A. 13:20-32e). This Act for the first time introduced the concept of deep aquifer recharge, a term that was undefined, in establishing appropriate septic densities in the Highlands Preservation Area. To accomplish this statutory objective, the Department undertook an analysis of drought of record flow in streams in the Highlands Preservation Area under the assumption that drought flow must only come from ground water sources, and under extreme drought conditions shallow aquifer contribution to stream flow would be negligible. This was a very conservative assumption that the Department believes was appropriate in the Highlands Preservation Area given the Legislative mandate. Details on the development of the septic density standards is provided in *Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4*, available through the Department's website at http://www.nj.gov/dep/highlands/docs/septicdensity.pdf.

Precipitation falling on the surface of the land has three possible fates: runoff, shallow ground water infiltration and aquifer recharge. Under normal conditions all ground water recharge, whether shallow or deep is available to dilute the nitrate load from septic systems. The NJGS

GSR-32 recharge calculation has been both peer reviewed and scientifically validated. The Department is convinced that the assumptions in the model concerning average recharge are appropriate to a planning level nitrate dilution analysis. Where better local information is available or specific geological conditions exist that would warrant a more conservative approach the rule at N.J.A.C. 7:15-5.25(a) allows an alternate standard to be determined.

1016. COMMENT: A serious flaw in this rule proposal is the use of the NJGS model for nitrate dilution. The NJGS model has not been court tested as other models have in the Pinelands, East Amwell and Ringwood. The Department is not using the most widely-accepted and court-tested nitrate models, but is instead using the NJGS model as a way to undermine protection of ground water and the environment. (65, 79)

RESPONSE: The Response to Comments 1006 through 1013 provides detail regarding the Department's nitrate-dilution methodology, which is a refinement of the Pinelands nitrate dilution model. The Department's synthesis of the Trela nitrate-dilution equation (1978) and the GSR-32 ground water recharge modeling component (1993) is scientifically defensible and has been used since 1995 for regulatory purposes with respect to the 50 or More Realty Improvement Certification. The Department is confident that this is the best model to assess the impact of septic systems on ground water quality and the most appropriate for use in wastewater management planning as the information necessary to run the model is currently available Statewide and more specific local information does not have to developed to perform the analysis. Where more specific local information concerning recharge and geology already exists

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that suggest the need for more protective standards, those standards may be incorporated into the WMP under N.J.A.C. 7:15-5.25(a).

1017. COMMENT: According to the NJGS model for nitrate dilution, the best recharge area is in the Highlands at the Rockaway rock outcrop. Rock does not drain, but under this model, the Rockaway rock outcrop would be allowed the smallest lot sizes. This model also overestimates the amount of water available in the Pinelands. (65, 79)

RESPONSE: The Department evaluated the model outcomes that would result from model application with respect to the soil type "Rockaway-Rock Outcrop" and the results do not support the commenters' statement. There are three Rockaway-Rock Outcrop soils accounted for in GSR-32, each specified by county: Morris, Passaic, and Sussex (note that a municipality need not be located in one of these counties in order for one of these soil types to be present in that municipality). The Department randomly assessed a municipality for each of the recharge rates in the identified counties, West Amwell, Randolph, and West Milford. Then, using a nitrate-target of two mg/L and with a population density of three persons per household, the Department ran the model for each of the three Rockaway-Rock Outcrop soils for each municipality. The results (in acres per septic system) for West Amwell, by county identifier: Morris = 6.8; Passaic = 6.5; and Sussex = 7.6. The results (in acres per septic system) for Randolph Twp., by county identifier: Morris = 5.4; Passaic = 5.1; and Sussex = 5.5. The results (in acres per septic system) for West Milford, by county identifier: Morris = 5.1; Passaic = 4.8; and Sussex = 5.1. The Department then selected three other soil types to compare with the preceding results: Abottstown, Barclay, and Evesboro (these three soils have some differing

characteristics that often provide varying septic densities, to hopefully establish a *range* of results to compare). Again, the Department ran the model for each of these soils for each of the above municipalities. The results (in acres per septic system) for West Amwell, by soil type: Abottstown = 6.4; Barclay = 7.0; and Evesboro = 4.9. The results (in acres per septic system) for Randolph Twp., by soil type: Abottstown = 4.5; Barclay = 4.5; and Evesboro = 3.5. The results (in acres per septic system) for West Milford, by soil type: Abottstown = 4.1; Barclay = 4.1; and Evesboro = 3.2. As indicated by even this nominal exercise, GSR-32 does not suggest Rockaway-Rock Outcrop to be "the best recharge area" in any of these three Highlands municipalities. In addition, Rockaway-Rock Outcrop is a soil *complex*, meaning it is composed of both Rockaway soils and areas of rock outcrop. For instance, according to the Soil Survey of Passaic County, New Jersey (USDA, 1975), Rockaway-Rock outcrop consists of 15-30 percent rock outcrop for each mapped area, such that 70-85 percent of the complex is a type of soil and not outcroppings of bedrock.

Finally, as detailed in the Response to Comments 1006 through 1013, the Pinelands nitrate-dilution model assigns one static recharge value of 20 inches annually for the entire Pinelands region, compared to GSR-32 estimates of annual recharge that are generally less than 15 inches in the Pinelands. Therefore, the GSR-32 model actually predicts less recharge than the Pinelands model: not more as suggested by the commenter.

1018. COMMENT: The Department's Highland rules requirements for septic systems in the Highlands preservation area will be greatly undermined by the disparity between those rules and the weak NJGS model for nitrate dilution in this rule proposal, which will be applied in the

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Highlands planning area. On the preservation area side of the line, the ground water model has to have 25 or 88 acre zoning, but on the planning area side of the line it is six acres. This is gong to be used against the Department to undermine your own protections in the Highlands. The Department must take another look at this section. This is the biggest problem in this rule proposal. The new rules will be used by developers to challenge the existing Highlands rules in court. (65, 79)

RESPONSE: The WQMP rule defers to the standards established in the Highlands Preservation Area when establishing allowable septic density. The Highlands Water Protection and Planning Act required the Department to establish a septic density standard "at a level to prevent the degradation of ground water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution." (N.J.S.A. 13:20-32e). This Act for the first time introduced the concept of deep aquifer recharge, a term that was undefined, in establishing appropriate septic densities in the Highlands Preservation Area. To accomplish this statutory objective, the Department undertook an analysis of drought of record flow in streams in the Highlands Preservation Area under the assumption that drought flow must only come from ground water sources, and under extreme drought conditions shallow aquifer contribution to stream flow would be negligible. This was a very conservative assumption that the Department believes was appropriate in the Highlands Preservation Area given the Legislative mandate. Details on the development of the septic density standards is provided in *Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4*, available through the Department's website.

In the Highlands Planning Area, the Highlands Regional Master Plan is still undergoing review and development. The Highlands Council have taken a more detailed look at ground water recharge and have prepared an assessment of sustainable septic density on a HUC 14 subwatershed level rather than the larger HUC 11 watershed level. In addition the Highlands Council has identified different nitrate targets for the Protection, Conservation and Planned Community Zones identified in the draft Highlands Regional Master Plan, in order to advance the purposes of that plan. The draft Highlands Regional Master Plan proposes septic density standards for the Highlands Planning area that are more stringent, than the antidegradation standard for the State, based on the resource protection objectives and more detailed analysis undertaken for the Highlands Region. The rule requires coordination with the Highlands Regional Master Plan during preparation of wastewater management plans in the Highlands Region. Pursuant to N.J.A.C. 7:15-5.25(a), these wastewater management plans may include more stringent standards than the State nitrate standards based on the more detailed assessment preformed by the Highlands Council. Therefore, the Department does not believe that the adoption of a Statewide nitrate target and method as part of this rule in any way compromises the work of the Highlands Council or the defensibility of the standard set for the Highlands Protection Area.

1019. COMMENT: For ISSDS planning purposes, the proposed regulations require the use of 500 gpd per residential unit (3 bedroom house) in all analyses. This is too large a number and uses excessively high flow rates in order to provide a safety factor in the sizing of a septic tank and disposal field. In designing septic systems, using an average of 75 gallons per person is

more reasonable when looking at the impact of septic systems in aggregate. How did the Department determine 500 gpd was more applicable to this situation then other established means of flow calculations? (37)

1020. COMMENT: Under N.J.A.C. 7:15-5.25(e)1iii, the flow standards used in the calculation of the build-out overestimates the amount of flow that is likely to be produced by the actual development. The proposed values or wastewater flow s per unit from non-residential conversions is 500 gallons per day. Rutgers University (Burchell, 1992/2001) and the Delaware River Basin Commission (1999), have researched this number to in fact be an average of 232.5 gallons per day for three and four bedroom households, and 125.25 gallons per day for one and two bedroom households. By using such a high value per unit in the proposed rule, fewer total units will be permitted under existing treatment capacity, working to reduce the amount of development, with no improvements to the economy, equity or the environment. Why has the Department chosen a gallons-per-day figure, more than double the standard, as demonstrated in the existing research, and, how can the Department show this will not reduce the allowable housing opportunities essential to New Jersey's economy and regional equity that would otherwise be permitted by the ecosystem capacity? (5)

RESPONSE TO COMMENTS 1019 AND 1020: The commenter misunderstands the method used to calculate the allowable residential units within a HUC 11 watershed. The basis for determining residential septic density under the rule is an assumed load of 10 pounds of nitrate per person per year and is independent from any estimation of wastewater flow. This load is then multiplied by three persons per household. The load is then diluted by the amount of

ground water recharge occurring within the watershed to determine the maximum number of residential units that can be placed within the watershed and not violate the two mg/L nitrate target.

However, not all development in areas to be served by septic systems will be for residential use. Therefore, there is a need to convert nonresidential development to residential equivalencies in order to perform the required analysis. Because the actual nitrate load from an undefined nonresidential use cannot be estimated with any degree of certainty, wastewater flow was used to accomplish the conversion. For consistency the WQMP rules incorporate the planning flows from existing rules as they pertain to ground water discharges found in the Standards for Individual Subsurface Disposal Systems at N.J.A.C. 7:9A-7.4 in order to make this conversion. The planning flow assigned to nonresidential use under these rules, where the use is undefined, is .125 gallons per square foot of building. The flow calculated from a three bedroom single family dwelling under these same rules 500 gallons per day. The rule uses these figures to translate nonresidential flow into residential units by dividing the total nonresidential flow by 500 gallons per day to achieve residential equivalence so that nonresidential uses can be compared against calculated the HUC 11 septic capacity.

1021. COMMENT: Revisions to the Water Quality Management Planning rules should establish target ground water concentrations for the septic based densities based upon protection of existing natural ground water quality, or a two mg/L default value in the absence of site specific data. (86)

1022. COMMENT: The recharge values in the New Jersey Geological Survey nitrate dilution model identified to be used in N.J.A.C. 7:15-5.25(e) are far too high. There are two options here. One option would be to eliminate the models all together from the rule because methodology doesn't belong in a rule, or in the alternative, allow a site specific demonstration to show that the numbers in the models are wrong. (86)

1023. COMMENT: In certain geologic conditions where GSR-32 should not be used, the proposed rule should require that recharge volumes for these geologies be estimated through local investigation or standardized by scientific study state-wide. In lieu of this, the Department should be prepared to provide legal defense expenses and expertise to municipalities that choose to apply other more protective nitrate dilution models that yield less development density for development employing individual septic systems. (10, 80)

RESPONSE TO COMMENTS 1021 THROUGH 1023: Site specific ground water data does not exist for most sites in New Jersey, and collecting that information would be onerous and expensive. Further, the intent of the rule is to move away from site specific analyses and to base wastewater management decisions on comprehensive planning. The application of a two mg/L nitrate target eliminates the need for site specific data, ensures that where water quality has already been degraded below the Statewide average of two mg/L water due to historical land uses water quality will be restored, and allows a comprehensive approach to wastewater management planning rather than a site-by-site analysis.

As detailed in the Response to Comments 1006 through 1013, the Department believes the models developed will provide an appropriate septic density outcome consistent with the approach used for developing the antidegradation target. However, N.J.A.C. 7:15-5.25(a) allows wastewater management planning agencies to establish more stringent standards based on more detailed local information concerning ground water recharge and geology. Where a more stringent standard has been adopted, it is the responsibility of the wastewater management planning agency or the township to ensure the scientific basis of that standard is defensible.

1024. COMMENT: The establishment of a new statewide nitrate standard is troublesome. There is no scientific justification for reducing the current standard of five mg/L, which is already half of the conservative standard for human health. Such a reduction seems to be an arbitrary standard set only for the purpose of reducing development potential, which will also take property value without compensation. (58)

1025. COMMENT: Imposing such a stringent nitrate standard would require lot owners to decrease their potential development density thereby significantly decreasing the value of that land. (60)

1026. COMMENT: The change in nitrate levels would have a significant effect on not only the net increase in lot sizes that would be required, but also a net decrease in the number of approvable lots. More importantly, this would have a significant effect on the affordability of housing within New Jersey. (34)

RESPONSE TO COMMENTS 1024 THROUGH 1026: The expressed Legislative objective in the Water Quality Planning Act "is wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State, including ground waters and the public trust therein;" (N.J.S.A. 58:11A-2b). The nitrate planning standard is an antidegradation standard intended to satisfy the Department's obligation to prevent further degradation of water quality. The Department has established the Statewide average nitrate concentration in ground water to be two mg/L for nitrate.

Ground water contributes significantly to surface waters in many areas of the State, particularly during low flow periods. Once ground water becomes surface water there are a number of additional environmental effects that must be considered. Among them, nutrients such as nitrogen carried by ground water into surface waters can result in eutrophication of surface waters reducing dissolved oxygen and compromising the health of the aquatic community. Many surface waters are also used for drinking water supplies. Allowing nitrogen concentrations to increase in the base flow of these surface waters may compromise their continued availability as drinking water supplies, particularly where this ground water contribution is relied upon to dilute other direct discharges to surface. Lastly, as described in the rule proposal, nitrate is used as a surrogate for a suite of compounds that may be discharged from the septic system itself or onto the land surface by the land use supported by that septic system (See Nitrate as a Surrogate for Assessing Impact of Development Using Individual Subsurface Sewage Disposal Systems on Ground Water Quality; NJDEP, 2007). Certain ecological receptors are more sensitive than humans to these changes in water quality. These criteria are adopted in the Surface Water Quality Standards at N.J.A.C. 7:9B-1.14(d).

The commenter is reminded that the rule does not establish minimum lot sizes that must be imposed everywhere in the watershed. Rather it sets forth the maximum number of septic systems that can be sustained within a watershed, based on ground water recharge, without degrading water quality below the Statewide average of two mg/L of nitrate. The distribution of that sustainable development throughout the watershed is left to the discretion of the wastewater management planning agency. Therefore, it is impossible to predict the impact of this rule on the development potential of any particular lot with certainty. However, where present zoning would allow development density to exceed the sustainable capacity of a HUC 11 watershed, realization of that pattern and intensity of development would result in ground water degradation, contrary to the expressed Legislative intent of the Water Quality Planning Act. In these cases an adjustment of local zoning would be required to ensure that future wastewater discharges do not degrade water quality.

Studies have also shown that the value of regulated development that preserves the integrity of the nearby environment is positively influenced (increased) by its relatively limited supply. In comparison, other studies illustrate that high volumes of unplanned development drop in value as recreational opportunities vanish, traffic congestion mounts and initial demand is satisfied. For these reasons, the Department disagrees that land values will be drastically reduced by implementation of the provisions in the proposed WQMP rule.

1027. COMMENT: How is the proposed nitrate-dilution model applied to individual homes? (37)

RESPONSE: The nitrate dilution model is not expected to be applied to existing homes. Foremost, where a wastewater management plan has been prepared and adopted in accordance with this rule, the overall impact of future septic development based allowable under local zoning, will have been assessed and determined to meet the two mg/L standard on a HUC 11 watershed basis. In these instances, any development that is consistent with the zoning upon which the wastewater management plan was based would also be consistent with the wastewater management plan and no additional analysis would be required for any septic development.

Where wastewater management plans are not prepared and adopted as required under this rule, the Department will withdraw and redesignate wastewater service areas to discharge to ground water less than 2,000 gallons per day. Even in these cases, N.J.A.C. 7:15-8.1(c)2, only applies to project proposals of six residential dwelling units or more. Only developments meeting this threshold are subject to site specific review for consistency with the two mg/L nitrate dilution target. An individual residential project proposal would not trigger the provisions of the WQMP rule. However, it is important to note that the six dwelling threshold is cumulative as of the adoption of this WQMP rule proposal. In other words, if five single-detached dwellings were proposed one-at-a-time within a given municipality's total area of under-and-undeveloped lands to be served by discharges to ground water of less than 2,000 gallons per day, a 6^{th} single-detached dwelling proposal would, indeed, trigger the six dwelling unit criteria and would then be subject to the applicable septic density applied to that area.

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1028. COMMENT: Will development in septic areas and/or sewer service areas be stopped if the existing background ground water nitrate levels exceed two mg/L, five mg/L, 10 mg/L, or other concentration threshold? (37)

1029. COMMENT: Will septic designs be required to obtain actual water samples prior to completing their design and submitting to the County Board of Health? (37)

RESPONSE TO COMMENTS 1028 AND 1029: The rule does not restrict new development in areas where the nitrate concentration may currently exceed the two mg/L nitrate concentration and the rule does not require sampling of ambient values. The rule assesses the impact of future development, but does not prohibit new development as a means of correcting for existing development density on septic systems that exceeds the Statewide average nitrate concentration of two mg/L. The rule seeks to avoid compounding those water quality impacts by continuing a pattern of development on septic systems that cannot be sustained.

It should be noted that this set of regulations does not replace the design criteria for individual septic systems at N.J.A.C. 7:9A which include minimum requirements for separation between private wells and septic systems. In places where existing development on septic systems is resulting in nitrate concentrations in ground water that exceed the two mg/L standard established in this rule but still meet the drinking water standard, the application of the two mg/L standard will ensure that water quality is not further degraded. If the density of existing development on septic systems is known to be causing or contributing to a serious ground water quality problem, these areas should be identified in a wastewater management plan for future sewer service.

Some areas of the State currently exceed the ground water quality standard for nitrate of 10 mg/L. In these areas a source of drinking water other than ground water from an on-site well will be required. It should also be noted that these extremely elevated nitrate concentrations are most typically associated with present or past agricultural uses. Where these agricultural uses are converted to residential units, the application of the two mg/L nitrate standard in establishing septic density will, over time, result in water quality improvement. Even in cases where a clustered development is permitted to retain some agricultural use of the remainder of the property under N.J.A.C. 7:15-3.5(b)4x the rule requires that best management practices be employed to reduce the future concentration of nitrate in ground water, which will also result in water quality improvement over time.

1030. COMMENT: Some municipalities that have adopted ordinances requiring the use of the NJGS nitrate dilution model are having issues with the implementation of the Department's 50 or more reality improvements utilizing septic systems. Currently, the 50+ Certification program uses a simplified model that does not provide comparable results to the NJGS model. Consequently, the program reviewing the 50+ certifications is approving developments that have not satisfied the NJGS model. It is presumed that the 50+ certification program will no longer use a different model after the proposed regulations are adopted and that the Department will establish a common policy with regard to nitrate dilution. Clarification is needed on how consistency will be achieved between the 50+ Certification program and the nitrate dilution analysis in the respective WMPs. (62)

RESPONSE: The NJGS methodology, *A Recharge-Based Nitrate-Dilution Model for New Jersey*, is not significantly different from *A Simplified Nitrate Dilution Approach*, the model used for the 50 or More Realty Improvement Certification Program since 1995. They are both a synthesis of the Trela nitrate-dilution equation (1978) and the GSR-32 ground water recharge modeling component (1993). The primary difference between the two models is that *A Simplified Nitrate Dilution Approach* provides the ability to enter the exact percentage of impervious cover proposed on each site. In contrast, *A Recharge-Based Nitrate-Dilution Model for New Jersey* calculates an assumed impervious cover based on an extrapolation of Technical Release 55 (TR-55, NRCS, 1986), which estimates percent impervious cover based simply on proposed lot size. Wastewater management plans prepared and adopted in accordance with this rule will establish the allowable septic system density based on existing zoning. However, at the wastewater management planning level project specific design information is unavailable and thus impacts resulting from the actual location of the septic disposal fields cannot be assessed. In cases where a 50 or more realty certification is required from the Department, that review will continue to require a demonstration that unacceptable localized ground water impacts will not occur due to the actual location of the discharges relative to sensitive receptors.

1031. COMMENT: Will Total Maximum Daily Loads be used in septic areas for ground water discharge and if so, how? (37)

RESPONSE: The Department does not prepare total maximum daily loads to directly address ground water quality problems. Total Maximum Daily Loads (TMDLs) are set to determine and allocate the maximum amount of a pollutant that may be introduced into a surface water body

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and still assure attainment and maintenance of surface water quality standards. TMDLs, however, only apply to surface water bodies such as rivers, streams, lakes, and reservoirs; therefore the loading reduction only applies to a surface water body. Although TMDLs are not the appropriate water quality mechanism to set limits for ground water discharge, they do, as appropriate, consider loading inputs from ground water to surface waters. An outcome of a TMDL may be that reduction of nutrient loadings from septic systems would be necessary to attain surface water quality standards. The feasibility of this approach and means to accomplish it would be addressed in the specific TMDL Implementation Plan.

N.J.A.C. 7:15-5.25(e)3

1032. COMMENT: There is opposition to the proposed requirement at N.J.A.C. 7:15-5.25(e)3 that municipalities establish a mandatory maintenance program for septic systems by ordinance. For small municipalities, such a program would be difficult to enforce and would likely require hiring additional personnel to oversee administration of the ordinance requirements. The requirement is unnecessary and would not achieve the desired result because septic systems rarely, if ever, fail because of neglected maintenance. The incentive for homeowners to pump out their septic systems is clear. When septic systems fail, it is for reasons such as the age of the system, deficiencies with the original installation, changes in soil or other geological characteristics, or a combination of these factors. It is requested that this requirements be removed from the rule upon adoption, or that it be applied only to future construction. (72)

1033. COMMENT: At N.J.A.C. 7:15-5.25(e)3, the rule proposal mandates septic management programs Statewide to “ensure that all individual subsurface sewage disposal systems are

functioning properly. This shall include requirements for period pump out and maintenance, as needed." While this proposed mandate is a worthy objective, the complexities of implementing and sustaining such an effort would be considerable and represent a new and costly unfunded State mandate. The rule commentary suggesting costs would be "de minimus" and that fines levied for noncompliance could be used to fund the program are unrealistic and misleading. There would be significant legal, personnel, database development and other direct and indirect associated costs. One county has over 26,000 septic systems making this quite an undertaking whether it is done on a municipal or county-wide basis. (2)

1034. COMMENT: While septic inspections are a good idea on the surface, the focus of clean water should be on more stringent rules for well drilling and septic installation. If septics are installed with the specific geology in mind, a malfunctioning system would only cause problems for the home owner who chooses not to maintain their system, rather than spreading effluent to neighboring properties. In rural areas, health concerns are handled by the county Department of Health. This will likely put the task of septic inspections on the counties. Without additional resources, it will be a costly job for the counties to take on. An entire program needs to be set up, inventories taken of septics, alternate systems and cesspools. The enforcement would be a full time job in itself to keep track of units that have not met the deadline. There does not appear to be funds allocated to maintain the program.

If this job does not revert to the counties, the municipalities would be financially strapped to provide this service. With the growing number of homes on septic, there may not be enough

companies available to handle the work. This could cause problems with unqualified companies providing services. (36)

1035. COMMENT: Proposed N.J.A.C. 7:15-5.25(e)3 requires a demonstration, such as an ordinance, that septic systems have a mandatory maintenance program and are periodically pumped out. The preparation of a septic management plan is a major undertaking. State guidance and funding are needed for the development of the many elements of a septic management plan. (18, 42, 44, 45, 61)

1036. COMMENT: N.J.A.C. 7:15-5.25(e)3 requires a septic maintenance program that would require documentation that all septic systems are maintained properly. This septic maintenance program increases the burden on local government to implement a program that may have limited benefit. An outreach program, developed by the Department, to instruct septic system owners of the need to and the "how to" maintain the system would be a better approach. (14)

RESPONSE TO COMMENTS 1032 THROUGH 1036: All wastewater treatment disposal systems, even the most modern, require routine inspection and maintenance to ensure that they continue to function properly. Poor siting and improper installation are recognized causes of failure, along with lack of maintenance. A septic system that is not pumped out accumulates solids beyond the capacity of the settling portion of the tank, causing solids to overflow into and to clog the drainage field or tank. The *Voluntary National Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems* (EPA 832-B-03-001; March 2003) includes statistics from a variety of sources concerning the failure rate of septic systems

and improper maintenance as a significant cause of those failures. Among them is an estimate that ten percent of all systems back up into homes or have wastewater emerging on the surface of the ground based on 1995 U.S. Census data. This results a discharge of untreated wastewater into the home or onto the surface of the land where human exposure and illness are significant concerns. Specific information related to New Jersey is not available because there are no requirements for routine inspection, maintenance or reporting.

The minimum septic management program required under the rule is envisioned to be no more complicated than inventorying systems and tracking pump outs. Where an existing inventory does not exist, this can be accomplished by a comparison of existing sewered areas identified in the wastewater management with improved properties. The inventoried properties can then be grouped into districts similar to recycling or solid waste collection districts with each district being placed on a three year rotation for inspection and maintenance as required. This can be accomplished by a simple notification with a requirement that a receipt or voucher be returned to the administering agency. The date of return can then be entered into the inventory spreadsheet thus completing the requirement. The rule does not specify an agency responsible to complete this task. The agency could be the local or county health department responsible for issuing construction approvals, a sewer authority, municipality or county. The Department has left this decision to the discretion of the wastewater management planning agency to determine the most efficient and cost effective method of accomplishing this task.

The Department already requires notifications of proper operation and maintenance practices for homeowners utilizing ISSDSs pursuant to the Standards for Individual Subsurface Sewage

Disposal Systems at N.J.A.C. 7:9A-3.14. Educational materials are available for this purpose on the Department's website at http://www.nj.gov/dep/dwq/bnpc_home.htm. In addition, numerous Fact Sheets (FS) have been prepared by Rutgers University Cooperative Research& Extension, specifically, FS531, FS532, FS533, and FS840, on different aspects of septic system operation, maintenance, and septic management plans, which can be obtained through Rutgers or upon request to the Department. The Department has also prepared a simple fact sheet that municipalities can use when initiating the septic management program, which is available on request or at http://www.nj.gov/dep/watershedmgt/rules.htm. Finally, the U.S. Environmental Protection Agency has developed *The Wastewater Information System Tool* (TWIST) at http://cfpub.epa.gov/owm/septic/index.cfm, which is a user friendly data management tool formatted in Microsoft Access® that can be used to accomplish the septic management task.

1037. COMMENT: Which entity is responsible for the development and management of a maintenance program for individual subsurface sewage disposal systems (ISSDS)—the MUA, municipality, or county? (37)

RESPONSE: The rule does not specify an agency responsible to complete this task. A septic management program could be undertaken by the municipality or the county, if the municipalities agree to handle it through the county. If there is a county or municipal MUA that has the authority to take on multiple functions, this may also be an appropriate entity, but it is not expected that sewer authorities would be involved in this effort. The agency could be the health department responsible for issuing construction approvals, a sewer authority, municipality or county. The Department has left this decision to the discretion of the wastewater management

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planning agency to determine the most efficient and cost effective method of accomplishing this task.

1038. COMMENT: An effort needs to be made with COAH and other appropriate agencies to assist low and moderate income owners, as well as seniors, to pay for septic inspections, or at the very least, make it income tax deductible. (36)

RESPONSE: A properly functioning wastewater treatment system is essential to every residence and routine inspection and maintenance is a normal cost associated with home ownership. For properties served by centralized sewer systems the cost is in the form of a sewer and or water bill. Septic system owners are not presented with regular bills for the inspection and maintenance of their systems, because they are privately owned. However, septic systems require maintenance to remove accumulated material in the septic tank and prevent clogging of leach fields. Unfortunately, many homeowners do not recognize this required attention until a system failure occurs, and even then many will ignore the failure unless it backs up into their home. The cost of replacing a septic tank and leach field ranges from $10,000 to $60,000 depending on the soils and geology under the system. The cost of maintenance is about $500 every three years. The Department believes the annualized cost of inspection and maintenance is probably lower than the cost of public sewer service in most of the State. The cost of routine maintenance is certainly lower than the replacement cost of a system where that maintenance is overlooked. Therefore, the Department concludes that this program is an affordable means to ensuring adequate wastewater treatment over the long term. While not within the scope of this rule or the authority of the Department to effect changes suggested in the comment, the

Department would work with sister agencies in any actions they may desire to take to develop measures that would assist low income families in meeting this obligation.

1039. COMMENT: N.J.A.C. 7:15-5.25(e)3 which requires septic maintenance programs is strongly supported. (22, 76)

1040. COMMENT: Requiring mandatory maintenance programs for septic systems under proposed N.J.A.C. 7:15-5.25(e)3 is an excellent way to reduce non-point source pollution and is supported. The Department should offer municipalities guidance in developing sound methods for implementing this provision to ensure the rule's intent is accomplished. (68)

1041. COMMENT: The requirement for a mandatory maintenance program for areas served by individual septic systems is supported. This supports the proper care and maintenance of these systems at the local level, where it is best established and carried out. (10, 80)

RESPONSE TO COMMENTS 1039 THROUGH 1041: The Department acknowledges these comments in support of this provision of the rule and agrees that guidance is a valuable aid to implementing this requirement. Guidance to assist in compliance with the septic management requirement is available at http://www.nj.gov/dep/watershedmgt/rules.htm. In addition the U.S. Environmental Protection Agency has developed *The Wastewater Information System Tool* (TWIST) at http://cfpub.epa.gov/owm/septic/index.cfm , which is a user friendly data management tool formatted in Microsoft Access® that can be used to accomplish the septic management task.

1042. COMMENT: The proposed requirement for septage management planning and inclusion of an evaluation of the impact of septage on water resources is environmentally sound and should be adopted. However, with no rules or regulations in place for collecting the septage flow data, the proposed rule should require uniform reporting and allow time for municipalities to gather the information. This information should not be submitted with WMPs required in the first nine months, but rather with the next WMP update or planning cycle once procedures for reporting are established. (18, 32)

RESPONSE: It is not the intent of the rule that there be reporting of the septic system management program to the Department. The requirement is met through the adoption of the required ordinance, and so does not warrant a postponement in implementation.

1043. COMMENT: Revisions to the Water Quality Management Plan should regulate Department mapped well head protection areas in septic management plans. (86)

RESPONSE: The commenter appears to suggest that location of septic systems in well head protection areas be regulated through this rule. The Department has not determined that the exclusion of septic systems from well head protection areas is entirely appropriate. Such an exclusion would render public sewer systems as the preferred wastewater management in well head protection areas. Typically public sewer systems support more intense development patterns and higher percentages of impervious cover than development on septic systems. This impervious cover would then reduce recharge in an area that may be an important recharge area

for the well being protected. The Department believes that wastewater management and land use decisions designed to protect wells require a more local analysis that cannot be accomplished through this rule at this time.

The Department agrees that well head protection areas should be a consideration when planning future land uses and densities. While the WQMP rules do not specifically require consideration of well head protection areas, wastewater management planning agencies are not precluded from including these local considerations under N.J.A.C. 7:15-5.24(a) in their wastewater management plans or through locally adopted well head protection ordinances.

N.J.A.C. 7:15-5.25(f)

1044. COMMENT: The proposed rule changes aim to identify public water supply service areas, which seems to be redundant to what is already being done in the Department's Division of Water Supply. Every application that goes before the Division of Water Supply for Safe Drinking Water Permits is analyzed and reviewed for the area water supply including the pending need and demand for future growth. (25)

RESPONSE: The New Jersey Safe Drinking Water Act rules at N.J.A.C. 7:10-11.5(c)6 require a public community water system to submit a map identifying the existing and proposed water system whenever applying for a permit application governed under N.J.A.C. 7:10-11. Among other requirements, this provision of the rules also requires the identification of the system "water service area." The mapped water service area is required to clearly delineate the boundary of the geographical area currently served by the existing system, in addition to the area

anticipated to be served upon completion of the proposed water system. This requirement is limited to the existing area plus what is being proposed in the application. It does not require the identification of the entire water service area that is planned for the water system, which is needed under the WQM Planning rules. This information is necessary to inform the analysis intended to assure that sustainable water supply is available for the entire build-out, or the 20-year projection, as applicable.

1044A. COMMENT: The proposed regulations address water allocation, which is already assessed during the Bureau of Safe Drinking Water permit review. Is a conflict created between the Bureau of Water Allocation, the Bureau of Water Systems and Well Permitting and the Division of Watershed Management? (37)

RESPONSE: The rule requirement at N.J.A.C. 7:15-5.25(f) calls for demonstration of water supply availability consistent with the New Jersey State Water Supply Plan. The evaluation of this demonstration will be made by the Department, which includes the Bureaus of Safe Drinking Water, Water Allocation and Water Systems. Therefore, the Department does not anticipate any conflicts will be created between the planning and regulatory processes.

1045. COMMENT: A study of water supply in some critical areas was to result from the implementation of drought regulations and a moratorium. Preliminary reports came out, but despite a deadline set by the Governor, the time came and went without a final report being published. That final report would have answered a lot of questions about water supply. (25)

RESPONSE: The Department believes the commenter is referring to Executive Order 32, which was issued by the Governor in September 2002 to deal with the severe drought of 2001 – 2002 in the Atlantic County region. The order required the Department to assess the adequacy of the water supply of the Townships of Egg Harbor, Galloway and Hamilton in Atlantic County. The focus on this area was due to the number of pending water allocation requests, and record declines in streamflow and ground water levels that were observed at that time. The Department has developed a draft report on the status of Southeastern New Jersey's water supply. This report will be included as an addendum to the New Jersey State Water Supply Plan expected to be issued in 2008.

The Southeast report and its appendices essentially conclude that the three townships share their water supply with that of the southeastern part of the State. The document identified the more immediate problem to be that of streamflow depletion caused by public and agricultural withdrawals. A longer term problem identified was saltwater intrusion, caused primarily by public water supply withdrawals. The Department, through its Bureau of Water Allocation, has issued permits in Atlantic County that limit impacts to the surficial aquifer and reserve the highest quality water for potable uses. The Department, under contract with the United States Geological Survey (USGS) is developing a ground water model that will assess the impacts of withdrawals on both the confined and surficial aquifer systems. This model will enable the Department to implement allocation measures that maximize water availability to help meet the needs of the region while protecting surface water systems and natural resources. The Department expects the model to be available in 2009.

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1046. COMMENT: Providing stronger connections between wastewater and water supply as this rule does is significant, but it is not as significant as the draft rule that was submitted in 1998 under the Whitman administration. The Department should take a closer look at the water supply aspects of that rule proposal. (65)

1047. COMMENT: The link between wastewater and water supply is important, but it could still be stronger than proposed. There was an earlier version of this link in draft rules during the Whitman administration that were never adopted that could be referred back to. (59)

RESPONSE TO COMMENTS 1046 AND 1047: The earlier draft rules referred to by the commenters, which were the subject of a stakeholder process, essentially proposed to ensure that 80 percent of a waterway's MA7CD10 (statistical seven-day low flow that occurs on average every ten-years) is maintained. The thresholds in the draft proposal applied to (point-of-impact) depletive and consumptive withdrawals of 100,000 gallons a day (gpd) or more or 50,000 gpd if the withdrawal is upstream of a reservoir or water supply intake. However, if a watershed as a whole already exceeds the threshold, *any* new depletive/consumptive withdrawal would be scrutinized and may have to develop and implement a mitigation plan.

This rule does not differ significantly in intent from the earlier proposal. However, the adopted rule will take advantage of more detailed water budget information on a HUC 11 basis. The New Jersey State Water Supply Plan (NJSWSP) presently under development, and expected to be released later this year, will set flow requirements for ecological integrity. The plan will then assess existing water uses, particularly those that are depletive and consumptive, on a HUC 11

watershed scale and determine whether and how much additional water may be diverted from that watershed and still be protective of the aquatic community. The wastewater management plan prepared in accordance with these rules will include a full build-out that predicts not only future wastewater treatment needs, but water supply needs as well. This water supply demand will then be compared against the available supply as determined in the NJSWSP and where that supply is inadequate to meet the projected need certain actions may be required. The Department expects that the NJSWSP will include a detailed list of actions that may be required which may include: water conservation, beneficial reuse of reclaimed water, or developing new sources or interconnecting sources with available water. These strategies are not significantly different from the mitigation requirements of the 1997 draft rule proposal. Where a water deficit cannot be offset by these measures a reduction or change in the type of development predicted by the build-out may also be required.

The assessment required under this rule will be more protective than the 1997 proposal in that it will allow a prediction of all potential water losses, not just those subject to regulation under the water allocation program, and those water losses will be compared against the most current water supply information available.

1048. COMMENT: The link between wastewater and water supply is applauded. (49)

1049. COMMENT: The concept of connecting the wastewater rules to water supply for the first time is supported. (5)

1050. COMMENT: Linking water supply and wastewater management planning is strongly supported. This element of water resource protection has been overlooked by present regulations. New Jersey State Water Supply Plan and other planning initiatives such as the draft New Jersey Highlands Regional Master Plan support this initiative.

Reduced base flow is a result of overallocation of water from streams, which reduces the capacity of a stream to assimilate pollutants and results in less dilution of pollutants and, therefore, results in a greater concentration of pollutants in stream systems. Thus, the stream's assimilative capacity is compromised. The loss of water also stresses aquatic and streamside communities. Loss of base flow is why streams in many areas are drying up. Reduced base flows cause higher water temperatures since the naturally cool ground water that feeds the base flow of a stream is replaced by surface runoff from asphalt and other warmed surfaces. These higher temperatures can alter the fish community by reducing the abundance of sensitive species such as trout (which require cool, clean waters), concurrent with creating conditions for more pollution-tolerant species to thrive. (10, 80)

RESPONSE TO COMMENTS 1048 THROUGH 1050: The Department acknowledges these comments in support of linking wastewater to water supply in these rules.

1051. COMMENT: The Department must ensure that the State will provide water to areas with sewer service areas. (54)

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RESPONSE: The New Jersey Water Supply Management Act, N.J.S.A. 58:1A-2, states that "the water resources of the State are public assets of the State held in trust for its citizens and are essential to the health, safety, economic welfare, recreational and aesthetic enjoyment, and general welfare, of the people of New Jersey; that ownership of these assets is in the State as trustee of the people." The Department has the obligation to manage water supply as a common resource. Under the Water Allocation rules, there are several demonstrations required as part of the water allocation permit process, including providing information to establish that a requested diversion is in the public interest, N.J.A.C. 7:19-2.2(f). There is no requirement to provide available water supply to sewer service areas, however, in general, areas served by public wastewater collection systems are of a density that would be consistent with areas served by public water systems. In addition, these rules seek to limit sewer service areas to those places that possess minimal environmental sensitivity and to those areas that local and regional planning agencies designate to support future growth. Therefore, the Department generally agrees with the commenter that public water supplies should serve centralized wastewater service areas, but we cannot commit to the unconditional availability of water to meet those, as yet unquantified, needs.

Wastewater management plans are required to include a build-out analysis. This build-out analysis will be used to predict the future water supply needs of the land use and development patterns upon which the plans are based. Once the future water supply demand is established, it will be compared against existing water allocations to determine whether sufficient water already has been permitted to support that growth. If current allocations are not sufficient to meet the future predicted water supply demand, the New Jersey State Water Supply Plan will be consulted

to determine where additional water is available to supply that need. However, the Department cannot compromise the quality and ecological health of the State's waters in order to supply these areas. The wastewater management planning process is intended to assist in the identification of areas where future water supply demands may not be sufficient and to begin to address those deficiencies through water conservation, beneficial reuse, interconnection of systems with surplus water, new source development and other measures as may be appropriate. Where these options are infeasible due to cost, it will be necessary to reduce the future water supply demand by altering the predicted land use pattern.

1052. COMMENT: The proposed rules at N.J.A.C. 7:15-5.25(f) require the WMP agency to submit information and analyses to the Department for a determination on water supply needs. The Department should be determining existing and future water supply needs using information that is submitted by the Water Department's, municipal utility authorities, consultants, industry, institutions, and agriculture users. Examples of information submitted to the Department include: Water Allocation Permit Applications and supporting documentation; Agricultural Water Use Registrations; Water Conservation Plans; Drought Management Plans; Water Use Data (ground water and surface water diversions); water level data; and hydrogeologic studies.

In developing water supply needs, the Department should also coordinate the project with the Delaware River Basin Commission (DRBC), Pinelands Commission, USGS, New Jersey Geological Survey and stakeholders. (85)

1053. COMMENT: N.J.A.C. 7:15-5.25(f) requires the applicant to demonstrate that the proposed WMP, WMP update or WMP amendment does not conflict with State and regional water supply plans or TMDLs adopted as a WQM plan amendments. Considering that this water supply data is within State control and, in terms of wastewater management planning, a separate even if related issue, it should be the State's responsibility to assess WMP, WMP update or amendments capacity issues from a water supply perspective. As related to water supply concerns, such analysis should be conducted by State agencies and not by a WMP applicant. (88)

1054. COMMENT: The proposed rules require the WMP agency to identify measures to ensure an adequate water supply. As the Department issues Water Allocation Permits, Water Use Registrations, and Agricultural Water Use Certifications, it is the Department that should be identifying, funding, and implementing measures, studies, or projects to ensure a safe and adequate water supply. (85)

RESPONSE TO COMMENTS 1052 THROUGH 1054: Water departments, utilities authorities, consultants, agricultural water users and the Department's water supply regulatory programs consider only existing uses and near term water supply demands. The area of concern under the Department's water supply regulatory programs is limited to the existing area plus what is being proposed in the application. It does not require the identification of the entire water service area that is planned for the water system, which is needed under the WQMP rules to ensure that future land use plans are consistent with sustainable use of water supply. Wastewater management plans are required to include a build-out analysis which will be used to predict long term water

supply needs. Many public water supplies draw from multiple sources or rely on interconnections among water systems. These situations complicate assessment of water supply availability. Therefore, the Department agrees with the commenters that the Department must act as a partner in evaluating future demand, available supply and the development of strategies to meet those long term water supply demands. The Department also agrees that the regional planning entities, including but not necessarily limited to, the Delaware River Basin Commission, Pineland Commission, Highlands Water Protection and Planning Council, and United States Geological Survey should be consulted throughout the development of not only the water supply component, but the entirety of the wastewater management plan.

Wastewater management can have a profound influence on water supplies availability. For example, where water is withdrawn from one watershed, used, treated and then discharged into another watershed, commonly referred to as a depletive use, the effects of that wastewater management decision on the losing watershed, including impacts on water quality, ecological health, and even safe yields of reservoir systems must be a consideration in wastewater management planning. Furthermore, where water supply planning has identified actions necessary to ensure the sustainability of water supplies, wastewater management plans must support the implementation of those actions. While the Department provides much of the basis information about water supply, local entities play the important role of designating future land use and must coordinate these plans with the wastewater and water supply needs and availability to ensure an integrated approach. Therefore, it is entirely appropriate and necessary to include water supply considerations in the wastewater management plan prepared by the WMP agencies.

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1055. COMMENT: In order to identify measures to ensure a safe and adequate water supply, the following water resources investigations or projects should be implemented by the Department: update the Department Water Supply Action Plan 2003-04; re-evaluate the Water Supply Critical Area Number 2 Program; update the Camden Metropolitan Area Water Supply Feasibility Study; complete the Department Interconnection Study; initiate the recommendations and update the Comprehensive Water Supply Plan for Southeastern New Jersey; and evaluate inter-basin transfers in the various watersheds.

Also, the proposed rules discuss available water supplies established in regional water supply plans. The Department should provide funding for regional water supply plans, USGS surface water and ground water investigations (i.e. MTBE, methylmercury), and watershed restoration plans. (85)

RESPONSE: While this comment is outside of the scope of this rule, the Department provides the following update concerning the various studies referenced by the commenter.

The Department has and continues to fund regional water supply studies. For example, studies have recently been completed for the surficial aquifer in the Upper Maurice River Basin, saltwater intrusion in the Salem-Gloucester region, and confined aquifers in the coastal aquifers. Ongoing studies include:

A re-evaluation of the impacts of previous allocation cutbacks on aquifer levels in Area of Critical Water Supply Concern 1 (Critical Area 1) has been completed by the USGS. The

Department will review the findings and develop recommendations on how to address water supply needs in the region. The Department will present the findings to the public and solicit input on future actions. The outreach effort for Critical Area 1 is expected to commence in 2008.

The USGS is completing a study of Area of Critical Water Supply Concern 2 (Critical Area 2) that re-evaluated the impacts the reductions in allocation have had on water levels in the Potomac-Raritan-Magothy (PRM) aquifer. The final report is expected by mid-2008. The Department will also present the findings and seek public input on water supply management in this region. The public outreach effort is expected to commence in late 2008 or 2009. The Camden Metropolitan Area Water Supply Feasibility Study was conducted in response to the over pumping of the PRM aquifer in Critical Area 2. While the Department has no immediate plans to formally update the study, the actions taken in response to the Critical Area 2 report may result in alternative water supply strategies being considered.

An analysis of water supply in Cape May County and identification of potential options for meeting future demands has been completed by the USGS. The key objective is to identify sustainable sources of water supply that meet the needs of the county while reducing impacts from saltwater intrusion and minimizing impacts on environmentally sensitive resources. The final report is scheduled for completion in 2008. The Department will present the findings to interested parties in Cape May County and gather input from the public on the identified alternatives. The Department will also fund a study to assess the feasibility of preferred options. The outreach and feasibility study is scheduled to commence in 2009.

An assessment of the interaction between surficial and confined aquifers in Atlantic County by the USGS is nearing completion. The study will provide improved understanding how diversions in the aquifer systems impact surface water flow and saltwater intrusion. The study will also result in the development of a modeling capability that will enable the Department to evaluate various diversion scenarios (for example, conjunctive use of aquifers) that maximize water supply opportunities in the region while protecting water and other natural resources. The final report is scheduled to be completed in 2009. This study will help further the comprehensive planning capability for the entire southeast region of the State.

The Department has completed an interconnection study that evaluated the status of water supply interconnections, identified areas of concern and offered recommendations for improvements in interconnections to help avoid drought conditions in regions of the state, mitigate droughts when they occur, and to help respond to water supply emergency situations. The Department will be working with water supply purveyors and local authorities to implement the recommendations as appropriate.

Future studies that are being considered include an analysis of the Kirkwood-Cohansey aquifer in the lower Maurice River basin (Cumberland County) and a comprehensive study of water supply in the northeast region of the State.

These studies result in an integrated understanding of regional water supply status and provide the Department with the tools to better evaluate the impacts of individual water diversions on the regional water supply.

Protection of public health by ensuring that New Jersey's drinking water meets the highest standards is central to the Department's mission. The Department, working in concert with water supply purveyors will continue to assess and study contaminants of potential concern to satisfy this obligation. These studies are addressed through the safe drinking water standards. The Department will also continue to use its Federal 319 grant funds and dedicated Corporate Business Tax Watershed Management Fund money to prepare and implement watershed restoration plans aimed at protecting and restoring the chemical, physical and biological health of New Jersey's water.

1056. COMMENT: The rules require the adoption of water conservation ordinances. Existing water conservation ordinances and plans should be enforced and education programs should be developed and implemented. The Camden Metropolitan Area Water Conservation Study should be updated. (85)

1057. COMMENT: The proposed rule should articulate and promote conservation practices, such as, low flow toilets, re-use of gray water, etc. These conservation practices can be encouraged in every wastewater management plan. (5)

RESPONSE TO COMMENTS 1056 AND 1057: The Department agrees with the suggestion that the Department should encourage water conservation as a matter of good stewardship. The Department notes that the Uniform Construction and BOCA Codes have been updated to require low flow and water conserving fixtures. These improvements should reduce the per capita water

demand as older structures are rehabilitated or reconstructed. This will not only benefit water supply, but also wastewater treatment plants in that it will reduce the amount of wastewater that has to be treated. The Department may require additional water conservation measures as part of an overall strategy to ensure the adequacy of water supplies to meet future demands. However, because of the diversity in settings across New Jersey, a more refined strategy tailored to the significant water users in each watershed is required. In urban areas, where lawns are not prevalent in the landscape, a lawn watering ordinance will not be effective at reducing demand. However, if there are significant water losses due to aging infrastructure, the rehabilitation of that infrastructure would be of paramount importance. In a pastoral setting, effecting a change in the type of irrigation system from spray to drip might be significant in terms of saving water. Rather than applying a uniform approach across the State, the wastewater management planning process will enable a targeted implementation strategy.

The Department is not aware of any study by the name, “The Camden Metropolitan Area Water Conservation Study.” There is a study entitled "Camden Metropolitan Area Water Supply Feasibility Study," which looked at various large scale regional supply options relative to Critical Area 1 in this region but did not address conservation issues.

1058. COMMENT: An explicit methodology and measurable criteria should be developed by which applicants can conduct an assessment of consistency to assure that proposals do not conflict with the New Jersey State Water Supply Plan, regional water supply plans or TMDLs adopted as WQM plans. There should be a consistent review process with quantifiable

benchmarks that can be understood by applicants for proposal submissions and used as a foundation by the Department in assessing the consistency of submitted plans. (88)

RESPONSE: The commenter references the need for a methodology and measurable criteria against which consistency can be determined. It is unclear to whom the term "applicants" is intended to refer. Under this rule, wastewater management plans are to be developed by counties and if counties refuse responsibility, then the responsibility falls to municipalities. The Department is committed to working in partnership with the counties in the development of these wastewater management plans. Thus the Department will advise counties and municipalities throughout the wastewater management planning development process where the New Jersey State Water Supply Plan and adopted Total Maximum Daily Loads require additional measures to be implemented to achieve consistency. In the majority of cases, these special measures will typically be implemented through the adoption of local ordinances, such as low phosphorus fertilizer ordinances or water conservation ordinances.

Wastewater management plans are adopted into and become the centerpiece of areawide Water Quality Management Plans (WQMPs). Wastewater management plans are an integral part of the continuing planning process required by the Water Quality Planning Act, and are intended to ensure consistency among Federal, State, regional and local land use plans. Wastewater management plans are typically based upon municipal planning and zoning. The Water Quality Planning Act prohibits the Department of Environmental Protection from issuing permits for projects that conflict with WQMPs. If the term "applicants" is intended to represent applicants for Department of Environmental Protection permits, then any project that is consistent with the

municipal zoning upon which the wastewater management plan is based would also then be consistent with the WQMP.

1059. COMMENT: It is important to note that some counties do not have the data and information about regional water supply systems to properly complete depletive/consumptive water use analyses, especially in basins where the majority of the public water supply is derived from surface waters and where large water purveyors are involved in intra-basin transfers. Furthermore, the analytical method and geographical and scientific approach would be very different as compared to areas that rely heavily on ground water. Some counties will have to rely heavily on the New Jersey State Water Supply Plan when it is released, as well as assistance from the Department and New Jersey Water Supply Authority to accomplish this work. (9, 19)

RESPONSE: The Department agrees with the commenters that public water supply systems can be very complicated if they draw from multiple sources or are interconnected with other systems. The rule does not require a depletive/consumptive use analysis be performed by the WMP entity. The primary responsibility of the WMP entity is to provide the water demand information associated with the build-out analysis, identify the water source(s) to be used by the build-out yield, and then provide an appropriate response where the Department determines that the demand outstrips the supply source identified. The Department will assist the WMP agency in determining the availability of water supply sources and offer appropriate alternatives to address any deficiencies identified as a result of this analysis.

1060. COMMENT: The proposed rules require the applicant to demonstrate adequate water supply in accordance with the most recent New Jersey State Water Supply Plan. The most recent New Jersey Statewide Water Supply Plan, Appendices, Map, and Executive Summary are dated August 1996. The Department needs to expedite the process to update the Plan. (85)

1061. COMMENT: The Department's updated New Jersey State Water Supply Plan will be needed for the WMP agencies to perform a depletive/consumptive water use analysis. Until the information is disseminated, the analysis required pursuant to the rules cannot be undertaken. This needs to be factored into the deadline for submission of the county's updated plan. (81)

1062. COMMENT: The updated New Jersey State Water Supply Plan will be needed for the WMP agencies to perform their analysis. The starting date for WMP development should be extended if the NJSWSP has not been released prior to the new rules being adopted. (88)

1063. COMMENT: The New Jersey State Water Supply Plan (NJSWSP) is a key document in this planning framework and the current plan is out of date. Large segments of information that will be provided in that plan are key components of the county Water Quality Management Plans. Funding was provided by the legislature to complete an updated NJSWSP, but it has yet to be done.

The Department should not begin the implementation of this rule until the NJSWSP update is completed and adopted. The nine month deadline placed on the county plans should only start

after the NJSWSP is adopted. Has the Department contemplated the impact of implementation of this rule prior to any update to the NJSWSP? (6, 7)

1064. COMMENT: The New Jersey State Water Supply Plan (NJSWSP) is a key document under the planning framework in the proposed rules as large segments of information that will be provided in this plan are key components of the county WMP. The NJSWSP is outdated and until that plan is updated and adopted, the Department should not start the nine month time clock for WMP submittal proposed by this rule. (18, 32)

1065. COMMENT: The New Jersey State Water Supply Plan (NJSWSP) update should be completed and adopted prior to the implementing the proposed WQMP rules. There are key components of the NJSWSP that are necessary for the implementation of the WQMP rules and there can be no approval of any WQMP since they are to be based (in part) on the NJSWSP. (16)

1066. COMMENT: N.J.A.C. 7:15-5.25(f) requires responsible agencies to insure that there is adequate water supply for future development, but unless there is a water supply plan more recent than the 1996 one, responsible WMP agencies will have no reasonably accurate way of complying. (22, 76)

1067. COMMENT: The Department's desire to rely on the New Jersey State Water Supply Plan in the context of N.J.A.C. 7:15-5.25(f)2 is appreciated because the analysis requires

information about future water supply that may depend upon future water supply projects. However, the current New Jersey State Water Supply Plan is a decade old and does not contain the necessary information. The Department should consider this section further in consultation with wastewater management planning agencies and water purveyors. (38)

1068. COMMENT: Proposed N.J.A.C. 7:15-5.25(f) sets forth the criteria for determining the extent of water available in a particular planning area. The proposed rules do not require WMP agencies, any regional conglomeration of these agencies or the State to conduct a water supply analysis to determine the extent of our remaining water supply. Instead, the rules provide the following: The Department will only adopt a WMP, WMP update or WMP amendment if water supply needs associated with environmental build-out are demonstrated to be met with existing, new or expanded water supplies that do not conflict *with the most current New Jersey State Water Supply Plan* (NJSWSP), regional water supply plans, or TMDLs adopted as WQM plan amendments including, but not limited to, any limitations on withdrawals due to ecological and saltwater intrusion concerns.

Thus, for the most part, the determination of whether water supply needs exceed supply will be based entirely upon the NJSWSP. The NJSWSP, last updated in 1996 and which incorporates data that was actually collected several years earlier, quantifies water availability for 23 planning areas throughout the State. To determine water availability, the Department combined surface water availability, which was calculated in terms of "safe yield," and combined it with ground water availability, which was calculated using methodology developed and utilized by the Department that is roughly based on the premise that natural recharge is equal to natural

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discharge. For ground water, in determining how much of the recharge could be used without causing harmful regional impacts, the Department evaluated several planning areas that have apparently undergone comprehensive geohydrologic investigations in an effort to estimate the threshold at which ground water supplies experience significant and unacceptable stresses. The Department's methodology utilizes two planning thresholds: in most regions, an assumption that twenty percent of natural recharge is available for human use without unacceptable regional impacts and, in the coastal area, a ten percent value is employed to address the potential for saltwater intrusion. The resultant water supply estimates are provided in a Table of Available Water by Planning Area that, for each of the 23 areas, sets forth in million gallons per day the Total Recharge, Available Ground Water (the 20 percent or 10 percent of natural recharge), Surface Water Yields, Total Available Water, Interbasin Transfer and Net Available Water. It is this last figure, Net Available Water, that will essentially serve as the key "number" for establishing under the proposed rules whether the water supply needs identified by the build-out analysis exceed available water supply.

There are several problems or limitations associated with the proposed rules' reliance on the NJSWSP, most of them related to the fact that the document is more than a decade old and incorporates data that is even older. For example, one figure missing is how much water the State is currently consuming on a daily basis. Knowing that such a number is difficult to calculate at any given time (e.g. gallons per day as indicated by existing and pending water allocation permits, plus an estimate of the number of households and other entities consuming less than 100,000 gallons per day), the use of the "percentage of natural recharge" figure to calculate the Total Available Water is presumably the conservative factor in the calculation that

is supposed to ensure that a safe threshold of water consumption is not exceeded. However, these recharge percentages are also based upon data and analysis that is more than a decade old and may not be applicable anymore. This is evident from the population projections in the NJSWSP that were used to determine overall water supply needs and duration in New Jersey. For example, the NJSWSP projects New Jersey's 2010 population as being 8,250,197 and the correlative water demand for that same year to be 1,647.3 mgd. However, data from the US Census Bureau demonstrates that, by the year 2000, New Jersey had already exceeded that 2010 projection with a population of 8,414,350. Similarly, the NJSWSP estimates New Jersey's 2040 population to be 8,933,212 and correlative water demand to be 1,758.6 mgd. The Census Bureau, based on the actual 2000 numbers, predicts that, as of 2006, we will have a population of 8,724,560 and, as such, may already be approaching the NJSWSP's 2040 number, nearly thirty years sooner than it predicted. (17, 49)

1069. COMMENT: The NJSWSP points out the significant limitations in the 10 and 20 percent thresholds for ground water availability are "planning thresholds" as opposed to area specific thresholds, which becomes more significant the closer a planning area gets to near deficit or deficit conditions. It concludes that the refinement of the planning thresholds through verifiable ground-tested methodologies is a major requirement for better, more accurate, water supply planning.

Other limitations of the information contained in the NJSWSP and the data it is based upon, as described in the NJSWSP include: the lack of, and need for, a collective evaluation of the numerous activities that affect water quality and quantity of the State's regional water supplies,

including, but not limited to, the depletive use in combination with degradation in water quality caused by increased development activities, that increase the rate of decline of water availability; the lack of, and need for, better information quantifying the "profound" effects to local flow paths of the hydrologic cycle and the overall water supply caused by development, through its reduction in vegetation and increase in impervious cover; the lack of information related to the hydrologic/ecological impacts associated with reduced freshwater flow and its impacts upon water supply; and the water availability component of the Water Balance Model used in the NJSWSP must be updated periodically (at least once a year).

None of the information utilized by the NJSWSP has been updated since its publication in 1996. Accordingly, it is apparent that reliance upon the NJSWSP at this time to determine whether water supply needs can be met is simply inappropriate and, although the NJSWSP is reportedly in the process of being revised, that process has been ongoing for several years and there is no indication that a revised NJSWSP will be available in the near future. (17, 49)

RESPONSE TO COMMENTS 1060 THROUGH 1069: The 1981 New Jersey Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., mandated the development and the completion of periodic revisions to the New Jersey Statewide Water Supply Plan (NJSWSP) to improve the management and protection of the State's water supplies. The first Statewide Water Supply Plan was adopted in 1982. Following updates to the Plan released in 1983, '85, '87, 1991, and 1993, the first comprehensive revision of the NJSWSP was completed in 1996. The most recent update to the water supply planning process, entitled "Water Supply Action Plan 2003-04," consisted of an outline and progress report on key capital infrastructure projects and water resource

evaluations previously identified in the Plan. The Department continues its work on a comprehensive update to the 1996 New Jersey Statewide Water Supply Plan and expects to release that plan later this year.

The Department shares the commenters' concerns over the age of the existing plan (1996) and the data upon which it was based. The Department is working as quickly as possible toward release of the comprehensive update, which will build on the 1996 release of the NJSWSP in an effort to address mounting challenges to traditional water supply management in New Jersey. The primary focus of the NJSWSP is to ensure that sustainable water supplies are available to meet current and projected water supply demands while protecting existing users, the ecological health of the water system and water dependant species within the prescribed planning horizon. A key component of this effort is to guarantee water availability during periods of relative stress, including weathering the drought of record. The following are key objectives of the 2008 revision of the NJSWSP:

- Define current water use trends and quantify the volumes of water used, within each of the State's 151 11-digit Hydrogeologic Unit Code (HUC 11) watersheds
- Calculate current depletive and consumptive water loss values for each HUC 11; both positive (net loss) or negative (net gain)
- Develop water budgets for the watershed and confined aquifer planning areas to determine which areas have exceeded or are in danger of exceeding the planning thresholds identified in this Plan

- Determine whether existing approved (allocated) resources exceed sustainable thresholds
- Identify and quantify the location of potential supplemental sources of sustainable supply
- Define overarching water supply policies to support State objectives, including the preservation of existing water supply resources, the restoration of "stressed" areas, and to support economic growth and future development within sustainable limits
- Identify statutory, policy and regulatory actions that are necessary to ensure an adequate statewide water supply to meet anticipated demand

Key differences between this update and the 1996 Plan relate to the assessment of water availability. Numerous improvements to the water availability estimates in the current assessment were made based on expanded and improved water use data, increased understanding of NJ-specific hydrogeologic processes, and current scientific research relating hydrologic modifications to aquatic ecosystem impacts. These key differences include:

- Water availability was estimated for 151 HUC11 drainage basins (approximately 50 mi^2 in area) rather than the 23 Regional Water Resource Planning Areas (roughly equivalent to the Watershed Management Area and approximately 350 mi^2 in area). This resulted is a much finer analysis scale and prevents the "masking" of small stressed areas by adjacent unstressed areas.
- The 1996 Plan defined availability as 10 percent or 20 percent of average annual recharge. The 1996 Plan lumped total confined and unconfined aquifer withdrawals together. The current plan separated confined and unconfined aquifers and treated them as two unique but linked water resources. Additionally, the current plan estimates the

actual water loss to the planning unit via depletive and consumptive losses and not the total withdrawal.

- The current plan utilizes the stream low flow margin method to estimate unconfined aquifer availability (in conjunction with other established thresholds such as protecting reservoir safe yields). This method was developed to quantify acceptable hydrologic impacts from peak depletive and consumptive withdrawal periods on aquatic ecosystems during environmentally critical streamflow periods. It uses the spatially extensive and long historic stream flow monitoring data to develop the HUC11 specific stream flow statistics used in the analysis.

- The NJ Hydroecological Integrity Assessment Process was used to define the water availability for several test watershed and these results were used to define water availability for the stream low flow margin method.

- Confined aquifer availability was estimated using the results from the numerous confined aquifer and Critical Area ground-water models that have been developed and refined over the last decade. Numerous modeling scenarios were run to determine how much water could be withdrawn from New Jersey's coastal plain confined aquifers without impacting one of several Department identified thresholds of concern (for example, saltwater intrusion, excessive drawdown, and drawdown at critical area boundaries). These results were summarized by region and aquifer to provide a detailed picture of confined aquifer availability and potential problems with increased utilization.

Despite these dramatic improvements in the NJSWSP, the NJSWSP will not provide definitive answers regarding water supply availability and specific selected alternatives for many regions of the State. It will help identify areas of concern. However, more detailed water supply assessments and engineering feasibility studies may be needed to identify specific long term water supply alternatives. For example, the draft results of the USGS assessment in Cape May indicate that there are several options available to address long term water supply needs. However, a detailed engineering feasibility study is needed to assess the alternatives and identify the most feasible/appropriate. Where planning and feasibility studies have been completed, the NJSWSP will specify water supply solutions that can be carried over into the wastewater management plans, (for example, the Tri County Project in Critical Area 2).

The Department expects to "roll-out" the preliminary sections of the Plan, including water availability and overarching water supply policies in the summer or fall of 2008. To the extent that this information is available at the time that preliminary results of the build-out analyses, required for wastewater management plan preparation, are completed in a particular county, the Department will share that information with those counties and municipalities. The Department will then work together with the county and municipalities to formulate a strategy address those long term water supply needs.

However, the Department understands that it cannot reasonably expect counties to implement a water supply plan that has not yet been released to the public. Therefore, this rule only requires that water supply strategies not conflict with the most current NJSWSP. If the timing is such that

the 2008 update to the NJSWSP is not available, the Department will have to rely on the recommendations of the 1996 Plan. It should be noted, that Chapter 6 of the 1996 Plan does include Recommended Initiatives for Planning Areas Anticipated to be in Deficit. Wastewater management plans developed under this rule must not conflict with those regional water supply recommendations and where specific actions are recommended, wastewater management plans should support their implementation.

The Highlands Council has released a draft Highlands Regional Master Plan (HRMP) and is expected to adopt the HRMP in summer 2008. The draft HRMP includes more detailed water supply availability assessments than even the 2008 update of the NJSWSP will provide. The Department expects to be able to rely on their efforts in this Region, to assess water supply availability. Where water supply deficits are predicted in areas recommended for growth, the Department will work closely with the Highlands Council to develop appropriate responses to satisfy the future water supply need.

Wastewater management plans in much of the State are based on information that is more than twenty (20) years old. There has been a requirement since the early 1990's to update wastewater management plans on a six year cycle. The information necessary to evaluate the future wastewater treatment needs and the capacity of wastewater treatment plants has been readily available since that time. In these areas there can be no assurance that the future wastewater management needs of the State can and will be met in a manner that will not cause water quality degradation and potential human health risk. The Department cannot agree to postpone these

necessary and long overdue wastewater management plan updates, in anticipation of the final adoption of an updated NJSWSP. The Department is committed to working with wastewater management planning agencies to incorporate the best available information regarding future water supply availability and to begin to implement measures to ensure that supply exists when needed.

1070. COMMENT: One possible alternative to the use of the NJSWSP is for the Department to work with the county planning agencies, organized in groups according to their common watersheds, to conduct studies of their respective water supplies similar to that conducted by the Highlands Commission for the Highlands Region. See, Highlands Draft Water Resources Technical Report, Volume II – Water Use and Availability (hereafter "Highlands Water Report"). Based on a through analysis of available methods and data, it was determined that the Low Flow Margin method was the best scientific method available at this time for estimating capacity of ground water supplies across the entire Highlands Region to determine both ecological flow needs and to estimate sustainable levels of human consumption. The Highlands Region was broken down and analyzed according to its 183 HUC 14 subwatersheds, the smallest drainage area available for application of the method. Additionally, the overall process for estimating Net Water Availability included the following components: a definition of ground water capacity applicable to each subwatershed within the Highlands Region; a determination of Ground Water Availability based upon potential variations in ecological water needs for each land use capability zone, which determined what portion of Ground Water Capacity can be provided for human use; the identification of additional constraints on Ground Water Availability due to subwatersheds that serve as source water areas, as a water availability deficit

area, or as a tributary to a water availability deficit area; estimates of maximum consumptive/depletive water uses for subtraction from total Ground Water Availability; and modification of Net Water Availability based on return of treated wastewater effluent into a stream.

The results of this analysis are both surprising and alarming. According to the Net Water Availability calculations, 107 of the 183 subwatersheds currently have maximum monthly consumptive and depletive water uses that exceed their Ground Water Availability and are therefore considered to be Current Deficit Areas. A total of 131 of the subwatersheds have their Ground Water Availability exceeded at full allocation consumptive and depletive water use and are considered Future Deficit Water Areas. Of the 183 subwatersheds, 24 have consumptive ground and surface water uses that exceed their full Ground Water Capacity. An additional 34 HUCS have consumptive ground and surface water uses greater than 20 percent of their Ground Water Capacity. Thus, if a 20 percent threshold is applied uniformly across the Highlands Region, as is one of the options discussed by the Highlands Water Report, 58 HUC 15 [SIC] subwatersheds would already have no Net Available Water today.

It is likely that the Highlands Water Report presents a more accurate picture of our current water supply, at least in the Highlands Region, than that presented by the NJSWSP. At the very least, the Department should consider the methodologies utilized in the Highlands Water Report as a possible means of obtaining a better estimate of water supplies throughout the State. It is understood that such a vast undertaking would take significant time and resources. However, the Department could undertake the studies watershed-by-watershed, beginning with the areas most

likely to reach Net Water Availability deficit sooner, and gradually phase out the use of the NJSWSP as each watershed plan is completed. (17, 49)

RESPONSE: The approaches utilized by the Highlands Council and the Department to estimate water-table aquifer availability are fundamentally the same. In fact, the methods used to estimate streamflow statistics in ungaged watersheds and the streamflow statistics that are used to estimate the low flow margin (the September median flow minus the 7Q10) are the same. Additionally, the Department used the Highlands Council's HUC14 watershed statistics to generate its HUC11 statistics in the Highlands region to prevent underlying data disagreements. Differences in the Department's and Highland Council's water availability estimates result from a similar but slightly different depletive and consumptive calculation methodology and the threshold percentages used to determine water availability. The Department may consider using this more detailed assessment unit, the HUC 14 subwatershed, in a future update of the NJSWSP. To alter the assessment unit to the HUC 14 subwatershed would delay the release of the NJSWSP update by several years. The Department does not believe that the further delay in the release of this update and continued reliance on the 1996 Plan is justified by the value gained from the more refined approach. The Department will consider the water supply analysis and seek consistency with the recommendations contained in the HRMP once it is adopted.

1071. COMMENT: For the first time, the Department is going to be requiring an analysis for water supply when doing water quality planning. However, this analysis is inadequate and does not go into enough detail. One of the most serious concerns is that the rules, as proposed, do not require a water budget and there is a disconnect between quality and quantity when it comes to

water. There is no depletive use model to show where sewer service areas will impact both ground water and surface water supplies. The Water Quality Management Planning rules need to show a direct relationship between water supply, water withdrawal, and sewer service areas, septics, and their impact on the environment. (79)

RESPONSE: The update of the NJSWSP prepares water budgets on a HUC 11 watershed basis, and determines based on ecological needs whether additional water can be lost from the system and maintain biological health. The water budgets assess the types of water users and determine water losses from the system on a HUC 11 basis. Most if not all NJPDES regulated discharges establish water quality based effluent limits assuming the 7Q10 flow is all that is available for dilution. The required ecological flows will likely be higher than the 7Q10 flow. Therefore, the Department believes that water quality impacts as a result of water supply withdrawals will be avoided due to the higher stream flow required. There is no need to duplicate this effort in a wastewater management plan provided that the wastewater management plan maintains consistency with the NJSWSP as required by this rule.

The Department has developed a GIS model builder application that will calculate future build-out based on existing zoning. The model provides the build-out information including future wastewater demand and water supply demand in a format that can be sorted based on water supply purveyor, sewage treatment plant, HUC 11, or municipality. This application will enable the Department and the wastewater management planning entity to know the source for future water supplies, and the ultimate treatment and disposal location and thus allow the evaluation of the impact of depletive water use. The HUC 11 assessment function allows a determination of

the number of septic systems, and thus houses, within a HUC 11 and thus future consumptive water uses resulting from irrigation can be estimated.

1072. COMMENT: At N.J.A.C. 7:15-5.25(f), the Department proposes to adopt wastewater management plans, updates or amendments if the water supply needs associated with the environmental build-out are demonstrated to be met with existing, new or expanded water supplies that do not conflict with the most current New Jersey State Water Supply Plan, regional water supply plans or TMDLs including but not limited to any limitation on withdrawals due to ecological and saltwater intrusion concerns. Given the detailed level of analysis and planning that will be required by the proposed regulations to prepare wastewater management plans and updates, it is likely that new data and information will be obtained which will conflict with information contained in the New Jersey State Water Supply Plan. Since there are separate regulatory mechanisms aimed at protecting the State's potable water sources from overuse, there is no need to tie these restrictions into Wastewater Management Plans. (60)

RESPONSE: The components of a WMP under the adopted rule are intended to integrate all water resource considerations when planning for wastewater management. Because water quantity is inextricably linked with water quality, plans must consider how water supply needs are intended to be addressed.

Wastewater management can have a profound influence on water supply availability. For example, where water is withdrawn from one watershed, used, treated and then discharged into another watershed, commonly referred to as a depletive use, the effects of that wastewater

management decision on the losing watershed, including impacts on water quality, ecological health, and even safe yields of reservoir systems must be a consideration in wastewater management planning. Furthermore, where water supply planning has identified actions necessary to ensure the sustainability of water supplies, wastewater management plans must support the implementation of those actions. Therefore, it is entirely appropriate and necessary to include water supply considerations in wastewater management planning.

The Department intends to provide through the NJSWSP all of the information necessary to determine the limits of water supply availability and preliminary measures to begin to remedy any identified deficiencies.

1073. COMMENT: The language at N.J.A.C. 7:15-5.25(f) includes ecological and saltwater intrusion concerns, which is a good thing, but it's vague and there are no standards, therefore it is unenforceable as proposed. On adoption, ecological concerns should be defined and thresholds such as criterion standards to enforce an ecological or saltwater intrusion decision should be added. (86)

RESPONSE: The New Jersey State Water Supply Plan is the appropriate vehicle for the Department to determine water supply limitations based on ecological and salt water intrusion concerns, and to specify actions to remedy water supply deficits. It would be inappropriate for the Department to adopt a separate set of standards in this rule which could conflict presently or in the future with the NJSWSP. It should also be noted that the NJSWSP is a planning document that will establish thresholds protective of ecological resources to be used as a tool by water

supply managers when making permit decisions for new and increased consumptive/depletive diversions from surface waters and water table aquifers. At the planning level, these thresholds will be used to predict future water supply deficits and to develop a strategy to address those deficits so as to avoid ecological and saltwater intrusion impacts. The Department has developed the Low Flow Margin (LFM) Method for use in establishing those planning thresholds. In the LFM method, 25 percent of the difference between the median September low flow and Minimum Annual Seven-Consecutive Day/Ten Year (7Q/10) drought flow may be available for depletive and consumptive uses in a watershed. The method was successfully "tested" in ten watersheds across the State against a range of flow regimes considered protective of ecological resources. Additional analysis did find, however, that there were some watersheds that are characterized by low runoff/high recharge rates (primarily in northern New Jersey) where the LFM might consume excessive amounts of the 7Q/10. To address this consequence, an alternative threshold consisting of 50 percent of the 7Q/10 is under consideration.

Saltwater intrusion may affect regions differently from both concentration and timing of impact aspects. As such, no specific threshold is established in the NJSWSP or in the water allocation permitting regulations. The Department considers the impacts water allocations may have on saltwater intrusion in a region to ensure risks to water supply and other users are minimized. Future availability of water supply from resources threatened by saltwater is constrained by the following factors:

1. Criteria imposed in Water Supply Critical Areas 1 and 2.

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2. Threat and timing of saltwater intrusion in seaward and bayside margins of the aquifers.

   In situations where hydrologic head changes do not result in saltwater intrusion affecting water supply sources for many hundreds of years, a diversion may be approved. However, if saltwater intrusion is imminent or likely within the foreseeable future, additional withdrawals from the affected aquifer may not be appropriate.

3. Lack of stabilization leading to progressive drawdown of water levels within the aquifers.
4. The potential for impacts to wetlands and surface water in the outcrop areas of the aquifers.
5. Water-level interference with other users.

Individual water allocation decisions must be consistent with the NJSWSP. After the review of an individual water allocation application and consideration of specific natural resource impacts, conditions will be imposed in the permit that enforce the intentions of the ecological and saltwater intrusion protections in the NJSWSP. This required consistency is supported under this rule. Where the NJSWSP or a regional water supply plan identifies specific limitations or requirements concerning future water supply in a given region, those same limits and requirements will be carried over into the wastewater management plans; thereby maintaining consistency among these plans.

Details on the planning thresholds will be available when the draft NJSWSP becomes available for public comment. Interested stakeholders should periodically check the Division of Water Supply's website (http://www.nj.gov/dep/watersupply) for the latest information.

1074. COMMENT: N.J.A.C. 7:15-5.25(f) says there should be no conflict between the water supply plan and the TMDL and what's being proposed under the rules. This is good but standards or criteria thresholds should be added for the Department or the public to understand what a conflict is. (86)

RESPONSE: It is not possible to predict the outcomes of studies that have not yet been completed. For example, the Department cannot predict an effluent limit based on a TMDL that has not yet been prepared. Therefore including a specific standard in this rule is not possible. Those standards must be established in the NJSWSP, regional water supply plans and TMDLs and upon their adoption those standards become part of the WQMP. At that point those standards are enforceable as the Department is barred from issuing any regulatory approval that would conflict with the WQMP. At that time any wastewater management plan that conflicts with the standards included in the WQMP, whether it be passing flow requirements, effluent limits or another requirement, could not be approved and adopted and any conflicting provisions in an existing WMP would be superseded.

1075. COMMENT: Regarding the water supply analysis, although adequate water supplies are discussed, they are not defined. Are all towns required to do water budgets, especially those that have small community systems and a lot of wells, or will a note from the water company saying "don't worry about water", even though no analysis of the water supply has been done, be enough? This is also tied to the New Jersey State Water Supply Plan (NJSWSP). The existing NJSWSP is basically now 12 years old and based on 1986 land use data and this Plan is still in use which makes no sense. Until a new NJSWSP is released, the rule should include language

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requiring water budgets with a depletive use analysis to make sure there is actually water available when it's stated "there's water." (65, 79)

RESPONSE: The Department does not expect that municipalities or wastewater management planning agencies will have to prepare individual water budgets. The Department is presently working on an update to the NJSWSP that will include water budgets and water availability assessments on a HUC 11 watershed basis. The Department expects that these budgets and the calculated water availability, coupled with the results of the build-out analysis and the future demand for water will form the basis for determining whether sufficient water supply exists. The NJSWSP will also provide a range of water supply mitigation options to be implemented where water deficits are predicted.

The Department expects to "roll-out" the preliminary sections of the Plan, including water availability and overarching water supply policies in the summer or fall of 2008. To the extent that this information is available at the time that preliminary results of the build-out analyses, required for wastewater management plan preparation, are completed in a particular county, the Department will share that information with those counties and municipalities. The Department will then work together with the county and municipalities to formulate a strategy to address those long term water supply needs.

The Department does not believe that a simple statement such as "don't worry about water," as suggested by the commenter is sufficient to demonstrate compliance with N.J.A.C. 7:15-5.25(f).

However, the Department understands that it cannot reasonably expect counties to implement a water supply plan that has not yet been released to the public. Therefore, this rule only requires that water supply strategies not conflict with the most current NJSWSP. If the timing is such that the 2008 update to the NJSWSP is not available, the Department will have to rely on the recommendations of the 1996 Plan. It should be noted that Chapter 6 of the 1996 Plan does include Recommended Initiatives for Planning Areas Anticipated to be in Deficit. Wastewater management plans developed under this rule must not conflict with those regional water supply recommendations and where specific actions are recommended, wastewater management plans should support their implementation.

The Highlands Water Protection and Planning Council has released a draft Highlands Regional Master Plan (HRMP) and is expected to adopt the HRMP in early summer 2008. The draft HRMP includes more detailed water supply availability assessments than even the 2008 update of the NJSWSP will provide. The Department expects to be able to rely on their efforts in this Region, to assess water supply availability. Where water supply deficits are predicted in areas recommended for growth, the Department will work closely with the Highlands Council to develop appropriate responses to satisfy the future water supply need.

1076. COMMENT: At N.J.A.C. 7:15-5.25(f) the proposed rule links water supply to wastewater capacity and requires that there be validation to ensure a water supply into the future. Large areas of New Jersey are served by private water companies who have not and will not

share their future supply planning information. How can a public agency acquire this 20 year planning information? The proposed rule should include a provision that requires a private utility to provide future supply planning information to the wastewater management planning agency. (18, 32)

1077. COMMENT: Pursuant to proposed N.J.A.C. 7:15-5.25(f), the Department would only adopt a WMP, WMP update or WMP amendment where it has been demonstrated that the water supply needs are met on a HUC 11 basis, which also do not conflict with the New Jersey State Water Supply Plan, regional water supply plans, or TMDLs. Municipalities and counties do not have the databases available, and in many instances do not have a database at all, to supply the information required for the analyses and allocations that would be required in a HUC 11 basis. The work that would be necessary to develop this information would be expensive, time consuming and subject to a wide margin of error. (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 1076 AND 1077: Neither public nor private water systems are required to provide 20-year planning information to the Department. They are required to demonstrate reasonable need as part of the allocation permit process. The Department plans to revise the water allocation requirements in an upcoming rulemaking to require the identification of the proposed area to be served by any requested water allocation. The Department has an existing Geographic Information System (GIS) spatial coverage of public water supply areas, and the Department has requested updated water service areas through the water allocation permitting program.

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The Department has developed a GIS model builder application wherein existing GIS data layers are fed into the model, including the public water supply data layer, sewer service area layer, environmental constraints, parcel data, local zoning data and land use/land cover data, and the model performs a prescribed sequence of operations to develop a build-out for a designated geographic area. The build-out data is reported in a pivot table that can be sorted by municipality, sewer service area, water purveyor, HUC 11, development type or any combination of these. Essentially this application will enable counties to predict the future water supply needs of any area served by public water. Thus, making a 20-year projection from each public water supplier unnecessary.

The Department has available on its Division of Water Supply web site a listing of public water suppliers, their existing allocation and firm source capacity, their existing use, and their contracted use. This information can be used to make an initial determination of whether the future water supply needs can be met under an existing allocation.

If the future demand cannot be met under an existing allocation, the Department will assist counties in determining whether additional water can be drawn from existing sources, and if additional water is unavailable what steps should be taken to reduce existing demand or augment existing supplies thus making water available for the future.

The Department agrees that there is an unavoidable margin of error when attempting to forecast future growth and water supply demands. However, a precise prediction of future growth will never be achievable because zoning will continue to change, open space will be purchased and

other responses to local needs will continue to affect land use decisions. As a planning level exercise, the degree of precision is sufficient to begin an analysis of water supply and wastewater needs and to begin the planning to meet those needs. The Department expects that any action regarding water supply required in a wastewater management plan will be tempered by the level of uncertainty surrounding the future water supply need and availability.

However, it is important to begin managing the State's water resource as a whole and not independently evaluate wastewater and water supply planning. Using a separate analysis for wastewater and water supply could result in a prediction of greater wastewater management need than there is water supply to support the planned development. This could result in wasteful expenditures on sewage treatment plant studies and expansions which may never be realized due to water supply limitations. Similarly, wastewater treatment methods could have a profound impact on the availability of future water supplies due to inter basin transfers of wastewater, and thus compromise the ability to meet future water supply demands.

While changes will undoubtedly occur over time that may not exactly match what was initially anticipated in the planning process, as these changes occur, they will be captured as the wastewater management plan is periodically updated as required by the rules. As a result of the required updating process, adjustments will be made to account for these changed realities and to assure that planned development continues to be sustainable from a wastewater and water supply standpoint.

1078. COMMENT: Use of the HUC 11 scale to quantify current and future water supply needs at N.J.A.C. 7:15-5.25(f)1 is inappropriate. A great deal of the State's water supply was estimated using the HUC 14 scale. (22, 76)

RESPONSE: As stated in Response to Comments 1060 through 1069, water availability in the updated NJSWSP was estimated for 151 HUC11 drainage basins (approximately 50 mi^2 in area) rather than the 23 Regional Water Resource Planning Areas (roughly equivalent to the Watershed Management Area and approximately 350 mi^2 in area). This resulted in a much finer analysis scale, while preventing the "masking" of small stressed areas by adjacent unstressed areas. The Department selected this incremental improvement in the scale of the analysis as adequate for analysis of the water supply issues on a State-wide basis. The updated NJSWSP will not provide definitive supply answers in all areas, but will improve the Department's ability to identify those areas that appear to be in deficit and requiring more detailed (HUC 14) and local assessments.

The Highlands Water Protection and Planning Council has released a draft Highlands Regional Master Plan (HRMP) and is expected to adopt the HRMP in early summer 2008. The draft HRMP includes more detailed water supply availability assessments on a HUC 14 subwatershed level than that which will be provided in the 2008 update of the NJSWSP. However, this is the only area of the Sate where the HUC 14 analysis suggested by the commenter has been completed. To alter the assessment unit Statewide to the HUC 14 subwatershed would delay the release of the NJSWSP update by several years. The Department does not believe that the further delay in the release of this update and continued reliance on the 1996 Plan is justified by

the value gained from the more refined approach. In the Highlands, the Department expects to rely on the more refined water availability estimates in the HRMP to assess water supply availability. Where water supply deficits are predicted in areas recommended for growth, the Department will work closely with the Highlands Council to develop appropriate responses to satisfy the future water supply need.

1079. COMMENT: Water supply data is maintained by the purveyor and not the municipality. Therefore, N.J.A.C. 7:15-5.25(f)1 should aggregate water supply by the purveyor and not municipality. Disagregation by municipality for each purveyor, if such data is readily available from the purveyor, is supported. (38)

1080. COMMENT: The ability to obtain additional water supply rests with water purveyors. The rules should obligate water purveyors to provide information about additional water supply plans to the wastewater management planning agency in the same manner as it has obligated wastewater management planning agencies. The ability to obtain additional water supply is extensively regulated by the Department and further consideration of N.J.A.C. 7:15-5.25(f)2ii is warranted. (38)

RESPONSE TO COMMENTS 1079 AND 1080: The Department has an existing Geographic Information System (GIS) spatial coverage of public water supply areas, and the Department has requested updated water service areas through the water allocation permitting program. The Department has developed a GIS model builder application wherein existing GIS data layers are fed into the model, including the public water supply data layer, sewer service area layer,

environmental constraints, parcel data, local zoning data and land use/land cover data, and the model performs a prescribed sequence of operations to develop a build-out for a designated geographic area. The build-out data is reported in a pivot table that can be sorted by municipality, sewer service area, water purveyor, HUC 11, development type or any combination of these. Essentially this application will enable counties to predict the future water supply needs of any area served by public water.

The Department agrees with the commenter that public water purveyors may be better positioned to answer the questions surrounding future water supply sources. The Department will assist counties in gathering and assessing this information. The Department will continue to require that public water suppliers provide information concerning existing and future service areas, future demand, firm source capacity and available water as part of the water allocation permitting process. The Department has available on its website a listing of public water suppliers, their existing allocation and firm source capacity, their existing use, and their contracted use. This information can be used to make an initial determination of whether the future water supply needs can be met under an existing allocation.

If the future demand cannot be made under an existing allocation, the Department will assist counties in determining whether additional water can be drawn from existing sources, and if additional water is unavailable what steps should be taken to reduce existing demand or augment existing supplies thus making water available for the future.

1081. COMMENT: N.J.A.C. 7:15-5.25(f) requires submission of information and analyses, which may not be readily available to the WMP agency for submission within the Department's prescribed schedule. Either those requirements should be removed or the implementation schedule should be revised to provide sufficient time for gathering and analyzing the requisite data. (18, 42, 44, 45, 61)

RESPONSE: The Department has an existing Geographic Information System (GIS) spatial coverage of public water supply areas, and the Department has requested updated water service areas through the water allocation permitting program. The Department has developed a GIS model builder application wherein existing GIS data layers are fed into the model, including the public water supply data layer, sewer service area layer, environmental constraints, parcel data, local zoning data and land use land cover data, and the model performs a prescribed sequence of operations to develop a build-out for a designated geographic area. The build-out data is reported in a pivot table that can be sorted by municipality, sewer service area, water purveyor, HUC 11, development type or any combination of these. Essentially this application will enable counties to predict the future water supply needs of any area served by public water.

The Department has available on its web site (http://www.nj.gov/dep/watersupply/) a listing of public water suppliers, their existing allocation and firm source capacity, their existing use, and their contracted use. This information can be used to make an initial determination of whether the future water supply needs can be met under an existing allocation. Where an existing allocation, or safe yield in the case of a reservoir system, is insufficient to meet the projected future water supply demand, the Department will assist counties in the identification of future

potential water supply sources, and any measures identified in the NJSWSP to ensure the sustainability of those sources.

However, the Department cannot agree to delay implementation of the adopted rules. Wastewater management plans in much of the State are based on information that is more than twenty (20) years old. There has been a requirement since the early 1990's to update wastewater management plans on a six year cycle. The information necessary to evaluate the future wastewater treatment needs and the capacity of wastewater treatment plants has been readily available since that time. In these areas there can be no assurance that the future wastewater management needs of the State can and will be met in a manner that will not cause water quality degradation and potential human health risk. Therefore, the Department cannot agree to postpone these necessary and long overdue wastewater management plan updates, in anticipation of the final adoption of an updated NJSWSP. The Department is committed to working with wastewater management planning agencies to incorporate the best available information regarding future water supply availability and to begin to implement measures to ensure that supply exists when needed.

1082. COMMENT: N.J.A.C. 7:15-5.25(f)2 is applicable when the Department determines that there is insufficient water supply available to provide for the needs identified by the Water Management Planning Agency. Under such circumstances, the rules require that, among other things, the Agency identifies measures to ensure adequate water supply, including obtaining additional water supply through beneficial reuse as identified in accordance with the Department's "Technical Manual for Reclaimed Water for Beneficial Reuse." The problem with

this provision is that it identifies the only circumstance, (i.e. when it is determined that there is insufficient water supply) under which a Water Management Planning Agency is required to consider beneficial reuse. This is unacceptable. The Department knows better than anyone what a finite and inadequately defined resource the State's water supply is. As such, every Water Management Planning Agency and every Plan and Plan update must be required to incorporate a beneficial reuse element. (17, 49)

RESPONSE: Pursuant to N.J.A.C. 7:19-2.2(g), any person that applies for a new or modified Water Allocation Permit, for a non-potable diversion, is required to demonstrate that the diversion is of the lowest acceptable quality water considering the intended use. In order to address this issue for water service provided by purveyors, the Bureau of Water Allocation conditions all new and modified permits to restrict the delivery of water for new services if the diversion is for non-potable, consumptive uses. The Water Quality Management Planning rules build upon this requirement for new and expanded water allocations by requiring an assessment of reuse for existing uses where future water supply demands are predicted to exceed sustainable levels based on water budgets prepared as part of the NJSWSP. In places where consumptive water uses are significant a wastewater management plan should assess the potential to use reclaimed water for beneficial reuse, in addition to water conservation, as a substitute for existing consumptive uses of potable water, thereby making that potable water available to meet future potable water supply demand. As part of the next Water Allocation rule revision, the Bureau of Water Allocation anticipates that it will require reuse where required in the WQMP. However, it should be noted that beneficial reuse is not an option in all parts of the State as in some areas wastewater flow is a component necessary for maintenance of safe yield of reservoir systems and

minimum passing stream flow requirements. Similarly, where there is no predicted water supply deficit going forward, there would be no discernable environmental benefit to making an existing user abandon its existing water supply in favor of a more expensive beneficial reuse option.

1083. COMMENT: N.J.A.C. 7:15-5.25(f)2 appears to make the wastewater management planning agencies responsible for resolving potential water supply shortages 20 years into the future or at build-out or at least providing the Department with information and analyses to that effect. The regulations should be clarified to state that wastewater management planning agencies are responsible only for identifying measures that could be used to reduce future demands for potable water but not for implementing them and that the Department will not require the identified implementers to commit to the identified measures as a condition of plan approval. WMP approval could be delayed or prevented by potential future water supply problems and that causes concerns. This eventuality would be especially difficult if immediate needs for wastewater facilities were delayed by potential water supply shortages 20 years or more in the future. One could argue that the projected wastewater capacity needs will be moot if the Department through its Safe Drinking Water Program prevents future development because of inadequate water supply capacity. (38)

RESPONSE: The Department agrees with the commenter, that any uncertainty surrounding the future water supply needs should not impede the progress of a wastewater management plan. However, wastewater management decisions can have a profound effect on the health and sustainability of the State’s waters. For example, depletive uses also referred to as inter-basin transfers, whereby water is withdrawn from one watershed used, treated, and then discharged

into another watershed can have profound effects on the safe yield of reservoir systems and other public water supplies as well as the ecological health of the streams in the watershed where the water is withdrawn. Where known, these effects must be factored into wastewater management decisions and if the effects are significant, a plan should specify measures to reduce or mitigate those effects. Those measures could include water conservation, increasing stormwater recharge, or reducing consumptive (evaporative) water losses. Also where a regional water supply solution has been identified by the Department to address a significant deficit, for example in Critical Area 2, the WQMP and the wastewater management plan should bolster commitment to that solution through its identification in the plan. However, because the particular water supply constraints and potential solutions vary by watershed, it is not possible to prescribe the specific components that must be implemented through the WQMP. The Department is committed to working closely with counties to identify water supply deficits, and to begin to address those deficits through planning, so as to avoid undue delay in the adoption of wastewater management plans. The Department is equally committed to developing strategies that ensure that the water supply needs of growth and redevelopment areas will be met in the future.

N.J.A.C. 7:15-5.25(f)2i

1084. COMMENT: The ability to implement reuse projects rests with large water users, water purveyors and wastewater management planning agencies depending upon the specific circumstances. The proposed rules should obligate water purveyors to provide information about reuse to the wastewater management planning agency in the same manner as it has obligated wastewater management planning agencies. Reuse is a regulated activity and further consideration of N.J.A.C. 7:15-5.25(f)2i is warranted. (38)

RESPONSE: The Water Allocation rules at N.J.A.C. 7:19-2.2(g), require that applicants for new water allocations or major modifications to existing allocations for nonpotable uses analyze the availability and utilization of the lowest acceptable quality water for the intended use. However, this requirement only applies to applicants for new water allocations or major expansions and most often would be limited in scope to the singular project that is subject of the application. The Department does not expect that water purveyors will possess detailed water reuse feasibility studies outside of meeting the requirements for individual allocations, which studies would be available through the Department.

The wastewater management plan will assess the ultimate build-out of a water supply area and determine whether a water supply deficit is anticipated. If a water supply deficit is anticipated, the wastewater management plan affords the opportunity to comprehensively evaluate existing large consumptive water uses in an effort to determine where a “critical mass” of consumptive users may exist in close proximity to one another. In these situations it may be more cost effective to beneficially reuse reclaimed water rather than develop new water supply sources. The Department will assist wastewater management planning agencies in making this initial assessment. Only after a potential water supply deficit area is identified and significant consumptive users are confirmed to contribute to that deficit would it be appropriate to assemble the wastewater treatment and water supply providers to initiate a more detailed feasibility study. The Department expects to play a significant role in bringing these parties together working with the wastewater management planning agency.

1085. COMMENT: There is reference in N.J.A.C. 7:15-5.25(f)2i that any request to increase water supply be accompanied with an analysis on beneficial reuse per the Department's Technical Manual. Satisfying the requirements laid out in the manual could be cost prohibitive. The analysis for satisfying whether a reuse option is available should be simplified. (7, 20, 69)

RESPONSE: N.J.A.C. 7:15-5.25(f)2 states "Where the Department determines there is insufficient existing water supply available to provide for the needs identified in (f)1 above based on existing water allocation permits and the available water supply established in the most recent New Jersey State Water Supply Plan , regional water supply plans or adopted TMDLs, the WMP agency must identify measures to ensure an adequate water supply, including one or more of the following:… Obtaining additional water supply through reuse as identified in accordance with the Department's "Technical Manual for Reclaimed Water for Beneficial Reuse" as amended or supplemented, incorporated herein by reference." The rule does not include a requirement that any requested increase in water supply be accompanied with an analysis of beneficial reuse as the commenter suggests. Where such an analysis is dictated based on projected water supply deficits, the Department will assist wastewater management planning agencies in determining where beneficial reuse is not a viable alternative.

However, the existing Water Supply Allocation Rules at N.J.A.C. 7:19-2.2(g), require that applicants for new water allocations or major modifications to existing allocations for nonpotable uses analyze the availability and utilization of the lowest acceptable quality water for the intended use. Even in these rules not every requested increase in water supply is required to perform this analysis as it is limited to nonpotable water uses. It should be stressed that this is an

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existing regulatory requirement, and the Department's technical manual has been successfully applied in these cases.

1086. COMMENT: The adoption of water conservation ordinances rests with municipalities. The appropriateness and legality of conservation ordinances in municipalities where the water purveyor is an investor owned utility or a water authority, unless the utility or authority supports the ordinance, is questionable. Further consideration of N.J.A.C. 7:15-5.25(f)2iii is warranted. (38)

RESPONSE: Municipalities possess the authority and responsibility to adopt local ordinances as necessary to address issues of public health, safety and welfare. The Department is unaware of any legal impediment to municipal authority to adopt a water conservation ordinance as it might affect a public water supplier. It should be further noted that the prospect of a requirement to adopt a water conservation ordinance under this rule only exists where future water supply deficits are predicted. In these places the public water supply purveyor may be unable to meet future demand without such conservation initiatives.

1087. COMMENT: The ability to reduce the amount of future development rests with municipalities. Obtaining a municipal commitment to reduce future development based upon an anticipated water supply shortage where the water purveyor is an investor-owned utility or a water authority, unless the utility or authority supports the reduction, may be problematic. Further consider of N.J.A.C. 7:15-5.25(f)2iv is warranted. (38)

RESPONSE: The Department notes that N.J.A.C. 7:15-5.25(f) identifies a number of strategies for addressing future water supply needs in areas where existing water supplies may be insufficient to meet projected future demand including: making additional water available by substituting reclaimed water for beneficial reuse for potable water where appropriate such as for non-contact cooling water or irrigation, obtaining water from an alternative source with excess capacity, adopting water conservation measures to reduce existing demand, and lastly reducing future demand by altering planned land uses. The rule does not specify that any one or all of these measures must be employed in a water supply deficit area. Rather, a specific plan must be tailored to the water supply deficit area based on water usage patterns in that particular locality. The Department is committed to ensuring water availability in growth and redevelopment areas of the State and through this planning process intends to predict those future water needs and begin planning to meet those needs.

However, sources of easily treated potable water are finite, and in most cases that water is subject to competing uses including both human and ecological. It is the Department's mandate to protect the physical, chemical and biological integrity of the State's surface waters. The biological integrity of aquatic communities cannot be maintained absent water. Therefore, in order to achieve this mandate the amount of water lost through depletive and consumptive human uses must be limited. Once those limits are reached or exceeded other sources of water must be developed to support the human need. These other sources can be the transfer of water from other watersheds with a water supply surplus, using lower quality water for water uses not subject to human consumption, or even desalination of seawater. While seawater itself may be nearly limitless in supply, the cost of desalination may be prohibitive when considering the

population to be served. Further, reverse osmosis treatment technologies are very energy intensive and may contribute to other environmental consequences including greenhouse gas emissions and the impingement and entrainment of fish and shellfish. Thus in some locations there may be water supply limitations on the amount of development that is sustainable. In these places, those limitations must be recognized by State, regional and local land use plans.

Article 3 of the Municipal Land Use Law (N.J.S.A. 40:55D-28b(2)) requires that the land use plan element take into account, among other things, water supply. Further, any municipality issuing land use approvals pursuant to Article 6 of the Municipal Land Use Law (N.J.S.A. 40:55D-38b(3)) must have an ordinance that includes provisions ensuring adequate water supply. Therefore, municipalities have an obligation under the Municipal Land Use Law to acknowledge and plan around water supply constraints. This responsibility is reinforced through this rule by requiring municipalities to plan for its future water supply needs and if necessary adjust its zoning to reflect water supply limitations that cannot be overcome. An investor owned water supply company or water utility cannot sell or rely on the availability of water supplies for which it has no allocation, and thus cannot override this municipal responsibility. The Department fully expects that public water purveyors will be engaged in the planning effort to arrive at a solution to any water supply deficit.

N.J.A.C. 7:15-5.25(g)

1088. COMMENT: The proposal talks about the non-compliant waterways in the State. Seventy-one percent of HUC 14 subwatersheds and thirty-four percent of the lakes are impaired for one or more designated uses or have failed to meet surface water quality standards. Wreck

Pond watershed in Monmouth County alone is responsible for a majority of the ocean swimming beach closings in New Jersey. Not doing something about the non-point source and point source pollution inputs into that watershed would not only be counter-productive but would cost the State heavily in terms of lost tourist dollars, not to mention the quality of life. (13)

RESPONSE: The rule does include provisions intended to address nonpoint source pollution. Nonpoint source pollution that may be associated with new development is addressed through the standards at N.J.A.C. 7:15-5.25(g). Nonpoint source pollution that causes non-attainment of surface water quality standards and/or designated uses is addressed through the development and implementation of TMDLs and watershed restoration plans, as provided for at N.J.A.C. 7:15-6 and N.J.A.C. 7:15-5.25(g).

1089. COMMENT: Pet waste contributes to the non-point source pollution. When someone walks their dog, they should be responsible for picking up the waste, putting it in a bag, and throwing it in the garbage. This should be a statewide mandate. (70)

RESPONSE: The Department concurs that pet waste can be a source of pollutants that cause impairment in waterbodies and has a regulatory program in place to address this issue. Through the municipal stormwater permitting program the Department currently requires Tier A municipalities to adopt and enforce ordinances that require proper pet waste management. Where the Department finds that pet waste contributes to the impairment of a waterbody in a Tier B municipality, where this requirement does not apply, the requirement can be added as an additional measure to the municipal stormwater permit.

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1090. COMMENT: At a minimum, land uses controlled by the WMPs and WQMPs developed under the proposed amendments must be consistent with the minimum impervious coverage limits of CAFRA and CAFRA planning area boundaries, except where those limits might conflict with other requirements (e.g. result in build-out densities which exceed the water budget or nitrate dilution standards). All land uses covered under the amendments should be subject to these minimum standards, including those not subject to CAFRA's direct permitting jurisdiction. (17)

RESPONSE: The Department acknowledges the link between increasing impervious cover and declining water quality and water dependent natural resources. It is for this reason that impervious cover standards have been established in specially protected areas such as the Highlands Preservation Area pursuant to the Highlands Water Protection and Planning Act and, as the commenter notes, certain coastal and waterfront areas pursuant to the Coastal Area Facility Review Act. Establishing an impervious cover standard that would apply in the remainder of the State will entail further study and deliberation and the Department welcomes additional input in this regard. It should be noted that the lack of an impervious cover standard in the WQMP rule does not supersede or circumvent standards for impervious cover that exist in other rules.

1091. COMMENT: At N.J.A.C. 7:15-5.25(g), the Department is proposing that each WMP address the effects of future planned development with respect to nonpoint source pollution. This requirement is an attempt to complete the watershed work that was initiated by the counties

when the Department was providing funding to undertake such work. Now the Department is attempting to require local governments to complete work begun under the watershed program without providing sufficient funding. This proposal is opposed and it is recommended that this work effort be completed by the State at the State's expense. (60)

RESPONSE: As stated in Response to Comment 863, the watershed initiative referred to had as its goal the development of Watershed Management Area Plans that would advance the objectives of, but not supersede WQM plans. The requirement for a continuing planning process predates that initiative and is still in effect. The rule readoption with amendments modifies some of the requirements of the continuing planning process and reassigns wastewater management planning responsibility to counties. In addition to simplifying the overall procedure by making it GIS based, the Department is making both technical and financial assistance available to counties to accomplish the wastewater management planning tasks.

1092. COMMENT: Another long-standing issue is whether or not surface water quality standards apply to non-point source pollutant loadings. The Department says no, that BMPs comply with water quality standards with respect to non-point sources, so under the Stormwater rules or Stormwater permit rules, the BMPs are presumed to achieve and maintain water quality standards. This is not appropriate and the Department has to assert authority and develop methodologies to actually apply the water quality standards to non-point source water. (86)

RESPONSE: Pursuant to the Water Pollution Control Act, the Department has the authority to promulgate regulations "to prevent, control or abate water pollution." N.J.S.A. 58:10A-4. The

antidegradation policies currently codified at N.J.A.C. 7:9B-1.5(d) were intended to address point sources of pollution necessary to comply with the Federal antidegradation requirements at 40 CFR 131.12. Under the Clean Water Act, USEPA has limited jurisdiction over nonpoint sources. The antidegradation analysis required for point sources of pollution involves detailed stream monitoring, followed by modeling to predict water quality impacts. This analysis requires a considerable investment of time and resources, with no certainty as to the outcome prior to the conclusion of the analysis. Applying this approach to nonpoint sources is problematic and uncertain due to the fact the nonpoint source discharges have a large collection area, with numerous potential sources and types of contaminants, which sources may vary from day-to-day. Even if the Department could issue a permit based on the results of this analysis, effluent limitations would have to be established and long term discharge monitoring required to document compliance with those limits. Monitoring of nonpoint sources, including how, when and where; and identifying a responsible party for compliance present significant obstacles to the successful implementation of a traditional point source control strategy. Given the cost, delay and uncertainty associated with an antidegradation analysis, the Department has determined that the use of best management practices and available technology to eliminate and minimize water quality degradation of surface waters from nonpoint source pollution is the State's nonpoint source pollution antidegradation strategy. The Department has determined that the maintenance of vegetated riparian buffers is the best and most reliable means to prevent the degradation of surface water quality from nonpoint source pollution and protect the chemical, physical and biological integrity of the State's surface waters. This approach is reflected in the Special Water Resource Protection Area requirements under the Stormwater Management rules, N.J.A.C. 7:8,

and the riparian zone requirements under the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, and supported in the nonpoint source pollution standards at N.J.A.C. 7:15-5.25(g).

1093. COMMENT: Floods in New Jersey are becoming bigger, more frequent, more dangerous, and more costly as evidenced by the disastrous flooding of the Delaware River in the early spring of 2006 and the Raritan River that followed both the Nor'easter of April 2007 and Hurricane Floyd in 1999.

The reason for this may be that we are paving over the land and increasing runoff. Information from the Division of Watershed Management tells us that hard impervious surfaces, like roads, parking lots, curbs, driveways, and rooftops, harm the environment. Impervious surfaces prevent precipitation from soaking into the ground and recharging ground water; reduce the watersheds ability to replenish base flows to streams and rivers; increase the volume of stormwater flows that leave developed sites; impact water quality with nonpoint pollution; and result in downstream erosion and flooding.

Impervious cover is also disrupting the hydrological cycle of precipitation, infiltration into soil, evaporation and transpiration into the atmosphere, condensation and cloud formation, and precipitation again. The rules need to restrict impervious cover.

There is also evidence that stormwater management practices over the past 25 years, which were designed to reduce or detain peak stormwater flows have failed. These practices have actually

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increased the volume of storm runoff leaving developed sites and resulted in downstream flooding and impaired water quality. These outdated practices must be halted.

There are several types of 100 percent porous pavement approved by the Department for stormwater management. These are made from asphalt, concrete, or concrete pavers. There is also the old standby of gravel stone and there are state guidelines for designing "open section" (curb-less) roads to allow stormwater to disperse along roads and soak into the ground. 'Flush' curbing, which is level with the road surface, has also been used for this purpose. Rather than reconstruct or increase impervious pavement, the Department, should require porous streets and parking lots, open section roads and should end outdated stormwater practices. Such a change is consistent with the goals of the state Stormwater rules and the Clean Water Act. (52)

RESPONSE: As discussed in Response to Comment 1090, the Department does not agree to establish a State-wide impervious cover limit at this time. The Department's Flood Hazard Area Control rules, N.J.A.C. 7:13, effective on November 5, 2007, will better protect the public from the hazards of flooding, preserve the quality of surface waters and protect the wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat. Unless properly controlled, development within flood hazard areas can increase the intensity and frequency of flooding by reducing flood storage, increasing stormwater runoff and obstructing the movement of floodwaters. Structures that are improperly built in flood hazard areas are subject to flood damage and threaten the health, safety and welfare of those who use them.

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The new Flood Hazard Area Control rules not only incorporate the existing Stormwater Management rules, N.J.A.C. 7:8, but also incorporate more stringent standards for development in flood hazard areas and adjacent to surface waters in order to mitigate the adverse impacts to flooding and the environment that can be caused by such development.

The Stormwater Management Rules at N.J.A.C. 7:8-5.2(a), adopted on February 2, 2004, require nonstructural stormwater management strategies to be incorporated into the site design of a major development. A total of nine strategies are to be used to the maximum extent practicable to meet the ground water recharge, stormwater quality, and stormwater quantity requirements of the rules prior to utilizing structural stormwater management measures. The nine mandatory nonstructural strategies contained in the Stormwater Management Rules are listed below:

1. Protect areas that provide water quality benefits or areas particularly susceptible to erosion;
2. Minimize impervious surfaces and break up or disconnect the flow of runoff over impervious surfaces;
3. Maximize the protection of natural drainage features and vegetation;
4. Minimize the decrease in the "time of concentration" from pre-construction to post-construction. "Time of concentration" is defined as the time it takes for runoff to travel from the hydraulically most distant point of the drainage area to the point of interest within a watershed;
5. Minimize land disturbance including clearing and grading;
6. Minimize soil compaction;
7. Provide low-maintenance landscaping that encourages the retention and planting of native vegetation and minimizes the use of lawns, fertilizers and pesticides;

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8. Provide vegetated open-channel conveyance systems discharging into and through stable vegetated areas; and

9. Provide other source controls to prevent or minimize the release of those pollutants into stormwater runoff. These source controls include, but are not limited to:

i. Site design features that help to prevent accumulation of trash and debris in drainage systems;

ii. Site design features that help to prevent discharge of trash and debris from drainage systems;

iii. Site design features that help to prevent and/or contain spills or other harmful accumulations of pollutants at industrial or commercial developments; and

iv. When establishing vegetation after land disturbance, applying fertilizer in accordance with the requirements established under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq., and implementing rules.

These mandatory strategies are implemented through a variety of nonstructural stormwater management measures. When properly integrated into the site design, these nonstructural measures can be effective in reducing development-induced increases in runoff volumes, rates, pollutant loads, and concentrations. The New Jersey Stormwater Best Management Practices (BMP) Manual contains guidelines for the design of individual nonstructural measures. These measures serve to encourage minimizing creation of new impervious cover with new development.

1094. COMMENT: Proposed N.J.A.C. 7:15-5.25(g) requires an assessment of nonpoint source pollution impacts from future development to ensure that stormwater, riparian zones and steep slope criteria are met. These requirements are redundant of existing regulatory requirements and, as written, may create inconstancies where applicants require permits under those other programs. For example, the Department's Stormwater Rules address nonpoint source pollution and rather than adding to an already burdensome WQMP process, the Department should rely on its stormwater reviews to regulate nonpoint source. (18, 42, 44, 45, 61)

RESPONSE: The Department notes that this rule is a planning rule and does not necessarily require additional permits that would not already be required for activities under other regulatory authorities. For example, the submission of stormwater quantity, quality or recharge calculations under N.J.A.C. 7:15-5.25(g) is already a requirement where the Stormwater Management rules, N.J.A.C. 7:15-8, are triggered. Evaluation criteria for wastewater management plans and amendments, should not be necessary, just demonstration that a municipality has an adopted stormwater management plan and ordinances in conformance with N.J.A.C. 7:8, the Stormwater Management rules. Site specific requirements, found at N.J.A.C. 7:15-5.25(h)4 just requires that the project demonstrate compliance with the Stormwater Management rules (N.J.A.C. 7:8). This demonstration can be shown if documentation is provide that the project or activity is exempt from the Stormwater Management rules or has obtained a waiver or variance under the municipal mitigation plan provisions of the Stormwater Management rules.

1095. COMMENT: The assessment of nonpoint source pollution impacts should also include a review of the municipal stormwater management plans. (85)

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RESPONSE: The New Jersey Municipal Land Use Law at N.J.S.A. 40:55D-97 requires that every municipality shall submit a stormwater management plan and implementing ordinances that have been adopted to the county planning agency or county water resources association, as appropriate, to be the approved, conditionally approved or disapproved. Once approved by the county review agency, the Department under the provisions of the Stormwater Management rules at N.J.A.C. 7:8-4.5 reserves the right to review stormwater management plans and ordinances and make recommendations to correct any deficiencies.

1096. COMMENT: WMPs addressing nonpoint source pollution and dovetailing with municipal and regional stormwater management plans and ordinances, including the public education requirements of the plan aimed at prevention of pollution at N.J.A.C. 7:15-5.25(g)1 is supported.

The adverse effects of stormwater and the pollutants it carries include altered stream morphology, e.g., embeddedness or excess sedimentation of streams and in-stream habitats; thermal stress; nutrient enrichment; oxygen depletion; and contamination of water supplies, the food chain, aquatic life, wildlife, and domestic animals. Waterways used for recreation become unsuitable and the quality of life for human communities declines with growing odors, algae blooms, aesthetic degradation and the psychological impacts of knowing a stream is polluted and its life destroyed. (10, 80)

RESPONSE: The Department acknowledges the support expressed in the comment. At N.J.A.C. 7:15-5.25(g), the rule requires that municipal and regional stormwater management plans and ordinances be addressed in a manner that is identical to those in the Stormwater Management rules, N.J.A.C. 7:8. The Department believes that this is a sound approach that will result in consistency for applicants with respect to local planning and the Department's regulatory review for stormwater impacts.

1097. COMMENT: The rules intent to require responsible agencies to assess nonpoint source pollution impacts from future development is supported. However, at N.J.A.C. 7:15-5.25(g), relying on municipal ordinances to address nonpoint source pollution impacts from future development will result in inconsistent, and in many cases, unsatisfactory protection. Municipalities vary widely in their implementation and enforcement activity as the stormwater regulations have shown. Generous use of waivers and variances can also undermine the intent of protective ordinances. The rule proposal should be re-proposed to include an enforcement provision if municipal ordinances are used to achieve protection from nonpoint source pollution. (22, 76)

RESPONSE: The rule relies primarily on planning designed to advance the intent of the WQPA and other authorities upon which the rule is based. State permits and approvals must be consistent with adopted WQM plans, but there will be numerous activities that do not trigger any State permits. Therefore, the Department must rely on local authorities to complement direct State permitting review. This is particular important with respect to control of nonpoint sources or pollution, as provided in N.J.A.C. 7:15-5.25(g).

1098. COMMENT: The Department's evaluation criteria, or standards, should be conditioned upon municipal compliance with the stormwater permits, meaning a town should have to adopt all the ordinances they are obligated to adopt under their stormwater permit before they can get a wastewater approval. There are a lot of towns that are not in compliance with those stormwater permits and a bridge should be built between these rules and the Stormwater Management rules. The most important ordinance to have adopted is the Riparian Protection Ordinance for buffers on Category One waters. (86)

RESPONSE: The rule at N.J.A.C. 7:15-5.25(g) does require compliance with the Stormwater Management rule, N.J.A.C. 7:8, which is linked to the Stormwater Regulation rules N.J.A.C. 7:14A-25. The required stormwater management plan and stormwater ordinance, along with the riparian zone and steep slope ordinances, will provide the necessary protection with respect to nonpoint sources of pollution.

1099. COMMENT: The reliance on a municipal ordinance to implement steep slope protections is questionable unless the Department is proposing more specific standards that would be incorporated into the municipal ordinance. Simply to require a statement that there would be restrictions on development on over 20 percent steep slopes is very minimal. The steep slope protections need to be much stronger and more sophisticated than that. (24)

RESPONSE: The steep slope standard requires adoption of an ordinance that meets the performance standard set forth at N.J.A.C. 7:15-5.25(g). The performance standard is specific in

that it specifies the limited circumstances under which new disturbance can be allowed, while allowing flexibility as to the details. To assist municipalities, the Department has and will continue to provide a model ordinance that meets the performance standard.

1100. COMMENT: The Department is proposing Category One protection with a 300 foot buffer requirement. This requirement will make some properties unbuildable for their intended use, without regard to time and money already spent and without consideration of the public need for the project. A hardship waiver or exception should be granted to properties that provide affordable housing and supportive services and have received Preliminary and Final Approval prior to February 7, 2005. (27)

RESPONSE: This rule, at N.J.A.C. 7:15-5.25(g)2 and 3, requires that a municipality develop ordinances that establish buffers consistent with buffers established in both the adopted Stormwater Management rules (N.J.A.C. 7:8) and the Flood Hazard Area Control Act rules (N.J.A.C. 7:13). The Stormwater Management rules and Flood Hazard Area Control Act rules establish the waivers and exceptions to the applicability of the buffers which cannot be superseded by the WQMP rules. The ordinance may include a provision to acknowledge circumstances where the Department, through a valid permit, has granted relief from the Stormwater Management and Flood Hazard Area Control Act rules.

1101. COMMENT: A flexible approach is required to implement riparian buffers in urban, regional, town and village centers. For instance, the proposed 300-foot buffer on C1 streams will prevent proposed redevelopment in the small villages and towns that grew up around mills on

streams. In some cases, redevelopment projects can improve the environment, such as where parking lots and abandoned buildings abut streams and are redeveloped to include riverfront parks with walkways and adequate stormwater treatment. To ensure adequate environmental protections are in place, flexible requirements for riparian buffers should be available only to communities that have received plan endorsement from the State Planning Commission. Communities that go through this process have undergone a thorough review by state agencies, including the Department, of both current conditions (including natural resources) and the plans and ordinances in place. (78)

RESPONSE: The Department believes that good water quality is the right of all citizens regardless of the level of urbanization of the area where they reside. To that end all waters of the State, regardless of location are a resource that are held in the public trust and that the Department has been charged with protecting. Thus, the Department in this rule at N.J.A.C. 7:15-5.25, in the Stormwater Management rules, N.J.A.C. 7:8, and in the Flood Hazard Area Control Act rules, N.J.A.C. 7:13, requires buffers that are designed to protect water quality. The buffers or riparian zones that must be addressed in local ordinances pursuant to this rule are identical to those in the Flood Hazard Area Control Act rules. The Department's rules noted above have little, if any, impact on redevelopment of impervious areas as the 300 foot buffers established are designed mainly protect existing vegetation. Impervious cover is typically devoid of vegetation. Furthermore, the land use regulations contain provisions that allow disturbance within the buffer, for example, as the standards at N.J.A.C. 7:8-5.5(h) that address disturbed areas, the provision for "other activities" in a riparian zone at N.J.A.C. 7:13-10.2(r) and the hardship exception standards found at N.J.A.C. 7:13-9.8. Since the ordinance is based on a

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Department rule, it may include a provision to acknowledge circumstances where the Department, through a valid permit, has granted relief from the Stormwater Management and Flood Hazard Area Control Act rules.

1102. COMMENT: The term "avoidable disturbance" is used in N.J.A.C. 7:15-5.25(g). This term, the language, and the whole approach in the riparian section seems to be at odds and inconsistent with the Department's other rules such as the stream encroachment rules and with the Special Water Resource Protection Areas in the Stormwater Management rules. This proposal seems to allow disturbance that would be prohibited under the Special Water Resource Protection Area provided in the Stormwater Management rules. In addition, N.J.A.C. 7:15-5.25(g) conflicts with the Commissioner's Administrative Order No. 1 (2007) regarding the demonstration that would need to be made to allow for disturbance of the area within 300 feet of Category One waters. This section should be clarified upon adoption. (86)

RESPONSE: Both the Stormwater Management rules, N.J.A.C. 7:8, and the Flood Hazard Area Control Act rules, N.J.A.C. -7:13, referred to by the commenter as the "Stream Encroachment rules," contain provisions that allow disturbance within the buffer, for example, as the standards at N.J.A.C. 7:8-5.5(h) that address disturbed areas, the provision for "other activities" in a riparian zone at N.J.A.C. 7:13-10.2(r) and the hardship exception standards found at N.J.A.C. 7:13-9.8. Thus, the provisions at N.J.A.C. 7:15-5.25(g) are consistent with and complement the Department's rules. Furthermore, compliance with those rules and Administrative Order No. 2008-02, which superseded Administrative Order No. 2007-01 is still required for regulated projects. Therefore, there is no conflict.

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1103. COMMENT: Under the proposed regulations, riparian buffer conservation zone setback requirements will be adjusted to: 300-feet for Category One waters and all upstream tributaries within the same HUC 14; 150-feet for trout production and trout maintenance waters and all upstream tributaries, T&E species habitat, and upstream tributaries within a one mile radius and all streams flowing through "acid-producing" soils; and 50-feet for all other streams not identified as above. Provide the environmental justification and scientific basis such stringent setback requirements. Also, provide site specific studies and reports identifying the necessity of such restrictions. (34)

RESPONSE: The riparian zones outlined in the rule are identical to those established in the Flood Hazard Area Control Act rules, N.J.A.C. 7:13, which became effective November 5, 2007 (see 39 N.J.R. 4573(a)). A discussion detailing the justification of the riparian zones can be found in summary of this rule at 39 N.J.R. 1908 and in the summary and the Response to Comment of the Flood Hazard Area Control Act rule at 38 N.J.R. 3971 and 39 N.J.R. 4573.

1104. COMMENT: The establishment of a 150-foot buffer for any segment of water flowing through an area that contains acid producing soil is questionable. The Standards for Management of High Acid Producing Soil (Section) 1-1 in the Standards for Soil Erosion and Sediment Control in New Jersey (1999) contain methods and materials to mitigate the potential impacts of these soils and they should be referenced. The amended stream encroachment rules doubled the buffers required for trout production, trout maintenance, and waters flowing through

areas that support endangered and threatened species. To then require a 50-foot riparian zone on all other waters in these rules is excessive and could negatively impact local planning efforts.

The concurrent process of developing the WMPs and adopting ordinances does not allow for the needed flexibility required when considering riparian zones while developing overall WMPs. It seems as though the proposed rules seek to use regulations to plan as opposed to planning while considering regulations. (66)

RESPONSE: The riparian zones outlined in the rule are identical to those established in the Flood Hazard Area Control Act rules, N.J.A.C. 7:13, which were effective November 5, 2007 (See 39 N.J.R. 4573(a)), including the 50 foot riparian zone noted in the comment. A discussion detailing the justification of the riparian zones can be found in summary of this rule at 39 N.J.R. 1908 and in the summary of the Flood Hazard Area Control Act rule at 38 N.J.R. 3971 and Response to Comments 403 through 407 of the Flood Hazard Area Control Act rule, 39 N.J.R. 4628. Mitigation for acid soils is not addressed by this rule as this rule is a planning rule that does not contemplate site-by-site analysis. Riparian zones are relevant to the build-out analysis and for the development of ordinances at the municipal level required at N.J.A.C. 7:15-5.25; and for the delineation of sewer service area at N.J.A.C. 7:15-5.24, all of which are planning level exercises that do not involve site-by-site analysis. Thus, the incorporation of mitigation standards is more appropriately done at the level of actual regulation, that is in the Flood Hazard Area Control Act rules and in any ordinances adopted at the local level to address acid soils. Such ordinances may include a provision to acknowledge circumstances where the Department,

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through a valid permit, has granted relief from the riparian zone provisions of the Flood Hazard Area Control Act rules.

1105. COMMENT: The consideration of relief from riparian zone requirements afforded in N.J.A.C. 7:15-5-5.25(g) due to the unique nature and constraints associated with certain linear development such as public roadways is appreciated. (30)

RESPONSE: The Department acknowledges the support expressed in the comment.

1106. COMMENT: The proposed riparian zones as outlined in N.J.A.C. 7:15-5.25(g)2, which mirror the stormwater management rules are strongly supported. The Department is providing useful filters which will provide a myriad of benefits to water quality and quantity, as well as other environmental benefits. (64)

RESPONSE: The Department assumes that the commenter means the Flood Hazard Area Control Act rules rather than the Stormwater Management rules and acknowledges this comment in support of this provision of the rules.

1107. COMMENT: The protection of riparian areas by a 300 foot riparian zone is strongly supported. This width is consistent with New Jersey's Stormwater Rules and with scientific findings. However, the 300 feet minimum should apply to all streams with an option provided for greater than 300 feet where species protection requires it, rather than a step-down standard that gives less protection to built areas. Built and urban areas need high quality streams and

habitats as much if not more than undeveloped and pristine areas. If the charge to restore and enhance is to be taken seriously, a 300 foot buffer minimum is needed, first as a healing measure and then as a maintenance measure. Wide riparian zones need to both be regulated in order to accomplish the protection needed.

It is clear that flood hazard areas and riparian zones along streams need adequate width in order to provide the vital functions referred to above. What is less concise, however, are the minimum widths necessary to provide these functions reliably across various terrains and landscapes, particularly for wildlife habitat and migration. Literature sources cited herein include ranges of up to 300-feet, to 500-feet, to 600-feet, to even 1,000-feet in order to provide adequate habitat for the life stages and migration of numerous species. In addition, the riparian area itself needs buffering in order to maintain optimum function, further necessitating the need for adequate widths in order to sustain long-term viability. (10, 80)

RESPONSE: The Department acknowledges these comments in support of this rule provision. At N.J.A.C. 7:15-5.25, the rule requires that riparian zones be addressed in local ordinances in a manner that is identical to those in the Flood Hazard Area Control Act rules. The Department believes that this is a sound approach that will result in consistency for applicants with respect to local planning and the Department's regulatory review. As noted in the comment, the riparian zones that are required are supported in the scientific literature, as noted in the rule summary for both the Flood Hazard Area Control Act rules and the Stormwater Management rules as well as by the courts. At this time, the Department does not believe that it is appropriate at this time to

require 300 foot buffers on all streams. However, the rule allows a local authority to require wider riparian zones where they believe it is warranted.

With regard to floodplains, the State of New Jersey has long regulated development within floodplains through the Flood Hazard Area Control Act rules. In November 2007 those rules were strengthened to further address flooding, protect riparian zones and endangered and threatened species habitat.

1108. COMMENT: N.J.A.C. 7:15-5.25(g)2(3) requires, in connection with protection of riparian zones, the identification of "Any segment of water flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the regulated water for survival, and all upstream tributaries within one mile." However, the purposed rule does not describe a method for determining "critical" dependency. (88)

RESPONSE: A list of species that are considered critically dependent on the watercourse is available from the Division of Land Use Regulation at http://www.nj.gov/dep/landuse/se.html.

1109. COMMENT: At N.J.A.C. 7:15-5.25(g)3, there is concern that the requirement for riparian buffer ordinances will disqualify farmers from participation in the Conservation Reserve Enhancement Program (CREP), a program to install riparian buffers on agricultural lands. Areas that are not legally farmable are not eligible for CREP. The Department as a partner in the New Jersey CREP, which with its federal match brings $100 million dollars for conservation, should

not be dooming this program to failure with overly restrictive buffer requirements. For each 220 linear feet of buffer, a farmer loses an acre of potentially productive land. Agriculture must continue to receive special attention when the Department or municipalities develop these ordinances. (58)

RESPONSE: The requirement for riparian zones under a municipal ordinance will have no detrimental effect on the CREP program and does not apply to existing agricultural operations. Under the CREP program, farmers receive financial incentives to voluntarily remove marginal pastureland or cropland from agricultural production and convert the land to native grasses, trees and other vegetation, which can then serve as a buffer to filter or contain agricultural runoff. Riparian zones under CREP are either placed under a temporary (usually 10-15 yrs) restriction or under a permanent easement.

The new requirements do not remove the ability to *continue to* farm existing agricultural areas. Riparian zone creation supports and works with the CREP program resulting in protection of water quality in riparian zones through farmers receiving money to provide these protected areas.

1110. COMMENT: The proposal points out the problems that are caused by non-point pollution. It's good the rules focus on non-point pollution and at least obliquely mention combined sewer overflows (CSOs). CSOs carry both sanitary waste and stormwater run-off to wastewater treatment plants. Sanitary waste includes hygiene products, potables and raw sewage. Stormwater runoff includes non-point pollutants such as fertilizers, pesticides, oils, solvents and other pollutants which rail washes off highways, parking lots, lawns and

construction sites. During rainstorms the combination of sanitary waste and stormwater overloads the treatment plants. The excess overflows untreated into the nearest body of water, which in New Jersey means it pollutes our rivers, our bays and the ocean. What is flushed down toilets, put on lawns, or tossed into a storm drain can show up later on our beaches. Experts agree we must address those problems in order to improve surface water quality, particularly along the coast where combined sewage overflows and non-point pollution have been the largest contributing factors of beach closings at a staggering cost to our economy. Is there still some funding available under the CSO bond legislation to address CSO issues?

In addition, the separation of CSOs will benefit urban areas by controlling stormwater runoff, which causes local flooding. There must be a stop to turning coastal waters into a cesspool where local merchants feel they must try to disinfect with chlorine tablets in order to stay in business. Those waters are a precious resource, which sustain industry, supports sizable commercial and recreational fisheries, and provide year-round recreation for citizens. (13)

RESPONSE: Combined sewer overflows are treated as a point source under the regulatory construct supporting the Clean Water Act and the New Jersey Water Pollution Control Act. Combined Sewer Overflows (CSOs) are regulated as point sources under the Federal Clean Water Act and the New Jersey Water Pollution Control Act. Combined Sewer Systems (CSSs) are primarily located along the tidal portions of the Delaware River and its tributaries in Camden County, along the tidal portion of the Raritan River, along the Passaic River in Paterson, and throughout the New York-New Jersey Harbor Complex. CSO Points were not located along, nor did they discharge to, the coastal waters of New Jersey south of Sandy Hook.

CSSs, and their corresponding CSO Points, represent a very small fraction of the wastewater conveyance and treatment facilities in New Jersey. CSSs are located in only twenty-four of the five-hundred fifty-six (556) municipalities in New Jersey. Only ten (10) wastewater treatment plants receive and treat sewage generated in CSSs.

New Jersey's has been implementing an aggressive and practical CSO Control Strategy in phases consistent with the National CSO Control Policy. In the first phase, CSO Permittees were required to implement the National CSO Control Policy's Nine Minimum Control measures or technology-based limitations. One of the required technology-based control measures is the control of solids and floatables. In response to the numerous beach closures that occurred in the 1980's, New Jersey adopted the most stringent CSO Solids/Floatables Control requirement in the Nation. All CSO Permittees are required to capture and remove Solids/Floatables which can not pass through a bar screen having bar spacing of ½ inch.

Initially, New Jersey had 276 CSO Points located in older urban communities. As a result of the first phase of the CSO Control Strategy, 56 CSO Points have been eliminated through consolidation and sewer separation. Currently, 220 CSO Points remain. Eighty-three percent of CSO Points that are located in the NY/NJ Harbor Estuary Complex have CSO Solids/Floatable Control Measures constructed and operating. Statewide, 70 percent of the CSO Points have Solids/Floatables Controls constructed and operating. The Solids/Floatables control plans for the

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remaining CSO Points are either in the bidding process, site acquisition process, or are under construction.

To assist the CSO communities in the construction of Solids/Floatable Controls Measures, the Department has provided approximately $35 Million in planning and design grants in the form of grants for up to 90 percent of the eligible engineering costs and $245 Million in low interest construction loans through New Jersey Environmental Infrastructure Financing Program (NJEIFP). Currently, there are no funds appropriated for planning and design of CSO control facilities. Low interest construction loans are available through the NJEIFP.

In 2004, the Department initiated the second phase of New Jersey's CSO Control Strategy by requiring the CSO Permittees to undertake a process to develop CSO-Long-term Control Plans (CSO-LTCPs). These studies include the evaluation of alternatives for attaining compliance with the Federal CWA and State Water Quality Standards, and the protection of designated uses.

The Department is integrating the development of CSO LTCPs into the Regional Watershed Management Planning and Total Maximum Daily Loads (TMDLs) development processes. The most significant water quality concern directly associated with CSOs is pathogens. As a first step in the development of CSO LTCPs, the Department has required owners and operators of CSSs to develop and evaluate the feasibility of implementing pathogen controls on CSO Points. Additionally, the cost and feasibility of separating CSSs and/or eliminating CSO Points and the cost and feasibility of conveying and treating all sewage at POTWs are being evaluated. These

cost and performance analyses, when linked to the Total Maximum Daily Load (TMDL)/Waste Load Allocation (WLA) process, can assist the development of responsible WLAs, can serve as part of the basis for the establishment of discharge limitations or may assist in developing a Use Attainability Analysis (UAA). UAAs are structured scientific assessments of the physical, chemical, biological and economic factors affecting the attainment of a designated beneficial use.

For further understanding of the regulation and control of CSSs in New Jersey, the commenter is encouraged to visit the Department's website at http://www.nj.gov/dep/dwq/gp_cso.htm and to review the Combined Sewer Systems Draft General Permit and associated documents.

1111. COMMENT: Restricting delineation of sewer service areas or any development to occur on steep slopes greater than 20 percent seems unnecessarily burdensome. What is the justification for why steep slopes greater than 20 percent should be determined an "environmental constraint?" (34)

RESPONSE: That steep slopes of 20 percent or greater constitute an environmental constraint is well established and was discussed in the summary for the rule. Steep slopes of this magnitude as well as slopes between 10 and 20 percent are afforded protection in the Highlands Water Protection and Planning Act Rules at N.J.A.C. 7:38-3.8, which reserves the strictest prohibitions with respect to slopes of greater than 20 percent and allows some disturbance, in accordance with standards, in slopes between 10 and 20 percent. Disturbance of steep slopes results in accelerated erosion processes from stormwater runoff and the subsequent sedimentation of waterbodies with the associated degradation of water quality and loss of aquatic life support.

Related effects include soil loss, changes in natural topography and drainage patterns, increased flooding potential, further fragmentation of forest and habitat areas, and compromised aesthetic values. It should be noted that slopes of varying steepness are already protected in some New Jersey municipalities, for example, Princeton, Harrison Township, and the municipalities within the consortium of municipalities known as Ten Towns within Morris and Somerset Counties. The need to protect steep slopes notwithstanding, the Department recognizes the need to accommodate development needs where possible without compromising public health and safety and critical environmental resources. In consideration of the various soils and conditions throughout the State, the Department has required a demonstration of protection for slopes equal to or greater than 20 percent, and has included limited exceptions. These exceptions allow for redevelopment within the limits of existing impervious surfaces; as well as new development that is necessary to protect public health, safety or welfare; provide an environmental benefit; prevent extraordinary hardship on the property owner peculiar to the property; or prevent extraordinary hardship, provided the hardship was not created by the property owner, that would not permit a minimum economically viable use of the property based upon reasonable investment. This standard with the noted exceptions is intended to balance the need to mitigate adverse effects to water quality and quantity and help protect fragile ecosystems from unwarranted damage or destruction with the need to allow reasonable development to proceed.

1112. COMMENT: The Department should state its authority to regulate steep slopes greater than 20 percent. (18, 42, 44, 45, 61)

1113. COMMENT: Regarding the protection of steep slopes from development at proposed N.J.A.C. 7:15-5.25(g)6, there are soil erosion standards under the purview of the Department of Agriculture that already focus on ensuring development is stabilized. The Department should not adopt the proposal's steep slope restrictions, but instead defer to the Department of Agriculture's expertise. (18, 42, 44, 45, 61)

1114. COMMENT: The proposed steep slope protection requirement, under N.J.A.C. 7:15-5.25(g)6, should be removed since it has nothing to do with wastewater management planning. The Department is using this proposed regulation to force everyone to adopt specific steep slope ordinances. Most municipalities have steep slope ordinances, but the specific requirements vary. Steep slope ordinances should remain a local concern under local control.

Steep slope areas are not in and of themselves environmental resources that require protection. Rather, the degree of slope for a particular development affects stormwater management measures that might be required. Whether or not a township wants to preclude development of steep sloped areas and how they want to do it should remain under local control. The Department is not in a position to identify costs and benefits of particular steep slope ordinances for each municipality and should not attempt to do so through the WQMP process. (1)

RESPONSE TO COMMENTS 1112 THROUGH 1114: Steep slopes are a landscape feature that is particularly susceptible to generating nonpoint source pollution when disturbed. Control of water pollution from all sources, including development on steep slopes because of the nonpoint source pollution it causes, are part of the Department's mandate under the Water

Pollution Control Act and the Water Quality Planning Act. Protection of this land form is necessary to meet the objectives of the rule to protect and restore water quality. N.J.A.C. 7:15-5.25(g)6 establishes the minimum requirements for steep slope protection that must be incorporated in municipal ordinances with regard to steep slope protection. Beyond these minimum requirements, flexibility is provided to municipalities regarding the specifics of the ordinance.

1115. COMMENT: N.J.A.C. 7:15-5.25(g)6, which relates to the protection of steep slopes, one of the features identified by the rules as being an "environmentally sensitive area" states that steep slopes shall be protected from "avoidable disturbances." As if this language was not ambiguous enough, the rules go on to list several exceptions to the protections afforded steep slopes, including "to prevent extraordinary hardship on the property owner peculiar to the property" or "to prevent extraordinary hardship, provided the hardship was not created by the property owner, that would not permit a minimum economically viable use of the property based upon reasonable investment." These exceptions are unnecessary to the rules in that "takings" of property are already adequately protected against under existing law and these exceptions merely provide an opportunity for property owners to avoid the steep slope protections. Further, it is difficult to imagine how these standards will be equally applied to various properties. Instead of adding to the rules, these exceptions provide an opportunity for unequal application and/or unfettered and arbitrary discretion and should be removed from the proposal. (17)

RESPONSE: The Department believes the term "avoidable" is clear. If the proposed impact can be avoided through means such as redesign or reduced project scope, then it must be avoided

through those means. The Department recognizes that there is existing law to guide court decisions regarding taking of property without due compensation. Inclusion of the subject language in ordinances protecting steep slopes and riparian zones is intended to enable municipalities to allow encroachment for compelling reasons without triggering lawsuits.

1116. COMMENT: The consideration of relief from steep slope requirements afforded in N.J.A.C. 7:15-5.25(g) due to the unique nature and constraints associated with certain linear development such as public roadways is appreciated. (30)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

1117. COMMENT: For steep slopes at N.J.A.C. 7:15-5.25(g)6 instead of relying on municipal ordinances, a more definite way to insure compliance is to include steep slopes as an environmentally sensitive area and require at N.J.A.C. 7:15-5.24 that sewer service areas exclude steep slopes similar to the way riparian areas and other environmentally sensitive areas are excluded. (22)

RESPONSE: The WQMP rules do not include a direct land use permitting process. Instead, the rules address aspects of the continuing planning process, including wastewater management planning. While Department permits can only be issued where they are consistent with areawide WQMP adopted in accordance with the rule, there are numerous activities that are below the threshold for Department permitting. In these cases, the Department must rely on the local approval process to ensure that the objectives of the rule are met. The most appropriate

means to accomplish this is through adoption and enforcement of relevant ordinances at the municipal level. The Department did not opt to specify that steep slopes should be excluded from sewer service areas because such areas are often fragmented. The Department believes that excluding steep slopes from the sewer service area would contribute to the creation of sewer service areas that are fragmented and filled with small areas that would have to be excluded from the sewer service area. This pattern of sewered development would not enable the application of municipal zoning powers to achieve a consistent and orderly pattern of development, and would not facilitate center-based development, thus making it difficult to achieve the objectives of local master plans. The ordinance approach allows consideration of steep slopes on a project by project basis at the local level and regardless of the manner in which sewer service will be provided. It is not valid to assume that all development that may involve tracts of steep slopes should be excluded from sewer service. In fact, it may be best if development is concentrated on portions of a tract that are not steep in order to preserve the steep slopes. A dense cluster is actually more likely to require sewer service, so excluding areas of steep slope from sewer service area is counterproductive to their preservation.

1118. COMMENT: There is opposition to the exception for new disturbance of steep slopes at N.J.A.C. 7:15-5.25(g)6ii that would "provide an environmental benefit." This benefit should be clearly defined so that it is not open to broad interpretation and misuse. Similarly, a hardship exception that "that would not permit a minimum economically viable use of the property <u>based upon reasonable investment</u>" is also vulnerable to misapplication. The test should be reasonable use and the Department should adopt the language from the Highlands rules at N.J.A.C. 7:38-6.8(c) through (e). (22, 76)

RESPONSE: The rule as currently written specifies the exceptions to prohibition of new disturbance on steep slopes in terms of performance standards. The Department believes that this approach is sufficiently clear and provides flexibility so as to avoid the unintended consequences that could result if there were a list of qualifying activities instead of a performance standard. In setting this performance standard, the Department envisioned that examples of disturbance that could have an overall environmental benefit might include stabilization of an eroding slope or remediation of a contaminated site that is located on a steep slope. The language included regarding hardship is intended to be commensurate with the Highlands Water Protection and Planning Act rules at N.J.A.C. 7:38-6.8(c) through (e), but simpler to reflect that this is a planning rule.

1119. COMMENT: The protection of steep slopes as defined as 20 percent or greater, which will provide needed protection to these fragile features is strongly supported. Disruption of steep slopes has a negative impact environmentally because of increased erosion, increased volume and velocity of stormwater runoff (causing flood flows), sedimentation from soils entering receiving water bodies, reduction of ground water recharge, and destabilization of hills and ridges. Habitat for wildlife and unique plant species is also lost. Aesthetically, the disruption of vegetation and natural grades and ridges degrades scenic and viewshed quality. The most protective approach to steep slopes is to keep them naturally vegetated with a mixed plant community that includes herbaceous plants, shrubs and trees of various size, age and species. (10, 80)

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RESPONSE: The Department acknowledges these comments in support of this rule provision.

1120. COMMENT: Do the proposed requirements for steep slopes give County Planning Boards the right to deny site and subdivision plans based on steep slopes? (51)

RESPONSE: The WQPA requires that all State approvals must be consistent with adopted areawide WQM plans. Counties would not be required to make such a finding and should only do so if they have authority independent of the WQMP rules.

1121. COMMENT: The requirement at N.J.A.C. 7:15-5.25(g)7 that a WMP,WMP update or WQM plan amendment include additional measures as specified in an adopted TMDL, or watershed restoration plan, is redundant of existing regulatory requirements and should be eliminated. (18, 42, 44, 45, 61)

RESPONSE: Both TMDLs and watershed restoration plans are adopted as amendments to the applicable WQM plan, as are WMPs. Identification of applicable additional measures adopted as part of a TMDL or a watershed restoration plan in the applicable WMP will consolidate these nonpoint source pollution response measures so that there is one “go to” location for applicants and reviewers needing to know measures that apply and may affect a particular project.

N.J.A.C. 7:15-5.25(h)

1122. COMMENT: N.J.A.C. 7:15-5.25(h) should be rewritten to include subheadings as the numerous cross references make it difficult to follow. The Department should issue technical

guidance manuals on how section N.J.A.C. 7:15-5.25(h) is to be implemented. (18, 42, 44, 45, 61)

RESPONSE: The six numbered paragraphs within subsection N.J.A.C. 7:15-5.25(h) are keyed to subsections N.J.A.C. 7:15-5.25(d) through (g) and simply provide the alternative standards for wastewater, water supply, and nonpoint source pollution that are scaled to be appropriate to a site specific amendment. The performance standards at N.J.A.C. 7:15-5.25(h) are straightforward and do not require development of a technical manual to implement. However, the Department will develop and provide a site specific amendment application form which will guide applicants through the technical requirements to obtain a site specific amendment.

1123. COMMENT: N.J.A.C. 7:15-5.25(h) pertains to site specific amendments. Site specific amendments may not be allowable under the Clean Water Act. Allowing site specific amendments to be approved serves as another loophole. The phrase a “new pattern of sewer development” appears to be new. What does a “new pattern of sewer development” mean? Would a “new pattern of sewer development” allow fragmentation of the landscape? This phrase should be better defined or eliminated. The Department should actively discourage fragmentation of the landscape. There is no reason to have sewer service areas fragmenting landscapes. The rule should incorporate a reference to the Department’s recent study by Rowan and Rutgers Universities that identifies an accelerating loss of land at over 15,000 acres a year. Land losses to development can’t keep happening when there is so little land left. These kinds of provisions make no sense in light of the Department’s own data which is showing that despite all the Department’s efforts, we are losing the race to preserve the landscape. The Department itself

held a public briefing and issued a press release on this study just weeks before this rule proposal and this proposal does not even reference this study as a basis for the rule. The Department should also reference a study called the "Natural Capital Project" by the economist Costanza from Vermont, which quantified the value of the natural resources of the state. Those natural resources values should be recognized as the basis upon which the rule is proposed. (86)

1124. COMMENT: Proposed N.J.A.C. 7:15-5.25(h) states that "Site specific wastewater management plan amendments shall not create a significantly new pattern of sewered development such that a significant potential or incentive is created for additional revisions or amendments to open new areas to sewered development." The Department must define what it means by the term "significantly new pattern of sewered development." As written, this subsection will make it virtually impossible to obtain approval for site specific amendments. The Department should revise this provision and define, with illustrative examples, what constitutes a "significantly new pattern." (18, 42, 44, 45, 61)

RESPONSE TO COMMENTS 1123 AND 1124: Site specific amendments to areawide WQM plans have been allowed and processed since the plans were first developed in the 1980's and are not prohibited by the Clean Water Act. The Department has limited the ability to propose site specific amendments where WMPs are not up to date under this adopted rule. (see the Response to Comment 476 for further discussion of site specific amendments)

The Department has used the criterion "the addition does not create a significantly new pattern of sewered development such that a significant potential or incentive is created for additional

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revisions or amendments to open new areas to sewered development" since 1997 when the Department adopted amendments to N.J.A.C. 7:15-3.5(b)4v to allow revisions for these types of minor developments desiring sewer service area expansions, provided the total added flow was 8,000 gpd or less, the total net land area added to the sewer service area is 100 acres or less and, there were no significant individual or cumulative impacts to environmentally sensitive areas or other natural resources. The Department stated in the summary of that proposal that the creation of a linear sewer service area along a road would be considered as a significantly new pattern of sewered development and provided the following examples to explain this provision. A residential development of 50 acres with 7,500 gallons per day of anticipated flow, contiguous to a future sewer service area with development extending along an existing county road that is roughly perpendicular from the sewer service area, one lot deep on each side of the road, would be considered a significantly new pattern of sewered development and would not qualify for a revision. A residential development of 50 acres with 3,000 gallons per day of anticipated flow, contiguous to a future sewer service area with a compact areal shape (in other words, development is shaped such that the length of the proposed extension of sewerage out from the sewer service area would be minimized. For instance, the proposed development might be roughly rectangular with the longest edge contiguous to the sewer service area) is not a significantly new pattern of sewered development and would be eligible for a revision. Further, another example of "a significantly new pattern of sewered development" would be one in which a sewer line was extended through undeveloped lands in order to reach a pocket of development. A situation in which a pocket of existing development on septic systems, which is surrounded by existing sewered areas, would be connected to the sewer system, would generally not be considered "a significantly new pattern of sewered development." The Department has

experienced no difficulty with evaluating applications relative to this criterion and believes that the concept is clear, thus does not anticipate any difficulties determining this for amendment proposals under N.J.A.C. 7:155.25(h).

The Department concurs that fragmented land use planning should be avoided and based the sewer service delineation requirements related to prohibitions of sewer service areas in identified environmentally sensitive areas as any contiguous area of 25 acres or larger at N.J.A.C. 7:15-5.24(b) in part on this principle.

The Department does not believe the rule should incorporate references in the rule unless they are related to specific text within the rule document. However, the use of studies such as those referenced by the commenter are used in the Department's assessments of the rules social, economic, environmental, jobs, environmental and smart growth impacts of the rule proposal. As such, the Department did reference a study by the Center for Remote Sensing and Spatial Analysis that identified from 1995 to 2002, a 16 percent annual decrease in the number of acres in agricultural production in New Jersey in the Agriculture Industry Impact Statement. The Department referenced this study because it supported the Department's belief that with the measures to direct growth in this rule, the number of agricultural acres lost to development may be reduced. The "Natural Capital Project" by the economist Costanza from Vermont, was not available to the Division of Watershed Management prior to this rule proposal and thus could not be included within Department's analysis of the rules economic impact.

1125. COMMENT: Site specific wastewater management plans under N.J.A.C. 7:15-5.25(h) should only be considered in the narrowest of conditions and when there is such an amendment, it should not create a significantly new pattern of sewered development.

N.J.A.C. 7:15-5.25(h)1 illustrates why site specific amendments should be prohibited except under very narrow conditions. At N.J.A.C. 7:15-5.25(h)1, an applicant must prove that the flow from the site specific proposal will not exceed the permitted flow. Unless it is a huge project, there is enough variability in flow to allow site specific projects to move forward on faulty flow data. Such projects should be part of a wastewater management plan to allow for a comprehensive evaluation. (22, 76)

RESPONSE: The Department believes the commenters meant site specific water quality management plan amendments as WMPs are regional documents that can not be site specific. The Department believes the rule establishes the appropriate limitations for when a site specific amendment will be allowed. The rule at N.J.A.C. 7:15-5.25(h) already specifies that a site specific amendment must not create a new pattern of sewered development and site specific amendments are only allowed if the applicable wastewater management plan is up to date, which means that the comprehensive analyses set forth in N.J.A.C. 7:15-5.24 and 5.25 have been completed and will serve as a basis for comparison with the specific analyses set forth in N.J.A.C. 7:15-5.25(h) for site specific amendments. The analyses required at N.J.A.C. 7:15-5.25(h) provide the basis to make an informed decision about the acceptability of a proposed site specific amendment, given the more comprehensive analyses that were completed for the wastewater management planning area.

1126. COMMENT: N.J.A.C. 7:15-5.25(h)2 as written refers to several open-ended demonstrations. Instead, the rule should provide standards so that there is clear understanding as to what would be expected. (18, 42, 44, 45, 61)

RESPONSE: The rule at N.J.A.C. 7:15-5.25(h)2 contains requirements with very specific decision endpoints for two circumstances. N.J.A.C. 7:15-5.25(h)2i applies where a WMP is not up to date and a site specific amendment is allowed in accordance with N.J.A.C. 7:15-5.1(a). N.J.A.C. 7:15-5.25(h)2i requires demonstration of compliance with the nitrate standard using one of two models, depending on development type, or an alternative analytical method approved by the Department that is designed to assess the impacts of nitrate discharged from individual subsurface sewage disposal systems. N.J.A.C. 7:15-5.25(h)2ii applies where a WMP is up to date and a new discharge to ground water is proposed in an area where the nitrate loading for a HUC 11 has been determined in terms of equivalent dwelling units using septic systems. The loading attributed to the new discharge to ground water must be the equivalent of the loading that would have occurred with development identified in the WMP for the parcel proposed for development or offset by reductions in loading in the remainder of the HUC 11.

1127. COMMENT: At N.J.A.C. 7:15-5.25(h)4iii use of mitigation as a method of avoiding a regulation is unacceptable. The proposed rule should clarify that a municipality can’t grant a waiver or variance under the stormwater regulations UNLESS site conditions prevent an applicant from meeting a particular standard. (22, 76)

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RESPONSE: N.J.A.C. 7:15-5.25(h)4iii allows as one possible means of compliance with the stormwater requirements demonstration that a project has received a municipal waiver or variance for the proposed project or activity in accordance with the Stormwater Management rules, N.J.A.C. 7:8, through a municipal mitigation plan. The Stormwater Management rules, N.J.A.C. 7:8, currently provide that a municipality can grant a waiver from the stormwater management design and performance standards at N.J.A.C. 7:8-5 if the municipality has developed and adopted municipal mitigation plan in accordance with the requirements at N.J.A.C. 7:8-4.2(c)11. As a result, this option must be afforded as a means of compliance with N.J.A.C. 7:15-5.25(h)4.

1128. COMMENT: The hardship variance based on the criteria of "reasonable investment" at N.J.A.C. 7:15-5.25(h)5vii is opposed. Investment in land is just one form of investment and should carry no special rights. (22, 76)

RESPONSE: The Department is not providing a hardship variance based upon reasonable investment, since the Department agrees that in and of itself, investment in property does not guarantee approval of a particular project, or automatically constitute hardship if such approval is not granted. Rather, the rule states that the Department will consider granting an approval in the cases where, "the proposed disturbance would prevent extraordinary hardship on the property owner peculiar to the property; or prevent extraordinary hardship, provided the hardship was not created by the property owner, that would not permit a minimum economically viable use of the property based upon reasonable investment."

When determining whether a denial would permit a minimum economically viable use of the property based upon "reasonable investment," the Department is distinguishing between varying levels of investment. For example, one property owner may need a municipal variance because the property does not meet a minimum road frontage requirement, while another may need a statutory or legal change to pursue development (for example, a change in zoning). Using the second example, a prospective developer could make an investment in a property, knowing that it is inadequate to support his/her proposed development, hoping that the zoning will change at some point to facilitate development, but the likelihood of this change occurring may be less than the likelihood that a variance would be obtained for the first described property. Consequently, the costs incurred in investing in the first property may be more reasonable than the costs incurred in investing in the second. Thus, it is appropriate for the Department to consider whether an investment is "reasonable" when assessing whether extraordinary hardship has resulted from the implementation of its regulation.

1129. COMMENT: At N.J.A.C. 7:15-5.25(h), site specific amendments must be in compliance with the environmental standards proposed at N.J.A.C. 7:15-5.25(d), (e), (f), and (g). The applicant would have to independently respond to every subsection and make calculations for proposed projects and activities. Redundancy and overlap of State regulatory programs should be omitted. For example, N.J.A.C. 7:15-5.25(h)6 requires the demonstration that the "new disturbance is not located in areas with a 20 percent or greater slope." As the soil erosion standards adequately regulate steep slopes, N.J.A.C. 7:15-5.25(h)6 is unnecessary and redundant. (18, 42, 44, 45, 61)

RESPONSE: In order to evaluate the implications of a proposed amendment with respect to the standards, and the analyses that were done to develop the WMP, it is necessary for an amendment application to provide the information at N.J.A.C. 7:15-5.25(h). The information required is adjusted, where appropriate, to provide only the information needed to evaluate the change relative to the WMP and the scale of the amendment, rather than to conduct an analysis for the overall WMP area. Please refer to Response to Comments 1112 through 1114. The Soil Erosion and Sediment Control Standards include requirements for construction, but the long term issues associated with having disturbed steep slopes are not addressed there.

N.J.A.C. 7:15-5.26

1130. COMMENT: The Habitat Suitability Determination is vague, ambiguous, unduly broad, and arbitrary and capricious. The Department would consider as "suitable" any site that is part of a larger habitat area for threatened and endangered species under the Habitat Suitability Determinations proposed at N.J.A.C. 7:15-5.26. This part of the Habitat Suitability Determination is objectionable because it would apply to any site, regardless of its size. Under this proposed regulation, the Department would have the authority to deny an application simply because the area at issue contains a tiny fraction of a much larger habitat. This is unreasonable and lacks any technical justification. (42, 44, 45)

RESPONSE: The Habitat Suitability Determination section of the rule is not a list of criteria for approval or denial but rather it is to be used by an applicant that wishes to rebut the presumption of habitat based on the Landscape Project maps. N.J.A.C. 7:15-5.26 sets forth the types of information that the Department will consider in determining whether the habitat is in fact

suitable for a particular species. Size of the landscape patch, as indicated in the rule, is one such type of information. Further, it should be noted that the Habitat Suitability Determination in the rule is not unlike the processes set forth in the adopted Highlands Water Protection and Planning Act rule at N.J.A.C. 7:38-5, the Freshwater Wetlands Protection rule, N.J.A.C. 7:7A-2.4, and in the Coastal Zone Management rules at N.J.A.C. 7:7E-3C.

1131. COMMENT: If at all, the Department should regulate only designated critical areas for *endangered and threatened species only* per Rank 3, 4, or 5 as indicated on the Landscape Map. (18, 42, 44, 45, 61)

1132. COMMENT: If the Department will not limit the ban on sewer service area designations in areas with threatened and endangered species habitat to habitat patches of Ranks 3, 4 and 5, the Department should revise the Habitat Suitability Determination regulation so that the standard for rebutting the presumption for an area of Rank 1 and 2 is lower than that for areas of Rank 3, 4 and 5. (42, 44, 45)

RESPONSE TO COMMENTS 1131 AND 1132: The rule only requires the inclusion of habitat ranked 3, 4, and 5 by the Landscape Maps in the composite GIS analysis that is used to delineate the sewer service area that avoid the majority of these areas. Areas ranked 1 or 2 as per the Landscape Maps are not required to be included in the analysis. Areas assigned a rank of 1 or 2 are not considered because they are not habitat for threatened or endangered species. Areas that are ranked 2 contain one or more occurrences for at least one non-listed State priority species and areas ranked 1 meet habitat specific suitability requirements for threatened or priority wildlife

species but do not intersect with any confirmed occurrences of such species. Therefore, since the rule only requires inclusion of Landscape Map habitat ranked 3, 4, and 5 in the analysis to designate sewer service areas and not habitat ranked 1 and 2, no changes were made to the rule.

1133. COMMENT: Under the proposed regulations, sites that have New Jersey Landscape Project designated habitats with ranks 3, 4, or 5, must submit a Habitat Suitability Determination in order to rebut the Department's determinations of said habitat. Although the requirements for a Habitat Suitability Determination are discussed, no timeframe for the Department's review of this determination is provided. Provide a timeframe for the approval/denial of a submitted Habitat Suitability Determination, as well as what the Department's criteria and justification for the approval or denial of an application will be. (34)

RESPONSE: The Department did not establish a timeframe for response with respect to a Habitat Suitability Determination because the review time is likely to be highly variable based on several factors including: the size of the area of habitat in question; the seasonality of species or critical habitat components and key elements of species habitat; and the type of change in the habitat that the applicant believes has taken place. The Department anticipates that a determination will be made quickly for small sites where prior, legal disturbance is obvious and has thus rendered the habitat unsuitable. In contrast, more time will be required to evaluate sites where subtle changes in the habitat, such as an increase in invasive species or other, legal changes to vegetative cover or management regime, have occurred that may affect suitability. In addition, for Habitat Suitability Determination applications that are submitted while the species or critical habitat components are absent from the site or key habitat elements are unavailable, it

is possible that a determination may be delayed until the correct season to verify the information that has been submitted as part of the application.

The Department also did not establish criteria for rendering a determination of "suitable" or "unsuitable" of a Habitat Suitability Determination because such criteria would be species and habitat specific and therefore would be as complex and voluminous as the existing species-specific scientific literature itself. Rather the Department set forth the types of information that must be submitted in order for Department staff, where necessary, to review the site characteristics in detail against the existing peer-reviewed scientific literature or in simpler cases, in order to determine the obvious and legal change in the character of the site since the publication of the Landscape Project maps. The Habitat Suitability Determination is likely to be an interactive process between Department staff and the applicant and its representatives and therefore will afford the applicant opportunities to inform the ultimate determination throughout the process.

1134. COMMENT: N.J.A.C. 7:15-5.26 provides the procedure for rebutting the Department's designation of properties as containing habitats for rare and endangered species according to the Landscape Maps. It should not be responsibility of a landowner to go through a lengthy process to prove that an endangered species is not located on the site. The Department should be providing the documentation proving that the site contains what the Landscape Maps are depicting. The Landscape Mapping has not been fully vetted through a public process. (14)

RESPONSE: The method used in developing the Landscape Project maps was both peer-reviewed and publicly noticed and therefore is considered by the Department to be appropriate for use in this rule. The Landscape Project maps are the documentation that reflects the most recent and best information about habitat that is suitable to support threatened and endangered species. The process of rebutting habitat suitability has to do with demonstrating on a site specific basis that the habitat is not suitable for the species for which the Landscape Project indicates habitat is present. Please refer to the LS Project Booklet/Report, which includes an appendix describing how the Department approves sightings/occurrence information.

1135. COMMENT: N.J.A.C. 7:15-5.26(a) provides that a Habitat Suitability Determination may be used to rebut the presumption of accuracy for a habitat patch of Rank 3, 4 or 5 on the Department's Landscape Map. The requirements for a Habitat Suitability Determination proposed at N.J.A.C. 7:15-5.26(b), however, are overly inclusive. By way of example, the applicant is required at N.J.A.C. 7:15-5.26(b)3vi to provide: "The location and a description of all upland, wetland, and aquatic ecological vegetative communities on the site, based on quantitative data collected during the optimal time(s) of the year using appropriate, scientifically accepted terms of description and analysis techniques. For each ecological community identified on the site, the evaluation shall include physiognomy, species composition with a list of the most abundant plant species by strata (canopy tree, subcanopy tree, shrub, vine, herbaceous, bryophyte), a description of successional stage, slope degrees and aspect, geologic substrate (as indicated in the most recent USGS bedrock geologic maps), soil texture and pH (as indicated in the most recent Soil Survey and verified by field sampling), depth to water table (as indicated in the most recent Soil Surveys), and hydrologic influences."

In place of requiring such broad and extensive studies as proposed at N.J.A.C. 7:15-5.26(b)3, the Department should tailor the requirements to the particular species identified in the referenced letter from the Department's Natural Heritage Program at N.J.A.C. 7:15-5.26(b)1. (18, 42, 44, 45, 61)

RESPONSE: The applicant is encouraged to contact the Department prior to conducting research or submitting a Habitat Suitability Determination so that they may ensure that the appropriate information is included. The rule language noted in the comment is necessarily broad in order to address the variety of habitats covered by the Landscape Maps, however, the Department agrees that only that habitat that is necessary for the survival of the species needs to be described. It is important to note however, that this may include areas where the species feeds, breeds or rests.

1136. COMMENT: N.J.A.C. 7:15-5.26(c) outlines the criteria the Department would evaluate for the Habitat Suitability Determination. Significantly, the provision introduces the following positive policy: "In making a Habitat Suitability Determination the Department shall consider as suitable habitat any site that, based on the best available scientific information, provides all of the components necessary to sustain any threatened or endangered animal species, including, but not limited to, nesting or breeding areas, foraging or feeding areas, resting or roosting areas, hibernacula or denning areas, migratory and/or movement pathways, areas necessary for lifecycle completion, or any site that is a part of a larger habitat area that provides all of the components necessary to sustain the threatened or endangered animal species in question."

This is a welcome policy change and support was expressed for recognizing that all of the necessary components must be present to be deemed as "suitable habitat." (18, 42, 44, 45, 61)

RESPONSE: The Department acknowledges this comment in support of this provision of the rules.

1137. COMMENT: Proposed N.J.A.C. 7:15-5.26(d)3 should be amended because it forces the applicant to choose between two untenable options: either wait indefinitely for the Department to act or accept a finding that the site constitutes suitable habitat for that species. The Department should establish a definite, reasonable deadline by when a determination would be made, or the application would be deemed approved should the Department not act timely. (18, 42, 44, 45, 61)

RESPONSE: The Department disagrees that the submission of a Habitat Suitability Determination will result in an indefinite wait for an applicant. It is in the best interest of not only the Department and the applicant but also of the public that the Department move toward a decision in a timely manner so that an updated plan may be adopted and implemented. The Department will act as quickly as possible however, Habitat Suitability Determinations are based on an accurate assessment of habitat and where seasonal conditions do not permit this precise evaluation, the Department will be unable to make a determination until the habitat can be accurately evaluated. Once accurate assessments can be made, a finding of "not suitable" or "suitable habitat" can be made. Accordingly, it would be inappropriate to change the rule to

provide that failure to make a decision within some time limit that may or may not be possible depending upon the situation will result in an approval and potential destruction of the habitat without appropriate analysis.

N.J.A.C. 7:15-6 Water Quality Limited Segments Lists and Total Maximum Daily Loads

N.J.A.C. 7:15-6.2

1138. COMMENT: The Department should expand current public comment requirements for impairment listing (in existing N.J.A.C. 7:15-6.4) to require public hearings in the affected watersheds, rather than leaving the public process to the discretion of the Department. (17, 49, 86)

RESPONSE: The Department has identified over 2100 impaired waters on its 2006 List of Water Quality Limited Segments (also known as the 303(d) list). Therefore, the recommendation to hold public hearings in every affected watershed is impractical. However, since the proposed Listing of Water Quality Limited Segments is processed as an amendment to the Statewide Water Quality Management Plan in accordance with N.J.A.C. 7:15-6.4, the Department may decide to hold a nonadversarial public hearing in anticipation of sufficient public interest. If so, the location, time and place of the hearing will be identified in the notice.

1139. COMMENT: N.J.A.C. 7:15-6.2(a), Listing of Water Quality Limited Segments, requires the Department to develop lists of water quality limited segments in accordance with the following: the Federal Requirements at 40 C.F.R. 130.7(b); Federal information or guidance concerning Clean Water Act section 303(d), 305(b) and 314 Integrated Reporting and Listing

Decisions; and the USEPA guidance document entitled "Information Concerning 2008 Clean Water Act sections 303(d), 305(b) and 314 Integrating Reporting and Listing Decisions, October 12, 2006 (Diane Regas).

There are no objections to the use of these documents as guidance in the development of a listing of water quality limited segments. However, the resources listed in the proposed rules should not be the only resources the Department may utilize for such development. A very important aspect of the Clean Water Act is that it allows states to promulgate regulations and standards that are more protective than federal standards, a feature that the Department has relied on in the past to implement some of its stronger water quality protections. Both N.J.A.C. 7:15-6.2(a) and 6.3(a) should include language stating that provision of the CWA and any other guidance document, study, data or resources that support the use of a stricter, more protective approach than those recommended by the identified Federal resources should be used in the development water quality limited segment lists or TMDLs. (17, 49)

RESPONSE: The guidance documents listed at N.J.A.C. 7:15-6.2 specify the requirements that State must comply with to submit its Listing of Water Quality Limited Segments to the USEPA for approval. The rule provisions cites this guidance but provides that other guidance amending or supplementing the cited guidance will also be used. Therefore, no changes are needed in the rule text. The Department publishes and provided the public with an opportunity to comment on the Integrated Water Quality Monitoring and Assessment Methods Document that will be used to develop the proposed List. The Assessment Methods are based upon New Jersey's adopted

Water Quality Standards which can be as indicated by the commenter, more stringent than the Federal standards.

1140. COMMENT: The Department responsibility to identify through listing of impaired waters and to prepare programs to address water quality limited waters is fundamental to cleaning up polluted waters in New Jersey. The process nationwide and locally has been excruciatingly slow. While the TMDL program is not as effective as it should be, the process can work if diligence is applied to gather and interpret water quality information regarding waterways and if problems are addressed in a comprehensive way with measurable goals that chart success. Support was expressed for the efforts in these rules regarding TMDLs but caution that training, funding, and support will be needed to make it work. The effort to ensure that Departmental programs (such as wastewater permitting) and other Departmental and/or municipal efforts (such as nonpoint source control programs, i.e. stormwater) don't work at cross-purposes is essential. These rules take a good step towards that goal with the requirement that the list of water quality limited segments is made an amendment to the Statewide Water Quality Management Plan, as well as the requirement that the implementation of the statewide, areawide and local WQM plans address these stream problems. (10, 80)

RESPONSE: The Department acknowledges the support for this provision of the rule and concurs that TMDL effectiveness depends on adequate funding for development and implementation and coordination with other State and local efforts that control the discharge of pollutants of concern to impaired waterbodies.

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1141. COMMENT: The Department's notices concerning the Water Quality Limited Segments Lists, Total Maximum Daily Loads, and proposed rules should be forwarded to county planning departments. (85)

RESPONSE: Actions with state-wide application such as the proposed Water Quality Limited Segments Lists and Department rules are published in the New Jersey Register, on the Department's website at www.state.nj.us/dep and in a newspaper(s) of general circulation. TMDLs, which are more targeted, are published in the New Jersey Register, on the Department's website and in a newspaper(s) in the affected area. In addition, notice of proposed TMDL amendments are mailed to interested parties such as affected dischargers, purveyors, and Designated Planning Agencies, and would also include counties.

N.J.A.C. 7:15-6.3

1142. COMMENT: N.J.A.C. 7:15-6.3(a), Total Maximum Daily Loads, provides that the Department shall develop TMDLs for water quality limited segments in accordance with: the Federal Requirements at 40 C.F.R. 130.7(c) and (e); USEPA guidance document entitled "EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs under Existing Regulations issues in 1992"; USEPA guidance document entitled "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"; and USEPA guidance document entitled "Establishing Maximum Daily Loads in light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in Friends of the Earth, Inc. v. EPA, et al."

There are no objections to the use of these documents as guidance in the development of TMDLs, however, the resources listed in the proposed rules should be the only resources the Department may utilize for such development. A very important aspect of the Clean Water Act is that it allows states to promulgate regulations and standards that are more protective of federal standards, a feature that the Department has relied on in the past to implement some of its stronger water quality protections. Both N.J.A.C. 7:15-6.2(a) and 6.3(a) should include language stating that and any other guidance document, study, data or resources that support the use of a stricter, more protective approach than those recommended by the identified Federal resources in the development water quality limited segment lists or TMDLs. (17, 49)

RESPONSE: As a point of clarification, the rule provides that the cited regulations and guidance documents, including all future amendments and supplements, shall provide the basis for development of total maximum daily loads. To be approved, TMDLs must be developed in accordance with federal requirements. These requirements direct that the TMDL be calculated so that the endpoint (Surface Water Quality Standards or other target needed to ensure designated uses are attained) is attained under critical conditions, including seasonal variation, and include a margin of safety to account for uncertainty. Because TMDL development requirements already incorporate multiple conservative features, the Department believes that establishing requirements more protective than the Federal requirements is unnecessary to ensure that the outcome is protective of SWQS and designated uses.

1143. COMMENT: There are objections to the use of the term “loading capacity of the segment” at N.J.A.C. 7:15-6.3(b)4. Although the term refers to the loading capacity during

identified critical conditions, it implies that loading up to that capacity is acceptable. Clarifying language should be added that conveys the concept of improving water quality, not loading it with a pollutant up to a certain level. (22, 76)

RESPONSE: The requested clarifying language is not necessary because total maximum daily loads (TMDLs) are used to accomplish water quality improvement, not to allow water quality degradation. A TMDL is required to be developed where it is demonstrated that one or more of the Surface Water Quality Standards (SWQS) are not being met in a surface water body due to the presence of one or more pollutants for which SWQS have been adopted. The TMDL is that amount of a pollutant that can be assimilated by a surface water body and still attain the SWQS for that substance. If the surface water is impaired with respect to the pollutant, then the pollutant is present in amounts that are beyond the assimilative capacity and must be reduced. Thus, a TMDL will specify pollutant loading reductions in order to improve water quality so that it meets the SWQS, or, in a threatened water, to ensure that standards are not violated. TMDLs are not a vehicle for allocating loading capacity with the objective of allowing a surface water to degrade from a quality that is better than standards to the standard. The antidegradation policies at N.J.A.C. 7:9B-1.5 are applicable where water quality is better than criteria. Therefore, proposals for new or expanded surface water discharge that would add pollutants to a surface water where the quality is better than the standards would need to comply with antidegradation requirements.

1144. COMMENT: There is strong objection to the lack of public participation requirements during the allocation of loading capacity at N.J.A.C. 7:15-6.3(b)5. (22, 76)

RESPONSE: The rule provides at N.J.A.C. 7:15-6.3(c) that, based on anticipated public interest, opportunities for public participation may be provided at any point in the development of a TMDL on any of the TMDL components, one of which is the allocation of loading capacity, see N.J.A.C. 7:15-6.3(b)5. The Department recognizes that allocation of loading capacity is a component of a TMDL that has the potential to be of interest to the public. Public interest can be anticipated where pollutant load is generated by both regulated and unregulated sources and a decision must be made as to the relative load reduction that will be assigned among these sources. Source reductions called for from regulated sources (permitted discharges such as wastewater treatment facilities) have relatively immediate cost implications for rate payers, typically in the form of user cost or tax increases, an obvious basis for public interest. Source reductions called for from unregulated sources (such as unregulated stormwater flows from forests and developed areas not subject to stormwater regulation) have a much less direct effect on the public, as these reductions are typically obtained through voluntary actions on the part of land owners and/or may be accomplished through a State or Federally funded project. Where sources are exclusively unregulated, the Department would anticipate little public interest, based on experience with TMDLs developed to date. Where the decision on how to allocate loading capacity has significant cost and other implications, input from the affected public is important to properly inform the Department's decision on how to allocate loading capacity. Consequently, the Department believes the nature of the TMDL study itself should guide the decision on how often and at what points in the process it is appropriate to provide opportunities for public involvement, in addition to formal public notification requirements.

1145. COMMENT: N.J.A.C. 7:15-6.3(b)6 indicates that the TMDL document would include an implementation plan to achieve attainment of the Surface Water Quality Standards and "or other more stringent target." The necessity of having more stringent standards is unwarranted and inappropriate. The phrase "or other more stringent target" should be deleted. (18, 42, 43,45, 61)

RESPONSE: The cited language refers to a situation in which it may be determined that the Surface Water Quality Standards for a causal pollutant will not result in attainment of the designated uses. This could occur, for example, in an estuarine setting where nitrogen is causing excessive productivity that results in dissolved oxygen violations. The SWQS for FW2 waters for nitrogen is a human health based standard that may be higher than the level necessary to limit productivity in SE/SC waters so that dissolved oxygen standards are attained. A TMDL for nitrogen to address the dissolved oxygen impairment in this case would be calculated to achieve a nitrogen endpoint that would sufficiently limit productivity. Because a TMDL must ensure that designated uses are attained, in addition to numeric criteria set forth in SWQS, the rule language is required.

1146. COMMENT: Instead of optional informational meetings and comments solicitation at N.J.A.C. 7:15-6.3(c)1 and 2, the Department should require these meeting and be required to solicit comments from the public. The references in this section to public participation identified in N.J.A.C. 7:15-6.4 are inaccurate and misleading. N.J.A.C. 7:15-6.4 merely refers to the Department's publishing notices and having the option of holding nonadversarial public hearings. (22, 76)

RESPONSE: The Department believes that the level of additional public participation provided in the development of a TMDL should be commensurate with the specific study. For example, where the spatial extent is large, the tools used to relate loading with water quality are complex, endpoints are atypical, or implementation measures have significant socio-economic or environmental implications, multiple opportunities for public participation are appropriate. On the other hand, based on the Department's experience to date, for small scale, routine TMDLs, and where sources are primarily unregulated, public interest is likely to be minimal. In such cases, specifying an inflexible public participation process would not serve to add value to the process and may unnecessarily delay water quality improvement. The reference to N.J.A.C 7:15-6.4 at N.J.A.C. 7:15-6.3(c) is simply to set apart the opportunities for public participation identified at N.J.A.C. 7:15-6.3(c) as being in addition to those associated with the formal proposal and adoption process at N.J.A.C 7:15-6.4.

1147. COMMENT: N.J.A.C. 7:15-6.4 outlines amendment procedures to incorporate a revised List of Water Quality Limited Segments to the Statewide Water Quality Management Plan or to incorporate a TMDL document to the applicable areawide Water Quality Management plan. N.J.A.C. 7:15-6.4(a)1 proposes that a 30 day comment period would be held on the proposed amendment. Instead, the Department should extend this timeframe to a minimum of six months or 180 days from the date of publication in the New Jersey Register. (18, 42, 43, 45, 61)

RESPONSE: The Department believes that setting such an extended public comment period for each TMDL amendment would be inappropriate. In its experience with developing TMDLs, the Department has found that few if any comments are received on most TMDL studies. Requiring

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such an extended comment period would unnecessarily delay finalization of these TMDLs.

Where TMDLs with substantial regulatory significance are developed, there will be ample opportunity for public participation during the development process, in addition to the formal public participation process. The Department may also provide a longer comment period if the proposal is complex or likely to generate significant public interest. In addition, if the interested public believes that an extension of the typical 30-day comment period is needed, a request to this effect can be made. The Department's responses to such requests to date have been positive.

1148. COMMENT: The proposed rules reduce public notice for the Wastewater Management Plan amendments and other actions taken by the Department, for example, in the total maximum daily load section. There should be no reduction in public notice by the Department, as this would reduce the Department's responsibilities and place the burden of effort onto the public. These proposed avenues of public notice are not enough to reach all interested or affected parties because the general public may not be aware to look on the Department's website for postings, nor do they typically receive copies of the New Jersey Register. There should be a more comprehensive effort to reach the public by the Department in order to inform them and solicit their comment, rather than reduce the effort to less than what it is today. (28)

RESPONSE: The proposed rules do not change the public notice requirements for WQMP amendments that are WQLS or TMDLs. As described in Response to Comment 1141, the Department will continue to publish notifications of proposals with state-wide application such as the proposed Water Quality Limited Segments Lists in the New Jersey Register, on the Department's website at www.state.nj.us/dep and in a newspaper(s) of general circulation.

TMDLs which are more targeted will continue to be published in the New Jersey Register, on the Department's website and in a newspaper(s) of the affected area. The notification process accomplished through using these methods should be sufficient to reach the people who need to be informed. Some of the provisions for public participation during TMDL development in the rule prior to the adopted amendments have not been duplicated in the adopted rule. For example, the rule prior to these adopted amendments differentiated watershed TMDLs from site specific TMDLs and called for a public advisory committee when developing a watershed TMDL. The adopted amendments do not differentiate between types of TMDLs, but rather calls for public involvement commensurate with the complexity and anticipated interest in the TMDL. This accomplishes the same purpose as the rule provisions prior to the adopted amendments. The adopted amendments also recognize the new opportunities for obtaining public input available through advances in technology, such as web postings and electronic communication.

1149. COMMENT: The WQMP rules should establish explicit and mandatory ten percent minimum margin of safety and ten percent minimum reserve factors. (17, 49, 86)

1150. COMMENT: The provision at N.J.A.C. 7:15-6.3(b)5i-iv outlines the Department's development of the total maximum daily loads for water quality limited segments. The TMDL would allocate loading capacity for point and nonpoint sources of pollutants, margin of safety for the overall load reductions, and an "optional reserve capacity to allow for future growth." It is recommended that the reserve capacity should be mandatory, not optional, and the Department should take the initiative to support COAH obligations through this provision. Thus, N.J.A.C.

7:15-6.3(b)5iv should be rewritten and renumbered to reflect these changes, as follows: "… and a mandatory reserve capacity to allow for future growth." (18, 42, 43,45, 61)

RESPONSE TO COMMENTS 1149 AND 1150: The margin of safety (MOS) is a mandatory component of a total maximum daily load (TMDL), which is intended to account for uncertainty in the development of a TMDL, particularly with respect to the method used to establish the relationship between pollutant loading and the observed water quality. The MOS can be implicit, that is by making one or more conservative assumptions in the development of the TMDL, or explicitly, that is by setting aside a specified amount of the loading capacity that is not allocated to sources of the pollutant of concern. Each TMDL will have a different level of uncertainty. In addition, some TMDLs may present opportunities for making conservative assumptions such that an implicit MOS is appropriate, while others will necessarily require setting an explicit MOS. Therefore, it would be inappropriate to artificially set a single type and magnitude of MOS.

Reserve capacity is an optional component of a TMDL that is used primarily when there is a potential for new or expanded sources of the pollutant of concern. For example, it would be appropriate to specify a reserve capacity when a wastewater treatment facility expansion is known to be needed either because of a pending permit application or based on a build-out analysis that identifies the need for additional wastewater treatment capacity within a drainage area under study in a TMDL, including from COAH housing. Because the need for setting aside a reserve capacity and the magnitude will vary from TMDL to TMDL, it is inappropriate to

stipulate a fixed capacity for every pollutant in every spatial extent considered in developing TMDLs.

1151. COMMENT: The TMDL program should 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. (17, 49, 86)

RESPONSE: The commenters appear to suggest that the NJPDES rules, N.J.A.C. 7:14A, direct model use in TMDL development. This is not the case. In fact, actual data and the water quality standards are necessary inputs to development of a TMDL because the purpose of a TMDL study is to identify the amount of a pollutant that can be assimilated by a waterbody and attain the Surface Water Quality Standards (SWQS). The SWQS establish the target for the TMDL and actual water quality data, including concentration and flow, is used to determine the degree to which a waterbody deviates from the SWQS as well as the relationship between loads and observed concentrations so as to calculate the load reductions needed to attain the SWQS.

1152. COMMENT: The TMDL program should require that TMDLs attain critical conditions, including specific numeric “not to exceed at any time” enforcement policy, not seasonal or monthly averaging. (17, 49, 86)

RESPONSE: A TMDL study is required to identify the maximum amount of a pollutant that can be assimilated and still attain the Surface Water Quality Standards (SWQS). The requirements for this demonstration stipulate that the loading capacity must be that which will attain the

SWQS under the appropriate critical condition and in consideration of seasonal variation. The critical condition is generally a flow level identified in the SWQS as the flow above which the criterion must be met. Whether or not seasonal variation must be considered in setting the TMDL will depend on the water quality data available for the subject waterbody, which will indicate if exceedances are larger or more likely to occur at a particular time of year. The SWQS for a pollutant will specify if numeric criteria must be met on an average basis (e.g. temperature), must fall within a range (e.g. pH), apply in consideration of other narrative criteria (e.g. phosphorus), or cannot be exceeded (e.g. nitrate).

1153. COMMENT: Regarding the TMDL program, the rules should eliminate the pollutant trading option as it has proven unworkable. (17, 49, 86)

RESPONSE: Water quality trading of loading capacity specified within a TMDL has been successfully employed in other states (Long Island Sound TMDL) but has not yet been practiced in New Jersey to date; therefore, there is no basis to conclude that this concept has proven unworkable. For the recently adopted Passaic River Basin TMDL, a preliminary trading tool has been developed as part of a Rutgers University study funded by EPA. The trading program will consist of a trading currency among point sources that will result in a condition the same or better than the TMDL premise, as demonstrated by the trading scenarios. This and any trading program would have to be approved by the Department and the EPA following a public participation process. To be approvable, a viable trading option would have to ensure that the TMDL target is met and that there is full enforceable accountability for required load reductions.

1154. COMMENT: TMDLs must assure that stormwater discharges are regulated and assigned allocations. (17, 49, 86)

RESPONSE: Stormwater discharges are a source of a number of the pollutants of concern for which waterbodies in the State are listed as impaired. When a TMDL is developed where stormwater is a source of the pollutant of concern, a wasteload allocation (if the stormwater source is considered a point source regulated under the Clean Water Act) or a load allocation (non-regulated stormwater), is assigned to the stormwater sources. In 2002 EPA issued guidance recommending that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as BMPs (Wayland, 2002). Through the NJPDES stormwater regulation rules at N.J.A.C. 7:14A-25, individual and general permits are issued for regulated industrial and municipal stormwater discharges. These permits include requirements to control pollutants delivered through stormwater discharges to waterbodies. For example, the municipal stormwater permits for Tier A municipalities specify minimum requirements, including adoption and enforcement of a pet waste disposal ordinance, prohibiting the feeding of unconfined wildlife on public property, street sweeping, catch basin cleanouts, performing good housekeeping at maintenance yards, and providing related public education and training. Implementing these best management practice (BMP) requirements is anticipated to result in significant reductions in loadings of pollutants that are responsible for many of the listed impairments in New Jersey, including phosphorus, pathogens, suspended solids, and nitrogen. The Department believes that, where these BMPs can reasonably be expected to achieve the load reductions specified for this source category, they should be the required response for TMDL implementation. Where additional measures are believed to be needed to achieve the reductions

assigned to this source category, the Department can and has stipulated such measures, which become part of the stormwater permit.

1155. COMMENT: The Department should establish a mandatory timeframe between the completion of the TMDL and revisions of NJPDES permit effluent limitations to enforce allocations. (17, 49, 86)

1156. COMMENT: Under the "reasonable assurance" requirements for implementation of non-point loadings in the TMDL program, the Department should mandate that BMPs shall include specific changes to local land use and development ordinances, including restriction of new generation of additional point and nonpoint loadings, until the TMDL is fully implemented. The Department should additionally require adoption of mandatory ordinances to implement the allocations and BMPs. (17, 49, 86)

RESPONSE TO COMMENTS 1155 AND 1156: The Department does not believe that a mandatory timeframe should be established between completion of a TMDL and NJPDES revisions. The Department recognizes the need for the timely incorporation of TMDL based effluent limits into NJPDES permits. The Department's goal is to issue draft permit actions within six months of TMDL adoption. The draft permit actions will be subject to the normal public comment process.

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1157. COMMENT: The Department should mandate that towns in the TMDL drainage adopt stream buffer, pesticide application, and water conservation ordinances to implement the allocations. (17, 49, 86)

RESPONSE: A TMDL study must address the basis to conclude that TMDL reductions in nonpoint sources are reasonable when they are offsetting required reductions from point sources, a concept referred to by EPA as "reasonable assurance." For pollutants contributed by runoff, each TMDL study will identify a nonpoint and stormwater point source load reduction needed to achieve the SWQS, which will be based on the relative contribution of the pollutant in question that comes from nonpoint and stormwater point sources and the measures available that can be implemented to achieve the identified reductions, given the nature of these sources. In some drainage areas, runoff from agricultural areas may be the most significant nonpoint source whereas in others, stormwater from developed areas may be the primary source, some of which will be regulated stormwater point sources and some of which will be nonpoint sources. Each of these sources will be effectively reduced by a different suite of management measures. Therefore, it would be inappropriate to specify the suggested set of mandatory ordinances as a component of reasonable assurance or implementation, without regard to the nature of the study area, the pollutant of concern and the relative contribution of the pollutant of concern from sources that might respond to an ordinance approach to implementation.

1158. COMMENT: The Department should 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. (17, 49, 86)

RESPONSE: The Department recognizes that TMDLs alone may not be sufficient to restore impaired waterbodies. The TMDL implementation plan identifies the regulatory and non-regulatory tools to achieve the reductions. The load allocation calculated for the nonpoint source contribution of the TMDL is generally applied to land uses in the TMDL drainage area that are most readily reduced such as agricultural and urban land uses. Nonpoint source mitigation from agricultural land use is best addressed by implementation of conservation practices tailored to each farm. Specific projects geared towards implementation of reductions in nonpoint sources are often part of the implementation plan for a TMDL and are pursued as funding becomes available; thus there is no need for the TMDL to supersede AMPs when they can work in concert together.

1159. COMMENT: The Department should revise the TMDL ranking criteria, set real priorities, and enforce them. The Department should also set and enforce mandatory maximum timeframes for completion of each discrete component of the TMDL program process. (17, 49, 86)

RESPONSE: In the Integrated Water Quality Monitoring and Assessment Methods the Department sets forth its criteria for ranking listed impairments as to high, medium and low priority for development of TMDLs. The ranking of impairments for TMDL development considers many factors including the importance of the parameter of concern, the TMDL complexity, whether the parameter is actively produced or legacy, how much additional data and information is needed, the sources of the pollutants, the severity of the impairment or threatened

impairment, the spatial extent of the impairment, the designated uses of the waterbodies, the efficiencies of grouping TMDLs for waterbodies located in the same subwatershed or for the same parameter of concern, the efficiencies related to leveraging water quality studies triggered by NJPDES permit renewals, the status of TMDLs currently under development, the timing of TMDLs for shared waters, the status of watershed management activities, other ongoing control actions such as site remediation activities that will result in the attainment of SWQS, the existence of endangered and sensitive aquatic species, recreational, economic, cultural, historic and aesthetic importance, and the degree of public interest and support for addressing particular waterbodies. The commenters suggest the ranking criteria be changed, but do not specify how. The Department believes the current ranking criteria will result in the most efficient and effective means to achieve water quality improvement. In the current system, pollutants of concern ranked with a high priority (pathogens, metals, toxics and nitrate) are directly related to human health issues and are actively produced. Based on the overall consideration of the factors discussed above, the impairment should be addressed in the short term and, as resources allow, as part of the two year schedule workload. As part of a MOA with EPA Region 2, the Department initiated an aggressive program to develop TMDLs in 2002. The Department focused its early efforts on addressing fecal coliform pathogen and nutrient impairments which were the most prevalent causes of water quality impairment across the State. The Department has completed over 300 TMDLs that address pathogens and more than 75 that address nutrients. However, the development of a TMDL may not be the appropriate response to address all pollutants, because in some waters where water quality standards are not attained the source may be due to a legacy pollutant with no active sources, or due natural conditions, such as geology.

Also, often the sources of legacy pollutants, such as hazardous sites, are not subject to regulation under the Clean Water Act.

Setting a mandatory maximum timeframe for completing each component of a TMDL is not appropriate because of the many variables that can affect the amount of time required for each component. The objective is to develop scientifically sound TMDLs that can effectively direct the measures that are needed to attain water quality standards and which include opportunities for public involvement commensurate with the nature and scope of the TMDL study.

1160. COMMENT: The Department should establish conflict of interest standards for any consultants such that no consultant (or academic institution) may provide TMDL or NJPDES related services to both dischargers and the Department in the same watershed. (17, 49, 86)

RESPONSE: The Department shares the concern regarding potential conflicts of interest. However, the suggested limitation is not practicable given the limited number of qualified consultants and academic institutions. The Department believes that other measures adequately ensure there will be no conflict of interest in this regard. When using the services of a consultant or academic institution, all of the Department's contracts and grant agreements include by reference the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq., and the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq.. Thus, the contractual obligation specifies that the Contractor represents and affirms that none of its employees, its subcontractors, its subcontractors' employees, and the Contractor itself is engaged in any conduct which constitutes

a conflict of interest under, or a violation of, either the New Jersey Conflicts of Interest Law or the Local Government Ethics Law.

Further, the Department includes language in individual subcontracts to ensure that there will be no project specific conflicts between the Department and the regulated community. The Department maintains a contract with the New Jersey EcoComplex for the development of TMDLs, which establishes an interdisciplinary team of experts (from Rutgers University, Stevens Institute of Technology, Rowan University and The New Jersey Institute of Technology) as recommended by the National Academy of Sciences in their 2001 paper "Assessing TMDL Approach to Water Quality Management", to review TMDL technical approaches and provide comments back to the Department. Under this contract, subcontracts have been issued to consultants to collect data and perform specific modeling functions in fulfillment of technical approaches that have been vetted through the NJEC Panel and watershed stakeholders. When under such a subcontracting arrangement, a consultant is not permitted to present or discuss interim or final work products without the express consent of the Division of Watershed Management or must wait until 60 days after the date of adoption of the TMDL in the New Jersey Register. Because the consultant may be called upon to provide expert testimony in support of work products they produce, in the event of litigation brought against the Department resulting from such work products, they are not allowed to represent other parties contesting TMDLs based on the work done under contract to the Department The Department believes these controls are sufficient.

N.J.A.C. 7:15-8 Withdrawal and Redesignation of Wastewater Service Area Support

1161. COMMENT: The need for municipalities to create and update wastewater management plans and for N.J.A.C. 7:15-8.1(a) that withdraws wastewater service area designations in areas that fail to adopt and maintain a wastewater management plan is supported. (22, 76)

1162. COMMENT: N.J.A.C. 7:15-8.1(a), the withdrawal of wastewater service area designations that are not up to date is supported. This is the only way to reality-check wastewater planning in the State and bring attention to the fact that most plans are obsolete in light of current facts. (10, 80)

1163. COMMENT: The proposed requirement that existing planning areas with either no wastewater management plan or an outdated wastewater management plan must submit a WMP or update within nine months of the date the rules are adopted or all future wastewater service areas will be withdrawn until such a WMP or updates is adopted is supported. (17)

1164. COMMENT: The provision in the proposed rules that withdraws sewer service areas should a planning agency fail to submit a wastewater management plan or wastewater management plan update within the schedule established in the rules is supported. However, existing WMP entities have had ample notice and urging to update plans and many are already not in compliance. These entities should not be rewarded for failure to comply. The proposed compliance schedule should be reconsidered. Where it is determined that a WMP is not up to date as of the effective date of the proposed rule, the wastewater service area designations in the existing WMP, or where no WMP exists, the sewer service area provisions of an areawide Water

Quality Management Plan, should be withdrawn immediately and considered not in compliance. (82)

1165. COMMENT: The rule proposal notes that studies directed at the impact of continued sprawl development compared to more center based development make clear that the cost of providing municipal services to sprawl development is significantly greater. Also, when WMPs are kept current, they benefit the development of the community by resolving conflicts among the State, regional and local land use plans and providing assurance that wastewater quality is maintained and capacity exists to support planned development. Therefore, it is extremely important that the WMPs be kept current. The withdrawal of wastewater service area designations for places which have not updated their WMPs is supported. (13)

RESPONSE TO COMMENTS 1161 THROUGH 1165: The Department acknowledges the commenters' support for this provision of the rule. While the Department concurs that WMPs need to be kept up to date to provide a sound basis for decision making, the withdrawal of sewer service area according to the schedule in the rule is necessary to provide an adequate period for development of satisfactory WMPs. WMPs developed in accordance with the adopted rule may call for sewer service areas to remain in many areas, making immediate withdrawal unnecessary and inefficient from a regulatory perspective.

Opposition

1166. COMMENT: The proposal to withdraw wastewater service areas where wastewater management plans are not current is opposed. Withdrawal of wastewater service areas has the

potential to create economic and social hardships, generate costly litigation and cause environmental impairment as a result of not being able to install needed infrastructure. Significant public investment has been made in the design and construction of regional wastewater treatment facilities with the expectation that planned or design capacity of such facilities will be fully utilized. The original 201 Facility Plans received formal approval and funding for construction of regional facilities from both the Department and USEPA after the completion of extensive environmental studies. The rule proposal to withdraw wastewater service areas and effectively ban the use of this publicly funded capacity is opposed. (33, 60)

RESPONSE: The 201 facilities plans were developed decades ago and, just like an out-of-date WMP, cannot be relied upon as a basis for decision making. Many circumstances have changed since development of the facilities plans. Further, the design period for the treatment facilities was 20 years or less, so that any remaining capacity has not been used for the originally intended purposes or in the timeframe originally planned. Therefore, it is important to reassess the changed circumstances and priorities since the facilities plans were completed in the process of developing an up-to-date WMP that conforms with the standards set forth in this rule to ensure sustainable use of natural resources.

1167. COMMENT: The proposed rules state that the Department will rescind the sewer service area if a county or municipality fails to submit a wastewater management plan within nine or12 months. This will unfairly penalize development: since 148 wastewater management planning entities (covering about 90 percent of the state) are not in compliance with the current rules, potential loss of sewer service areas is enormous; it is patently unfair to penalize economic

development (commercial, schools, hospitals, municipal redevelopment projects) by rescinding a sewer service area because counties/towns fail to update their plans; and rescinding sewer service areas will frustrate small growth, cleanups, brownfields and infill development. These unintended consequences are directly at odds with the Corzine Administration's stated goals for economic growth and development. (54)

1168. COMMENT: The portion of the proposed rules that authorizes the Department to withdraw sewer service area designations is objectionable. While that sanction could be justified in situations where the Department was able to clearly demonstrate that such action is required to protect public health, it is unwarranted as a means to compel compliance with the rule's requirements. Even the availability of such an unauthorized threat could result in serious adverse economic impacts. (18)

RESPONSE TO COMMENTS 1167 AND 1168: The Department believes that the criteria set forth in the rule relative to sewer service area delineation will result in sewer service areas that are better aligned with natural and water resource constraints, while providing the opportunity to accommodate local development objectives within these constraints. Based on the currently applicable WQM plans or WMPs, many of which are out of date, some sewer service areas include areas with the potential to generate wastewater far in excess of the wastewater treatment capacity. In some of these cases, additional wastewater discharge to the receiving stream cannot be accomplished within the Federal and State requirements for antidegradation. Further, some sewer service areas contain significant threatened and endangered species habitat, which is not compatible with development at the intensity warranting sewer service. Sewer service area

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withdrawal where wastewater management plans are not updated is necessary because the Department relies on the wastewater management plan (WMP) components of the areawide WQM plans to provide a comprehensive evaluation of the cumulative effects of land use on the water resources of the State.

A WMP is a detailed planning document intended to ensure that adequate wastewater treatment capacity is available to accommodate the needs of existing and future development. These plans are essential to ensuring that the planned method of wastewater treatment is appropriate given local environmental constraints and that wastewater treatment facilities can accommodate the future needs of the wastewater management planning area. An outdated WMP cannot be relied upon to accurately predict the future wastewater management needs of the WMP area. Similarly, where land use plans have changed, an outdated WMP may not accurately assess point and nonpoint source pollutant loading, hydro-modification issues, water supply sustainability, and the protection of sensitive environmental resources.

Furthermore, if the WMP is not updated, the implications of new information, such as threatened and endangered species sightings, pollutant loading, or sustainability of water supply, may not be adequately reflected in the plan against which the project will be measured. For example, a recent designation of Category One waters and the associated antidegradation policies with respect to point and nonpoint pollutant sources may prevent the permitting of new or expanded wastewater treatment facilities that are identified in an outdated plan, leaving areas without a suitable wastewater management alternative. Further, the lack of a comprehensive or updated WMP may lead to a greater density of development than is appropriate or sustainable in terms of

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water resources because the cumulative impacts of development in the WMP area have not been evaluated.

1169. COMMENT: If a county or other delegated planning agency, such as a municipality or a sewage authority, does not submit the wastewater management plan in a timely fashion, the amended rules provide that wastewater service area designation may be withdrawn. This will surely have a negative impact on development and approved projects awaiting permits. While the rule allows continued service in an area where sewage collection systems have already been installed, those projects that would have otherwise built their own infrastructure will be harmed by the municipality's delay. The Department clearly recognizes that projects about to break ground should not be penalized but fails to provide relief for those projects that are before a municipal board awaiting approval. (29)

1170. COMMENT: There are some things in this rule proposal that will halt a lot of activity. The withdrawal of all wastewater service area designations will stop any actions of review or pending treatment works approval applications or even those that would be submitted while all of the designations have to be revised, recreated, and new plans have to be adopted. Then with the number of plans that will be created or new plans that have to be adopted, it will take an inordinate amount of time for the Department to go through and certify all of those plans before anything can get done. This will be a period of stagnation before any progress occurs in the treatment works approval process. (25)

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RESPONSE TO COMMENTS 1169 AND 1170: Refer to Response to Comments 1167 and 1168 regarding the need to withdraw sewer service area where plans are not up to date. This need notwithstanding, the Department does provide relief in the form of grandfather provisions at N.J.A.C. 7:15-3.8 for projects that have had an amendment adopted or filed for publication prior to the effective date of the rule. Further, there are some categories of revisions that will allow projects with minimal potential for adverse impacts to proceed if the WMP is not up to date, as set forth at N.J.A.C. 7:15-3.5. Extending grandfathering to each situation in which some level of approval may have been obtained would undermine attainment of the objectives of the rule. The Department believes the relief provided represents the appropriate balance of the need to recognize significant investment in a project and the need to accomplish the rule objectives.

1171. COMMENT: As currently drafted, some of the proposed regulations are, at best, ambiguous and, at worst, inconsistent with the Department's public statements regarding the intended purpose and effect of the proposed rules. For example: the proposed rules state that wastewater service area designations shall be "withdrawn" in areas which fail to adopt and maintain a wastewater management plan in accordance with the requirements of N.J.A.C. 7:15-5.2(b), 5.13 and 5.23. However, on May 21, 2007, in public statements regarding the proposed amendments to the WQMP rules, the Department declared that wastewater service area designations will only be "suspended" in counties and municipalities until WMPs are adopted and maintained and the Department, thereafter, approves the restoration of the suspended wastewater service area designation. There is a difference between a plan withdrawal and a plan suspension, the two words do *not* mean the same thing. A plan withdrawal suggests that an existing plan has been rendered null and void and must be redone from scratch; while a plan

suspension suggests that operation of an existing plan is only temporarily deferred or delayed but the plan will be re-continued, intact, upon the occurrence of some condition. It is antithetical to an important goal of planning (i.e., to promote certainty in result) to allow this ambiguity to exist in adopted regulations and the Department should act in a manner consistent with its public statements.

Allowing a fully compliant adopted WQMP amendment to be withdrawn, suspended, expired, ceased, or lapsed in this manner, whatever the terminology, is contrary to the planning goals sought to be advanced by the Department in proposing the WQMP rules. The proposed rules should provide for maintenance of previously approved WQMP amendments following a withdrawal or suspension, and describe with specificity the consequences to a facility with a site specific WQMP when a municipality or county does not maintain a current WMP. Further, the proposed rules should state that the WQMP amendment is maintained in full force and effect, subject only to changes that may be necessary after approval of the WMP, when the planning agency does submit its WMP or WMP update to the Department.

As drafted, the proposed rules have the potential to leave such entities in a state of uncertainty or limbo, if not a complete and indefinite moratorium; and neither statute, regulation (currently adopted or proposed), nor case law provides reasonable relief for entities that fall victim to a WMP agency's recalcitrance. *Cf.* Toll Bros., Inc. v. State Dept. of Environmental Protection, 242 N.J. Super. 519, 529 (App Div. 1990) (Failure of a planning agency to timely act upon an application to amend an areawide water quality management plan does not result in automatic approval of the amendment under the Federal Clean Water Act, the New Jersey Water Quality

Plan Act, of the regulations adopted there under.)

Proposed N.J.A.C. 7:15-8.1(a) should be revised to provide that individual WQMP amendments are "suspended" and not "withdrawn" unless a wastewater management planning agency has submitted its WMP or WMP update to the Department in a timely fashion and, thereafter, the WQMP amendment is maintained in full force and effect, subject to changes that may be necessary after approval of the WMP, when the WMP agency does submit its WMP or WMP update to the Department. (40)

RESPONSE: The Department believes that the rule provision with regard to sewer service area withdrawal is clear. N.J.A.C. 7:15-8.1(a) provides that, where a plan is not up to date, sewer service areas will be withdrawn except where sewers are already physically constructed. This provision does not negate other provisions of adopted WQM plans, such as approved planning flows at wastewater treatment facilities, required effluent limitations, or requirements as a result of an adopted TMDL. A "fully compliant" amendment would only be subject to this provision of the rule if it was adopted more than 6 years prior to the effective date of the rule. An amendment that was adopted more than 6 years prior to the effective date of the rule but for which the anticipated development has not occurred presents the same issues as does an out of date WMP, with respect to decision making relative to water resource protection. If an area that was designated for sewer service has this designation withdrawn, but is found to be consistent with provision of sewer service in accordance with the rule once an up to date plan is prepared and approved, this designation can be restored. However, should the updated information demonstrate that changes have occurred since the prior out of date WMP was filed which result

in a situation where development anticipated by the out of date WMP is no longer supported, it would be inappropriate to consider re-instituting the out of date WMP. Therefore, it would be inappropriate to confer the status suggested in the comment by automatically deeming amendments "suspended" rather than "withdrawn."

1172. COMMENT: The proposed regulations would revoke service area if the timeframe for submitting the plan is not met. It would then allow construction of septic systems. This in essence rewards development and allows development without a wastewater management plan. There should be no reward of this type. (87)

RESPONSE: Where sewer service is withdrawn, there needs to be a default means for development to proceed without sewer service. The level of development that may occur is not unlimited. Instead, the area subject to the withdrawal becomes designated as discharge to ground water of 2,000 gpd or less. Allowing development to proceed using septic systems is not a reward, it is a responsible alternative response for wastewater management. Only a development of five or fewer units would not be subject to review under the WQMP rule. Development on septic systems of 23 or less units on less than 100 acres are an eligible revision category and can proceed if requirements at N.J.A.C. 7:15-3.5(b)4vi are met.

1173. COMMENT: Sewer service area delineations in outdated WMPs should be withdrawn but this withdrawal will disproportionately affect the State's rural areas, where counties and municipalities may not have the resources to complete the WMP. Where WMP responsibility falls to a municipality that is unable to meet the rule requirements, the withdrawal of the sewer

service areas per N.J.A.C. 7:15-8.1 will revert these areas to wastewater treatment by individual subsurface sewage disposal systems that the existing zoning may not support, thus, opening these communities to legal actions by landowners and developers and causing poor planning decisions and sprawl. Moreover, without any entity pursuing a WMP update, the zoning densities prescribed in N.J.A.C. 7:15-5.25(e) will not be put into effect, thus negating the intent of the rule to attain sustainable nitrate dilution levels. (77)

RESPONSE: As provided at N.J.A.C. 7:15-5.13, where a county does not proceed with development of a WMP, individual municipalities may request WMP authority and submit a WMP. The Department is prepared to offer assistance to municipalities, upon request, in completing key components of a WMP, such as sewer service area delineation, environmental build-out, and has made available example ordinances with respect to riparian zones and steep slopes that meet the requirements at N.J.A.C. 7:15-5.25(g). The Department believes that the support that has been and will be made available for development of satisfactory WMPs will allow for full compliance with the rule.

1174. COMMENT: The withdrawal of wastewater service area designations at N.J.A.C. 7:15-8.1(a) is an excessive penalty that does not achieve the goal of implementing wastewater management planning that uses an updated WMP as the basis for decision making. The Department should reconsider this proposed action and identify alternatives where wastewater planning agencies do not comply with the required adoption and maintenance of a wastewater management plan. (18, 42, 43,45, 61)

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RESPONSE: The previous rule provided no consequence for failure to maintain an up to date WMP. There was no reason for a WMP agency to submit or update a WMP if they were satisfied with the status quo. Withdrawal of sewer service area is an appropriate consequence for failure to act. This is because sewer service areas that were delineated not in accordance with the new rule are flawed in that they include areas that are not suitable for development at densities requiring sewer service and may have the potential to generate significantly more wastewater than can be accommodated by the receiving waters or for which sustainable water supply is available. The Department is working proactively with counties to develop satisfactory WMPs within the required timeframe as it is the purpose of the rule to provide a sound basis for water resource decision making, not to force a lapse of sewer service areas.

1175. COMMENT: The Department needs to provide assistance to ensure that WMPs are up to date prior to the onset of the withdrawal provision at N.J.A.C. 7:15-8.1(a). If not, the result will not necessarily be additional resource protection, but rather additional sprawl. (77)

RESPONSE: The Department has been working with counties to prepare satisfactory WMPs since the rule was proposed. In addition, tools have been developed to enable expeditious completion of sewer service areas and environmental build-out components of WMPs. Refer to Response to Comments 42 through 50, 537 through 547, and 664 through 681 for additional detail on the assistance provided.

Contractual Flows

1176. COMMENT: At N.J.A.C. 7:15-5.8, there is mention of contractual flows, but what is not addressed in this rule is the status of private contractual allocations between a town and a specific private entity like a developer. This issue must be addressed in the planning rules as part of the planning process because there have been private contracts struck between wastewater entities and developers and money has changed hands. Those contracts have no status under the rules and are not recognized in the plan, so are they void? Previously, developers complained about the economic impacts of losing the contractual relationships they had entered into with respect to wastewater flows. What needs to be addressed are the relationships between private contracts that allocate flows to private entities and government entities or between two private entities including how these relationships are factored into a larger plan and how they are approved. Such contracts should not have any standing, but the rule should address whether or not the Department incurs a legal burden by withdrawing sewer service areas or withdrawing flow in any way. By impairing contracts, affecting ratepayer concerns or allegedly impairing debt repayment on bonds that allegedly project cash flows based off of wastewater flows that have yet to be realized, what is the Department's legal situation? These issues were raised on the October 2005 proposal. The Department should go back and look at the financial arguments that were made by the regulated community with respect to how withdrawal of previously approved sewer service areas would impact economic and the contractual financing structure to address this issue. (86)

1177. COMMENT: In preparing Basis and Background Documents for future revisions of the WQMP rules, the Department must address what may be exaggerated and/or inaccurate comments regarding adverse economic, contractual, ratepayer, local property tax, and financing

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impacts made during the public hearings regarding the proposed amendments noticed at 37 N.J.R. 4069(b) and 37 N.J.R. 4071(a).

Claims were made that bond financings and bondholders would be adversely impacted. However, bond financing and bondholders will not be adversely impacted because security and revenue streams to back any bonds sold to finance wastewater infrastructure are legally guaranteed and bondholders are legally insulated from any changes to the Department's WQMP regulations.

The Local Finance Board has jurisdiction over and certifies local government and authority budgets and is statutorily mandated to require that sufficient revenues are collected to fund debt service. If the local revenues are insufficient to meet debt obligations, under statute, that debt service becomes an obligation of and is legally guaranteed by the taxpayers of the State of New Jersey. This statutory framework legally protects bondholders and these risks were disclosed in the Official Statements on the Bonds.

The Department should secure written legal opinions from private Bond Counsel, the Local Finance Board, the Attorney General, the New Jersey Environmental Infrastructure Trust Bond Counsel, and the Treasurer regarding applicable revenue guarantees, regulatory risk, *force majeur,* and any risk to bondholders from WQMP rule change. (86)

1178. COMMENT: Claims were made during the public hearings regarding the proposed amendments noticed at 37 N.J.R. 4069(b) and 37 N.J.R. 4071(a) that contractual obligations

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would be harmed, particularly capacity reservation agreements, advance connections fees and associated existing and anticipated contractual revenues. The Water Quality Planning Act, WQMP planning rules, and WQMPs trump any inconsistent contractual commitments. These contracts that are entered into that are inconsistent with WQMPs and regulations are entered into "at risk" and are not legally enforceable in the event of conflict with Department rules or WQMPs. These contracts allocate regulatory risk.

The Department should secure a formal Attorney General's Opinion that addresses the legal relationships between contracts and applicable statute, regulations, and plans. (86)

1179. COMMENT: Claims were made during the public hearings regarding the proposed amendments noticed at 37 N.J.R. 4069(b) and 37 N.J.R. 4071(a) that current ratepayers would be harmed because current rates were set in anticipation of receipt of future revenues for unused treatment capacity and full utilization of planned future wastewater flows. Some alleged that contract and capacity reservation agreements provided revenues that subsidized current rates. Current wastewater rates and user charges are legally governed by, among other things, the Clean Water Act, federal funding agreements, and the franchise and rate-setting powers of the Board of Public Utilities. Current rates must reflect current costs and current wastewater flows, not anticipated costs and flows. There are also issues associated with fair and equal treatment of all users and franchises, accurate allocation of costs to users based on actual use, and use of federal funds. Alleged current rate subsidies by upfront or annual capacity reservation contract revenues may be inconsistent with those requirements.

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The Department should seek written binding guidance from USEPA and Board of Public Utilities in response to claims made regarding adverse impact on current wastewater treatment rates and user charges that address issues of current rates, how they are set, how they would be impacted by future unused NJPDES permitted treatment capacity, rescission of previously approved sewer service areas and planned wastewater flows, and revenues associated with contracts, such as capacity reservation contract revenues. (86)

1180. COMMENT: The proposed rules recognize the existence of Service Agreements between communities and regional treatment plant authorities. However, these same rules would reduce the amount of new users that may be connected to the sanitary sewerage systems and treatment facilities, therefore, the design capacity of these facilities may never be realized. Those communities which, through Service Agreements, own (and have paid for) that unused capacity will be unable to use that capacity. At a workshop, the Department used a new term for this situation called “Stranded Asset.” It must be recognized that each municipal sanitary sewerage system has been implemented through appropriate bond ordinances (recognizing grants, loans and local debt). These municipal projects were completed based upon the rules, regulations and representatives of State and Federal governments at that time. Regional authorities developed their Water Pollution Control Facilities on the same principals and representations. The proposed rule amendments do not address the investments (Stranded Assets) identified above. How are municipal sewerage systems and regional treatment plants going to pay for or be compensated for the unused system capacities? Before this rule is effective, a fund must be established to properly compensate those parties for the unused capacities which are being taken away from them. (15, 21, 67)

1181. COMMENT: While acknowledging the need to provide penalties in the event of lack of compliance with the rules, withdrawing sewer service areas, except where collection systems exist, in instances where either a county or municipality fails to comply with the rules, should not be done. Where regional authorities have been established and bonded for construction of collection and/or treatment facilities to meet the provisions of the Clean Water Act existing sewer service areas must remain in effect. Withdrawal of the sewer service area could have severe financial impacts. The Department should explore other means to assure compliance. (31)

1182. COMMENT: The impact of the proposed rules on the contracts that utilities authorities have with their customer municipalities and the covenants that utility authorities have with their bondholders must be emphasized. Designating a county board of chosen freeholders as responsible for the development of a WMP that includes utilities authorities wastewater treatment plants and its' service area abridges the covenants utilities authorities have with their bond holders and may potentially affect the customer base and revenue. Any policy or procedure that reduces existing flow or reduces an existing service area for an existing authority may cause an increase in rates charged by the existing authority in order that the existing authority maintain or increase its revenues, as necessary, in order to provide for existing or planned debt service expenditures. (38)

1183. COMMENT: The development and redevelopment lost to the rescission of sewer service areas will negatively affect property values, property taxes and the future rate base of any sewer

authority serving the affected areas. This is directly at odds with proper planning, and the investment of public tax dollars by sewer authorities in bonds. The rescission of sewer service areas must address and respect proper planning and the investment of public tax dollars by sewer authorities through bonds, especially for sewer capacity that has already been allocated for approved or planned projects. (54)

1184. COMMENT: Wastewater authorities are required to update WMPs every six years. The county now prepares the WMP as part of the Water Quality Management Plan. If the county does not update the wastewater management portion in a timely manner, then the ratepayers of local authorities will be punished through a withdrawal of the wastewater service area. Is there any recourse for a company affected by the aforementioned situation? (6, 7)

1185. COMMENT: The party being punished for not updating the WQMP plan in the proposed rule is not the party who fails to act. How does this bring about a change in the behavior of the party who is not performing? The counties will now prepare and update the WMPs every six years part of the Water Quality Plan. If the county does not update the wastewater management portion in a timely manner, the ratepayers of local authorities will be punished through a withdrawal of the wastewater service area. (18, 32)

RESPONSE TO COMMENTS 1176 THROUGH 1185: The comments assume there will be a loss of sewer service and/or a reduction in available capacity with respect to a wastewater treatment facility that has a contractual arrangement reserving some of its unused capacity. There is no way to know to what extent, if at all, this will be a valid premise following adoption

of this rule. A contractual arrangement between a wastewater treatment entity and a developer would, by its nature, be speculative in that, until development approvals have been obtained, there is no assurance that the development for which a speculative developer had reserved capacity could in fact receive necessary approvals and be built, with or without this rule. This uncertainty and the options in the event connection cannot be realized would no doubt be reflected in such contracts.

Regarding reliance on cash stream from as yet unrealized future development to pay debt service and other expenses, an entity responsible for wastewater treatment needs to provide appropriate assurance to its financial institution, as well as the Local Public Finance Board, that it has the revenue generating ability to ensure repayments. Factoring in anticipated future connections will always carry uncertainty and must be backed with the ability to offset any unrealized future revenue with rate adjustments levied on existing users. It would be risky indeed for an entity responsible for a wastewater treatment facility to place any significant reliance on a future cash stream that is uncertain.

It is important to recognize that, if a sewer service area is reduced, it does not necessarily translate into a decrease in the ability to generate additional wastewater in the sewer service area that remains. The sewer service areas that have been delineated for a given wastewater treatment facility have the potential, based on zoning, to generate substantially more wastewater than a facility is designed to handle. It is this disconnect that has led to sprawl and situations in which an expansion of a facility is needed as the wastewater generated by the sewer service area exceeds the treatment capacity and the receiving water is not able to assimilate the additional

wastewater. The rule provisions at N.J.A.C. 7:15-5.25(d) require that areas delineated for sewer service be assessed to ensure that the build-out scenario will not generate more wastewater than can be accommodated within the existing wastewater treatment capacity, or an increased capacity that has been shown to be consistent with antidegradation requirements at N.J.A.C. 7:9B-1.5. Should a reduction in wastewater generation occur as the result of wastewater management plan development, it may be appropriate to make unused capacity available to areas that are appropriate for development or redevelopment, consistent with Smart Growth principles, which would be a further opportunity to avoid any potential impact to ratepayers.

Further, the economic impact of redelineation of sewer service area, if it occurs, is equally uncertain. A commenter suggests that currently unused capacity that has already been built is a stranded asset; it is, more accurately, a sunk capital cost for which funds were borrowed and repayment arrangements made. Costs for wastewater treatment are roughly divided between debt service for capital construction and operation and maintenance costs. While there may be economies of scale, costs for operation and maintenance are typically a function of the number of existing users, such that, while the operation and maintenance costs increase with the number of users, the fees keep pace with those increases. To build a treatment facility, it is generally necessary to borrow. To bond for new construction, the responsible entity must provide assurances regarding its revenue generating capability and will make repayment arrangements with the lender wherein the repayment period and schedule of payments can vary. Assumptions will need to be made about the user base over which the debt service can be spread, which will form the basis for the debt service portion of the user fee. It is not possible for the Department to know which entities may have set up repayment schedules that set user rates assuming a steady

stream of new users and connection fees, or whether they would actually lose potential user base as the result of sewer service area changes. However, as assumptions about the location and rate of connection of future users is speculative and may not be realized for a host of reasons, the treatment entity would need to be prepared to make up the unrealized revenue through rate adjustments. It is not known how significant an effect on the overall user fee a debt service redistribution could be or where it might occur. The Department does not believe it is necessary to secure a formal Attorney General's Opinion or other formal opinion on this issue.

1186. COMMENT: The impact of this proposed rule could also prevent fair competition, as in the case of solid waste transfer stations where the bonds are paid from tipping fees. (54)

RESPONSE: The Department assumes the commenter is referring to the designation of a selected wastewater management alternative for each area. This requirement has existed in the rules prior to the current rule and it is has not affected fair competition, to the extent such a concept applies to provision of infrastructure.

N.J.A.C. 7:15-8.1(b)

1187. COMMENT: No matter which option the Department adopts, it must address the application of these regulations to a sewer moratorium. A developer who has obtained all subdivision or site plan approvals and was barred from obtaining a TWA only because of a sewer moratorium, should be entitled to rely upon those approvals and be deemed as compliant and/or exempt from the new regulations for a fixed period of time, such as two years from the date the moratorium is lifted. Any such development will be included as part of the municipality's

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submission for development projects and future development under the existing zoning. The developer should not be penalized or made subject to more restrictive regulations because it was delayed by a moratorium which it was not responsible for and which was beyond its ability to correct. (18, 42, 43, 45, 61)

RESPONSE: A development concept that depends on connection to infrastructure that is not available is speculative at best and does not warrant the protections suggested by the commenter. However, if the WMP is submitted in a timely manner and reflects a particular development as part of the plan, demonstrating that wastewater capacity exists and that the development can occur without unacceptable impacts to water resources, the development would be able to proceed to TWA permitting once the moratorium is lifted.

1188. COMMENT: The rules should clearly state that if a project is in an area appropriate for growth, does not have any environmental constraints, currently meets zoning and is within sewer service area, the sewer service cannot be rescinded. (54)

RESPONSE: A project that meets the criteria described by the commenter may continue to qualify for sewer service under several scenarios that recognize reliance on prior approvals or infill situations, such as those set forth at N.J.A.C. 7:15-8.1(b). Further, an area devoid of environmentally sensitive areas may continue to be designated for sewer service when the applicable WMP is updated, if the other standards at N.J.A.C. 7:15-5.25 are met. However, the rule requirements have been set forth to ensure that objectives of the WQPA are met and a

blanket statement that any project that meets the described circumstances will not be potentially subject to a sewer service area withdrawal would be inappropriate.

1189. COMMENT: N.J.A.C. 7:15-8.1(b) identifies four exceptions to the proposed revocation of sewer service, through which the Department recognizes private investment. N.J.A.C. 7:15-8.1(b)1 provides for an exception for infill development where "sanitary sewer infrastructure lawfully exists." The Department states the exception is proposed to recognize public investment in infrastructure. Reference is made to instances where service is down the street and abutting the line. This subsection also states that "the sewer line, lots, and improvements on the lots must exist on the date that wastewater service area was withdrawn." This sentence should be deleted as it is confusing, unnecessarily restrictive, and inconsistent with the exception. Property owners should be able to build on vacant lots where the sewer infrastructure is in place. (18, 42, 43, 45, 61)

RESPONSE: The "improvements" referred to at N.J.A.C. 7:15-8.1(b)1 are those on the adjacent properties in order to qualify a lot as infill, not the improvements on the infill lots themselves, see definition of "infill." The rules provide not only for potential withdrawal if the WMP is not submitted within nine months of the effective date of the rule amendments, but also going forward if updates are not done. Accordingly, removal of the language quoted by the commenter would create confusion as to how the rule would apply if the withdrawal was due to a WMP update not in compliance with the schedule beyond 2014.

1190. COMMENT: The proposed development threshold for reviewing septics is a significant step forward. However, the language on grandfathering at N.J.A.C. 7:15-8.1(b)1 through 3 is too generous and constitutes a large loophole that will not protect enough environmentally sensitive areas. It allows for too much potential infill without looking at the environmental concerns. The rule grandfathers both projects that have local approval without looking to see what effect those approvals may have on water quality or threatened and endangered species and WQMP amendments or revisions that happened just prior to the adoption of the new rules. (65, 79)

RESPONSE: The rule limits infill development to where sewer infrastructure already exists when the rule is adopted between existing improved lots and then further only allows connections of 2,000 gallons per day or less within the infill area. The Department does not believe allowing this very limited amount of infill development in areas that are already developed is going to have a significant environmental impact. While there are differences between the EO 109 (2000) analyses and the standards that are required as a result of these amendments, grandfathered projects are reviewed to assure that environmental impacts are minimized.

Nevertheless, it is necessary to establish a bright line test so that the Department and the regulated community know which set of rules apply to their application. Further, it is appropriate under the reliance paradigm to allow projects that have reached an advanced stage in the approval process to be allowed to rely on the regulatory scheme in place at the time significant investments were made in planning. The Department believes that the grandfathering provisions and the infill allowance strike the appropriate balance between the need to apply the

more protective standards contained in this rule and the need to take a fair and reasonable regulatory approach.

1191. COMMENT: N.J.A.C. 7:15-8.1(b)2 states that a project will not have its service area withdrawn if it has "both preliminary or final site plan subdivision approval" etc. Does this mean the project needs both preliminary and final approval or one or the other? The wording needs to be clear. (14)

RESPONSE: N.J.A.C. 7:15-8.1(b)2 provides that wastewater service area designations are not withdrawn under N.J.A.C. 7:15-8.1(a), except as provided in N.J.A.C. 7:15-8.1(d), for projects that have received, prior to the effective date of the wastewater service area withdrawal, both a local preliminary or final site plan approval or subdivision approval where subsequent site plan approval is not required under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., or a municipal construction permit; *and* a Department TWA or NJPDES permit, if one is required, until such time as one of those qualifying approvals expires. Therefore, while only one of the local approvals is necessary to meet that part of the test, the requirement under this provision is to have any of the listed qualifying local approvals and a Department permit, if required.

1192. COMMENT: N.J.A.C. 7:15-8.1(b)2 which ignores the "time-of-rule" is objectionable. (22, 76)

RESPONSE: The Department assumes the commenter is referring to the inclusion of provisions that allow projects to proceed under the rule in effect prior to the effective date of this rule. As

discussed in Response to Comment 1190, it is necessary in a regulatory environment to allow for reliance where projects involving large monetary investments are affected.

1193. COMMENT: There is a concern that the retention of sewer service areas in certain circumstances delineated under N.J.A.C. 7:15-8.1(b) will result in the inefficient use of the land in terms of sprawl resulting in a checkerboard pattern of sewer service and septic areas. This type of development would not be consistent with the State Plan policy of developing in compact form, and would ultimately encourage sprawl as infill development occurs. (77)

RESPONSE: The Department shares the concern about continuation of sprawl type development. However, the exceptions to sewer service area withdrawal set forth at N.J.A.C. 7:15-8.1(b) allow applicants who have reached a significant threshold in the permitting and approval process to continue to rely on those permits and/or approvals until they expire, or allow projects that have limited potential for environmental impact to proceed.

1194. COMMENT: The grandfathering provisions of the rule proposal are not clear. What would be a proposal's status to gain an exemption under the grandfather clause for projects in the pipeline? If a proposal is outside a wastewater service area, whether or not the wastewater management plan is up to date, but has approvals, will that create a grandfather situation when these rules become effective? What is the exact effective date and what would be grandfathered under the status of a preliminary subdivision approval or such? (25)

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1195. COMMENT: The grandfather provision needs to be clarified so that the proposed development application is exempt from termination of its sewer service as long as it has preliminary local approval or has received a Treatment Works Approval. It should also be clarified that grandfathered projects are automatically deemed to be consistent with WQMPs. (54)

RESPONSE TO COMMENTS 1194 AND 1195: In order to qualify for the exception at N.J.A.C. 7:15-8.1(b)2, a project must possess both local approval and a TWA permit, as this will ensure that the proposed development was consistent with the then applicable WQM plan. The cumulative impact of allowing an exception simply because local approval has been obtained and further, deeming such projects consistent, would jeopardize the ability to meet the objectives of the WQPA. The Department assumes the question on status of a project outside a wastewater service area is referring to a project outside a sewer service area, as all areas are in some type of wastewater service area. A project in a wastewater service area of 2,000 gpd or less can proceed as provided at N.J.A.C. 7:15-8.2(c), whether or not the plan is up to date, or may receive qualify for approval under one of the revision categories at N.J.A.C. 7:15-3.5 that do not require the plan to be up to date.

1196. COMMENT: As currently proposed, these rules would cause onsite private sewage treatment plants to lose their sewer service in cases where no site plan approval was obtained if counties do not update their WQMPs. (54)

RESPONSE: It is assumed that the commenter is referring to a contracted sewer facility intended to serve a specific development. It is unlikely that such a project would proceed without the associated development having approval as well. If the contracted sewer facility is built, it would fall into the category of "sewers in the ground" and would not be withdrawn if a plan is not up to date.

1197. COMMENT: N.J.A.C. 7:15-8.1(b)2 provides an exception for projects that have received prior to the withdrawal date both a local preliminary or final site plan approval or subdivision approval, where a subsequent site plan approval is not required or a municipal construction permit and Department TWA or NJPDES permit. The provision further qualifies this exemption by limiting its effect "until such time as one of those qualifying approvals expires." Thus, if any one of the qualifying approvals is allowed to expire prior to the initiation of construction, then this exemption would no longer be applicable.

The Department explains the basis for granting these limited exemptions to revocation of sewer service: "The rationale for this proposed exception is again based on a demonstrated significant investment in project design and engineering in reliance on the ability to connect to a centralized sewer system." If the principle underlying the exemptions is that substantial monies have already been expended to obtain these approvals, then it does not comport with the proposed rule's limitation that the exemption no longer applies when only one of several approvals expire.

Further, the limited life of a permit (five years) is no longer a sufficient time period to be protected. The Department should remove the limitation placed on the exemption by deleting the phrase "until such time as one of those qualifying approvals expires." (18, 42, 43, 45, 61)

RESPONSE: The exceptions at N.J.A.C. 7:15-8.1(b)2 are intended for bona fide projects that are actively moving forward, not to provide indefinite insulation from new rule provisions. It is for this reasons that permits have an expiration. Therefore, upon expiration of a qualifying permit, it is appropriate that the exemption expire.

1198. COMMENT: At N.J.A.C. 7:15-8.1(b)3 site specific WQM plan amendments should only be considered under very narrow conditions. (22, 76)

RESPONSE: The Department believes that any revision or amendment adopted since EO 109 (2000) should be afforded the same consideration under this exception. Projects reviewed and approved since EO 109 (2000) are subject to many of the same standards as provided at N.J.A.C. 7:15-5.25 and should be entitled to rely on the approval for six years, which is the same period provided between WMP updates.

1199. COMMENT: N.J.A.C. 7:15-8.1(b)3 provides an exception for projects that have received a site specific WQM plan amendment or revision adopted prior to the effective date of these rules *for a period of six years from the date of adoption of the amendment or revision.* The basis document explains that the Department is providing "a limited but reasonable period of protection" (i.e. six years) as "WMP updates are to be prepared and submitted to the Department

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every six years." The proposed timeframe of six years for WMP updates is inadequate and should be extended to ten years. Thus, this provision should also be amended to provide for a "protection period" of ten years. (18, 42, 43, 45, 61)

RESPONSE: The Department believes that the 6-year time frame for plan updates, which was based on the MLUL requirement for master plan updates, reflects an appropriate amount of time to rely on the information contained within a WMP. The same, therefore, would be true for amendments that have not proceeded to implementation within six years from the date of amendment adoption.

N.J.A.C. 7:15-8.1(c)

1200. COMMENT: Revisions to the Water Quality Management Planning rules should lower the threshold for planning and NJPDES permit review of septics and require that all WQMPs include a septic service area component. (86)

RESPONSE: In setting a threshold for review, the Department was guided by the flow threshold for requiring a NJPDES permit, which is flow generation greater than 2,000 gpd. Wherever sewer service is not an allowed wastewater management alternative, septic system service areas are the default and are expected to occur in each WQM plan.

1201. COMMENT: The 6-acre requirement for septic systems is applauded. (49)

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1202. COMMENT: A positive of this rule proposal is that there are 16 acre requirements for septic systems down from 48 or 50. (59)

RESPONSE TO COMMENTS 1201 AND 1202: This rule proposal did not propose a 6-acre or 16 acre requirement for septic systems, so the Department believes the commenters were supporting the six unit threshold for development on septic systems and acknowledges these comments in support of the rule.

1203. COMMENT: The proposed WQMP rule amendments that restrict large developments that rely on septic systems to manage wastewater and the inclusion of septic system areas into the Water Quality Management Planning process in alignment with the New Jersey Pollutant Discharge Elimination System threshold of 2,000 gallons per day discharge is supported. (82)

1204. COMMENT: The curbing of low-density sprawl by requiring the Department's approval for projects, including projects with septic systems, generating greater than 2,000 gallons per day of wastewater is supported. (78)

1205. COMMENT: The proposed development threshold for reviewing septics is a significant step forward. However, these features could be strengthened. (65)

1206. COMMENT: N.J.A.C. 7:15-8.1(c) is supported but why isn't a nitrate dilution study for the HUC 14 not required under this subsection? Preparing a study based on six or more dwelling units rather than on a HUC 14 or smaller drainage area could yield inaccurate results. (22, 76)

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RESPONSE TO COMMENTS 1203 THROUGH 1206: The Department acknowledges these comments in support of the rule. Extending the analysis required for a 6 or more dwelling unit project to a HUC 14 area is not appropriate. The six or more threshold is used for determining if a proposed project is consistent within the less than 2000 gallons per day wastewater service designation. A project that exceeds this threshold, where a plan is up to date, will be compared to the allocation of equivalent dwelling units already determined for the applicable HUC 11 drainage area. If the plan is not up to date, the project will be inconsistent and will not be able to proceed, unless it qualifies for a revision. If it does qualify for a revision, it is because the project scale and minimal potential for environmental impact warrants an abbreviated analysis.

1207. COMMENT: There is concern with the application of the areas re-designated as ground water general wastewater service under N.J.AC. 7:15-8.1(c). This subsection has extensive limits on the number of units that make use of these systems for residential development but has only a flow limitation for non residential uses under N.J.A.C. 7:15-8.1(c)1. This is an inconsistent application of the designation and encourages a sprawl patterned commercial development that is contrary to the State Plan policy of compact, mixed-use centered-based development. (77)

RESPONSE: The non-residential threshold is considered the equivalent of the residential threshold for the general service area less than 2,000 gpd under this section of the rule. This represents the threshold for State review of a project with respect to wastewater generation. The

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WQPA requires projects requiring a State approval must be consistent with the WQM plan.

Therefore, projects below this threshold are below the threshold for a State permit.

1208. COMMENT: There is a concern that the limitation of the number of units, regardless of ownership, under N.J.A.C. 7:15-8.1(c)2 will be too complicated to enforce and is legally questionable. This provision causes a “first in” scenario, where landowners will rush to gain development approvals for land that they may otherwise have retained for other purposes, such as agriculture, but are fearful of losing their development abilities. Others, without the foresight to gain such approvals will be left without equity in their land. In addition, the non-contiguous six-unit at a time development pattern is an inefficient use of land resulting in the checkerboard pattern of development that disrupts the integrity of natural systems and agricultural viability. (77)

RESPONSE: Establishing a threshold for development that can occur in the general service area 2000 gpd or less does not preclude development. Rather, it is a threshold for being considered consistent with that service area designation. Through development of WMPs, this as well as other wastewater management alternative designations are expected to be made, provided they are consistent with the standards at N.J.A.C. 7:15-5.25. Where a WMP is out of date, a development proposal that is inconsistent with the wastewater service area designation cannot proceed, unless it qualifies for one of the revision or amendment categories that can proceed even if a plan is not up to date. Beyond these exceptions, as discussed in Response to Comment 476, allowing unrestricted site specific amendments does not adequately consider the cumulative and secondary impacts and jeopardizes the objective to achieve sustainable use of water

resources. The wastewater service area designation does not call for 6-unit noncontiguous development pattern, but rather uses six units as a threshold for consistency review.

1209. COMMENT: Support was expressed for the requirement at N.J.A.C. 7:15-8.1(c)2 that residential development of six or more dwelling units are subject to these rules and that in calculating the number of dwelling units, previous development is to be counted. This helps to close a loophole that would allow developments to avoid compliance with these rules. (10, 80)

RESPONSE: The Department acknowledges this comment in support of this rule provision.

1210. COMMENT: N.J.A.C. 7:15-8.1(c) proposes that areas where wastewater service designations have been withdrawn would be redesignated as ground water general wastewater service area for four types of facilities. Proposed N.J.A.C. 7:15-8.1(c)3 allows for two instances where the discharge to ground water exceeds the cumulative 2,000 gpd and five dwelling units threshold. N.J.A.C. 7:15-8.1(c)3ii provides for projects that have either a local site plan approval, subdivision approval where a subsequent site plan approval is not required under the MLUL or municipal construction permit and a permit to construct or alter issued by the administrative authority under N.J.A.C. 7:19A-3.5 until such time as one of these qualifying approvals expire. If the principle underlying the exemptions is that substantial monies have already been expended to obtain these approvals, then it does not comport with the proposed rule's limitation that the exemption no longer applies when only <u>one</u> of several approvals expire. The Department should remove the limitation placed on the exemption by deleting the phrase "until such time as one of those qualifying approvals expires." (18, 42, 43, 45, 61)

RESPONSE: The Department believes that in order to qualify for the exception at N.J.A.C. 7:15-8.1(b)2, a project must possess both local approval and a TWA permit, as this will ensure that the proposed development was consistent with the then applicable WQM plan. If a project with approvals does not proceed to implementation within the effective time frame of required permits and approvals it is appropriate to reevaluate the project in light of changed circumstances. The cumulative impact of allowing projects to proceed indefinitely would jeopardize the ability to meet the objectives of the WQPA.

N.J.A.C. 7:15-8.1(d)

1211. COMMENT: There is a concern that the re-designation of public schools sites under N.J.A.C. 7:15-8.1(d) may result in a sewer service island, surrounded by low-density septic service areas. Schools should be sited within or adjacent to residential populations to encourage walking, thus reducing vehicular trips. (77)

RESPONSE: The rule at N.J.A.C. 7:15-8.1(d) simply provides that a school which has reached the specified threshold in the approval process may continue to rely on inclusion in a sewer service area, if applicable. If surrounding areas were within a sewer service area that is withdrawn in accordance with N.J.A.C. 7:15-8.1(a), re-designation as sewer service area can occur, if doing so is in accordance with the rule at N.J.A.C. 7:15-5.24.

Economic Impact Statement

1212. COMMENT: The economic argument of the property tax implications needs to be looked at because studies tend to suggest that residential development in particular is an engine of property tax increase and it is driving the increase of the property tax. Anything done to dampen residential growth stabilizes the growth of property taxes. This should be looked at with data analysis to find out what the projected impact on the property tax might be. This would be a winning argument in support of this rule to counteract the development communities' position that environmental restrictions are causing the increases in housing costs. (86)

1213. COMMENT: Some claimed during the public hearings regarding the proposed amendments noticed at 37 N.J.R. 4069(b) and 37 N.J.R. 4071(a) that local property taxpayers would be adversely affected, but the link between local property taxes, the WQMP rules and the proposed amendments was not demonstrated. The Department should seek to demonstrate these types of relationships because New Jersey specific research has shown that the municipal service and educational costs of new residential development and some forms of commercial development exceed property tax revenues from this development. Local property taxpayers could benefit because any new development restrictions associated with the WQMP rules could serve to reduce or contain the rate of growth in local property taxes. (86)

RESPONSE TO COMMENTS 1212 AND 1213: The goal of this rule is to protect water quality within the State of New Jersey. To do so, the Department must assure that only development that is sustainable from a wastewater, water supply and environmental impact standpoint occurs. It is left to municipalities in the exercise of their land use planning authority to allocate that sustainable level of development in terms of types and locations of development, provided the

development is consistent with the standards contained in this chapter. The Department understands that residential development may entail greater cost to a municipality than the revenue generated, but defers to a municipality to determine if other factors override this economic consideration. As the commenter suggests there maybe a positive impact to property taxes as a result of this rule.

1214. COMMENT: An economic impact analysis regarding implementation of the State Development and Redevelopment Plan (Burchell, et al) was conducted, demonstrating several billion dollar net benefits and cost avoidance associated with SDRP planned land use and more efficient infrastructure policies. The Department should adapt aspects of this analysis to the re-adoption of WQMP rules and wastewater infrastructure planning. (86)

RESPONSE: This rule is consistent with the goals of the State Development and Redevelopment Plan (SDRP) as noted in the summary and the Smart Growth Impact statement and it is consequently bolstered by any research that supports the SDRP. The Department will consider the noted research when drafting future amendments.

1215. COMMENT: The growth of New Jersey's economy is inextricably tied to the ability of the private sector to invest in our State and is dependent upon the ability of companies to expand or move to our State. There is concern that a very restrictive land use policy through severe restrictions on water and wastewater use could have a negative affect on future investment. Furthermore, those companies that call New Jersey home need to have the assurance that

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expansions will still be allowed, or they may look to move their operations elsewhere.

Uncertainty can be a deterrent to new investment.

The potential inability of the State to effectively implement ambitious regulatory changes, such as those in this proposal, will be at the expense of the private sector, which is looking to invest in New Jersey. If the goal of the Department is to balance environmental protection with economic growth, it appears that under this proposal, the latter is still in question. The Department should take all necessary steps to ensure that these problems will be addressed prior to the final adoption of this rule proposal. (6, 7)

RESPONSE: The Department firmly believes that the protection of New Jersey's natural resources is in the best interest of all its citizens and that such protection and economic growth are not mutually exclusive. The Department further believes that the rule will result in reduced uncertainty for the private sector in that it will result in the delineation of definitive sewer service areas Statewide and requires the wastewater generation potential of sewer service areas to align with wastewater treatment capacity. Therefore, the rule ensures that these areas are both appropriate for development and that there is adequate capacity available to serve those areas. In addition, the removal of environmentally sensitive areas from the sewer service area will focus development in areas that are likely to be outside of the jurisdiction of the land use regulations that govern those environmentally sensitive areas, thereby hastening development. As such, these rules will inform and encourage investment and will result in sustainable economic growth within the State that is consistent with planning at all levels of government.

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1216. COMMENT: The proposals economic impact statement is inadequate and unrealistic. The proposed regulations are likely to result in very substantial costs to local government and serious adverse economic impacts in significant areas of the state. (18)

RESPONSE: The Department believes that significant economies, efficiencies, and savings will be realized by both public and private development projects if land use planning, at all levels of government, becomes consistent through integrated planning. As noted in the summary, sound comprehensive water quality and land use planning can dampen sprawl development, which can be costly to local governments. Studies of the economic impact of continued sprawl development compared to more center based development make clear that the cost of providing municipal services to sprawl development is significantly greater (see studies noted in the summary conducted by the Center for Urban Policy Research at Rutgers University in 1992 and 2000). Furthermore, because the Department is providing the data and GIS method for analysis necessary to update wastewater management plans, the burden to local governments to fulfill their planning obligations will be minimized. Finally, knowledge that local planning based upon zoning that is aligned with State-wide environmental standards will also provide the company interested in developing or expanding in the State some level of confidence that expensive redesign of projects that meet local standards but cannot meet State standards because the local planning did not take into account wastewater and water supply capacity needs will not occur.

1217. COMMENT: The proposed rules are contrary to Governor Corzine’s goals for economic development, since freezing sewer capacity at current levels will stifle future economic growth. Under the proposed rules, economic development will be penalized when counties and towns fail

to update their wastewater management plans. This proposal will only compound the lack of predictability that is already chilling redevelopment investment in New Jersey.

The proposed rules are replete with unfair, inequitable and unreasonable procedures and requirements that are contrary to good government, and unnecessarily increase the cost of compliance without any accompanying benefits to the environment or the public. These rules merely increase the cost of doing business in New Jersey. (54)

RESPONSE: The Department firmly believes that the protection of New Jersey's natural resources is in the best interest of all its citizens and that such protection and economic growth are not mutually exclusive. The Department does not agree that that counties and municipalities will fail to update their plans simply to frustrate economic development, as such actions would be detrimental to the sustenance of their communities. Furthermore, redevelopment typically occurs in areas that are already served by sewers. Therefore it is very unlikely that this rule will have any effect on such efforts at all. The Department further believes that the rule will result in reduced uncertainty for the development community in that implementation of the adopted amendments will result in the delineation of definitive sewer service areas Statewide and requires the wastewater generation potential of sewer service areas to align with wastewater treatment capacity. Therefore, the rule ensures that these areas are both appropriate for development and that there is adequate capacity available to serve those areas. In addition, the removal of environmentally sensitive areas from the sewer service area will serve to focus development in areas where it is likely to be outside of the jurisdiction of the Department's land use regulations, hastening development in these areas.

Contrary to the assertions made in the comment, the Department has no interest in increasing costs for the development community but believes that this rule will increase predictability within the sewer service area and will align planning at the local and State level to the benefit of the regulated public, while improving water quality and assuring sustainable use of the water resources in the State.

1218. COMMENT: The proposed WQMP rules in conjunction with other proposed Department regulations will have a far reaching impact on municipalities and private property-owners. The proposed rules will cause significant, negative economic impacts that will result from the loss of development potential due to the fact that certain areas, especially those that are not part of designated centers or are located along Category One waters, will not be able to receive the required sewer allocation.

The proposed rules do not clearly outline exemptions for specific land use activities, nor do they accommodate for the type of development that is consistent with center orientated growth advocated by the State Plan. The lack of specific provisions to accommodate for proposed centers jeopardizes the economic future of some municipalities. The economic impact that will occur as a result of the adoption of these rules are not only a issue because of potential loss in tax revenue, but also because of the potential loss of future jobs and investment dollars.

The loss of the development potential for a proposed Village Center would significantly impact the amount of anticipated municipal tax revenues that would be generated by such a project. A

development project such as a Village Center would help to ensure a relatively stable tax rate for a municipality. Additional housing units would generate additional tax revenue. Maintaining a stable tax rate does not only benefit private property owners but it also attracts additional industrial and commercial development that will generate jobs. At the county level, a proposed Village Center along with additional residential units and potential tax revenues could benefit a county and the local and regional school districts. The economic impact of the proposed rules would even be felt at the State level. If a municipality adopted a local hotel tax ordinance on a hotel in a Village Center, the State would receive additional hotel tax revenue as well as the municipality. This potential revenue would be a valuable resource for promoting tourism and economic development. (74)

RESPONSE: The Department disagrees that the delineation of sewer service area in those areas appropriate for growth because they are unhindered by environmental constraints and in those areas with water and wastewater capacity will result in the loss of development potential. While there may be a negative impact because the density of development will change, environmentally sensitive areas and those areas without adequate capacity were already limited in development potential by virtue of those very constraints. By delineating sewer service area to avoid these constrained areas, this rule provides increased transparency and certainty to those looking to develop.

With respect to exemptions, the commenter is reminded that this rule is not a land use rule and does not govern development on a site-by-site basis. Rather, this rule establishes a planning process that is consistent with Department land use rules. Therefore, it is inappropriate to

address regulatory relief for individual sites within this rule. Such relief, for example for projects located within 300 feet of a Category One water, is provided for in the Department rules that establish the 300 foot buffer, the Flood Hazard Area Control Act rule, N.J.A.C. 7:13, and the Stormwater Management rules, N.J.A.C. 7:8.

This rule allows extension of sewer service into environmentally sensitive areas that would not otherwise be allowed through the State Plan Endorsement process in accordance with N.J.A.C. 7:15-5.24(h). That process is the mechanism for the Department to recognize center-based development where appropriate.

The Department does not believe that the generation of a stable municipal tax revenue or the development of a village center, where appropriate, is precluded by this rule.

1219. COMMENT: The proposal's social, economic and jobs statements sometimes allude to potentially "profound" negative impacts, but dismiss them as if there are no alternatives, but there are alternatives. There is insufficient time to detail the manifold shortcomings of the impact statements, so only the following observation was provided.

The Department's estimates of the development potential within sewer service areas (subsequent to adoption of the proposal) are not merely marginally wrong, but fundamentally erroneous. First, they rely on outdated mapping (1995 aerial photography). Second, they ignore the several other Department proposals such as: Flood Hazard; Coastal Zone; Site Remediation; Surface Water Quality and Ground Water Quality Standards; which will severely reduce development

potential statewide, including in areas where sewage collection systems have already been installed. This list does not even include pending proposals that will raise higher the Department's barriers to workforce housing through species protection via the landscape mapping and revisions to the Freshwater Wetlands program.

The proposal is, to put it mildly, disingenuous when it contends that this rule adoption with amendments "will not thwart future economic growth, but rather will guide that growth into appropriate areas." Reading this proposal *in pari materia*, the message is clear: in the Department's eyes there are no appropriate areas for growth in New Jersey. To rebut that conclusion, the Department need only produce a detailed map depicting the cumulative effects of all of its proposed rules and then, on that map answer the question: where will people live? (18, 42, 43, 45, 61)

RESPONSE: The Department is charged with the protection of the State's natural resources and, as such, has an obligation to direct development to those areas that are appropriate for growth. The Department strongly disagrees with the assertion that there are no such areas left in the State. This rule does not ignore other land use rules but rather aligns the planning efforts it requires with those rules. In doing so, the resultant planning documents will depict clearly where growth should be located with respect to the protection of natural resources and water quality and available capacity. In the absence of such a document, investors and developers will continue to invest in areas that are already constrained by lack of capacity and the presence of environmental features that are appropriately regulated by the State. Thus, the effect of this rule

provides improved predictability and consistency that will allow growth to move forward in the State.

As for the cumulative effect of the rules proposed by the Department, the Department believes strongly that the protection of natural resources, including the State's water quality, the increase in predictability and consistency, and the protection of life, limb and property, which are all accomplished through Department rulemaking, are not only consistent with the Department's mission, but also will result in an increase in quality of life for all of New Jersey's citizens that far outweighs any impacts of the rule.

Agriculture Industry Impact

1220. COMMENT: There is concern with the impact that this regulation will have on the practice and future viability of agriculture throughout the entire State. The effort to consolidate and coordinate the Department’s rules on water supply, water quality, and wastewater planning and treatment is understandable and long overdue, but, water availability, water quality issues, and wastewater treatment capacity are absolutely critical to agricultural production of all kinds. Unfortunately, in the efforts to “streamline” the multi-faceted water rules, the Department has created serious obstacles to farming and, at the same time, exacerbated the loss of value of New Jersey farmland upon which the business of agriculture rests.

Agricultural policy in New Jersey has long given agricultural land use a special status among industries because of the human and environmental benefits a million acres of undeveloped land provide for all residents. In addition to the Federal, State, and Right to Farm programs that

already provide guidance for the industry, many processes have been negotiated with the Department in the past to help farmers accommodate ever more strict environmental regulations without needless interference. These rules in general seem to cancel out the exemptions and special policies and processes crafted in the past to support a viable agricultural future. It is essential that the Department amend sections of these rules that have this negative economic effect. These rules will interfere with the viable conduct of agriculture, a dynamic industry that must adapt to ever changing markets and conditions. (58)

RESPONSE: The water quality management planning rule establishes a continuing planning process that has as a central purpose promotion of integration and consistency among federal, State, regional and local land use planning. The adopted rule will provide better coordination between wastewater management plans and the Department's mandate to protect natural resources and to prevent the pollution of the waters of the State. The Department agrees completely with the commenter that agriculture provides human and environmental benefits to the residents of New Jersey and neighboring states. The Department believes that the rule will assist in maintaining viable agricultural by encouraging center based development. The effect of this rule will be to direct intensive growth into areas that are appropriate and that have the water resource capacity to support that growth.

This rule does not eliminate exemptions afforded to agriculture under any of the Department's regulatory programs. This rule is a planning rule that establishes sewer service area boundaries and thereby ensures that development is placed where appropriate and where wastewater and water capacity are available. This rule does not in anyway alter Department rules that govern

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site-by-site development or their associated exemptions and/or special consideration for agriculture.

1221. COMMENT: Research shows that, unlike other states, land values in New Jersey for farmland are more than 80 percent based on land development potential. Putting such a tight hold on new development removes a significant portion of, if not all of that potential, possibly constituting a taking. This potential is very important to the agricultural community, as it is a farmer's primary source of equity - equity to be used not only to retire on, but also equity needed to further invest in the farm or to bring in new farm families to continue the operation. (58)

1222. COMMENT: The Agricultural Impact Statement is unacceptable. Although the statement properly identifies the extensive impact to agriculture, especially when it comes to land equity by the severe limits placed upon land development, it is felt that merely acknowledging the impact is not sufficient. The equity that a farmer has built up in his land serves not only as a retirement investment, but as an integral part of the ongoing agricultural business activities as working capital, which a farmer borrows against to improve his operation or purchase new equipment or additional land. This aspect of economic impact to agriculture is completely absent from the impact statement.

It is inequitable and contrary to state policy to have the agricultural industry bear such a large burden without just compensation.

The notion that removing land values is a way of preserving agriculture is rejected. Devaluing farmland to the point that farming is the only option will not preserve agriculture. Rather, this ties farmers to the land and profession regardless of its profitability. (58)

RESPONSE TO COMMENTS 1221 AND 1222: This rule does not prevent development, rather, it is a planning rule that establishes areas that are appropriate for sewer service based on the existing resources and water and wastewater capacity. The rule does not target farmland for removal from sewer service areas, though it would be inconsistent with farmland protection objectives to identify sewer service areas where local land use plans seek to retain farming. Furthermore, site-by-site development outside of sewer service areas is not prohibited nor is it directly regulated by this rule. Thus, this rule will not constitute a taking as the commenter suggests. Since the rule uses existing constraints, that is, available capacity and environmentally sensitive areas which are protected by existing land use regulations, to establish sewer service area and septic density, the rule itself will not de-value land as suggested in the comment. In fact, existing constraints will likely have factored into the determination of such value. Any development potential calculated absent consideration of environmental constraints or unsupported by the available wastewater treatment capacity can only be characterized as speculative. The Department understands that five factors are considered by a loan agency when evaluating a loan application. These are character (the owner's credit score), capital (the owner's net worth), collateral (security pledged for the payment of a loan), capacity (earnings and cash flow) and conditions (the terms of the loan). The Department's rules have the potential to affect capital and collateral but would not affect the remaining factors. Consequently, the Department

cannot make generic conclusions regarding whether loans will be denied to agricultural operations based on implementation of the adopted rules.

The former ground water antidegradation standard for nitrate where ground water quality was allowed to be degraded half way from the present ground water nitrate concentration toward the drinking water quality standard has been replaced with an antidegradation standard that better reflects maintenance of existing water quality that is better than standards. Further, given that the age of most wastewater management plans exceeds twenty years, most have never considered the effect of septic systems on ground water quality and there is no assurance that even the old ground water quality antidegradation standard would be met. As in the case of sewer service areas, if future development potential to be supported by discharges to ground water exceeds the capacity of the watershed to assimilate the pollution from those discharges, that development potential was overstated.

The new standard establishes the density of ground water discharges based on the capacity of the aquifer to dilute pollutant concentrations such that the Statewide average background concentration of nitrate in ground water is maintained. Under this rule the overall development potential of each watershed is based on the capacity of that watershed to assimilate nitrate without degrading ground water below the average condition. In this way, the rule establishes the treatment capacity of each HUC 11 watershed to meet the wastewater treatment needs of development where wastewater is discharged to ground water.

However, because the rule uses a HUC 11 watershed as the assessment unit, and does not require that lots be uniformly distributed throughout the watershed, the absolute impact on the development potential of any particular property cannot be determined without first applying existing zoning to the unsewered areas within each HUC 11. Where smaller than average lots within a watershed are counter balanced by larger than average lots elsewhere in the watershed there may be no adjustment of zoning necessary. Finally, new development must be appropriately planned so as not to threaten the State's water resources, upon which all citizens rely. The State's water resources are held in trust and must be maintained and preserved consistent with the Department's mandate to do so.

The Department does not believe that the loss of value, whether real or perceived, will adversely affect the ability of farming to persist in the State. If, as the commenter suggests, land value is critical to the success of farming in New Jersey, then farmland preservation programs would not be sustainable. Consider that when farmland is preserved, many of the development rights are removed from the property through a deed of easement purchased by the State or local government unit. When that preserved farm is sold to another prospective farmer, those development rights no longer exist, and the compensation paid for the deed of easement does not transfer. Thus if continued farming was dependent on high land values, then these preserved farms could not succeed. The successful history of the farmland preservation program does not support the commenters position.

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1223. COMMENT: The Department should coordinate with the Department of Agriculture before this adoption of this rule to discuss the mitigation of the impacts to agriculture from this rule. (58)

RESPONSE: The Department continues to coordinate with the Department of Agriculture on rulemaking and has addressed all issues relative to this rule as it may impact agriculture that were raised by various commenters, including the Department of Agriculture. The Department has been an avid supporter of the farmland preservation program, transfer of development rights programs and other compensatory mechanisms to achieve the protection of farmland and the viability of agriculture in New Jersey while reducing the negative effects of suburban sprawl on ecosystems, water quality and air quality. The Department will continue to advocate for these important programs.

1224. COMMENT: The Agricultural Impact Statement states that farmers rely on the speculative value of their land, when in fact they rely on the real development value based in part on zoning and environmental regulations. The Farmland Preservation Program purchases development rights based on that premise. The land is valued at its highest and best use utilizing the zoning, physical constraints, and other legal factors and the landowner is paid the difference between the development value and the agricultural value. Retaining the development value, therefore, is critical to the farmer that utilizes this development potential as collateral for operating loans in an open-market financing environment.

The proposed rules are setting up a scenario that will result in windfalls for some landowners and wipeouts for others. Although the rules include a clustering provision, it is not mandated nor are there any incentives for a municipality to perform the level of planning necessary to produce center-based development. The proposed rules will result in some areas with existing infrastructure and other areas that will be primarily large-lot development. The statement that the proposed rules "effects on the agricultural industry itself will be minimal, while effects on land in general will balance out" is not supported. The policy implications dictate the need to explore alternative methods to retain a farmer's ability to borrow funds to maintain the agricultural operation when there is no development potential attached to the land. (66)

RESPONSE: The Department believes that center-based development and placement of sewer service areas in a manner that encourages compact forms of development is preferable to sprawl and has included provisions in the rules to encourage this type of development. Accordingly, N.J.A.C. 7:15-5.24(h) provides that the Department will permit sewer service area in environmentally sensitive areas to accommodate center-based development, provided certain minimum conditions are met, and a Plan Endorsement approval has been granted by the State Planning Commission. This proposal does not require any specific type or level of development in areas that are not environmentally sensitive, so long as appropriate wastewater facilities are available. The Department expects that these centers would be located in areas that are not environmentally sensitive where possible, but where no reasonable potential exists to avoid conflicts with environmentally sensitive areas, the Department may approve sewer service in environmentally sensitive areas to support well planned centers provided the habitat to be included as sewer service area is not critical to a population of endangered or threatened species,

the loss of which would decrease the likelihood of the survival or recovery potential of the species in the State. In addition, the Department would need to ensure that the endorsed plan adequately addresses the protection of environmentally sensitive areas located outside of the designated sewer service area. Finally, the Department would need to ensure that the wastewater management planning agency has identified an adequate wastewater management alternative in accordance with N.J.A.C. 7:15-5.25(a) through (c). However, it would be inappropriate to entirely discount protection of environmentally sensitive areas in center-based development. Accordingly, the Department's regulatory programs and authority would continue to operate in these sewer service areas, so the inclusion of wetlands and stream corridors in the sewer service area should not be considered as "developable" for the purposes of calculating the development potential and future wastewater needs of the center. The intent of allowing sewer service area in these areas is to intensify the development allowed in the center as a means of reducing the development pressure and intensity outside of the center. Sewer service areas will not have to meet the nitrate dilution standard, but rather will have to identify a practicable wastewater treatment and disposal option to address the future wastewater management needs of the center. These accommodations are made in the rule to avoid the large lot development pattern characterized by the commenter as "McMansions." In fact, large lot development would be entirely inconsistent with the purpose of a center, and because this type of development can be accommodated by on-site systems, the Department would not likely include areas zoned for such low density development as sewer service areas.

Smart Growth Impact Statement

1225. COMMENT: The Smart Growth Impact statement states that the rules allow the development of new infrastructure to encourage center-based development in appropriate areas, but it is hard to fathom how the thresholds outlined in the rules will ever be met to allow such a higher-density option. Between the required riparian zones, nitrate dilution thresholds, endangered and threatened species considerations, Natural Heritage Priority Sites, wetlands regulations, TMDLs, water supply availability, and stormwater recharge requirements, it seems only large-lot McMansions will be possible. (66)

RESPONSE: Pursuant to N.J.A.C. 7:15-5.24(h), the Department will permit sewer service area in environmentally sensitive areas to accommodate center-based development, in exchange for comprehensive environs protections, that has received a Plan Endorsement approval by the State Planning Commission. This proposal does not require any specific type or level of development in areas that are not environmentally sensitive, so long as appropriate wastewater facilities are available. The Department expects that these centers would be located in these areas where possible, but where no reasonable potential exists to avoid conflicts with environmentally sensitive areas, the Department may approve sewer service in environmentally sensitive areas to support well planned centers that the habitat to be included as sewer service area is not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery potential of the species in the State. The Department's regulatory programs and authority would continue to operate in these sewer service areas, so the inclusion of wetlands and stream corridors in the sewer service area should not be considered as "developable" for the purposes of calculating the development potential and future wastewater needs of the center. The intent of allowing sewer service area in these areas is to intensify the

development allowed in the center as a means of reducing the development pressure and intensity outside of the center. Sewer service areas will not have to meet the nitrate dilution standard, but rather will have to identify a practicable wastewater treatment and disposal option to address the future wastewater management needs of the center. These accommodations are made in the rule to avoid the large lot development pattern characterized by the commenter as "McMansions." In fact, large lot development would be entirely inconsistent with the purpose of a center, and because this type of development can be accommodated by on-site systems, the Department would not likely include areas zoned for such low density development as sewer service areas.

1226. COMMENT: The Smart Growth Impact statement fails to consider the negative impact on designated and existing centers. The unreasonably high planning flows will limit potential redevelopment activity (fostering sprawl) and add substantial costs to design and construction of infrastructure. (75)

RESPONSE: The Water Quality Management Planning rule at N.J.A.C. 7:15-5.24(h) includes specific flexibility to allow sewer service to support well planned centers. This section of the rule allows the extension of sewers to accommodate center based development that has received plan endorsement from the State Planning Commission provided that the Department has determined that: 1) the habitat to be included as sewer service area is not critical to a population of endangered or threatened species, the loss of which would decrease the likelihood of the survival or recovery potential of the species in the State; 2) that the endorsed plan adequately addresses the protection of environmentally sensitive areas located outside of the center; and 3)

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the WMP agency identifies a wastewater management alternative with capacity to serve the needs of the center.

The commenter suggests that the planning flows associated with the projection of future wastewater demands will limit potential redevelopment activity and add substantial cost to the design and construction of infrastructure. The Department acknowledges that there is some conservatism built into the planning flows. This conservatism is intended to ensure that minor changes in land use not predicted based on zoning or future infrastructure issues including the introduction of inflow and infiltration into the wastewater system, do not cause or contribute to an inability for a wastewater treatment plant to effectively treat wastewater and thereby cause water quality degradation in the receiving waters. The rule requires wastewater management plans to be updated every six years. Where actual wastewater flows differ significantly from the wastewater planning flows adjustments can be made at that time. To the extent the future updates find that excess wastewater treatment capacity has been constructed, that capacity can be made available to address other needs such as areas with high septic system failures, or an increase in the density of development in the rest of the center. The Department has been using planning flows for wastewater management planning and design for many years and has not found them to be a significant impediment to center designation or redevelopment potential.

1227. COMMENT: To clarify the intent of State Plan integration, the Smart Growth Impact statement should add the following consensus language, which was developed by the Clean Water Council in its December 21, 2006 letter to the Department Commissioner: “During the hearing and in subsequent written comments, the need for changes to the SDRP and its

relationship to the WQMP/WMP was identified from multiple points of view. The CWC has discussed this subject at length. It is clear from those discussions that the WQMP/WMPs provide substantive information that needs to be part of the broader SDRP process. With the long term goal of achieving consistency between the SDRP and the WQMP/WMP, it is generally acknowledged that the SDRP, to be a more valuable framework for WMP development, needs strengthening and upgrades regarding water resource issues. Given such SDRP improvements, WMPs and wastewater infrastructure investments would then be developed and implemented in ways that are compatible and supportive of the SDRP, while being in full compliance with all relevant water laws and objectives." (78)

RESPONSE: The Department agrees with the statement provided by the Clean Water Council and reiterated by the commenter here. The ultimate goal of the continuing planning process is the achievement of consistency between the State Development and Redevelopment Plan (SDRP) and water quality management plans while being in full compliance with all relevant water laws and objectives. The Department cannot amend the proposal Smart Growth Impact Statement as part of this rule adoption, but assures the commenter that it is committed to achieving this goal.

Beyond rule scope

1228. COMMENT: These water quality standards should not be used against wildlife and birds. Junk science, brought up by uninformed people, attempts to load up fake stats and information and place all the blame on wildlife or birds. The science from the NJ Division of Fish and Game is junk science in far too many instances and there should be truthful and honest science. (70)

RESPONSE: The WQMP rules do not target wildlife and birds. However, biology and data do support that wildlife, including birds, are a source of certain pollutants of concern, such as nutrients and pathogens that must be accounted for when developing a TMDL. These sources would generally be associated with land use loads that are not targeted for reductions because they are largely natural. An exception would be an unnatural situation, such as a lake that harbors excessive numbers of resident waterfowl to the extent that they become a significant source of pollutants. There are several strategies that can be employed to reduce the overabundance of waterfowl. The recommended approaches for community based programs have been developed by the U.S. Department of Agriculture and are available at USDA Animal and Plant Health Inspection Service (APHIS) Wildlife Services leaflet (information available at http://www.aphis.usda.gov/publications).

1229. COMMENT: A local governing body has been long deliberating over a stormwater control plan prepared by the borough engineer that was drafted based upon statutory guidelines and was then rejected by the county. Among many changes, the county required a change in the plan to monitor *e. coli* levels and to provide for a method of combating *e. coli* levels when they exceed acceptable limits. A new draft stormwater control plan continues to lack provisions for monitoring and combating excessively high levels of *e. coli* however, the local governing body does not believe these requirements are within the scope of statutory guidelines written by the State government, so they need not be addressed. *E. coli* contamination has been a problem for a long time and current rate of intense development is threatening old infrastructure. Therefore, a

method of monitoring for *e. coli* and a plan for dealing with excessive levels seems reasonable, whether within State guidelines for stormwater management or not. (47)

RESPONSE: Under the provisions of the Stormwater Management rule, N.J.A.C. 7:8, a municipality can voluntarily monitor for *e. coli* under their municipal stormwater management plan. Monitoring for *e. coli* is not a requirement unless included in a New Jersey Pollution Discharge Elimination System (NJPDES) permit as an "Additional Measure" in accordance with the NJPDES rules at N.J.A.C. 7:14A-25.7(e). "Additional Measures" can be required through amendments to an areawide WQM Plan, including a TMDL or regional stormwater management plan, adopted in accordance with this rule,. However, adding a requirement to monitor for *e. coli* in a municipal stormwater management plan is beyond the scope of these rules.

1230. COMMENT: The Department should encourage the Legislature to amend the Municipal Land Use Law to require that no development shall occur unless it is consistent with the WMP and the New Jersey Water Supply Master Plan.

Instead of allowing municipalities to take advantage of the WQMP rules to stop or thwart a project, local municipalities should be required to update their portion of the WMP or water supply plans. Since municipalities are required by the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.) to re-examine their master plan every six years, incorporating these strategic environmental resources into the review process would be the most efficient, practical and beneficial way to accomplish this goal. However, because this would require legislative action, the Department should encourage the Legislature to consider this proposal. In the meantime, the

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Department should encourage municipalities to include wastewater management and water supply facilities in the utilities element of their municipal master plans. (40)

RESPONSE: While alignment of State, regional and local land use plans to achieve the objectives of this rule is supported, legislative action to amend the Municipal Land Use Law is beyond the scope of this rule.

Summary of Agency-Initiated Changes:

In addition to the changes made on adoption explained above in the response to comments, the Department has made grammatical, cross-reference and typographical corrections throughout the rules. The Department has also made the following changes on adoption:

In the various provisions related to the Governor's designees' adoption authority in the rules, the Department added the words "or her" after "the Governor or his" before "designee." The Department is making this change for consistency throughout the rule. These provisions apply whether or not the Governor is male or female.

In the various provisions related to steep slopes in the rules, the Department deleted "greater than 20 percent" wherever it appears as "slopes greater than 20 percent" and inserted the word "steep" before "slopes." "Steep slopes" are defined in N.J.A.C. 7:15-1.5 as any slope equal to or greater than 20 percent therefore "greater than 20 percent" is redundant to the definition.

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The Department is amending N.J.A.C. 7:15-1.6(c) to allow applications for consistency determinations under N.J.A.C. 7:15-3.2 to be submitted directly to a Department permitting program and not the Division of Watershed Management, if the consistency determination is being requested as part of a permit application. N.J.A.C. 7:15-3.2 makes provisions for consistency determinations to be requested as part of permit applications, but as proposed, N.J.A.C. 7:15-1.6(c) required all applications under this rule to be sent to the Division of Watershed Management in order to be deemed received for the purposes of calculating application review deadlines or other time periods under this chapter. The Department is making this change so that applications for permits that include a consistency determination request can go directly to the permitting program without first going through the Division of Watershed Management.

At N.J.A.C. 7:15-3.4(g), the Department is deleting the phrase "Except as provided in (h) below." This clause, which previously referred to a category of amendments commonly known as "expedited amendment" codified at N.J.A.C. 7:15-3.4(h) is no longer necessary as N.J.A.C. 7:15-3.4(h) was deleted and the subsection reserved in the adopted rules.

At N.J.A.C. 7:15-3.5(b)4iv, the Department is modifying the provision which requires a current WMP in accordance with the schedule at N.J.A.C. 7:15-5.23 for revisions that do not propose any changes to the sewer service area. N.J.A.C. 7:15-3.5(b)4iv allows WQM plan revisions for proposed expansions of less than 8,000 gallons per day for existing NJPDES-regulated discharges to ground water for facilities that will use the same general type of treatment works and that involve an expansion of the sewer service area of less than 100 acres. As explained in

the summary, the purpose of this requirement was to limit the areas where expansion of sewer services can be processed as revisions. The Department determined that revision projects that involved an expansion of the sewer service area to contiguous lots involving less than 100 acres and contributing less than 8,000 gallons per day of additional wastewater and did not create a significant new pattern of sewered development, should only be processed as a revision if the WMP was up to date, to avoid reliance on outdated information and to ensure that expansions do not compromise the assessment of current and future wastewater management needs. The primary purpose of this provision was to assess any impacts to environmentally sensitive areas from the expanded sewer service area and to ensure adequate consideration of the cumulative impacts of wastewater management decisions. The Department believes that any expansion to an existing NJPDES-regulated discharge to ground water planning flow or permitted flow of less than 8,000 gallons per day for facilities that do not propose any changes to the sewer service area can be adequately assessed to determine if sufficient capacity exists to accommodate the existing sewer service area, even in areas that do not have an up to date WMP. Therefore, a provision was added to adopted N.J.A.C. 7:15-3.5(b)4iv that allows existing NJPDES-regulated discharges to ground water that are proposing a planning flow or permitted flow increase of less than 8,000 gallons per day and for which the same general type of treatment works is proposed with no associated sewer service area changes to be processed as revisions even where there is not a current WMP.

At N.J.A.C. 7:15-5.14(c), the Department is modifying this provision regarding municipal wastewater management plan chapters to be consistent with N.J.A.C. 7:15-5.2 and 5.23 which allow submitted wastewater management plans and not just adopted wastewater management

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plans, to be grandfathered from the withdrawal of wastewater service area in accordance with N.J.A.C. 7:15-8.1. The rule proposal summary regarding this provision clearly stated that where a specific municipal chapter in the wastewater management plan has not been submitted and adopted as required by the schedule at N.J.A.C. 7:15-5.23, the withdrawal of wastewater service area designations under N.J.A.C. 7:15-8.1 shall only apply to those municipalities whose chapters are missing. Further, N.J.A.C. 7:15-5.2(d) provides that if a wastewater management plan is submitted by (nine months after the effective date of this rule), the wastewater service area designations in the wastewater management plan and the sewer service area designations in portions of areawide Water Quality Management plans where no wastewater management plan was ever prepared remain in effect until the submitted WMP or WMP update is either: disapproved or returned by the Department pursuant to N.J.A.C. 7:15-3.4(g)2 or (g)8; or adopted as a new wastewater management plan in accordance with this chapter. N.J.A.C. 7:15-5.23(b), provides that if a municipality accepts wastewater management plan responsibility through alternative assignment under N.J.A.C. 7:15-5.13, the municipality shall submit a wastewater management plan by (one year from the effective date of this amendment) or in accordance with a schedule established under N.J.A.C. 7:15-5.23(e).

Under these provisions, the submittal of a wastewater management plan by the time established is sufficient to either start Departmental review or establish a schedule for wastewater management plan submittal and in either case, does not initiate a withdrawal of wastewater service area designations in accordance with N.J.A.C. 7:15-8.1. N.J.A.C. 7:15-5.14(c) cross-references the provisions at N.J.A.C. 7:15-5.2 and the schedule at N.J.A.C. 7:15-5.23. Thus, the modification to N.J.A.C. 7:15-5.14(c) to allow submitted municipal wastewater management

plan chapters to be grandfathered is consistent with the intent and provisions cross-referenced in this subsection.

At N.J.A.C. 7:15-5.20(b)2, the Department is modifying this provision to acknowledge that the boundaries of future wastewater service areas may also coincide with recognizable environmental features depicted in Department GIS coverages used for the wastewater management plan and not just recognizable geographic or physical features. This change is necessary to accommodate new N.J.A.C. 7:15-5.24 which identifies the conditions where extension of sewer service is not appropriate or related to features such as roads, municipal boundaries or even river courses. N.J.A.C. 7:15-5.24(a) sets forth the general policy that large contiguous areas of environmentally sensitive resources should not be included in sewer service areas. The limitations on the extension of sewer service in these areas are consistent with the Department's mandate to protect the ecological integrity and natural resources of New Jersey, including water, threatened and endangered species, wetlands and unique and rare assemblages of plants.

N.J.A.C. 7:15-5.24(b) establishes the criteria for delineating a sewer service area boundary in consideration of environmentally sensitive areas. The Department selected four environmental features to be used in determining if centralized sewer service is inappropriate for an area: threatened and endangered species habitats, Natural Heritage Priority Sites, Category One riparian zones, and wetlands. The Department identifies environmentally sensitive areas that are not appropriate for sewer service area as any contiguous area of 25 or more acres that contains any or all of these four features.

In developing these rules, the Department considered simply removing all threatened and endangered species habitats, Natural Heritage Priority Sites, wetlands and special water resource protection areas from sewer service areas. However, simply removing these features using the Department's GIS data layers resulted in sewer service areas that were fragmented and filled with small areas that would have to be excluded from the sewer service area, as well as did not conform to recognizable geographic or physical features. This pattern of sewered development would not enable the application of municipal zoning powers to achieve a consistent and orderly pattern of development, and would not facilitate center-based development, thus making it difficult to achieve the objectives of local master plans.

To address these issues, the Department developed a repeatable method for sewer service area mapping by merging the GIS coverages of the four selected environmental features. Environmentally sensitive areas would then be excluded from the sewer service area based on the size of a contiguous area, or polygon, encompassing one or more of these features in the merged coverage. Wastewater management plan mapping depicting future wastewater service areas must also make allowances for these GIS polygons of environmental features to be excluded from future wastewater service areas. Thus, N.J.A.C. 7:15-5.20(b) was amended to make this allowance to exclude environmentally sensitive features from within the boundaries of future wastewater service areas, whether or not the boundary follows a recognizable geographic or political boundary.

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At N.J.A.C. 7:15-5.25(g)2ii(1) the Department modified the language to be consistent with the wording of this provision in the adopted new Flood Hazard Area Control Rules, N.J.A.C. 7:13, and amended Coastal Zone Management Rules, N.J.A.C. 7:7E (See 39 N.J.R. 4573(a)). The meaning of this provision has not changed.

As proposed, N.J.A.C. 7:15-5.25(g)2ii(2) established a 150-foot riparian zone along both sides of "any trout maintenance water and all upstream tributaries within one mile." Similarly, as proposed, N.J.A.C. 7:15-5.25(g)2ii(3) established a 150-foot riparian zone along both sides of "any segment of a water flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the regulated water for survival, and all upstream tributaries within one mile." In each case, "all upstream tributaries within one mile" includes not only separate streams that flow into the regulated water having the trout maintenance or threatened and endangered species habitat designation, but also the regulated water itself upstream of such designation. In order to clarify this point and to clarify how to measure the one-mile limit, N.J.A.C. 7:15-5.25(g)2ii(2) and (3), were modified on adoption to apply to "all upstream waters (including tributaries) within one linear mile as measured along the length of the regulated water."

At N.J.A.C. 7:15-8.1(c), when wastewater service areas are withdrawn in areas that do not have an up to date WMP and all development on septic systems must meet the new two mg/L nitrate standard, the rule was changed to grandfather existing development on septic systems from the time of wastewater service area withdrawal, which could occur nine months or later than the effective date of this rule, instead of (the effective date of this rule), similar to how existing

developments in sewer service areas were treated.

Under the rule prior to these amendments and until an up to date WMP is adopted or wastewater service areas are withdrawn, there are three primary wastewater service area designations that are identified in WMPs. These categories are 1) sewer service area; 2) a general wastewater service area designation for all discharges to ground water with planning flows of less than 20,000 gallons per day; and 3) a general wastewater service area designation for all discharges to ground water with planning flows of less than 2,000 gallons per day. Sewer service areas are the land area from which all generated wastewater is designated to flow to a domestic or industrial treatment works as identified in an adopted areawide WQM plan. Each domestic or industrial treatment works has a separate sewer service area. The general wastewater service area designation for all discharges to ground water with planning flows of less than 20,000 gallons per day includes land areas where any number of wastewater discharges to ground water may occur as long as each discharge is less than 20,000 gallons per day. Wastewater facilities needing NJPDES discharge permits and those that qualify for certificates under the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, which include individual subsurface sewage disposal systems (ISSDS), fall into this general wastewater service area designation. The general wastewater service area designation for all discharges to ground water with planning flows of less than 2,000 gallons per day includes land areas where any number of wastewater discharges to ground water may occur as long as each discharge is less than 2,000 gallons per day. Wastewater facilities that discharge less than 2,000 gallons per day and qualify for permits under the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, which include ISSDS, fall into this general wastewater service area designation.

Under N.J.A.C. 7:15-8.1(a), the Department will withdraw all sewer service area designations and all general wastewater service area designations for all discharges to ground water within areas that do not have an adopted wastewater management plan that is current in accordance with the schedule established at N.J.A.C. 7:15-5.23. While this action affects areas shown as future sewer or wastewater service areas on maps, it does not impact areas where sewer lines and existing structures are already lawfully installed and connected. In these cases the wastewater service area designation as it applies to those structures remains unaffected by this proposal. Exceptions to the revocation of sewer service enumerated at N.J.A.C. 7:15-8.1(b) include infill area development which was made in recognition that a public investment in sewage infrastructure has already been made with the expectation that its cost would be offset by future connections along its immediate route. An additional exception was provided for projects that have received, prior to the effective date of wastewater service area withdrawal, both a local preliminary or final site plan approval or subdivision approval where subsequent site plan approval is not required under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. or a municipal construction permit; and a Department TWA or NJPDES permit, if one is required, until such time as one of those qualifying approvals expires. The rationale for this exception was again based on a demonstrated significant investment in project design and engineering in reliance on the ability to connect to a centralized sewer system.

As proposed, the rule at N.J.A.C. 7:15-8.1(c) did not treat approved development using individual subsurface sewage disposal systems the same as development in sewer service areas, as the rule proposal only grandfathered development that had secured required State or local

approvals at the time the rule became effective. As mentioned previously, the rule at N.J.A.C. 7:15-8.1(a) withdraws all wastewater service area designations in places where wastewater management plans are not maintained in accordance with the requirements of N.J.A.C. 7:15-5.2(b), 5.13 and 5.23. N.J.A.C. 7:15-8.1(c) replaces all withdrawn wastewater service area designations with a new designation of "ground water general service area designation for planning flows of 2,000 gallons per day or less." The rule proposal at N.J.A.C. 7:15-8.1(c)2 would have made all residential development consisting of six or more dwelling units constructed after the effective date of the rule inconsistent with this new designation and, thus, these developments would have to secure a revision under N.J.A.C. 7:15-3.5(b)4vi. N.J.A.C. 7:15-8.1(c)3 declared certain developments consistent with the default designation provided they secured local approvals or a Department approval for 50 or more realty improvements prior to the effective date of the rule.

Requiring development on individual subsurface sewage disposal systems to have approvals in place prior to the effective date of the rule is incorrect for two reasons. First, wastewater service area designations are not withdrawn on the effective date of the rule under any circumstances. N.J.A.C. 7:15-5.2(b) allows wastewater service area designations in pending and adopted wastewater management plans to remain in place for a period of six-years from the date the WMP was adopted. N.J.A.C. 7:15-5.2(c) provides that, even where a WMP is out of date, wastewater service area designations shall remain in effect for nine months from the effective date of the rule. N.J.A.C. 7:15-5.13 allows a municipality that is granted voluntary assignment of WMP responsibility one year to submit a WMP before a withdrawal of wastewater service area designations is effectuated. Therefore, for at least nine months and in some cases longer,

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both the Department and local authorities will be issuing approvals for new development that is consistent with the existing wastewater service area designation. Only after nine months, when a WMP is not prepared and submitted in accordance with this rule, will a withdrawal of wastewater service area occur and a default wastewater service area be put in place. Requiring approvals to have been secured prior to the effective date of the rule would make these developments for which approvals were recently granted and which remain valid, now inconsistent with the areawide WQMP, thus precluding the issuance of other Department permits should they be needed. This would be harshly retroactive and unfair in consideration of the time and money spent securing those approvals.

Secondly, the schedule for submission of WMP updates established at N.J.A.C. 7:15-5.23 requires routine six-year updates. Failure to comply with the update schedule also results in a withdrawal of wastewater service areas under N.J.A.C. 7:15-8.1(a). These withdrawals may not occur for many years into the future. Requiring development to have secured approvals prior to the effective date of the rule in 2008, to avoid a potential withdrawal of wastewater service area designation in 2015 or 2021 or beyond, makes little sense when considering that those approvals would not likely remain valid at the time of withdrawal, even if such a withdrawal could have been foreseen in 2008. Thus the proposed requirement to secure certain local or Department approvals for development supported by individual subsurface disposal systems prior to the effective date of the rule does not make regulatory sense. Accordingly, this requirement is being changed to be consistent with the rule requirement for development in sewer service areas which provides that those approvals must be secured prior to the date of the withdrawal of the wastewater service area designation.

The adopted rule rectifies this discrepancy and provides for existing and already approved development on individual subsurface sewage disposal systems to also be grandfathered up until the time the wastewater service area is withdrawn.

Exceptions to the revocation of wastewater service area which are not sewer service areas are enumerated at N.J.A.C. 7:15-8.1(c). N.J.A.C. 7:15-8.1(c)1 allows wastewater facilities discharging to ground water that serve non-residential development with a daily maximum planning flow of 2,000 gpd or less. N.J.A.C. 7:15-8.1(c)2 allows individual or other subsurface sewage disposal systems serving residential development or subdivisions with a total of less than six dwelling units. Thus, the changes on adoption occur at N.J.A.C. 7:15-8.1(c)2i, and 2i(2) through (4) which set forth the situations in which previous residential development must be considered in determining the number of dwelling units. Previous residential development must be considered to ensure cumulative impacts are addressed and to capture circumstances where parcels are contiguous and share infrastructure; are in common ownership or are subdivided after the effective date of the wastewater service area withdrawal; where there is a substantial common interest by one or more individuals in the dwelling units; or where the addition of one or more dwelling units after the effective date of the wastewater service area withdrawal, results in a total of six or more dwelling units.

N.J.A.C. 7:15-8.1(c)3 sets forth the limited circumstances under which facilities discharging to ground water may exceed the cumulative 2,000 gallons per day and five dwelling unit threshold. Changes on adoption at N.J.A.C. 7:15-8.1(c)3i allow for projects with a valid approval for 50 or

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more realty improvements under the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq., received prior to the effective date of the wastewater service area withdrawal, as these activities have already undergone Department review. N.J.A.C. 7:15-8.1(c)3ii allows for projects which have received, prior to the effective date of the wastewater service area withdrawal, a local site plan approval or subdivision approval where subsequent site plan approval is not required under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. or a municipal construction permit and a permit to construct or alter issued by the administrative authority under N.J.A.C. 7:9A-3.5 to be deemed consistent with the general service area designation for wastewater planning flows of less than 2,000 gallons per day.

Lastly, N.J.A.C. 7:15-8.1(d) recognizes the unique approval process associated with public schools. Thus, wastewater facilities for public schools are exempt where there is evidence of compliance with statutory provisions of the Municipal Land Use Law at N.J.S.A. 40:55D-1 et seq. in the form of a planning board response dated prior to the effective date of the wastewater service area withdrawal, or the expiration of the 45-day courtesy comment period that municipal planning boards are allotted to provide recommendations to the school board and Department of Education prior to the effective date of the wastewater service area withdrawal.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (as amended by P.L. 1995, c. 65), require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law.

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Section 208 of the Federal Clean Water Act requires the governor of each state to identify those areas of their state that have substantial water quality control problems and to develop plans, or designate the appropriate entity to develop a plan, to do the following:

- Identify treatment works necessary to meet the wastewater treatment needs of each area;
- Establish the construction priorities for such treatment works;
- Establish a regulatory program to implement those treatment works;
- Regulate the location and construction of any facility having a discharge;
- Describe a process for the identification and control of nonpoint sources of pollution from agriculture and silviculture;
- Develop a process to identify and control construction related sources of pollution; and
- Develop a process to identify and control salt water intrusion into rivers lakes and estuaries resulting from the reduction of freshwater flow from any cause.

Section 319 of the Federal Clean Water Act (33 U.S.C. §§1251 et seq.) and Section 6217 of the Federal Coastal Zone Management Act Reauthorization and Amendments (16 U.S.C. §§1451 et seq.) require that states develop effective nonpoint source pollution control strategies. These Federal programs are not prescriptive in their approach, and consequently the specific requirements of these programs are left to the states. The Department accomplishes many of these Federal programs through the Water Quality Management Planning rules. The readopted rules continue this practice, while the adopted amendments refine the approach to improve the maintenance, restoration, and enhancement of water quality, as well as prevent future degradation, as required under the Federal Clean Water Act.

The readopted rules and adopted amendments provide an ongoing means to implement the Continuing Planning Process required under Section 208 of the Federal Clean Water Act (33 U.S.C. §1251 et seq.) through the areawide Water Quality Management Planning process. As part of this process, the current areawide WQM plans are amended through updated WMPs to ensure that WQM plans are based on and integrate the most current land use and water resource planning.

The readopted rules continue provisions related to development of the list of impaired waterbodies and TMDLs for impaired waterbodies, required under Section 303(d) of the Federal Clean Water Act and relevant regulations of the USEPA at 40 CFR 130.7. Under these regulations, all states are required to prepare and adopt a listing of water quality limited segments for surface waterbodies every two years and to develop TMDLs for those waterbodies that are listed as impaired. The adopted amendments incorporate these Federal requirements by reference to ensure that the Department's process remains in step with the Federal requirements.

The 2006 Integrated Water Quality Monitoring and Assessment Report prepared by the Department, and approved by the USEPA, concluded that 71 percent of HUC 14 subwatersheds and 34 percent of lakes were impaired for one or more designated uses or to failed meet the Surface Water Quality Standards. The Department concluded that a significant contributing factor to those impairments is nonpoint source pollution. The Federal Clean Water Act requires that the states identify programs, both regulatory and non-regulatory, necessary to achieve implementation of best management practices for controlling nonpoint sources of pollution, such

that waters of the state will meet the national clean water goals. Similarly, the Federal Coastal Zone Management Act Reauthorization and Amendments requires coastal states to identify their coastal zone and develop a program to implement coastal land use management measures to control nonpoint source pollution. In a joint report, "NOAA and EPA Region 2 Interim Findings on Information Submitted by New Jersey to Meet Coastal Nonpoint Program Conditions of Approval," dated June 17, 2004, USEPA and National Oceanic and Atmospheric Administration identified the lack of a septic management program as a significant gap, and the only remaining one, in New Jersey's nonpoint source control strategy. The adopted amendments will fill that void by requiring a septic management plan as a component of any WMP that includes septic systems as an approved wastewater management alternative. The Department has intentionally left flexibility in these rules to allow municipalities and counties the opportunity to fashion a plan that ensures routine maintenance and that meets their particular administrative style. Such a plan could be as simple as requiring submission of a voucher documenting a pump out at an established periodic interval, or could be as detailed as a municipality undertaking the role of inspection itself.

By virtue of the fact that the entire State of New Jersey lies within close proximity to the coast, there is increased likelihood that water pollution in any part of the State could contribute to coastal water quality deterioration. As noted in "State of New Jersey Coastal Nonpoint Pollution Control Program - Environmental Assessment," dated January 1997 and prepared by the U. S. Department of Commerce, National Atmospheric Administration, National Ocean Service, the Department has defined the entire geographic area of the State as part of its "coastal zone," for the purposes of implementing nonpoint pollution control. Current scientific literature has

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established a correlation between development, the loss of riparian forest area, the disturbance of steep slopes and those impairments. Therefore, a program to successfully control nonpoint source pollution and prevent future impairment of water quality due to nonpoint sources of pollution, as required by Federal Law, must necessarily concern itself with land use and development patterns. The readopted rules and adopted amendments and new rules are intended to meet part of that Federal obligation by encouraging redevelopment of existing developed sites and concentrating development patterns in existing urban and unconstrained areas rather than developing previously undisturbed sites in rural areas.

In summary, the Department believes that the readopted rules and adopted amendments are no more or less stringent than applicable Federal standards, provide the greatest flexibility reasonable to reduce compliance costs, and are appropriate based on scientific merit. Furthermore, implementation of the readopted rules and adopted amendments will result in improved surface water quality, which better protects the public's health and all uses of the State's waters. Accordingly, no further analysis was required pursuant to Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq.

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

SUBCHAPTER 1. GENERAL PROVISIONS

7:15-1.1 Scope

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(a) This chapter establishes water quality management policies and procedures pursuant to the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Department's enabling legislation, N.J.S.A. 13:1D-1 et seq., the Watershed Protection and Management Act of 1997, N.J.S.A. 58:29-1 et seq., the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., the Stormwater Management Act, N.J.S.A. 40:55D-93 through 99, the Water Supply Management Act, N.J.S.A 58:1A-1 et seq., the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq., and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. Specifically, this chapter establishes policies and procedures concerning the following subjects:

1. – 5. (No change)

6. – 7. (No change from proposal)

8. – 9. (No change)

10. – 12. (No change from proposal)

13. The process for identifying water bodies on the List of Water Quality Limited Segment***s*** and establishing total maximum daily loads;

14. – 15. (No change from proposal)

7:15-1.5 Definitions

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

…

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"Adoption" means the adoption by the Department of Statewide WQM Plans or amendments or revisions thereof and the adoption by the Governor or his ***or her*** designee of areawide plans or amendments or revisions thereof pursuant to this chapter.

…

"Committed flow" means the sum of the actual flow plus the sum *[or]* ***of*** all flows which are anticipated from connections which have been approved but are not yet in operation. The flow to be anticipated from any such connections shall be that flow approved by the Department.

…

"Undeveloped and underdeveloped areas" means areas that are either unimproved or contain existing improvements but could be further developed in a *[manor]* ***manner*** that would create additional wastewater flow without the need to obtain a variance, according to existing zoning.

…

"Urbanized municipalities" means those where 90 percent of the municipality's ***developable*** land area appears as "Urban Lands" as designated in the New Jersey Department of Environmental Protection's 1995/97 and 2002 Land Use/Land Cover geographical information systems database as amended and updated, available as a digital data download from the Department at www.state.nj.us/dep/gis , based on Level I of the Anderson Classification System (Anderson et al, 1976, modified by the New Jersey Department of Environmental Protection, 1999).

…

7:15-1.6 Program forms and information; Internet web site

(a) – (b) (No change from proposal)

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(c) Applications or other materials sent or delivered to a Department address other than those in (a) and (b) shall not be deemed to have been received for the purposes of calculating application review deadlines or other time periods under this chapter, until the application is actually received by the Division of Watershed Management*[.]***, unless the application is being submitted directly to a permit program for a consistency determination under N.J.A.C. 7:15-3.2.***

(d) (No change from proposal)

SUBCHAPTER 3. PLAN ASSESSMENT, AMENDMENT AND ADOPTION

7:15-3.1 Water quality management plan consistency requirements

(a) (No change)

(b) The Department shall not grant permits for the following projects and activities before a formal consistency determination review under N.J.A.C. 7:15-3.2 has been completed:

1. - 15. (No change from proposal)

16. Actions that require a Department-issued permit under the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, except for:

i. Bank stabilization projects that use only vegetation and/or soil-bioengineering as described at section 650.1601(d)(2) of Chapter 16 of the USDA Natural Resource Conservation Service (NRCS) Engineering Field Handbook, published December 1996*[)]*, incorporated herein by reference. Copies of the NRCS Engineering Field Handbook can be obtained from USDA-NRCS**,*** 220 Davidson Ave.**,*** 4th Floor, Somerset, NJ 08873-4115 (telephone (732) 537-6040)*[)]*; and

ii. (No change from proposal)

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17. – 18. (No change from proposal)

(c) (No change from proposal)

(d) (No change)

(e) (No change from proposal)

(f) (No change)

(g) (No change from proposal)

7:15-3.2 Procedures for consistency determination reviews

(a) Except for applications for projects or activities in the Highlands preservation area, which are addressed in (d) below, a complete application for a consistency determination review shall, where applicable, include, but not be limited to, all of the information in 1 through 13 below. If the consistency determination is being requested as part of a permit application, information contained in that application need not be duplicated.

1. – 10. (No change from proposal)

11. A folded site plan showing all of the following:

i. – iii. (No change from proposal)

iv. All ***steep*** slopes *[greater than 20 percent]*;

12. – 13. (No change from proposal)

(b) – (d) (No change from proposal)

7:15-3.4 Water quality management plan amendment procedures

(a) (No change)

(b) – (f) (No change from proposal)

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(g) *[Except as provided in (h) below the]* ***The*** Department procedure for amendment of areawide WQM plans is as follows:

1. – 2. (No change from proposal)

3. The Department shall notify the applicant and the applicable designated planning agency, if any, in writing of its decision under (g)2 above. If the Department's decision is to proceed further with the amendment application under (g)2iii above, then this notification shall include the public notice that shall be given for the proposed amendment. If the proposed amendment is a regional stormwater management plan, the Department shall also notify the Department of Community Affairs***, the Department of Transportation,*** and the Department of Agriculture. The applicant shall request written statements of consent under (g)4 below, and shall give public notice by publication in a newspaper of general circulation at the applicant's expense. The Department shall maintain a list identifying the newspaper that shall be used for this purpose in each planning area. The public notice shall also be published in the New Jersey Register. In cases where such Department decisions include a requirement for a non-adversarial public hearing, the public notice shall provide at least 30 days notice of the hearing.

4. (No change from proposal)

5. (No change)

6. – 7. (No change from proposal)

8. (No change)

9. (No change from proposal)

10. The Department shall provide written notification of the decision of the Governor or his ***or her*** designee to the applicant where applicable. Notice of the final decision shall also be published in the New Jersey Register.

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11. (No change)

(h) (Reserved)

(i) – (l) (No change from proposal)

7:15-3.5 Water quality management plan review, revision, and certification

(a) (No change)

(b) An application for a revision shall be submitted in writing to the Department in accordance with (d) below. The Department and the designated planning agencies shall prepare revisions to Statewide and areawide WQM Plans under this section whenever such revisions are necessary to:

1. – 2. (No change)

3. (No change from proposal)

4. Provide for the following substantive changes in Statewide and areawide WQM Plans where the Department determines, based on its assessment that the project for which the revision is proposed complies with the environmental standards established at N.J.A.C. 7:15-5.24 and 5.25, as applicable, that no significant individual or cumulative impacts will occur to environmentally sensitive areas or other natural resources (such as water supplies) due to the proposed revision (individually or in combination with past revisions in the area), that the changes are consistent with N.J.A.C. 7:15-3.6**,*** 3.7, and 3.10 and that certain directly affected municipal and county agencies and other interests as identified by the Department have been provided an opportunity to review and comment on the proposed revision:

i. – iii. (No change from proposal)

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iv. Any change in the estimated planning flow (see N.J.A.C. 7:15-5.16(b)8) or permitted flow (see N.J.A.C. 7:15-5.16(b)9) of less than 8,000 gallons per day to an existing NJPDES-regulated discharge to ground water, provided (b)4v below is satisfied ***unless the sewer service area is not changing*** and the same general type of treatment works is proposed;

v. (No change from proposal)

vi. The utilization of individual subsurface sewage disposal systems where the project for which the revision is requested involves less than 100 acres and generates less than 8,000 gallons per day of wastewater flow (or a total of fewer than 23 residential dwelling units), only where the WMP is not in compliance with the schedule at N.J.A.C. 7:15-5.23 and the applicant demonstrates that the project for which the revision is proposed meets the nitrate *[dilution]* ***planning*** standard at N.J.A.C. 7:15-5.25(h)2;

vii. – ix. (No change from proposal)

x. The utilization of individual subsurface sewage disposal systems or a NJPDES-regulated discharge to ground water for a clustered residential development, where the applicant ensures that a minimum of 70 percent of the property is permanently restricted from development, subject to a conservation restriction prepared in accordance with N.J.A.C. 7:15-1.7, and provided that the following conditions are met.

(1) – (2) (No change from proposal)

(3) Existing agricultural land uses allowed to continue on the restricted portion are required to implement Best Management Practices by implementing the findings of a Conservation *[Management]* Plan *[or a Natural Resources Management Plan]* developed by the Natural Resources Conservation Service; or

5. (No change)

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(c) (No change)

(d) (No change from proposal)

(e) The procedure for revision of Statewide and areawide WQM plans is as follows:

1. The Governor or his ***or her*** designee shall adopt revisions to areawide WQM plans and the Commissioner shall adopt revisions to the Statewide WQM Plan. Such revisions shall take effect immediately, unless the adoption notice specifies otherwise.

2. (No change from proposal)

(f) Designated planning agencies shall revise areawide WQM Plans in accordance with procedures established by such agencies and approved by the Department. All revisions to areawide WQM plans are valid only upon their adoption by the Governor or his ***or her*** designee.

(g) The Governor or his ***or her*** designee shall certify adopted WQM Plans in accordance with United States Environmental Protection Agency regulations.

SUBCHAPTER 5. WASTEWATER MANAGEMENT PLANNING REQUIREMENTS

7:15-5.1 Wastewater management plan requirement for water quality management plan amendments and revisions

(a) (No change from proposal)

(b) The Governor or ***his or her*** designee shall adopt an amendment or revision only if the amendment or revision complies with this chapter.

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7:15-5.6 Responsibility of sewerage authorities and municipal authorities

(a) The Passaic Valley Sewerage Commissioners (PVSC), joint meetings, county utilities authorities, and every sewerage authority and every municipal authority that performs sewerage-related functions in at least part of its district shall provide, upon the request of the WMP agency, the following sewerage-related information regarding its district or wastewater service area to the wastewater management planning agency or agencies responsible for a wastewater management plan area in which it lies partially or wholly within:

1. – 5. (No change from proposal)

6. Identification of *[total]* committed flow not presently connected to each named DTW in million gallons per day for each municipality within the sewer service area;

7. – 10. (No change from proposal)

(b) (No change from proposal)

(c) (No change)

(d) – (e) (No change from proposal)

(f) (No change)

(g) (No change from proposal)

7:15-5.14 Wastewater management plan partition by municipality

(a) – (b) (No change from proposal)

(c) Where a wastewater management plan chapter has not been ***submitted or*** adopted for a municipality in accordance with the provisions at N.J.A.C. 7:15-5.2 or the schedule established at N.J.A.C. 7:15-5.23, wastewater service area designations within that municipality shall be withdrawn in accordance with N.J.A.C. 7:15-8.1.

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7:15-5.17 Mapping features requirements

(a) Each wastewater management plan shall include mapping of each of the following features in the wastewater management plan area, and in any additional wastewater service area identified in that wastewater management plan under N.J.A.C. 7:15-5.18(c)4, 5.24, or 5.25:

1. – 10. (No change from proposal)

11. Steep slopes *[greater than 20 percent]***, if available*;**

12. – 16. (No change from proposal)

7:15-5.20 Specifications for text and graphics

(a) (No change from proposal)

(b) All maps in wastewater management plans, wastewater management plan updates, and WQM plan amendments and revisions shall be prepared and submitted in hard copy in a format which is consistent with the Department's mapping standards at N.J.A.C. 7:1D Appendix A and shall be in New Jersey State Plane Feet using the North American Datum of 1983 (NAD83), use 1:24,000 scale United States Geological Survey quadrangle maps as a base and shall meet "United States National Map Accuracy Standards," incorporated herein by reference as amended or updated, for that scale. The United States National Map Accuracy Standards were issued by the U.S. Bureau of the Budget, Revised June 17, 1947, and can be obtained at http://rockyweb.cr.usgs.gov/nmpstds/nmas.html. Other maps at other scales may be provided as supplements. Mapping information for wastewater management plans shall also be submitted in digital form compatible with the mapping standards at N.J.A.C. 7:1D Appendix A. The digital maps shall be accurate, at a minimum, to a scale of 1:12,000. The Department recommends that

the creation of new digital mapping information for wastewater management plans be prepared in a format that conforms to the "New Jersey Department of Environmental Protection Geographic Information System Mapping and Digital Data Standards" guidance document, as amended or updated. Guidance related to the mapping and digital data standards is available at the Department's website at http://www.state.nj.us/dep/gis. Each wastewater management plan shall include the following main maps in hard copy and in digital form, except digital maps in (b)3 below already generated by the Department in GIS do not have to submitted to the Department:

1. (No change from proposal)

2. A map depicting future DTW and wastewater service areas identified at the end of the 20-year period for urbanized municipalities, or at build-out for all other municipalities, under N.J.A.C. 7:15-5.18(c)1 through 5. Wherever feasible, the boundaries of future wastewater service areas shall coincide with recognizable geographic***,*** *[or]* political *[features]* ***or environmental features depicted in Department GIS coverages used for the wastewater management plan***. The existing boundaries of the wastewater management plan area shall also be depicted on any map under this paragraph; and

3. One or more maps depicting the existing boundaries of the wastewater management plan area, and the features identified under N.J.A.C. 7:15-5.17. This map shall also state that development in areas mapped as wetlands, flood prone areas, suitable habitat for endangered and threatened species as identified on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife as Rank 3, 4 and 5, Natural Heritage Priority Sites, riparian zones, steep slopes *[greater than 20 percent]*, or designated river areas may be subject to special regulation under Federal or State statutes or rules, and that interested persons should

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check with the Department for the latest information. Depiction of environmental features shall be for general information purposes only, and shall not be construed to define the legal geographic jurisdiction of such statutes or rules.

7:15-5.25 Evaluation criteria for wastewater management plans and amendments

(a) – (f) (No change from proposal)

(g) An assessment of nonpoint source pollution impacts of planned future development shall be conducted and it shall be demonstrated that the environmental standards for stormwater, riparian zones, and steep slopes established in this section, as well as measures identified in adopted TMDLs or watershed restoration plans, shall be met.

1. (No change from proposal)

2. Riparian zones adjacent to all waters as described below in this paragraph shall be protected from avoidable disturbance:

i. (No change from proposal)

ii. The riparian zone is 150 feet wide along both sides of the following waters not identified in (g)2i above:

(1) Any trout production water and *[any]* ***all*** upstream *[tributary to a trout production water]* ***waters (including tributaries)***;

(2) Any trout maintenance water and all upstream ***waters (including*** tributaries***)*** within one ***linear*** mile ***as measured along the length of the regulated water***;

(3) Any segment of a water flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the

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regulated water for survival, and all upstream ***waters (including*** tributaries***)*** within one ***linear*** mile ***as measured along the length of the regulated water***; and

(4) (No change from proposal)

iii. (No change from proposal)

3. – 7. (No change from proposal)

(h) Site specific wastewater management plan amendments shall not create a significantly new pattern of sewered development such that a significant potential or incentive is created for additional revisions or amendments to open new areas to sewered development. Site specific wastewater management plan amendments and revisions at N.J.A.C. 7:15-3.5(b)4 shall comply with the environmental standards of (d), (e), (f) and (g) above except as provided in (h)1 through 6 below:

1. – 5. (No change from proposal)

6. In lieu of the requirements at (g)6 above, demonstrate through site plans depicting proposed development and topography that new disturbance is not located in areas with a *[20 percent or greater]* ***steep*** slope, except as provided in (g)6i and ii above.

7:15-5.26 Habitat Suitability Determination

(a) Where an area is excluded from a sewer service area in accordance with N.J.A.C. 7:15-*[2.4]* ***5.24*** on the basis that it is within habitat patch of Rank 3, 4 or 5 on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife, an applicant may seek a Habitat Suitability Determination from the Department if it wishes to rebut the presumption that a habitat patch of Rank 3, 4 or 5 on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife is accurate.

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(b) – (d) (No change from proposal)

SUBCHAPTER 8. WITHDRAWAL AND REDESIGNATION OF WASTEWATER SERVICE AREAS

7:15-8.1 Withdrawal of wastewater service area designations

(a) – (b) (No change from proposal)

(c) Areas for which wastewater service area designations are withdrawn under this section are re-designated as ground water general wastewater service area designation for planning flows of 2,000 gallons per day or less. The following wastewater facilities with discharges to ground water are deemed to be consistent with this new designation:

1. (No change from proposal)

2. Individual or other subsurface sewage disposal systems serving residential development or subdivisions resulting in a total of fewer than six dwelling units.

i. For the purpose of determining the total number of dwelling units, previous development shall be taken into account. Previous development includes development constructed after *[(the effective date of this rule).]***the effective date of the wastewater service area withdrawal.*** Previous development to be taken into account in determining if the development qualifies includes:

(1) (No change from proposal)

(2) The construction of any residential development on contiguous parcels of property which were under common ownership on or after *[(the effective date of this rule),]***the effective date of the wastewater service area withdrawal,*** regardless of present ownership, or

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on parcels created by subdivision or resubdivision of land which occurred after *[(the effective date of this rule)]* ***the effective date of the wastewater service area withdrawal**;

(3) The construction of any residential development on contiguous parcels of property after *[(the effective date of this rule)]* ***the effective date of the wastewater service area withdrawal** where there is some shared pecuniary, possessory or other substantial common interest by one or more individuals in the units; and

(4) The addition of one or more dwelling units where such addition, when combined with the dwelling units constructed *[after (the effective date of this rule),]* ***prior to the effective date of the wastewater service area withdrawal,** results in a total of six or more dwelling units;

3. Wastewater facilities with a discharge to ground water including individual and other subsurface sewage disposal systems, associated with a development for which one of the following applies:

i. Projects that have a valid approval issued by the Department, as of *[(the effective date of these rules),]* ***the effective date of the wastewater service area withdrawal,** for construction of 50 or more realty improvements issued pursuant to the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq.;

ii. Except as provided in (d) below, projects that have received, prior to *[(the effective date of this rule),]** ***the effective date of the wastewater service area withdrawal*** both a local preliminary or final site plan approval or subdivision approval where subsequent site plan approval is not required under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. or a municipal construction permit and a permit to construct or alter issued by the administrative

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authority under N.J.A.C. 7:9A-3.5 until such time as one of those qualifying approvals expires; and

4. (No change from proposal)

(d) For a public school, in lieu of the MLUL approvals in (b)2 or (c)3ii above, a facility that provides evidence of compliance with statutory provisions of the Municipal Land Use Law at N.J.S.A. 40:55D-1 et seq. in the form of a planning board response dated prior to *[(the effective date of this rule)]***the effective date of the wastewater service area withdrawal*** or expiration of the 45-day courtesy comment period that municipal planning boards are allotted to provide recommendations to the school board and Department of Education prior to *[(the effective date of this rule).]****the effective date of the wastewater service area withdrawal.***

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Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994), permit the public to understand accurately and plainly the purpose and expected consequences of this adoption. I hereby authorize this adoption.

_____ _____

Date Lisa P. Jackson

Commissioner