



January 23, 2007

## **Toms River Development Restrictions Sought**

*Environmental Groups Petition DEP for Stricter Restrictions on Development Surrounding the Toms River*

**By Steven M. Dalton**

The New Jersey Department of Environmental Protection (“DEP”) is considering a Petition for Rulemaking to reclassify the antidegradation classification of segments of the Toms River and its tributaries, including Mirey Run, Doves Mill Branch, Union Branch and Wrangle Brook, from Category Two (C2) to Category One (C1) waters. If DEP agrees to the proposed reclassification, it is estimated that an additional 158 miles of the waters would be subject to the stricter C1 antidegradation classification and approximately 1,630 acres would be regulated through implementation of the 300 foot buffer required under the Stormwater Management rules adjacent to C1 waters. These changes would significantly curtail planned development along the Toms River.

Certain waters are designated by category for purposes of implementing the antidegradation policies set forth in the Surface Water Quality Standards rules. Specifically, waters may be designated as C1 or C2. For C1 waters, the antidegradation policy prohibits discharges which will cause “any measurable changes (including calculable or predicted changes) to the existing water quality.” N.J.A.C. 7:9B-1.5(d)(6)iii. For C2 waters, by contrast, “water quality characteristics that are generally better than, or equal to, the water quality standards shall be maintained within a range of quality that shall protect the existing/designated uses...” N.J.A.C. 7:9B-1.5(d)6.iv.

The American Littoral Society, Environment New Jersey, New Jersey Audubon Society, New Jersey Environmental Federation, Pinelands Preservation Alliance, Save Barnegat Bay and Sierra Club-New Jersey filed the Petition. The Petitioners assert that the waters of the Toms River are of exceptional ecological significance and in stream water quality, and are important in connection with threatened and endangered species habitat and recreational opportunities. They also assert that the Toms River is a potential future drinking water supply source and is important to the health of the Barnegat Bay. Portions of the Toms River have an antidegradation classification of Pinelands waters (PL), which are non-degradation waters with limited exceptions. Other portions are classified as C2. The Petitioners assert that assert that “[i]nconsistent water quality

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standards” threaten water quality, threatened and endangered species habitat and other wildlife and recreational interests.

The New Jersey Builders Association (“NJBA”) submitted comments to DEP challenging the Petition. The Surface Water Quality Standard rules require that a petitioner submit documentation establishing that “a more restrictive use is necessary to protect a unique ecological system or threatened/endangered species.” N.J.A.C. 7:9B-1.11(c), (f). The Petitioners contend that the change from C2 to C1 is necessary because “[t]he Toms River is subject to varying levels of protection that are not adequate to guarantee the high degree of its water quality and habitat.” But, the Petition is woefully inadequate to support this claim, and provides no data, documentation or other evidence whatsoever to meet the burden of establishing that a reclassification is necessary to prevent any negative affect on water quality, use of the watershed by threatened or endangered species, or recreational users. This article summarizes the arguments made in the Petition in support of reclassification of the Toms River to C1, and NJBA’s responses.

### **Water Quality of Existing PL and C1 Waters**

According to the Petition, approximately 230 miles of the Toms River are classified as PL or C1. One of the main themes of the Petition is that the portions of Toms River that are presently PL or C1 will be degraded by the C2 waters. Petitioners assert that the varying levels of protection of different segments of the Toms River and its tributaries are not adequate to guarantee a high degree of water quality and habitat. NJBA notes that the Petition presents no studies or data to support this conclusion. In fact, the AMNET<sup>1</sup> data included in the Petition suggests that the requested reclassification is not necessary to protect existing water quality of those portions of the Toms River classified as PL or C1 because the water quality for those areas is high. Development in accordance with current restrictions and water quality classifications is not having a negative impact according to the Petitioners’ data. Clearly, degradation of water quality is not occurring notwithstanding the existing “varying levels of protection”.

NJBA also make the point that the petitioners’ assertion that the 300-foot buffer required under the Stormwater Management rules adjacent to C1 waters will improve water quality, and benefit species habitat protection and recreation, is also

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<sup>1</sup> The Ambient Biological Monitoring Network (AMNET) consists of over 800 statewide locations for periodic monitoring of the biological health of rivers and streams based on in-stream benthic macroinvertebrate populations.

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unsubstantiated. The Petition includes no studies or other data demonstrating that DEP’s existing buffers are insufficient to protect water quality of the Toms River as well as associated species habitat. In fact, the water quality data presented in the Petition suggests that larger buffers are not needed to protect water quality.

### **AMNET Data for Segments of Toms River**

The Petitioner lists three sections of the main stem of the Toms River – “Headwaters and Upstream Boundary”, “Midstream Section” and “Downstream Section” – and the four tributaries, and presents AMNET water quality data for each section. For each section, the Petitioner argues that a C1 classification is warranted because the available AMNET data indicates high quality waters. These waters, Petitioner argues, “may be” degraded if the C1 antidegradation status is not adopted by DEP.

NJBA documents how the Petitioners’ arguments are undermined by their own data. Where upstream C2 waters flow into downstream C1 and PL waters, water quality scores have remained high. The “lesser” water quality classification of the upstream C2 waters has not negatively impacted the water quality of the downstream PL waters. In some instances, water quality “may have actually improved”. Thus, it is evident that the current water quality classification of FW2-TM is more than protective of water quality and natural resources, and an upgrade in the antidegradation status is unnecessary.

In its response, NJBA makes the point that the Petition is unavailing because it argues for reclassification to protect water quality even when C1 or PL waters are upstream of C2 waters. Upstream PL water segments of the Toms River are not threatened by the lower (less stringent) antidegradation classification of downstream waters. Downstream waters will not flow through upstream waters and will have no impact on water quality. Additionally, the downstream segments of the Toms River have extensive riparian wetland buffers and an artificial boundary in the Garden State Parkway and have exhibited consistently high water quality. Thus, an upgrade in the antidegradation status of this segment of the Toms River is unnecessary to protect water quality and natural resources.

Despite the data showing generally high water quality, Petitioners assert that water quality conditions have started to worsen. NJBA points out that the referenced data is contrary to this assertion. But, even assuming this to be true, Petitioners presented no evidence to demonstrate that any lessening of water quality is the result of the existing C2 designation of portions of the Toms River. Without such documentation, NJBA takes the position that the Petition should be denied.

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### **“Unprotected” Waters**

Petitioners assert that 150 miles of the Toms River are “unprotected” and that “clean water” should be a high priority. NJBA suggests that these arguments demonstrate the Petitioners’ misunderstanding of the stream classification system. A C2 water is not “unprotected”. “Clean water” is a high priority under DEP’s C2 designation. For C2 waters, “water quality characteristics that are generally better than, or equal to, the water quality standards shall be maintained within a range of quality that shall protect the existing/designated uses . . . .” N.J.A.C. 7:9B-1.5(d)6.iv. The assumption that a C2 designation is the equivalent of something less than clean water is patently wrong.

### **Drinking Water**

The Petition suggests that the Toms River will be used as a future drinking water supply. This is pure speculation based on the recent United Water Company water connection moratorium in Toms River. In fact, the foundation of this entire argument is flawed because DEP recently lifted the moratorium.

### **Barnegat Bay**

The Petition asserts the reclassification is needed to protect the C1 classified Barnegat Bay. NJBA notes that, like much of the Petition, this is pure speculation without any scientific support. No data or studies of the alleged negative impacts on the Bay from C2 water flowing from the Toms River were presented. In fact, in recent years, shellfish beds in Barnegat Bay have been reopened reflecting improved water quality.

### **Geographic Imbalance**

Petitioners complain that a “geographic imbalance” in C1 waters exists between Central and Northern New Jersey. NJBA’s comments remind DEP that the WPCA “recognizes that different listing criteria are applicable for different water ways”. The features of the waterway in question, and not quotas, should dictate whether a change in antidegradation status is justified.

### **Threatened and Endangered Species**

Petitioners argue that the proposed water quality reclassification is necessary to protect threatened and endangered species. In its comments, NJBA notes that no evidence was presented of negative impacts to species or species habitat from the existing C2 water quality classification of segments of the Toms River and its tributaries. In contrast, the AMNET data repeatedly shows that good quality habitat exists.

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Moreover, the Petition ignores the existing regulatory protections for such habitat. An extensive riparian wetland buffer and boundary formed by the Garden State Parkway exists for one segment of the Toms River. There is no demonstrated need for duplicative buffers. Additionally, the assumption that threatened and endangered species habitat exists on specific parcels may be untrue given the inherent fallibility of the Landscape Project maps upon which the Petitioners rely to estimate that reclassification would protect 6,536 acres of habitat.

### **Reclassification Proposed to Stop Development.**

The Petitioners call for the redesignation to create an additional 1,630 acres of open space through implementation of 300-foot buffers is a blatant appeal for a land grab, rather than a reclassification of a water body based on water quality concerns. NJBA pointed out that the argument that rivers are subject to development threats from unchecked and poorly managed growth ignores the plethora of DEP regulatory programs that must be satisfied to develop land near the Toms River. Development is not “unchecked”. It is subject to some of the most stringent environmental regulations in the Nation that are designed to be protective of public health, safety, welfare and the environment. Given that, 40% of the Toms River watershed is already permanently protected open space or unavailable for development, NJBA makes the point that there is no need for additional development limitations.

### **Recreational Uses**

Petitioners assert that the proposed reclassifications are necessary to protect recreational use of the Toms River. This claim is baseless. The current water quality classifications of the Toms River and its tributaries have not diminished or otherwise had a negative effect on the use of the Toms River for recreational purposes. In fact the opposite is true. The Petitioners did not present any evidence demonstrating how the proposed C1 reclassification would result in an increase of recreational use of the Toms River. The assertion that a change in water quality classification is necessary to promote or preserve recreational uses is completely unsubstantiated.

### **Surface water quality standards and criteria are protective of existing uses.**

The existing surface water quality criteria for FW2 waters were established by DEP to protect the designated uses of the waters, which include both existing and potential uses. N.J.A.C. 7:9B-1.4. In its letter, NJBA stresses that the Petition makes no claim and points to no evidence that existing uses of the Toms River have changed since

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the time DEP adopted the regulations that establish the current classifications. Therefore, the existing C2 antidegradation classification of portions of Toms River and its tributaries is sufficient to protect the C1 and PL antidegradation status of other portions of Toms River and its tributaries.

### **Petition Status**

As documented by NJBA, the Petition falls woefully short of the documentation required to justify a change in the antidegradation status of Toms River and its tributaries and the imposition of stricter environmental standards. DEP's decision for a responding to the Petition is January 2, 2007 but it has extended the deadline for 90 days. The Petition should be denied, but it remains to be seen whether DEP will bow to political pressure from environmental groups, or instead will make a decision that appropriately considers the lack of a substantive basis for the Petition and economic interests.

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