

New Jersey's Anti-Degradation Enforcement Campaign

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Antidegradation and the Clean Water Act

New Jersey's waters, like all states, are protected by the broad protections of the Clean Water Act of 1972. The impetus for the act, and its most well-known application, was to clean up some of the nation's most polluted waterways. However, it also granted broad protections to waterways that were not polluted, called anti-degradation protections. The Act defined the range of protections from Tier I [the Mississippi] to Tier III [national and state parks]. In New Jersey, these protections are spelled in the Surface Water Quality Standards [SWQS] with differing classifications to protect everything from shellfish waters, trout streams, Pinelands waterways and coastal estuaries.

New Jersey's anti-degradation protections, as written in the Surface Water Quality Standards, create a written contradiction. While the standards directly protect waterways in state and national parks with the strongest level of protection (Tier III), they provide an overly broad statement of other waterways that should receive strong anti-degradation protection, known as Category One (Tier II and a half). Waterways that are of "exceptional ecological significance" and "exceptional sources of water supply" should receive this protection. But the explicit criteria that is listed and is used to upgrade waterways focuses mainly on "trout production" streams. There are cases where "exceptional sources of water supply" and "trout production" overlap, and there are blatant cases where they do not.

This regulatory doublespeak has been partially corrected by Governor Jim McGreevey's administration. The state's environmental agency, the DEP, has finalized protections of some of the state's largest drinking water reservoirs which provide water for over 3.5 million residents, as well as a handful of significant rivers and reservoirs. This has inched up the total mileage of waterways that the state currently protects for waterways to over 3,000 miles. However, after intensive lobbying by NJPIRG, the DEP issued an IPR (issuance for public record) of over 4,000 miles of waterways across the state that either serve as a drinking water source or critical habitat for threatened and endangered species. This list corresponds to one submitted by NJPIRG and coalition partners identifying over 100 waterways across the state that deserve increased protections. For the most part, this list has not acted as a blue-print for immediate action on these waterways. The state has noted areas that might be protected, defended its current actions from legal suits by developers and worked to finalize another round of targeted waterway upgrades.

Changing Threats To Water Quality

The failure of past administrations to enforce the anti-degradation elements of the Clean Water Act can be directly seen in the declining water quality in waterways most affected by encroaching development. Increasingly, non-point source pollution is the threat that most endangers New Jersey's waterways – the DEP estimates that 60 percent of waterways pollution is non-point based. Anti-degradation protections are critical because they create standards to enforce “no measurable decline” in water quality, by creating buffers around waterways as well as creating more efficient and enviro-friendly stormwater management designs.

But these protections have not been used and enforced and waterways across the state have become more polluted in the last decade because of this failure. This trend is most clearly seen along rivers on the Jersey Shore and Central Jersey, and was noted most strongly in NJPIRG's 2003 report, “Rivers in Danger: The Impact of Development on Water Quality” and cited by the McGreevey Administration. The trend is a clear one: the level of impairment in a waterway is directly proportional to the amount of impervious cover immediately surrounding it and the acreage of development.

Comparing data from over decade from 1986 through 1995 on state land use patterns as well as water quality indicators, we get a clear picture of degradation. In the Metedeconk River watershed along the Shore, development increased by 4 percent, and water quality declined by 10 percent. In the Lawrence Brook and Millstone River watershed, development increased by 7 percent – the fastest rate in the state – and water quality declined by 12 percent. In and in the Rancocas Creek watershed, in South Jersey, a 3 percent increase in development triggered a staggering 29 percent decrease. Over this same time period, the New Jersey Clean Water Enforcement Act was passed, which helped to dramatically reduce violations of point source pollution across the state. Water quality should have improved in these waterways, but because of non-point source pollution, they continued to decrease.

Lack of Regulatory Clarity

New Jersey's current regulatory language remains muddled. While the state is responsible for enforcing the anti-degradation provisions of the Clean Water Act, it has only recently taken action to clarify that these protections do include areas that provide threatened and endangered habitat and water supply. Explicitly, the lack of clarity makes it more difficult to directly enforce the anti-degradation provisions, and more malleable to interpretation.

One can see that the language in the Surface Water Quality Standards does not provide as much direct clarity as desired in defining direct criteria for Category One waters: “No

measurable changes in water quality characteristics because of their clarity, color, scenic setting, other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply or exceptional fisheries resource.” [N.J.A.C. 7:9B-1.5]

In contrast, the regulations from New York are quite explicit. This connection between public health and anti-degradation is seen most prominently in New York’s “discharge restriction categories.” These standards apply to a broad category of areas, including discharges that provide a public health concern. It should be noted that the regulations clearly delineate and define each area of protection.

For waters of particular public health concern, the regulations clearly define four areas of qualification, two of them specifically monitoring the quality of surface drinking water and one concerning the quality of groundwater. (NYCRR 701.20)

- (1) waters within a 60-day water time-of-travel of unfiltered public water supply intake points;
- (2) public water supply watersheds with reservoirs experiencing accelerated eutrophication;
- (3) groundwaters requiring such protection as specified in watershed rules and regulations or wellhead protection programs; and
- (4) marine waters certified by the department for taking of shellfish

New Jersey needs to expand its enforcement of anti-degradation protections under the Clean Water Act, by upgrading more the waterways it has identified, enforcing these protections through the regulatory structure and clarifying its criteria language, to ensure that the original mandate of the Clean Water Act is fulfilled.