

Dear Commissioner Jackson:

Thank you for considering our concerns and adopting the FVA Guidance (Administrative Order No. 2007-01).

***When to Use the Functional Value Analysis***

Based on our review of that Guidance, we are writing to clarify regulatory and implementation issues. We remain concerned that the FVA did not close all the loopholes in proposals to reduce the width of 300-foot Category One Water buffers to 150 feet, especially as part of conversion of former agricultural lands to major development. Additionally, the Guidance is silent about cases where C1 buffers have been disturbed in the absence of a FVA demonstration.

In such cases, we seek aggressive DEP enforcement against disturbance in the regulated buffer zone. At a minimum, enforcement action should seek restoration to pre-disturbance conditions. Last, we request that the Department provide guidance to local governments to correct errors in interpretation of DEP's buffer rules, particularly given the fact that the Department's staff may have provided incorrect interpretations that municipal officials continue to rely on.

As you know, the 300-foot buffers along C1 waters were adopted as a stormwater BMP that is codified in the stormwater management rules (NJAC 7:8-5.5(h)). According to the Department's Basis and Background statement in the stormwater rule proposal (35 NJR 199(a); January 3, 2003), the 300-foot buffers are presumed, in the absence of a demonstration, to maintain "existing water quality" and protect "existing uses" from the adverse impacts of major development. Maintenance of EWQ and protection of existing uses are the anti-degradation policy mandated for Category One waters pursuant to the surface water quality standards (NJAC 7:9B-1.5).

The 300-foot buffers were designed by the Department as an anti-degradation implementation policy for C1 waters. From a regulatory and technical perspective, the 300-foot buffers serve in lieu of an applicant's requirement to conduct a site-specific anti-degradation demonstration and water quality studies for all point and non-point source pollutants. As you know, the NJPDES rules (NJAC 7:14A) include anti-degradation review requirements for point source discharges, but not non-point source pollutant loadings. The C1 buffers were designed as part of an effort to close this loophole by applying the C1 anti-degradation policies to NPS loads associated with "major development." However, the Department recognized that in some cases, the presumptive BMP would not be adequately protective. Therefore, under the stormwater management rules, the Department reserved its authority to require scientifically valid, site-specific demonstrations as necessary to comply with the surface water quality standards and anti-degradation policies (NJAC 7:8-1.5(a)). Site specific requirements would include an anti-degradation analysis and a water quality study to demonstrate that the post-construction conditions and NPS pollutant loadings associated with major development

would maintain existing water quality and comply with the surface water quality standards.

We believe that the Department should require such site-specific studies as part of the FVA demonstration for any encroachment in the 300-foot buffer along C1 waters.

Aside from these site-specific anti-degradation and water quality study review requirements, according to the stormwater management rules (NJAC 7:8-5.5(h)), agriculture is only an allowable buffer "disturbance" if maintained in active use. Conversion of land to major development may not encroach upon disturbed agricultural buffers. The Department is required to enforce its own rules and mandate 300-foot buffers with no exceptions allowed.

All other non-agricultural buffer encroachment allowed by the rules should trigger the Functional Value analysis.

### ***NJDEP Guidance to Municipalities***

Local government officials have been advised by Department officials that buffer reductions are acceptable on former agricultural lands. It is NJDEP's responsibility to fix this error by providing the correct guidance via a mailing to all local governments. Instead of implementing the FV Guidance on a case by case basis in response to various permit applications for "major development," we urge the Department to implement the FV Guidance on a statewide basis, in consideration of municipal land use requirements. Such an approach would allow towns to incorporate the C1 protections in municipal land use planning, zoning, and development review ordinances. In addition to the stormwater management rules, there are at least two other regulatory mechanisms that the Department can rely on to provide the FVA and compliance guidance to towns on a statewide and enforceable basis.

The first is the Department's New Jersey Pollutant Discharge Elimination System (NJPDES) revised stormwater rules (NJAC 7:14 - 36 N.J.R. 813(a)). Under those rules, the Municipal Stormwater Regulation Program regulates, in some form, all 566 municipalities within the State via either Tier A or Tier B final NJPDES general permits. These regulations and the NJPDES municipal stormwater general permits require compliance with the stormwater management rules (NJAC 7:8-1 et seq.). NJPDES permit compliance requirements include adoption of various municipal ordinances, including C1 stream buffer protection ordinances that meet the requirements on NJAC 7:8-5.5. We are very concerned that Towns are not adopting C1 buffer ordinances and that the Department is not enforcing the stormwater permit requirements, particularly in towns with C1 waters. Stormwater compliance oversight is a logical means to promulgate this guidance to towns.

Second, we understand that the Department will soon be proposing rules to revise and reauthorize the "water quality management planning rules" (NJAC 7:15-1). We expect that those WQMP rules will incorporate and require adoption by ordinance of the FV

Guidance and other local ordinances required by the municipal stormwater permit program.

The Department should take enforcement action in all cases where buffer disturbance or major development proposals have gone forward despite site-specific requirements of the SWQS and stormwater management rules, as well as the FVA Guidance.

In closing, we ask that the Department clarify implementation requirements under the FVA Guidance with respect to its applicability and review procedures relative to:

- 1) where major development has been approved locally in the absence of the FVA;
- 2) where major development is pending local review in the absence of the FVA
- 3) where DEP has issued land use permits, WQMP amendment and other approvals in the absence of the FVA; and
- 4) where DEP land use permits, WQMP amendments, and other approvals of major development are pending review.

Sincerely,  
Mike King, Coordinator  
REALsmart

cc: Bill Wolfe, Director  
NJ PEER