

Participating Organizations

Alliance for a Living Ocean
American Littoral Society
Arthur Kill Coalition
Asbury Park Fishing Club
Atlantic Highlands Arts Council
Bayside Regional Watershed Council
Bayside Saltwater Flyrodders
Belford Seafood Co-op
Belmar Fishing Club
Beneath The Sea
Bergen Save the Watershed Action Network
Berkeley Shores Homeowners Civic Association
Cape May Environmental Commission
Central Jersey Anglers
Citizens Conservation Council of Ocean County
Clean Air Campaign, NY
Clean Water Action
Coalition Against Toxics
Coalition for Peace & Justice/Unplug Salem
Coastal Jersey Parrot Head Club
Communication Workers of America, Local 1075
Concerned Businesses of COA
Concerned Citizens of Bensonhurst
Concerned Citizens of COA
Concerned Citizens of Montauk
Eastern Monmouth Chamber of Commerce
Environment NJ
Fishermen's Conservation Association, NJ Chapter
Fishermen's Conservation Association, NY Chapter
Fishermen's Dock Cooperative, Pt. Pleasant
Food and Water Watch, NJ
Friends of Island Beach State Park
Friends of Liberty State Park, NJ
Friends of the Boardwalk, NY
Garden Club of Allenhurst
Garden Club of Bay Head and Mantoloking/Seaweeders
Garden Club of Brielle/Bayberry
Garden Club of Englewood
Garden Club of Fair Haven
Garden Club of Long Beach Island
Garden Club of RFD Middletown
Garden Club of Morristown
Garden Club of Navesink
Garden Club of New Jersey
Garden Club of New Vernon
Garden Club of Oceanport
Garden Club of Princeton
Garden Club of Ridgewood
Garden Club of Rumson
Garden Club of Sea Girt/Holly
Garden Club of Short Hills
Garden Club of Shrewsbury
Garden Club of Spring Lake
Garden Club of Terra Nova
Garden Club of Washington Valley
Great Egg Harbor Watershed Association
Green Party of Monmouth County
Green Party of New Jersey
Highlands Business Partnership
Hudson River Fishermen's Association
Jersey Shore Captains Association
Jersey Shore Parrot Head Club
Jersey Shore Partnership
Junior League of Monmouth County
Keyport Environmental Commission
Kiwanis Club of Shadow Lake Village
Leonardo Party & Pleasure Boat Association
Mantoloking Environmental Commission
Marine Trades Association of NJ
Monmouth Conservation Foundation
Monmouth County Association of Realtors
Monmouth County Audubon Society
National Coalition for Marine Conservation
Natural Resources Protective Association, NY
NJ Beach Buggy Association
NJ Environmental Lobby
NJ Friends of Clearwater
NJ Marine Education Association
Nottingham Hunting & Fishing Club, NJ
NYC Sea Gypsies
NY Marine Education Association
NY/NJ Baykeeper
Ocean Wreck Divers, NJ
PaddleOut.org
Piscataway Saltwater Sportsmen Club
Rantan Riverkeeper
Religious on Water
Rotary Club of Point Pleasant
Rotary District #7540—Interact
Saltwater Anglers of Bergen County
Sandy Hook Bay Anglers
Save Barnegat Bay
Save the Bay, NJ
SEAS Monmouth
Shark Research Institute
Shark River Cleanup Coalition
Shark River Surf Anglers
Sierra Club, NJ Shore Chapter
Sisters of Charity, Maris Stella
South Monmouth Board of Realtors
Staten Island Tuna Club
Strathmere Fishing & Environmental Club
Sunrise Rod & Gun Club
Surfers' Environmental Alliance
Surfrider Foundation, Jersey Shore Chapter
Surfrider Foundation, South Jersey Chapter
TACK I, MA
Unitarian Universalist Congregation/Monm. Cnty.
United Boatmen of NY/NJ
Viking Village
WATERSPIRIT
Women's Club of Brick Township
Women's Club of Keyport
Women's Club of Long Branch
Women's Club of Merchantville
Women's Club of Spring Lake
Zen Society, NJ



Ocean Advocacy
Since 1984

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Re: Proposed amendments, repeals, and new rules regarding the Shellfish Growing Water Classification rules at N.J.A.C. 7:12 (DEP Dkt. No. 11-15-10)

Clean Ocean Action (COA) is a broad-based coalition of 125 conservation, environmental, fishing, boating, diving, student, surfing, women's, business, service, and community groups, and also represents concerned citizens and businesses. Our goal is to improve the degraded water quality of the marine waters off the New Jersey/New York coast. COA has reviewed the proposed amendments to Shellfish Growing Water Classifications and submits the following comments.

In 2012, Shellfish landings revenue in New Jersey totaled \$159 million dollars.¹ Estimates have valued New Jersey's shellfishing industry at \$700 million dollars.² This industry is a vital economic driver in many regions of our State. Furthermore, shellfish provide habitat and food for numerous species, filter pollutants, and function as "canaries in the coal mine" for water quality.

While there are certain aspects of these rules that are helpful, overall COA has significant concerns over the decline of water quality in NJ waterways, the actions New Jersey Department of Environmental Protection (NJDEP) has taken to comply with the National Shellfish Sanitation Program, and the restrictions on remediation and research these proposed rules codify. Furthermore, NJDEP has not provided critical information for COA to fully evaluate these proposed rules, as there is no information as to the actions NJDEP has (or has

¹ NOAA National Marine Fisheries Service

² http://www.pressofatlanticcity.com/news/press/new_jersey/oversight-of-new-jersey-s-shellfish-industry-lacking-group-finds/article_a75b0c64-9296-11df-820b-001cc4c03286.html



not) taken to meet the concerns laid out by FDA in the 2009, 2010, and 2012 Annual Program Evaluation Report, as well as the funding sources necessary to maintain compliance.

Degraded Water Quality in New Jersey Shellfishing Waters

The NJDEP proposed rule changes include updated classifications for New Jersey shellfishing waters which will result in the downgrading of 12 areas, amounting to 5,199.5 acres. The stated cause is due to elevated levels of bacteria, expansion of buffer zones surrounding a wastewater treatment plant outfall, dredging of a man-made lagoon, and/or high fecal coliform levels. While COA notes that NJDEP does propose to upgrade 951.4 acres of NJ shellfish waters (a positive step), the vast majority of the classifications reflect a reduction in water quality. This is a deeply disturbing and unacceptable trend in the wrong direction for NJ's ecology and economy. In short, this is a statewide call to action for aggressive identification and elimination of pollution.

COA demands the mobilization of the numerous programs within the NJDEP to address these water quality issues and restore these important economic and ecological resources. COA strongly urges NJDEP to require the final rule to address the downgraded areas with the following:

- trackdown and abatement to identify and stop sources of bacterial pollution,
- identification and funding for critical abatement and trackdown activities, and
- the dissemination of this information to the public.

These actions must be given a high priority as public health, safety, economic interests, and the environment depend upon water quality improvements.

Improvements in the Shellfish Classification Rules

There are certain improvements to the shellfish rules that COA supports. These updates and revisions include:

- The bacterium *Vibrio vulnificus* is proposed to be included along with *Vibrio parahaemolyticus* in the provision at N.J.A.C. 7:1.4(d), which addresses the annual risk assessment of illness from consumption of shellfish that the Department conducts.
- N.J.A.C. 7:12-1.4(e) is modified to provide that, in addition to the means of notice already specified, any notice of harvest suspension will also be posted on the Bureau of Marine Water Monitoring's website.
- The addition of new permits for growing and harvesting activities related to depuration and relay.
- Modification to the delineations of the various classifications of the State's shellfish growing waters to reflect the most current sanitary water quality testing data.
- N.J.A.C. 7:12-1.4 will be amended to match the various shellfish classification terms with those used in the NSSP Guide.
- The proposed new rule at N.J.A.C. 7:12-9.2 requires that any person engaged in shellfish hatchery, nursery, and/or aquaculture activities must register with NJDEP and apply for a permit before undertaking these activities.⁴

⁴ Shellfish rule proposal, page 64.

- The rules reduce the likelihood that human waste will be discharged into the shellfish growing waters through the requirement that each harvesting vessel have installed an appropriate marine sanitation device (N.J.A.C. 7:12-8.3), and the prohibition of discharging human waste into shellfish growing waters.

Lack of Compliance with the NSSP

The Food and Drug Administration (FDA) is responsible for reviewing the State's shellfish control program to ensure that it is consistent with the national standards applicable to all other state shellfish control programs. Complying with the National Shellfish Sanitation Program (NSSP) Guide dated 2013 is a necessary improvement to keep the state program in line with the latest guidance and in compliance with FDA regulations. However, the proposed rules do not address specific concerns made by FDA and many other environmental groups dating back to 2009.⁵ These concerns include:

- Failure by DEP to comply with NSSP inspection frequency requirements for Certified Shellfish Dealers and there was inadequate enforcement staffing available at Shellfish Dealers.⁶
- Insufficient DEP staffing to meet patrol frequency requirements, particularly for prohibited, restricted and closed areas.⁷
- Failure by DEP to purchase a larger boat to monitor shellfishing waters in the Delaware Bay.⁸
- Flaws in the DEP marine water sampling program due to a shortfall in staffing, furloughs, and layoffs.⁹ Some reports estimate a 30% reduction in the number and frequency of water sampling due to staff loss.¹⁰
- The continued need for microbial pollution source tracking in waters impacted by nonpoint source pollution such as the Navesink River, Shrewsbury River, and Sandy Hook Bay.¹¹
- A FY 2010 FDA evaluation found that New Jersey's Control of Harvest (Patrol) Element was still not in substantial conformance with the requirements under the NSSP for Control of Harvest.¹² Two years later, a FY 2012 FDA evaluation found that New Jersey still had not obtained an adequate vessel in Delaware Bay and still had not addressed the issue of regulating overboard discharge of human waste from harvest vessels.¹³

⁵ FDA Annual Program Evaluation Report, State of New Jersey. FY 2009. See also "*Oversight of New Jersey's shellfish industry lacking, group finds*", Press of Atlantic City, available at http://www.pressofatlanticcity.com/news/press/new_jersey/oversight-of-new-jersey-s-shellfish-industry-lacking-group-finds/article_a75b0c64-9296-11df-820b-001cc4c03286.html

⁶ FDA Annual Program Evaluation Report, State of New Jersey. FY 2009.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ http://www.pressofatlanticcity.com/news/press/new_jersey/oversight-of-new-jersey-s-shellfish-industry-lacking-group-finds/article_a75b0c64-9296-11df-820b-001cc4c03286.html

¹¹ FDA Annual Program Evaluation Report, State of New Jersey. FY 2009

¹² Annual Program Evaluation Report of State of New Jersey Shellfish Program, FY 2010.

¹³ Annual Program Evaluation Report of State of New Jersey Shellfish Program. FY 2012.

NJDEP must address these long standing inspection, monitoring, and water sampling concerns and how they affect NSSP compliance. The proposed rules would be the appropriate method to address these concerns.

Access to the Monitoring and Data Underlying the Shellfish Classifications

NJDEP is proposing amendments to update the delineations of shellfish growing waters classifications “reflecting data the Department has collected through annual assessments conducted in accordance with the NSSP Guide in which thousands of water samples are collected and actual and potential sources of pollution are inventoried.¹⁴” Yet, this robust source of water quality data has not been released in conjunction with the proposed rules. In order to fully evaluate the proposed rules, sources of pollution found through this program and the underlying monitoring data, including the frequency and quality assurance requirements of such monitoring must be available to the public.

The Proposed Rules will have a Negative Social and Economic Impact

COA disagrees that the proposed downgrading of specific waters will have a net positive social and economic impact. The downgrading of nearly 5000 acres of shellfishing waters statewide removes numerous economically important areas from harvest. Furthermore, the social impact of waters too polluted to harvest shellfish is harmful. From a civic perspective, 40 years after the Clean Water Act was enacted, the downgrading of State waters is a failure of good governance. The characterization of these actions as net positives is misleading, and minimizes the water quality issues New Jersey faces.

While it is essential that NJDEP ensure the protection of public health and safety from pollution, it is equally important that the State protect the economic potentiality and ecosystem services provided by these resources.

The fecal pollution causing the Navesink River Section Downgrade and the existing Prohibited Areas are unacceptable, especially given the historic and recent efforts to clean up the river.

The Navesink River is an iconic waterbody and one of the only soft clam fisheries in New Jersey.¹⁵ The downgraded classification of 565 acres of the River to prohibited is unacceptable both in a societal and economic sense. This backsliding of water quality in the Navesink comes after numerous efforts to combat these issues.

A multi-agency government effort to address non-point source pollution in the Navesink was initiated in 1981. By 1986, sampling and storm drain studies prompted the drafting of a Memorandum of Understanding between NJDEP, USEPA, and US and NJ Department of

¹⁴ See Proposed Rules

¹⁵ Navesink River TMDL, implemented through the Monmouth County Water Quality Management Plan, 2011.

Agriculture, as well as private and public institutions to:

*“formalize our commitment to the Navesink River Water Pollution Control Shellfish Protection Program and its primary goal of improving water quality in the Navesink Watershed to a point at which the river’s full shellfishery and recreational potential may be attained.”*¹⁶

The results of these efforts and the Memorandum of Understanding between these agencies is, at best, unclear, and at worst, ineffectual. The Navesink River was listed as impaired under the EPA 303(d) list for Total Coliform Bacteria in 1998.¹⁷ In 2006, EPA approved Total Maximum Daily Loads (TMDLs) for shellfishing impairments due to high total coliform levels for the Navesink and Shrewsbury Rivers and the larger Watershed Management Area 12 which encompasses the rivers. In 2008, a microbial source tracking study of the upper Navesink River was published which revealed both human and wildlife sources of pollution with problems noted from stormwater discharges.¹⁸ In 2011, the TMDL for the Navesink was finally adopted in the Monmouth County Water Quality Management plan.

As the most recent shellfish classification downgrade of over 500 acres of the Navesink make clear, the recommendations included in the 2008 microbial source tracking study, and actions included in the TMDL for the Navesink River have apparently not only been ineffective in improving water quality. In fact, ***the water quality of the Navesink has deteriorated even further.***

The key recommendations contained in the 2008 microbial source tracking study include 1) improve stormwater infrastructure, 2) maintain dumpsters, or refuse containers, properly to prevent leakage, and 3) identify and remediate problems in wastewater systems, such as leakages or illegal connections.¹⁹

The TMDL for the Navesink suggests several management efforts and describes various government programs to reduce pollution loads, but it does not appear to mandate their implementation or provide a schedule. The Navesink TMDL appears to rely mainly on the NJDEP Municipal Stormwater Program, however this program has had issues with oversight and enforcement since it was implemented, and the MS4 permits that municipalities are operating under have been expired for over a year.²⁰ COA has been in contact with NJDEP and understands that they are in the process of finalizing drafting and readying roll out efforts for the revised MS4 permitting program. However, there has been no indication that NJDEP will address these flaws in whatever iteration is being drafted at the moment, or when this new draft

¹⁶ Memorandum of Understanding, dated August 21, 1986.

¹⁷ Waterbody Assessment Report for the Navesink Estuary, *available at* http://iaspub.epa.gov/tmdl_waters10/attains_waterbody.control?p_list_id=NJ_0101&p_cycle=1998#causes

¹⁸ NJDEP 2008. Coastal Nonpoint Source Pollution Monitoring Program Upper Navesink River Stormwater Study: Microbial Source Tracking. February 2008 (revised)
<http://www.state.nj.us/dep/bmw/Reports/RevisedNavesinkStormFeb.pdf>

¹⁹ *Id.*

²⁰ See Petition Dated February 4, 2014, Requesting the Modification (or Revocation and Reissuance) of Tier A Municipalities, Tier B Municipalities, Highway Agency, and Public Complex General Stormwater Permits *available at* [http://switchboard.nrdc.org/blogs/llevine/NJ%20MS4%20Permit%20Petition%202-4-14%20\(with%20exhibits\).pdf](http://switchboard.nrdc.org/blogs/llevine/NJ%20MS4%20Permit%20Petition%202-4-14%20(with%20exhibits).pdf)

permitting program will be ready to roll out.

The 2008 microbial source tracking study, the Navesink TMDL, NJDEP's Municipal Stormwater Program, and NSSP guidelines recommend ongoing pollution source tracking efforts, litter, waste management, and other actions designed to combat stormwater pollution.²¹ However, it is unclear if source tracking efforts are ongoing in the Navesink, what progress Municipalities have made in implementing these efforts, and the status of the management actions required by the Navesink TMDL.

The Navesink River is emblematic of the issues plaguing the Municipal Stormwater Program, TMDL implementation, and downgraded shellfishing waters across the state of New Jersey. When one looks at this most recent shellfish classification downgrade in the Navesink, coupled with the systemic failures of the Municipal Stormwater Program, and the ineffective implementation of the Navesink TMDL, it is clear a rapid and holistic effort is needed in addressing these water quality issues, both locally for the Navesink River, as well as State wide.

The Shellfish Growing Water Classifications Rule must expand testing of shellfish to include chemical assessments and standards.

At this time, there are no current monitoring programs administered by NJDEP to survey levels of chemical contaminants in shellfish meat (other than bluecrab and lobsters) in New Jersey's waters, even though there is reason to believe that chemical contamination of shellfish poses a risk to human health. This is particularly crucial since consumers typically eat the whole animal. For example, there are elevated levels of chemical contamination in sediments throughout the state's coastal waters, which are often reflected in elevated levels of contamination in benthic organisms such as shellfish. In fact, the Mussel Watch program, managed by National Oceanic Atmospheric Administration, found that mussels at all sampling sites in New Jersey had elevated concentrations of metal or organic contaminants and categorized the sites as having medium to high levels of for several contaminants tested in shellfish tissue at each site. NOAA's additional study of PBDEs indicated high levels at all sites tested along the New Jersey coast (Sandy Hook, Long Branch and Shark River).

The FDA recognizes that shellfish can accumulate "*poisonous or deleterious substances*" due to their filter-feeding behavior.

*"The FDA has established action levels, tolerances and guidance levels for poisonous or deleterious substances to control the levels of contaminants in human food including seafood (FDA Federal Register, 1977; FDA, 1985)."*²²

²¹ See FDA NSSP Guidelines (2013) Section IV Guidance Documents – Chapter II. Growing Areas Page 224, see also Navesink River TMDL, implemented through the Monmouth County Water Quality Management Plan, 2011, see also NJDEP 2008. Coastal Nonpoint Source Pollution Monitoring Program Upper Navesink River Stormwater Study: Microbial Source Tracking. February 2008 (revised)

<http://www.state.nj.us/dep/bmw/Reports/RevisedNavesinkStormFeb.pdf>, see also NJDEP Municipal Stormwater Program regulations, http://www.nj.gov/dep/dwq/msrp_home.htm

²² FDA 2007. Guide for the Control of Molluscan Shellfish

<http://www.fda.gov/Food/FoodSafety/ProductSpecificInformation/Seafood/FederalStatePrograms/NationalShellfishSanitationProgram/ucm053987.htm>

The levels are designed to be used to assess public health impacts and are revised as needed. The 2007 Guide Section 4 Chapter 2 Table 1 provides action levels, tolerances and/or guidance levels for many contaminants including heavy metals, pesticides, and PCBs.

Additionally, EPA has recommended that bivalves be target species for evaluating contaminants:

“Bivalve molluscs (e.g., oysters, mussels, and clams) are filter feeders that accumulate contaminants directly from the water column or via ingestion of contaminants adsorbed to phytoplankton, detritus, and sediment particles. Bivalves are good bioaccumulators of heavy metals (Cunningham, 1979) and polycyclic aromatic hydrocarbons (PAHs) and other organic compounds (Philips, 1980; NOAA, 1987)...”²³

In 2005, EPA and FDA agreed to a Memorandum of Understanding on Environmental Contamination in Fish and Shellfish to work together to improve assessments and notification.²⁴ This MOU encouraged environmental monitoring efforts and communication to the public of health risks for both fish and shellfish. New Jersey can lead this effort to protect public health.

We urge the state to consider assessing shellfish, such as bivalves, for levels of contaminants of concern including metals, pesticides, PCBs, PBDEs, dioxins and furans, and polycyclic aromatic hydrocarbons. Existing and new advisory levels (of contaminant levels in edible tissue) based on the latest federal guidance by EPA and FDA should be used to assess whether or not shellfish is safe for human consumption. Surveys and screening should be used to identify areas of concern, establish shellfish consumption advisories, modify classifications of shellfish growing waters, and reduce pollution.

Permit for Shellfish Restoration and/or Enhancement in Waters Other Than Approved (N.J.A.C. 7:12-9.11)

Decades ago, vast numbers of oysters with names like Amboys, Shrewsburies and Navesink Goldens were harvested across 350 miles of oyster beds stretching from New Jersey to New York. Disease, pollution and, to some degree, overharvesting created a severe decline in that population, impacting not only the oyster industry, but also the health of the estuary system.²⁵

Shellfish research and restoration efforts are increasingly necessary in this age of water quality pollution, sea level rise, and increased storm frequency. The many benefits of these activities are well known and range from water quality improvement, habitat creation and restoration, and storm protection. In the last decade, efforts have been made to repopulate these areas with oysters for habitat, water quality improvements and storm resilience. Unfortunately, this work has recently been hindered by State policy.

²³ USEPA, 2000. Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Volumes 1 to 3. <http://www.epa.gov/fishadvisories/advice/es.html>

²⁴ USEPA and USFDA 2005. Memorandum of Understanding on Environmental Contamination in Fish and Shellfish <http://www.epa.gov/fishadvisories/files/moufdaepa.pdf>

²⁵ <http://www.jerseyseafood.nj.gov/seafoodreport.pdf>

NJDEP is now proposing to permanently codify this policy with a new permit for Shellfish Restoration and/or Enhancement in Waters Other Than Approved. This permit regulates shellfish gardening at a single site in waters other than Approved conducted by a non-profit organization or government agency for purposes of restoring or enhancing the shellfish resource or enhancing water quality, and not for human consumption.²⁶

The proposed permit would require a security plan, the minimum requirements of which are continuous surveillance and patrol (24 hours a day, 365 days a year), provisions requiring immediate notification of law enforcement in the event of any security breach or emergency, and other site-specific security measures, such as signs or fencing, that limit access to the site or to the shellfish.

These proposed rules would continue to place an impossible burden on non-governmental organizations to meet security requirements which are overly restrictive and unnecessary. The result would be to make restoration and research activities in restricted and prohibited waters nearly impossible. To effectively eliminate expanding restricted shellfish growing for non-consumption, (a crucial tool for waters that need them most), would be a disservice to citizens and the environment.

NJDEP has offered no evidence that illegal harvesting of shellfish in classified waters is a serious issue necessitating such restrictions. NJDEP has also failed to consistently apply these security measures to similar permitted activities.

In conclusion, COA supports certain proposed amendments to the Shellfish Growing Water Classification Rules. However, substantial changes are still needed before readopting the existing rules to ensure the program is in compliance with the NSSP, protective of public health, to reduce pollution in these downgraded waters, and that the oversight and water monitoring efforts are fully funded and appropriate for the tasks at hand

We look forward to your written response and request a meeting to discuss our concerns.

Sincerely,



Cindy Zipf
Executive Director



Zachary Lees
Ocean and Coastal Policy Attorney

²⁶ Proposed N.J.A.C. 7:12-9.11.