

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

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SECRETARY OF STATE

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED  
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: WVDEP, Secretary's Office TITLE NUMBER: 60

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5

TITLE OF RULE BEING AMENDED: Antidegradation Implementation Procedures

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 373

SECTION § 64-3-1(z), PASSED ON March 6, 2008

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE  
FOLLOWING DATE: July 1, 2008

  
Authorized Signature

**TITLE 60  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
SECRETARY'S OFFICE**

**SERIES 5  
ANTIDEGRADATION IMPLEMENTATION PROCEDURES**

FILED  
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DEPARTMENT OF ENVIRONMENTAL PROTECTION  
SECRETARY'S OFFICE

**§60-5-1. General.**

1.1. Scope. -- This rule establishes the procedures by which the Department of Environmental Protection shall implement the State's water quality anti-degradation policy found at 47 CSR 2-4.

1.2. Authority. -- W. Va. Code §22-11-7b(d).

1.3. Filing Date. -- April 11, 2008

1.4. Effective Date. -- July 1, 2008

1.5. Applicability

1.5.a. Except as noted, the antidegradation implementation procedures herein apply to regulated activities that have the potential to affect water quality. The level of review required will depend upon the existing uses of the water segment that would be affected, the level of protection ("tier") assigned to the applicable water segment, the nature of the activity, and the extent to which existing water quality would be degraded.

1.5.b. Nonpoint source activities will be deemed to be in compliance with antidegradation requirements with the installation and maintenance of cost-effective and reasonable best management practices in accordance with 47 CSR 2-4.1.b. These include, but are not limited to, best management practice programs for silviculture administered by the Division of Forestry, programs for oil and gas operations administered by the Office of Oil and Gas of the Department of Environmental Protection, nonpoint source construction activities, and reasonable land, soil and water conservation measures and practices applied to agricultural nonpoint sources.

1.5.c. Where applicable and practical, the antidegradation procedure and review shall be integrated into and proceed concurrently with existing environmental processes and reviews pursuant to the National Environmental Policy Act.

1.5.d. Information contained within existing environmental processes and reviews, such as environmental assessments, environmental impact statements, facilities plans, and findings of no significant impact, may be used to provide part or all of the requirements of the antidegradation procedure and review.

**§60-5-2. Definitions.**

2.1. "Agency" or "agencies" means the Department of Environmental Protection or other federal, state, or local governmental entities with regulatory authority over activities that may affect water quality.

2.2. "Ambient concentration" means that measured value or level of water quality downstream of the proposed or existing activity (discharge point for point source, runoff area for nonpoint source) for any parameter of concern determined through EPA-approved, collection and analytical methods in 40 CFR 136 or other methods accepted by the Secretary.

2.3. "Ambient water quality conditions" (AWQC) means those physical, chemical, biological and radiological conditions of the receiving waters of the state existing at the time of review of a regulated entity.

2.4. "Baseline water quality" means that ambient concentration established at the time of an initial antidegradation review for a stream or stream segment or any other water(s) of the state.

2.5. "Board" or "EQB" means the West Virginia Environmental Quality Board.

2.6. "Minimum uses" means recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

2.7. "Parameter of concern" means any parameter for which numeric water quality criteria have been adopted in 47CSR2 and any other parameter for which numeric criteria are not established but where the discharge of such parameter has a reasonable potential to either cause or contribute to a violation of the narrative criteria outlined under 47CSR2, section 3.

2.8. "Reasonable less-degrading or non-degrading alternatives" shall be identified based on case specific information. In most cases, less-degrading or non-degrading pollution control alternatives shall be considered reasonable where the costs of such alternatives are less than 110% of the costs of the pollution control measures associated with the proposed activity.

2.9 "Regulated entity" means any regulated entity that affects or is proposing an activity that will affect water quality. For example, an applicant for a WV/NPDES permit, a WV/NPDES permit holder, or an owner or operator of an activity that discharges pollutants into a water of the state would be a regulated entity.

2.10. "Secretary" means the Secretary of the Department of Environmental Protection or its successor.

2.11. "Trading" means establishing upstream controls for a parameter of concern to compensate for new or increased downstream sources for the same parameter resulting in improved water quality for the parameter traded. More than one parameter of concern may be traded on a given stream. Trading may involve point sources, nonpoint sources or a combination of point and nonpoint sources. Unused permitted capacity cannot be traded.

2.12. "Trading assessment procedure" means methodologies to be used by the

Secretary to document the basis for any trade and include Total Maximum Daily Load Procedures (40 CFR 130.2(i)), wasteload allocation procedures outlined in EPA's Technical Support Document for Water Quality-based Toxics Control (EPA/505/2-90-001 PB91-127415, March 1991), wasteload allocation methodologies outlined in EPA's Draft Framework for Watershed-Based Trading (EPA/800-R-96-001, May 1996) or other EPA approved wasteload allocation methodologies as long as these methodologies are consistent with the trading provisions of this rule.

### **§60-5-3. Antidegradation Review Process.**

3.1. As set forth in 47 CSR 2-4.1, the State's antidegradation policy requires that existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. This requirement applies to all waters of the state.

3.2. Except where a water segment is specifically listed as a Tier 3 water, the following sections outline how the agency conducting the antidegradation review will determine the level of protection ("tier") assigned to the receiving water body associated with the activity subject to this rule.

3.3. Uses. The Secretary, in conducting an antidegradation review, must determine the existing uses of the receiving water body associated with the proposed activity. The Secretary shall determine the existing uses of the water body by identifying the uses set forth in 47 CSR 2-6 that the water body currently supports, or has supported since November 28, 1975. The regulated entity may be required to provide data sufficient for the permitting agency to determine the existing uses of the water segment.

3.4. Baseline water quality. Where baseline water quality has not been established for the water segment the regulated entity proposes to impact or has not been established for a parameter of concern that is reasonably expected to be discharged into the water segment as a result of the proposed regulated activity, the Secretary must determine the baseline water quality for the receiving water body. The Secretary may consider data for establishing the baseline water quality from a federal or state agency, the regulated entity,

the public, or any other source, as long as the data are recent and reliable. If adequate data are not available, the agency may, in conjunction with the regulated entity or on its own initiative, establish a plan for obtaining the necessary data. The regulated entity may be required to provide baseline water quality for those parameters of concern that are reasonably expected to be discharged as a result of the regulated activity into the affected water segment to help the permitting agency determine the baseline water quality, the existing uses, and the applicable tier. The regulated entity may contact the Secretary prior to initiating a baseline water quality evaluation to seek concurrence with its determination of the parameters of concern for its proposed activity and its proposed sampling protocol.

3.5. Determination of tier. If the tier has not already been determined for the water segment the regulated entity proposes to impact, then after determining the baseline water quality for parameters of concern and the existing uses for a water body, the agency will determine which level of protection (i.e. "tier") applies to the receiving water body associated with the activity, as follows:

3.5.a. Water segments within a federally designated Wilderness Area, or otherwise included in 47CSR2-4.1.c, as well as other water segments specifically listed as an outstanding national resource water pursuant to subsection 7.1 shall receive Tier 3 protection.

3.5.b. Water segments not within a federally designated Wilderness Area, or otherwise included in 47CSR2-4.1.c. or listed pursuant to subsection 7.1. of this rule, shall receive Tier 1 protection, and shall receive Tier 2 protection if the water segment is determined, pursuant to subsections 5.1. through 5.3. of this rule, to be a high quality water for purposes of antidegradation review.

3.5.c. Water segments may be determined to receive only Tier 1 protection, pursuant to subsections 4.2. through 4.6. of this rule, for purposes of antidegradation review.

3.5.d. To the extent practicable, a list of water segments protected

under Tier 3 will be maintained on the West Virginia Department of Environmental Protection's website.

3.6. Level of review. Once the correct level of protection ("tier") and water segment use(s) are identified for the receiving water body, the agency shall document its findings and proceed with the appropriate level of antidegradation review.

3.7. On or after July 2, 2001, the effective date of these implementation procedures, new and reissued WV/NPDES general permits will be evaluated to consider the potential for significant degradation as a result of the permitted activity. Regulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier 2 antidegradation review as part of the permit registration process. Regulated activities that are granted coverage by a WV/NPDES permit that will degrade a Tier 3 water segment must comply with the requirements of sections 6 and 7 herein.

3.8. Regulated activities that qualify for coverage under a Corps of Engineers regional or nationwide permit pursuant to section 404 of the Federal Act that has been certified by the state pursuant to section 401 of the Federal Act will not be required to undergo a Tier 2 antidegradation review, provided, however, that where an individual 401 certification is required, the Secretary may require an appropriate antidegradation review. Where an activity covered by a regional or nationwide permit pursuant to section 404 of the Federal Act and certified pursuant to section 401 of the Federal Act allows for filling of a water, this exemption only applies to the site of the fill, and does not apply to activities downstream of the site of the fill. Regulated activities that are granted section 401 certification that will degrade a Tier 3 water segment must comply with the requirements of sections 6 and 7 herein.

3.9. The Secretary shall develop guidance which addresses these implementation procedures and provides additional information to persons conducting regulated activities that are affected by these procedures. Such guidance shall include, but shall not be limited to, information regarding the following: (a) the determination of baseline water

quality; (b) social and economic importance pursuant to subsection 5.8; and (c) the reasonable alternatives analysis required by subsection 5.7. The Secretary shall provide an opportunity for public review and comment before finalizing any guidance.

#### **§60-5-4. Tier 1 Protection.**

4.1. Existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

4.2. Tier 1 protection applies to all waters of the state. A water segment shall be afforded Tier 1 protection where the level of water quality is not sufficient to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life, or where the water quality meets but does not exceed levels necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

4.3. In determining whether a water segment is afforded only Tier 1 protection, the agency will focus on whether the water segment is meeting or failing to meet minimum uses.

4.4. The Secretary will consider whether a water segment is listed on the state's 303(d) impaired waters list, but where the parameter(s) for which the water segment is listed does not result in that water segment's failure to attain minimum uses and where all other parameters exceed the quality necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life, the water segment will be afforded Tier 2 protection. Where the parameter(s) for which the water segment is listed does result in failure to attain minimum uses, such as an acid mine drainage-impacted water segment, that water segment will be afforded only Tier 1 protection.

4.5. All water segments listed on the state's 303(d) impaired waters list will be afforded only Tier 1 protection for the parameter(s) that resulted in the water segment being listed.

4.6. There also may be waters in the

state where one or both of the fishable/swimmable uses are attained, but existing water quality is not "better than necessary" to support those uses (i.e., assimilative capacity does not exist for any of the parameters that would be affected by the proposed activity). Tier 1 protection is appropriate for such a water segment.

4.7. Where existing uses of the water body are impaired, there shall be no lowering of the water quality with respect to the parameters of concern that are causing the impairment. The agency shall consider nomination of such water body for the 303(d) list of water quality-impaired streams.

4.8. Where a proposed activity will result in a new or expanded discharge that would otherwise prevent attainment of an existing use in a water subject to Tier 1 protection, the applicant may be allowed to satisfy antidegradation review requirements by implementing or financing upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trade must be enforceable.

#### **§60-5-5. Tier 2 Protection (High Quality Waters).**

5.1. A water segment shall be considered a Tier 2 high quality water where the level of water quality exceeds levels necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

5.2. Tier 2 waters need not exceed the level of quality needed to meet or exceed numeric

criteria for every parameter. For example, a water segment listed on the state's 303(d) impaired waters list can qualify for Tier 2 protection, but where the impairment that caused the water segment to be listed results in failure to attain minimum uses, that water segment will be afforded only Tier 1 protection.

5.3. Where a water segment does not meet or exceed applicable water quality criteria for every parameter, the Secretary will determine whether the water segment will be afforded Tier 2 protection as part of the antidegradation review process using best professional judgment. In addition to data available for review, the Secretary may consider factors such as (1) existing aquatic life uses, (2) existing recreational or aesthetic uses, (3) existing water quality data for upstream segments or comparable segments, (4) biological score for the water segment, and (5) the overall value of the segment from an ecological, health and public use perspective.

5.4. Where insufficient information is available to determine which tier should apply, a regulated entity may seek a determination that a water segment should be afforded only Tier 1 protection by submitting water quality data consistent with guidance developed pursuant to subsection 3.9. of this rule showing that there is no remaining assimilative capacity for any parameter to be affected by its activity. In seeking such a determination, the impacts of all of the regulated entity's activities on the water segment must be considered.

5.5. Where there is insufficient information to establish which tier should apply, it is the intent of these procedures to apply Tier 2 protection to such waters until such time as sufficient water quality data is obtained to determine the appropriate level of protection. No presumption shall be made with regard to the actual quality of any waters as a result of such initial application.

#### 5.6. Tier 2 antidegradation review.

5.6.a. Any regulated activity in a Tier 2 water segment is required to go through the Tier 2 antidegradation review process where:

5.6.a.1. The regulated activity is a new or expanded activity that would significantly degrade water quality; or

5.6.a.2. The Secretary determines, upon renewal of a permit or certification, that other individual circumstances warrant a full review such as cumulative degradation resulting from multiple discharges within a watershed, degradation resulting from a single discharge over time, or degradation caused by a regulated facility's historic noncompliance with its permit.

5.6.b. In allowing any degradation, the agency shall assure water quality adequate to protect existing uses fully (i.e., Tier 1 protection).

5.6.c. Degradation for Tier 2 shall be deemed significant if the activity results in a reduction in the water segment's available assimilative capacity (the difference between the baseline water quality and the water quality criteria) of ten percent or more at the appropriate critical flow condition(s) for parameters of concern. Critical flow conditions for non-precipitation induced discharges are the 7Q10 flow of the receiving stream, plus either of the following: maximum permitted flow or maximum flow specified in the application, for industrial activities, or the average design flow, for wastewater treatment activities. Degradation will also be deemed significant if the proposed activity, together with all other activities allowed after the baseline water quality is established, results in a reduction in the water segment's available assimilative capacity of 20% or more at the appropriate critical flow conditions for the parameters of concern, except that discharges affecting dissolved oxygen, pH or fecal coliform will be deemed insignificant provided that:

5.6.c.1. For dissolved oxygen, the maximum DO sag will not be greater than 0.4 ppm based on an appropriate wasteload allocation model, unless that reduction is projected to cause a violation of 47 CSR 2-8.12 through 8.12.3, Appendix E, Table 1;

5.6.c.2. pH is maintained within the 6.0 to 9.0 range;

5.6.c.3. For fecal coliform,

necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

5.6.d. Significant degradation will be determined on a parameter-by-parameter basis for each parameter of concern that might be affected by the regulated activity.

5.6.e. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 2 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trades must be enforceable.

5.6.f. New or expanded activities determined to be significant by the agency shall be subject to the Tier 2 review requirements described in subsections 5.6. through 5.9. herein. If the agency determines that no further Tier 2 review requirements shall apply for an activity, the activity must still achieve the highest established statutory and regulatory requirements applicable to them, or conditions of the permit, or water quality certification, and that determination must be made a part of the public notification, as provided in subsections 9.1 through 9.5.

## 5.7. Review of alternatives.

5.7.a. If a determination is made that significant degradation will occur, the agency shall determine whether reasonable and cost effective less-degrading or non-degrading alternatives to the proposed activity exist. The agency will evaluate any alternatives analysis submitted by the regulated activity for consistency with the requirements set forth in Subdivision 5.7.b. herein.

5.7.b. A regulated entity proposing any new or expanded regulated activity that would significantly degrade water quality in a high quality water is required to prepare an evaluation of alternatives to the proposed activity. The evaluation must provide substantive information pertaining to the cost and environmental impacts associated with the following alternatives:

5.7.b.1. Pollution prevention measures;

5.7.b.2. Reduction in scale of project;

5.7.b.3. Water recycle or reuse;

5.7.b.4. Process changes;

5.7.b.5. Innovative treatment technology or technologies;

5.7.b.6. Advanced treatment technology or technologies;

5.7.b.7. Seasonal or controlled discharge options to avoid critical water quality periods;

5.7.b.8. Improved operation and maintenance of existing treatment systems; and

5.7.b.9. Alternative discharge locations.

5.7.c. After alternatives to allowing degradation have been adequately evaluated, a determination shall be made regarding whether cost-effective and reasonable non-degrading or less-degrading alternatives to the proposed activity shall be required. This

determination will be based primarily on the alternatives analysis developed by the regulated entity, but may be supplemented with other information and data. As a rule of thumb, cost effective and reasonable non-degrading or less-degrading pollution control alternatives with costs that are less than 110% of the costs of the pollution control measures associated with the proposed activity shall be considered reasonable.

5.7.d. If it is determined that reasonable and cost effective less degrading or non-degrading alternatives to the proposed activity do exist, the project design may be revised accordingly. In general, if reasonable alternative(s) exist, the alternative or combination of alternatives that provide the least amount of degradation shall be implemented up to the determined reasonable and cost-effective threshold. If the regulated entity does not agree to adopt such reasonable and cost-effective alternatives, the alternatives analysis findings will be documented and the activity will not be allowed.

5.8. Review of social and economic importance.

5.8.a. If significant degradation would occur, even after application of reasonable less-degrading or non-degrading alternatives, a determination shall be made as to whether the proposed activity is necessary to accommodate important economic or social development in the area in which the waters are located.

5.8.b. The regulated activity must document the social and economic importance of the proposed activity.

5.8.c. The factors to be addressed in such documentation may include, but are not limited to, the following:

5.8.c.1. Employment (e.g., increasing, maintaining or avoiding a reduction in employment);

5.8.c.2. Increased production;

5.8.c.3. Improved community tax base;

5.8.c.4. Housing;

5.8.c.5. Ancillary community economic benefit; and

5.8.c.6. Correction of an environmental or public health problem.

5.8.d. In addition to the above, a regulated entity may be required to submit the following:

5.8.d.1. Information pertaining to current aquatic life, recreational, or other water uses;

5.8.d.2. Information necessary to determine the environmental impacts that may result from the proposed activity;

5.8.d.3. Facts pertaining to the current state of economic development in the area (e.g., population, area employment, area income, major employers, types of businesses);

5.8.d.4. Government fiscal base; and

5.8.d.5. Land use in the areas surrounding the proposed activity.

5.8.e. Once the available information pertaining to the socio-economic importance of the proposed activity has been reviewed by the agency, a preliminary determination regarding importance shall be made. In evaluating the regulated activity's demonstration of socio-economic importance, the agency may use EPA's Interim Economic Guidance for Water Quality Standards Workbook (EPA 823-B-95-002, March, 1995). Where there is a request for a variance from groundwater standards pursuant to 47 CSR 57 for existing sites where activities on those sites have the potential to impact surface water from contaminated groundwater and the activity is otherwise subject to this rule, the socio-economic justification process required under 47 CSR 57 subdivision 6.2.i will satisfy the requirements of this section. If the proposed activity is determined to have social or economic



importance in the area in which the affected waters are located, the substance and basis for that preliminary determination shall be documented and the Tier 2 review shall continue.

#### 5.9. Intergovernmental coordination for Tier 2 reviews.

5.9.a. The intergovernmental coordination requirements in 47 CSR 2-4.1.b. will be accomplished by providing notice to those agencies listed in Appendix A that the Secretary believes may have regulatory oversight of the regulated activity of the preliminary determination of the socio-economic review and requesting comments from those agencies regarding that review.

5.9.b. The public notice of the proposed activity will be provided as set forth in subsections 9.1 through 9.5 herein.

5.9.c. Once the intergovernmental coordination and public notice requirements are satisfied, the Secretary shall make a final determination concerning the social or economic importance of the proposed activity. All social and economic importance determinations, including determinations to prohibit the activity, shall be documented and made a part of the public record.

#### **§60-5-6. Tier 3 Protection Review Procedures (Outstanding National Resource Waters). See 47 CSR 2-4.1.c and 47 CSR 2-2.10 for a description of Outstanding National Resource Waters (ONRW).**

6.1. Tier 3 waters. ONRWs are to be maintained, protected and improved where necessary. Any proposed new or expanded regulated activity that would degrade (result in a lowering of water quality) a water body that has been designated an ONRW, other than temporary lowering of water quality, is prohibited.

6.2. Tier 3 antidegradation review. The agency shall use the following antidegradation implementation procedures for evaluating new or expanded regulated activities that have the potential to affect Outstanding National

Resource Waters (ONRWs), as described in 47 CSR 2 - 4.1.c. and as listed in accordance with subsection 7.1.

6.2.a. Determine whether the proposed activity is short term in nature and the resulting changes in water quality will be temporary. Such determination will be made on a case-by-case basis and shall be made after consideration of the following factors:

6.2.a.1. The length of time during which the water quality will be lowered;

6.2.a.2. The percent change in ambient concentrations;

6.2.a.3. The parameters affected;

6.2.a.4. The likelihood for long-term water quality benefits to the segment (e.g., as may result from dredging of contaminated sediments);

6.2.a.5. The degree to which achieving applicable water quality standards during the proposed activity may be at risk; and

6.2.a.6. The potential for any residual long-term influences on existing uses.

6.2.b. If after review of the factors in paragraphs 6.2.a.1 through 6.2.a.6, the agency determines that the proposed activity will be short term in nature and the changes in water quality will be temporary and limited, the proposed activity may be authorized. In such case the antidegradation review findings shall be documented and public notice activities shall be initiated. If after review of the factors in paragraphs 6.2.a.1 through 6.2.a.6. the agency determines that the proposed activity will not be short term in nature or that changes in water quality will not be temporary and limited, the proposed activity shall be denied.

6.3. Sources upstream from an ONRW. Any proposed activity that would result in a permanent new or expanded discharge upstream of an ONRW segment is prohibited except where such source would improve or not degrade the existing water quality of the downstream ONRW

segment.

6.3.a. To determine whether the proposed activity will result in the lowering of water quality in the downstream ONRW segment, the following factors, when applicable, shall be considered:

6.3.a.1. Change in ambient concentrations predicted at the appropriate critical condition(s);

6.3.a.2. Change in loadings (i.e., the new or expanded loadings compared to total existing loadings to the segment);

6.3.a.3. Reduction in available assimilative capacity;

6.3.a.4. Nature, persistence and potential effects of the parameter;

6.3.a.5. Potential for cumulative effects;

6.3.a.6. Degree of confidence in the various components of any modeling technique utilized (e.g., degree of confidence associated with the predicted effluent variability); and

6.3.a.7. Other factors determined by the Secretary, when appropriate.

6.3.b. If a preliminary determination is made that the applicable criteria in paragraphs 6.3.a.1. through 6.3.a.7. will be met, the antidegradation review findings shall be documented and the applicable public notice activities shall be initiated. If after review of the factors in paragraphs 6.3.a.1. through 6.3.a.7., the Secretary determines that the proposed activity will result in the lowering of water quality in the downstream ONRW stream segment, the proposed activity shall be denied.

6.4. For ONRWs in areas designated as federal Wilderness, nothing in this rule is intended to authorize activities not authorized by the Wilderness Act.

6.5. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 3 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trade must be enforceable.

#### **§60-5-7. Designation of Tier 3 Waters.**

7.1. Listing process for Tier 3 waters.

7.1.a. Tier 3 Nomination Procedures. Any interested party or the Secretary may nominate a water as an ONRW. After reviewing the nomination the Secretary shall consider the qualification criteria and may classify the nominated water as a Tier 3 water in accordance with the notice and comment provisions of this subsection. The address for filing such petitions is West Virginia Department of Environmental Protection, Attn: Tier 3 List, 601 57<sup>th</sup> Street, SE, Charleston, WV 25304. The nominating party has the burden of establishing a basis for listing of a water segment as a Tier 3 water. The Secretary shall return insufficient nominations to the nominating party. Generally, nominations that fail to address at least three of the qualification criteria set out in paragraph 7.2.a.2. of this rule shall be considered insufficient.

7.1.a.1. Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the State's antidegradation policy, the Secretary shall notify each locality in which the water or

segment lies and shall provide individual notice to property owners on the nominated segment. When a good faith effort to notify individual property owners has failed, and individual notice to property owners is impracticable, constructive notice by publication shall be provided. The written notice shall include, at a minimum:

7.1.a.1.A. A description of the location of the waters or segment;

7.1.a.1.B. The procedures and criteria for designation as well as the impact of the designation;

7.1.a.1.C. The name of the person(s) making the nomination; and

7.1.a.1.D. The name of a contact person at the Department of Environmental Protection who is knowledgeable about the nomination of the waters or segment. After receipt of the notice of the nomination, landowners, the public and localities shall be provided 60 days to comment.

7.1.a.2. Qualification Criteria. Factors to be considered in determining whether to assign an ONRW designation to a water from another category shall include the following:

7.1.a.2.A. Impact on private property owners;

7.1.a.2.B. Whether the interests of all affected parties have been adequately represented during the nomination and designation process;

7.1.a.2.C. The location of the water;

7.1.a.2.D. Any previous special designations;

7.1.a.2.E. Existing water quality;

7.1.a.2.F.

Outstanding ecological value;

7.1.a.2.G. Outstanding recreational or aesthetic value; and

7.1.a.2.H. Other factors determined by the Secretary, when applicable.

**§60-5-8. Public Participation in Antidegradation Reviews/Appeals.**

8.1. All antidegradation review findings shall be documented by the Secretary and made part of the public record. The findings, including the baseline water quality, the existing uses, and the tier assigned to the water body are to be available to the public.

8.2. Any required public notice will be provided through the appropriate Class I or Class II legal advertisement in a qualified newspaper with the largest circulation for the county where the activity will occur. The notice will identify the action being considered, list all existing uses identified of the water, and call for comments from the public regarding the proposed activity. The cost of such publication will be borne by the applicant.

8.3. Public notice, opportunity for public comment, and opportunity for a public hearing, consistent with the requirements of 47 CSR 10-12, will be provided of all activities proposed to be allowed after a Tier 1, 2, or 3 antidegradation review. Such public notice may be combined with other required notifications, such as notification to agencies as part of required intergovernmental coordination or notification of a proposed permit decision. Public notice is not required to be provided for proposed activities on Tier 1 or Tier 2 waters for which a review process has not been required, such as activities covered by a WV/NPDES general permits, except that any trading approved by the Secretary for antidegradation purposes will require public notice consistent with the requirements of 47 CSR 10-12.

8.4. Public notice of Tier 2 antidegradation reviews.

8.4.a. After a full Tier 2 review has been completed for a proposed activity, the

public notice shall include notice of the availability of the following:

8.4.a.1. The decision as to whether the proposed activity has been determined to comply with the antidegradation implementation rule;

8.4.a.2. Findings from the alternatives analysis;

8.4.a.3. A determination of the impact of the activity to ambient concentrations and baseline water quality;

8.4.a.4. The results of the socio-economic evaluation of the activity;

8.4.a.5. The determination regarding existence of reasonable and cost effective non-degrading or less degrading alternatives; and

8.4.a.6. A description of the water segment that is subject to the antidegradation review.

8.5. Once the intergovernmental coordination and public notice requirements of subsections 9.1. through 9.5. are satisfied, the Secretary shall make a determination concerning the social or economic importance in the area in which the affected water bodies are located. All determinations, including determinations to prohibit the activity, shall be documented and made a part of the public record.

8.6. Appeals-Final agency decisions, made after public comment, that identify applicable uses, designate tiers, or that find regulated activities to be allowed or prohibited, are final actions that are appealable to the Board.

**APPENDIX A**

**ANTIDEGRADATION IMPLEMENTATION PROCEDURES  
INTERGOVERNMENTAL COORDINATION AGENCIES**

**STATE AGENCIES**

**Bureau of Commerce**

Department of Natural Resources  
Division of Forestry  
Development Office

**Department of Health and Human Resources**

Bureau for Public Health

**Bureau of the Environment**

Department of Environmental Protection - all offices

**Department of Agriculture**

Soil Conservation Agency

**Department of Transportation**

Division of Highways

**FEDERAL AGENCIES**

US Environmental Protection Agency, Region III  
US Fish and Wildlife Service  
US Army Corps of Engineers  
US Forest Service  
US Office of Surface Mining