

**WEST VIRGINIA  
SECRETARY OF STATE  
Betty Ireland  
ADMINISTRATIVE LAW DIVISION**

Form #1

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2008 APR 15 PM 1:59

WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE**

Water Resources

AGENCY: ~~West Virginia Department of Environmental Protection - DWWM~~ TITLE NUMBER: 47

RULE TYPE: Interpretive CITE AUTHORITY: W.Va. Code §22-11-7b and 47CSR §2-4.1.c.

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 2A

TITLE OF RULE BEING PROPOSED: Designation of Tier 3 Waters

DATE OF PUBLIC HEARING: June 3, 2008 TIME: 6:00 P.M.

LOCATION OF PUBLIC HEARING: West Virginia Department of Environmental Protection - Coopers Rock Training Room

601 57th Street, SE

Charleston, WV 25304

COMMENTS LIMITED TO: ORAL  WRITTEN  BOTH

DATE WRITTEN COMMENT PERIOD ENDS: June 3, 2008 TIME: 6:00 P.M.

WRITTEN COMMENTS MAY BE MAILED TO:

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

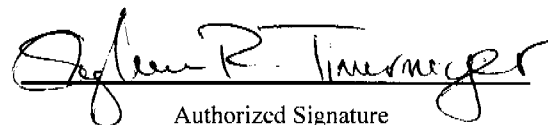
Scott Mandirola - DWWM  
West Virginia Department of Environmental Protection

601 57th Street, SE

Charleston, WV 25304

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

  
Authorized Signature

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**BRIEFING DOCUMENT**

**Rule Title: 47CSR2A – “ Designation of Tier 3 Waters”**

**A. AUTHORITY: W.Va. Code §22-11-7b and 47CSR §2-4.1.c.**

**B. SUMMARY OF RULE:**

**This rule provides guidance and clarification regarding the Secretary’s designation of waters as “outstanding national resource waters” or Tier 3 waters, pursuant to new language in legislative rule 47CSR§2-4.1.c. authorized by the Legislature under SB 373, effective March 6, 2008.**

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

**This rule is necessary to interpret and further clarify the language under 47CSR§2-4.1.c related to Tier 3 waters under the agency’s antidegradation program. This rule explains the basis the Secretary will use in determining which streams and stream segments fall under the new categories specified in the legislative rule. After the rule is finalized, the Secretary will prepare a revised list of Tier 3 waters, which list will be maintained on the agency’s website.**

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: 47CSR2A – “Designation of Tier 3 Waters”  
 Type of Rule:        Legislative   X   Interpretive        Procedural  
 Agency: Division of Water and Waste Management  
 Address: 601 57<sup>th</sup> Street SE  
Charleston, WV 25304

Phone Number: 926-0495 Email: lmclung@wvdep.org

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This rule clarifies and interprets a portion of legislative rule 47CSR2, “Requirements Governing Water Quality Standards.” Any costs associated with the implementation of this rule will be absorbed by the agency in its overall water quality program; thus, there will be no additional costs to State government. Nor will there be any revenues accruing to the State associated with this rule.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

**FISCAL YEAR**

| Effect of Proposal                 | 2008<br>Increase/Decrease<br>(use "-") | 2009<br>Increase/Decrease<br>(use "-") | Fiscal Year<br>(Upon Full Implementation) |
|------------------------------------|--|--|---|
| <b>1. Estimated Total Cost</b>     | 0                                      | 0                                      | 0   |
| Personal Services                  | 0                                      | 0                                      | 0   |
| Current Expenses                   | 0                                      | 0                                      | 0   |
| Repairs & Alterations              | 0                                      | 0                                      | 0   |
| Assets                             | 0                                      | 0                                      | 0   |
| Equipment                          | 0                                      | 0                                      | 0   |
| Other                              | 0                                      | 0                                      | 0   |
| <b>2. Estimated Total Revenues</b> | 0                                      | 0                                      | 0   |

Rule Title: 47CSR2A – “Designation of Tier 3 Waters”

3. **Explanation of above estimates (including long-range effect):**  
Please include any increase or decrease in fees in your estimated total revenues.

N/A

### MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

For the reasons explained on page 1, there will be no fiscal impact associated with this rule.

Date:

Signature of Agency Head or Authorized Representative

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**TITLE 47**  
**INTERPRETIVE RULE**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**DIVISION OF WATER AND WASTE MANAGEMENT**

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DEWEY STUBBS  
SECRETARY OF STATE

**SERIES 2A**  
**DESIGNATION OF TIER 3 WATERS**

**§47-2A-1. General.**

- 1.1 Scope. -- This rule provides guidance and clarification for designating a Tier 3 water pursuant to the provisions of 47CSR §2-4.1.c.
- 1.2. Authority. -- W. Va. Code §22-11-7b and 47CSR§2-4.1.c.
- 1.3. Filing. --
- 1.4. Effective Date. --

**§47-2A-2. Definitions.**

2.1. The definitions used in 47CSR2 and 60CSR5 will apply to this rule unless specifically noted otherwise.

**§47-2A-3. Applicability.**

3.1. This rule applies to the West Virginia Department of Environmental Protection as it designates Tier 3 waters pursuant to the provisions of 47CSR§2-4.1.c, provided that the rule does not address those waters eligible for processing under 60CSR§5-7.1.

**§47-2A-4. Tier 3 Designation.**

4.1. Waters Located in Federal Wilderness Areas.

4.1.a. All waters located within the boundaries of federally designated wilderness areas, bounded on both sides of the stream by public land, will be designated Tier 3 waters.

4.2. Waters Located in State Parks, National Parks and National Forests.

4.2.a. All high quality waters or naturally reproducing trout streams located within the boundaries of state parks, national parks or national forests, bounded on both sides of the stream by public land, will be designated Tier 3 waters. As of the effective date of this rule, there are no national parks located within West Virginia.

#### 4.3. Specifically Designated Federal Waters.

4.3.a. Waters specifically designated under the Wild and Scenic Rivers Act and the National Parks and Recreation Act of 1978, as amended, will be designated Tier 3, notwithstanding ownership status of the land bordering those waters. Waters included in these designations are currently limited to portions of the main stem of the Bluestone River as described under 16 U.S.C. §1274(a)(65) and portions of the main stem of the New River as described under 16 U.S.C. §466m et seq.

#### **47-2A-5. High Quality and Naturally Reproducing Trout Waters.**

5.1. For purposes of subsection 4.2, waters will be considered high quality based on their biological integrity as evidenced by an exceptionally healthy benthic macroinvertebrate community, and not pursuant to the definition in 47CSR§2-2.8, which relates to Tier 2 protection.

5.1.a. “Exceptionally healthy benthic macroinvertebrate community” means a benthic macroinvertebrate community collected and analyzed in accordance with DEP protocols, that whether done at the family or genus level, results in a score that is above the 25<sup>th</sup> percentile of the applicable reference streams. (e.g., West Virginia Stream Condition Index score greater than 78).

5.2. For purposes of subsection 4.2, waters will be considered naturally reproducing trout waters based on documented reproduction.

5.2.a. “Documented reproduction” means a DNR or DEP fish survey or other written documentation that verifies the presence of reproducing brown, brook or rainbow trout. Reproduction may be evidenced by the presence of multiple year classes of the same species that are not the result of any recent stocking activity. Reproduction may also be evidenced by the presence of a single year class after consideration of the stream, its location and stocking practices in the area.

5.3. Sample Location with respect to High Quality and Naturally Reproducing Trout Determinations.

5.3.a. When determining whether a water is high quality or a naturally reproducing trout stream, the sampling site may be located in reasonably close proximity to the segment contained on public land, provided the sample is representative of the public land segment.

#### **§47-2A-6. Waters Upstream of Tier 3 Segments.**

6.1. Waters upstream of a Tier 3 segment will be considered Tier 1 or Tier 2, as appropriate. The provisions of 60CSR§5-6.3 apply.