

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

Form #5

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2008 OCT 28 PM 4: 04

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Water Resources
WV Department of Environmental Protection - DWWM TITLE NUMBER: 47

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

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

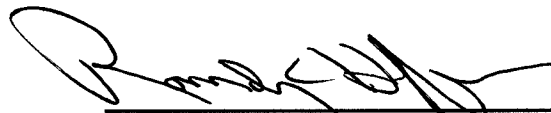
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

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

TITLE OF RULE BEING PROPOSED: Designation of Tier 3 Waters

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS December 1, 2008



Authorized Signature

**TITLE 47
INTERPRETIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATER RESOURCES**

FILED

2008 OCT 28 PM 4:04

OFFICE WEST VIRGINIA
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. -- October 28, 2008.
- 1.4. Effective Date. -- December 1, 2008.

§47-2A-2. Definitions.

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

- 2.1. "Water" or "waters" means a lake, stream or stream segment.

§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. This rule does not apply to the listing of Tier 3 waters pursuant to 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 water 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 forests or units within the national park system, bounded on both sides of the water by public land, will be designated Tier 3 waters.

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. §460m 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 25th percentile of the applicable reference waters (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 immediately upstream of a Tier 3 segment will be considered Tier 1 or Tier 2, as appropriate, unless subsequently designated Tier 3. With respect to the protection of downstream Tier 3 segments, the provisions of 60CSR§5-6.3 apply.



West Virginia Department of Environmental Protection

Proposed Interpretive Rule
Tier 3 Waters
Tue, June 3, 2008
10 pm

Sign In Sheet

Name (please print)	Address	Organization	Phone/Fax	E-mail	Comment Yes/No
Cliff Whyte		Henthorn ENV		cwhyte@henthornenv.com	NO
Jason B. Whyte		SBM Associates			NO
Laura A Conley-Rinehart		MV DOT-DOH	558-2804	Laura.A.Conley-Rinehart@wv.gov	NO
Eric Antwerp	Frage Heulle	Private Citizen	574-1067	eric.a.t@citynet.net	YES
Eric Pories	142 8th 405 32	WVRA	574-2343	wppko@westvirginia.com	NO
Craig Stuck	142 8th Ave Hunt	Thompson Pump	522-7002 522-7004 Fax	crsng10155@aol.com	NO
Lance Schultze			751-0596	lschultze@thompsonpump.com	YES
JASON BOSTIC	P.O. Box 3423 Chamberlayne, WV 25339	WV Core Associa Inc	342-4153	josh@wvcore.com	NO
Donnie Jenkins	1600 Conroy Tower 590 Set St, WV Martinsburg, WV	Jackson Kelly	340-1389	djackson@jacksonkelly.com	NO
Diana Green	Rt. 2, Box 334, CRL	Dunns Creek Watershed Assoc	414-4715	dkgg@sustentlink.net	NO
FoNAG 0125	Dist. 2 Box 334, CRLAS	SELF	343-4343	highlands@ncwvase.net	NO

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

IN THE MATTER OF:

PROPOSED INTERPRETIVE RULE
47CSRA, DESIGNATION OF TIER 3
WATERS

TRANSCRIPT OF PROCEEDINGS had or testimony adduced pursuant to the West Virginia Rules of Civil Procedure in the above-entitled action, on the on the 3rd day of May, 2008, commencing at 6:00 p.m. and concluding at 6:50 p.m. at 601 57th Street, S.E., Charleston, Kanawha County, West Virginia, pursuant to notice to all interested parties.

BEFORE: KATHY COSCO, Public Information Office

ORIGINAL

NANCY MCNEALY
CERTIFIED COURT REPORTER

Post Office Box 13415
Charleston, West Virginia 25360-0415
(304) 988-2873 FAX (304) 988-1419

I N D E X

Reporter's Certificate..... Page 28

1 MS. COSCO: Good evening, everyone. I'd like
2 to welcome you to the Department of Environmental
3 Protection. My name is Kathy Cosco. I'm with the Public
4 Information Office. This is a public hearing on the
5 Proposed Interpretive Rule 47CSRA, Designation of Tier 3
6 Waters. This rule provides guidance and clarification
7 regarding the Secretary's designation of waters as
8 outstanding national resource waters or Tier 3 waters
9 pursuant to new language in legislative rule 47CSR §2-4.1.C
10 authorized by the Legislature under Senate Bill 373
11 effective March 6, 2008.

12 This rule is necessary to interpret and
13 further clarify the language under 47CSR §2-4.1.C related
14 to Tier 3 waters under the agency's anti-degradation
15 program. This rule explains the basis the Secretary will
16 use in determining which streams and stream segments fall
17 under the new category specified in the legislative rule.
18 After the rule is finalized, the Secretary will prepare a
19 revised listing of Tier 3 waters which will be maintained
20 on the agency's website.

21 Right now there are two sign-in sheets that
22 are continuing to go around. I'll come back and collect
23 those here in a moment and will take a look at them and see
24 how many people are going to comment and then we'll address

1 whether we'll have time limits. I don't think we're going
2 to have to on that.

3 I'd like to introduce to you three people
4 who are from the Department of Environmental Protection.
5 They're here to hear your comments tonight. The first is
6 Scott Mandirola. He is the Assistant Director for water
7 quality standards. The next is Pat Campbell. He is
8 Assistant Director for the watershed assessment branch.

9 MR. CAMPBELL: Good evening.

10 MS. COSCO: Both of who are with the Division
11 of Water and Waste Management and Karen Watson who is our
12 Associate General Counsel. I'll come back and collect the
13 sign-in sheet but please make sure that you have signed in
14 and indicated whether or not you would like to speak.

15 In case you're not aware, there is another
16 public hearing taking place at the same time here in this
17 building and that meeting is to hear comments to the
18 proposed revisions to the State Implementation Plan for
19 Regional Haze. If any of you are interested in making a
20 comment on that matter, it's taking place over in the
21 Canaan Valley Room and Fred is here with that group. Can
22 you give me a show of hands if you're interested in maybe
23 going over to that and making a comment. You are?

24 MR. SHULTZ: Well, could you expand upon what

1 regional haze is and what potential ramifications there
2 are.

3 MS. COSCO: I will defer to Fred on that one.

4 MR. DURHAM: This is actually the second
5 hearing we've had on our regional haze SIP. Regional haze
6 is visibility impairment and the state is obligated to make
7 sure that the air is cleaned up in our National Parks and
8 National Wilderness areas. We had one hearing on this in
9 November on our plan to do so in West Virginia and got no
10 comments from the local residents, but we did get comments
11 from the federal land managers who are responsible for
12 those areas and we also got some comment from some other
13 states.

14 So in response to those comments, we
15 extended our comment period and that's what this hearing is
16 to hear specific things concerning the two things that we
17 changed is we made those comments from the federal land
18 managers available for anybody that wanted to review them
19 and make -- you know, weigh in on what they said, and we
20 also made one revision to a technical thing. It's called
21 the best available retrofit technology for one specific
22 facility. They took an early limit earlier than we had
23 proposed originally and that made them exempt from further
24 control under the Barb rule, what we call the Barb rule so

1 two specific areas.

2 MR. AUTENREITH: Is this the end of the comment
3 period for that?

4 MR. DURHAM: Yes.

5 MS. COSCO: So if you'd like to make a
6 comment in both places, we could accommodate you here and
7 then you can go to that meeting if you would like. If
8 you'll let me know that, I'll try to make sure we let you
9 talk and then that way you can go.

10 Okay, I'm going to collect the sign-in
11 sheet here. I think we have a couple more than need to
12 sign in. If you have written comments, we would like for
13 you to provide those to me when you speak or at the close
14 of this hearing. The agency will review all comments and
15 prepare a written response which will be filed when the
16 final rule is filed with the Secretary of State.

17 If everyone is ready, I'll collect that and
18 we'll get started. I'll go ahead and start from this
19 sheet and I'll collect the other. Will Lee Orr please come
20 up to the podium?

21 MR. ORR: Any particular order in this or
22 just start speaking?

23 MS. COSCO: Just start speaking.

24 MR. ORR: All right. My name is Lee Orr.

1 I am the Fisheries Committee Chair for West Virginia Trout
2 Unlimited. I'm actually speaking on behalf of Larry Orr
3 who could not make it tonight. He is in a meeting in
4 Pocahontas County so our comments -- there will be -- we're
5 actually commenting on letters that will be submitted by
6 the West Virginia Rivers Coalition. We're actually a
7 signatory on that letter basically stating that we support
8 their comments as they have made them. In addition, the
9 West Virginia Highlands Conservancy will be submitting
10 written comments and we were also be known that we support
11 their position and their comments on that as well on that,
12 and I brought additional copies. I assume that they will
13 submit those, but I do have copies and as a result of the
14 Tier 3 process and the interpretive rule and its
15 implementation, West Virginia TU would like to voice its
16 disapproval of the wholesale elimination of protection on
17 streams that had been designated Tier 2.5.

18 These were hundreds of streams that
19 contained wild natural reproducing trout. Streams that are
20 owned by all the citizens of West Virginia and that's
21 regardless of whether they flow through private or public
22 land, and we would just to be on record that we disapprove
23 of the rule as it stands now. That's it.

24 MS. COSCO: All right. Next is Linda

1 Tennant.

2 MS. TENNANT: I'm sorry, I submitted written
3 comments. I don't need to speak.

4 MS. COSCO: Okay. All right, thank you.
5 Then next is Sara Cowgill.

6 MS. COWGILL: I am going to start by
7 introducing myself. My name is Sara Cowgill. My mother's
8 name is Doris Jean. Her father's name was Everett Bernard.
9 His father's name was William Bernard. William Bernard was
10 married to Sara Victoria Taylor. She was the daughter of
11 Edmond Taylor, Jr. who was the son of Edmond Taylor, Sr.
12 who came from the Old Dominion and settled in West Virginia
13 making me a seventh generation American from West Virginia,
14 and I am proud to say that none of the generations of my
15 family have ever needed to degradate a stream and that
16 mother is the first generation that ever started or I'm
17 actually the first generation that grew up -- was born in a
18 house where we shit in the water, and I'm not proud of
19 that, but I do believe that water is a very valuable
20 resource and that we need to protect these resources that
21 we have, and I'm standing here. I weigh 125 pounds and
22 more than 70 percent of me is water and that makes me think
23 that we should be protecting more than 70 percent of the
24 water in this state, not the little green dots on the map

1 that's saying National or State Forest, and I also think
2 that we need to value where there is life, and that's not
3 just people drinking water or streams that feed drinking
4 water for people but also for our game and for our trees
5 because I think trees are valuable and I think that fish
6 are valuable but I also like newts, and I even respect my
7 thelia; and I think that if a stream bed that's not all the
8 time running, I think that that is still valuable because
9 when I see it is when the mist is coming up out of the
10 mountains; that's where it comes out of.

11 The missing stream beds are evaporating
12 through into the cracks of the mountains and I think that
13 those are alive, and I'm not a climatologist but I think
14 they are very valuable for keeping us in a very stable
15 climate and I want to say that I think that West Virginia
16 has the most stable, most mature ecosystem in the world,
17 and that we need to respect that, and, you know, it didn't
18 get here by accident.

19 We were here and we didn't really mess it
20 up too much and when we let these chemical companies come
21 in, our water systems clean themselves and our trees
22 cleaned our air, but if we continue to destroy our streams
23 and our forests and not take care of them, then we are
24 going to be in trouble. We're going to hit a point where

1 we can no longer recover, and the part of this rule that I
2 find very disturbing -- probably the most disturbing is
3 where it says 3.8, "And regulated activities that qualify
4 for coverage under the Corps of Engineers, regional or
5 nationwide permit, pursuant to § 404 of the Federal Act
6 that have been certified by the state to § 401 of the
7 Federal Act will not be required to undergo a Tier 2 anti-
8 degradation review."

9 That sounds like a -- it's a key-in to the
10 filling of a water, the filling of a water; that's not good
11 and it makes me mad that I've got to come here and say
12 this. I mean, I don't want to be having to come here. I
13 want to be home having dinner and the filling of a water is
14 not acceptable to me. What you should be doing is taking
15 care of our streams and that's why we have an Environmental
16 Protection Department, so I hope that if there's anything
17 that I can do to empower the Department, that they will let
18 me know because I'm not going to sit here and let them do
19 this and I don't know what else to do and people tell me
20 there's nothing you can do and I don't believe it.

21 Oh, I also support the Rivers Coalition,
22 the Highlands Conservancy, the OVAC and the comments of Lee
23 who spoke first.

24 MS. COSCO: Next we have Willa Mullins.

1 MS. MULLINS: Sara, you're a tough act to
2 follow. Let me start by saying my name is Brandi Mullins.
3 She did call me Willa, that's my first name, but that's how
4 I sign in to everything. I am with the Friends of
5 Blackwater Canyon and we're here to comment.

6 I'd like to say thank you to the Department
7 of Environmental Protection and particularly the Division
8 of Water and Waste Management. Your efforts are not missed
9 by everyone. This has been a long hard battle. We have to
10 protect our streams now.

11 As a mother of rivers, West Virginia is in
12 the incredibly unique position to protect major headwater
13 resources in the Mid-Atlantic. In addition, our rivers,
14 streams and other waterways provide significant economic,
15 scenic, recreational and ecological value not only to West
16 Virginia citizens but to all of those that visit and enjoy
17 them. It is for this reason that we should indeed all be
18 concerned that they're provided the utmost protection
19 afforded by the Clean Waters Act.

20 By providing solid anti-degradation
21 policies that leave few if any gray areas. These laws must
22 be clear and concise if they're to be enforceable and as
23 such, we must be careful that they meet at least the
24 minimum federal requirements. The West Virginia DEP has

1 taken a huge step forward with these policies and is moving
2 to the forefront of the anti-degradation questions that
3 plague many states by providing clarification and a well-
4 publicized public comment period.

5 We do, however, feel that the following
6 items need clarification before they are on truly solid
7 ground. §4.1A, a particular concern here is the need to
8 clarify and indeed confirm what the status would be of
9 rivers and streams bound on only one side by federally-
10 protected land or other public land. It would seem that
11 these streams should be afforded Tier 3 protection status
12 or that further investigation should be undertaken to
13 determine whether these waterways provide significant
14 recreational, scenic or ecological value to be included in
15 the initial list of Tier 3 river and streams.
16 Additionally, it should be further noted that the language
17 should not limit itself by saying "all waters" but should
18 also include "and segments of waterways".

19 §4.2.A, the comments previously applied to
20 §4.1.A should again be applied here. However, this
21 interpretation should additionally account for state forest
22 and national wildlife refuge. Additionally, while there
23 may be no National Parks in West Virginia as of the date of
24 this rule, there are units governed by the National Park

1 Service including but not limited to the Gauley River
2 National Recreation Area, Harpers Ferry National Historical
3 Park and the Wheeling National Heritage Area and all of
4 these areas should be included for immediate inclusion. Of
5 further consideration in this section should also be
6 national natural landmarks, such as Canaan Valley and the
7 God Near Scenic Area.

8 §4.3.A, this particular section should be
9 amended to include all waters flowing through federally
10 public lands that are governed by the National Park
11 Service. Additionally, consideration should be given to
12 rivers deemed eligible for federal wild and scenic status
13 where a proposed designation has either been deemed by the
14 U.S. Congress to be not necessary because state protection
15 will be adequate or a proposed designation has not yet been
16 brought before the Congress, but the eligibility has found
17 for favorable designation.

18 §5.1, the current determinations depend
19 solely on a measurement for healthy benthic
20 macroinvertebrate communities. While this can be a
21 determining factor for high quality waters, it is far from
22 the only measure that should be considered. It is urged
23 that the eligibility of water should be based only after
24 all available biological, chemical and physical

1 measurements have been given heavy consideration.

2 §6.1, it should be clarified in this
3 section that careful review of the impact of activities
4 upstream from a Tier 3.0 section of a stream or river upon
5 that Tier 3.0 section will be undertaken, it should be
6 further noted that no degradation of Tier 3.0 segments is
7 allowable regardless of the location of the initial
8 potential impact. Further this should be applied
9 proactively to streams that may be eligible to be added to
10 the Tier 3.0 list via the nomination process where they
11 meet multiple criteria for inclusion.

12 The Friends of Blackwater believes that all
13 of the Blackwater River should receive Tier 3.0 protection
14 from its headwaters in Canaan Valley to its confluence with
15 the Dry Fork at Hendricks. The Blackwater River and its
16 tributaries flow through the Canaan Valley National
17 Wildlife Refuge, the Monongahela National Forest, Canaan
18 State Park and Blackwater Falls State Park. The Blackwater
19 River is treated as a wild and scenic river by the U.S.
20 Forest Service, has been nominated as a national natural
21 landmark, is an important trout fishery where trout survive
22 year around. This nationally recognized river and tourism
23 magnet for outdoor recreationalists deserves the highest
24 possible protection from the State of West Virginia. Thank

1 you.

2 MS. COSCO: Next we have -- oh, I might blow
3 this last name, Erik Autenreith.

4 MR. AUTENREITH: Autenreith.

5 MS. COSTCO: Autenreith, Erik Autenreith.

6 MR. AUTENREITH: Here's copies. My name is Erik
7 Autenreith. I live in Fayetteville. I'm a member of a
8 watershed group, Plateau Action Network, and we've had --
9 this is our tenth year in existence. I'm not speaking as a
10 representative of that organization, but just to make
11 comment that I've personally been involved with this
12 organization for a long time. We've had great relations
13 with the DEP and many other state and federal agencies
14 helping to clean up our streams, especially Wolf Creek.

15 Also besides commenting to you-all, I want
16 to comment to the public because the public who are here
17 are the ones who are most interested -- some of the people
18 who are most interested in this issue, and we all affect
19 what happens here. It's never done until we are all dead,
20 but we started out with scientific stuff that shows which
21 streams are clean and which streams aren't so clean and
22 then it all got political because there was a big list, and
23 the big rub came with private landowners, people afraid of
24 losing their rights to develop along a certain creek cause

1 it was really clean and they wanted to maybe do something
2 that was going to make it dirty and they were afraid of
3 losing the right.

4 We need to take a really long view of
5 what's going on here. When we ruin our natural resources,
6 we're ruining our community. When the streams are clean,
7 it's a sign that the land is healthy and stream water.
8 Stream cleans stream land. It's a good place to raise your
9 family. Your family doesn't get sick -- so sick. You
10 don't have big medical bills. You generally have a nice
11 place to breathe, drink water, recreate, fish, hunt. The
12 more we ruin it, the more costs we all incur and typically
13 what happens is people live for themselves. This isn't
14 typical, but it happens a lot. People live for themselves
15 and they pass the crap on to the next generation. We need
16 to stop it. We are reaping the ill effects of the crap
17 being passed on to us.

18 The big extractive industries have left
19 plenty of examples for everybody to see what's happened.
20 We need to take this long-term view and for all the private
21 landowners, nobody wants to take away your rights to use
22 your land, but we as a community need to understand that
23 the water belongs to everybody. It runs downstream to the
24 next community and the fish drink it and the birds drink it

1 and everything else drinks it and then whatever goes in
2 there gets passed along to us. The cows, the chickens, all
3 of our food gets the crap that gets put in the river and we
4 get to eat it next.

5 So let's take the long-term view of what's
6 economically in our best interests. Specifically, about
7 this rule that's put forth to us, the DEP has clearly not
8 included the Gauley National Recreation Area. Legislation
9 says that this should apply to National Parks and how
10 somebody could not apply it to the Gauley National
11 Recreation Area, which is administered by the National Park
12 Service, it would take a very narrow interpretation of this
13 rule to make that conclusion, and I think that the reason
14 people have come to that conclusion is that we have
15 National Parks with a capital "N" and a capital "P" that
16 are the crown jewel of the National Park System,
17 Yellowstone, Grand Canyon, Yosemite, those sorts of things,
18 and we don't have any of those kinds of kinds of National
19 Park crown jewels in this state, but all the other park
20 units, National Park units, are National Parks, and they
21 deserve the same protection that any crown jewel National
22 Park deserves, and I have spoken to some of the
23 legislatures and just regular citizens who are present when
24 this legislation was drafted and they indicate to me that

1 it was certainly clear in their minds that these National
2 Park units in West Virginia were to be included in this --
3 under this law.

4 In this state I'm also told by a lawyer
5 that we operate under a plain meaning of the law -- the
6 plain meaning of the language, not by the intent that some
7 other states look at. In this case we have the words
8 "National Park" which are ambiguous. They refer to the
9 crown jewels of the National Park System, but they also
10 have a smaller, more generic meaning about the National
11 Park units. So I ask that you apply this to all the
12 National Park units in the state and treat them as National
13 Parks including New River Gorge, the Gauley, Bluestone,
14 Harpers Ferry National Recreation or National Historic and
15 the one somebody mentioned in Wheeling. I missed that one.

16 Okay, the next point is the designation of
17 waters that's quoted from your rule. "Waters located
18 within the boundaries of federally designated wilderness
19 areas." Your rules says that "this will only apply to
20 those streams or waterways that have -- they're bounded on
21 both banks with public land. I believe that this is -- it
22 should include all streams even if it has federal land or
23 publically owned land on one side and private land on the
24 other and the reason is that these waterways are integral

1 to the ecosystem, and if there's a national treasure
2 located along a stream, it would be foolish for us to allow
3 that stream to be degraded right next to and part of the
4 ecosystem of the national treasure and so I ask that you
5 change the language to reflect that to allow for public
6 land on one side and private land on the other.

7 The third issue, determining high quality,
8 naturally reproducing trout streams, this is a point
9 brought up by some other watershed groups. One measure for
10 high quality is the benthic macroinvertebrate communities.
11 It's not the only measure of health. There are many
12 healthy streams that have different qualities to them and
13 you should look at all of the qualities, all of the
14 biological, chemical and physical measurements that go into
15 determining what's a high quality stream. Some streams are
16 really clean but we don't have all the data in all those
17 categories so we might look at one piece of data that is an
18 indicator of a clean stream and consider that.

19 Oh, the current interpret rule as it is now
20 allows for water upstream of a Tier 3 segment to be
21 designated Tier 1 or Tier 2. I think the possibility of
22 Tier 3 section upstream of a Tier 3 section should be added
23 because there might be Tier 3 quality water here and then
24 dirty water in the middle and clean water further upstream

1 so that should be permitted, and I also think it should be
2 made clear in these rules that if there's a Tier 3 section,
3 that people upstream in a Tier 1 or Tier 2 section should
4 not be allowed to put so much pollution into that stream
5 that it degrades a Tier 3; that needs to be made very
6 clear, and that's it.

7 We just need to take a really long view of
8 what's going on here and not just look at the dollars that
9 we're going to get in our pocket, take into consideration
10 the people following us in life.

11 MS. COSCO: I believe our last speaker is
12 Lance Shultz.

13 MR. SHULTZ: Thank you for the opportunity to
14 speak tonight, to share some views, some observations
15 mainly. I too am a life-long West Virginia resident. I'm
16 a contractor. I'm a practicing environmentalist. Several
17 of our companies use the natural flowing waters within the
18 state's boundaries and borders to help prosper and advance
19 development, not only for construction and mining and
20 extraction projects but also to provide sanitary sewer and
21 sanitation and many of these water-related issues that are
22 so disparately needed to provide for the sanctity of human
23 health, and from what little bit I've read it's my humble
24 interpretation that many of these regulatory authorities

1 might jeopardize the future potential that these waters may
2 have to provide sanitary sewer and fresh water drinking
3 supplies to the state's resident.

4 I'd also like to maybe request that some
5 language that would appear subjective be made more concise.
6 As it says, the rule provides guidance and clarification
7 and there's some subjective language that I'd like to
8 request that more specific measures be taken.

9 In §4.3A, it says that "Portions of the
10 main stem of the Blue River and portions of the main stem
11 of the Blue River are included in the potential rule making
12 body." Well, I'd like to specifically know what portions
13 by latitude and longitude that they are characterizing or
14 referring to, and I would personally love to see a lot more
15 data and empirical evidence to support the entire §5.

16 From what I've read and granted I haven't
17 seen a lot of communication from this body. From what I've
18 read, almost all of the data that has been gathered and
19 read into the record in support of that section is decades,
20 decades old. If I'm inaccurate in that suggestion, I would
21 like to have further clarification be read into the public
22 record to contest my understanding.

23 I've also not really been given much in the
24 way of empirical evidence to support, in 5.2, the nature of

1 reproduction, how reproduction is defined. There's a lot
2 of specifics lacking in the language of that section. In
3 5.3, it says that, "The sampling site may be located in a
4 reasonably close proximity to the segment," and again that
5 further emphasizes the vague and ambiguous language. I
6 would very much like to know that that -- the word "close
7 proximity" is further defined. Much more specifically than
8 as it appears in the document as it is written.

9 Other than that, you know, my goal is
10 simple. To encourage the quality of life, the improvement
11 of society, the tax and regulatory policies that favor
12 investment and the sanctity of public sanitation and
13 regulations that are clear and easy to follow, and I would
14 also like to advocate that a much better concerted effort
15 be made to communicate hearings such as this and the nature
16 and background of it. Thank you.

17 MS. COSCO: I want to make sure I didn't miss
18 anybody. Did I miss anyone? Okay. Well, that brings us
19 to the conclusion of our hearing. We thank you very much
20 for coming out and sharing your thoughts with us.

21 As I said, the agency will review all the
22 comments, those that are written and the record of what was
23 said here today, and we will prepare a written response and
24 that will be filed when the final rule is filed with the

1 Secretary of State.

2 MR. AUTENREITH: Is there a time frame on that?

3 MS. COSCO: We don't have a time frame as of
4 yet.

5 MR. AUTENREITH: I mean is it some order of
6 months or half a year or?

7 MS. COWGILL: I have another question.

8 MR. AUTENREITH: I don't want to pin you down.
9 Just something?

10 MS. COWGILL: I have a question.

11 MS. COSCO: Well, let's stick to this one
12 first here.

13 MR. CAMPBELL: We haven't decided. I mean we're
14 not going to linger on this. I think we're going to go
15 back and start thinking about the comments and responding
16 to comments and I think it will be just a matter of how
17 long it takes, not some specific target, you know, we're
18 going to do this in two months or three months. If we get
19 done in three weeks, we'll be done in three weeks. We're
20 going to work on it as we can.

21 MS. MULLINS: When --

22 MS. COSCO: Let me address Sara's.

23 MS. COWGILL: Yeah, it said that we can like
24 file like a request that any river that we like could get

1 some kind of upgraded standing and if it -- we just submit
2 the location, previous designations, the existing water
3 quality. Would that be through samples of -- outstanding
4 ecological value. Is that an essay? And then recreation
5 or esthetic value and can words on that and just see if
6 somebody will like upgrade our Tug River cause river otters
7 are cool?

8 MS. COSCO: Karen.

9 MS. WATKINS: Maybe I can -- the rule today
10 that we're putting out, the interpretive rule, does not in
11 any way address that process.

12 MS. COWGILL: Okay.

13 MS. WATKINS: Which you seem to recognize, but
14 what you're talking about is governed by the language in
15 another rule, the Anti-degradation Implementation Rule and
16 it goes into a lot of detail and I'm sure that either Mr.
17 Mandirola or Mr. Campbell or I, but you could give them a
18 call to talk with them more as they will show you in the
19 rule or we can show you -- I've got a copy of it if you'd
20 like, but you can talk with them to try to understand what
21 is required to nominate. That's called our nomination
22 process for individual streams.

23 MS. COWGILL: Okay, so that's outside of what's
24 happening now?

1 MS. WATKINS: Right, right. We didn't feel it
2 was necessary because the rule -- the other rule is pretty
3 clear on that point so we didn't feel that it was necessary
4 to put out an interpretive rule and it wasn't really
5 affected by what the Legislature did this last time around
6 either.

7 MS. COWGILL: Okay, okay.

8 MS. WATKINS: It's been on the books for some
9 time.

10 MS. COWGILL: Right, the filling thing did when
11 the Clean Water Act, that changed from this word to that
12 word, and then I noticed you used that word "fill".

13 MS. WATKINS: Yeah. Actually, I think that's
14 in a different rule that maybe I can show you that here
15 just in a second.

16 MS. COWGILL: That was 3.8 of -- and that's not
17 included in this either?

18 MS. WATKINS: No, ma'am. It isn't and I'll be
19 glad to --

20 MS. COWGILL: Okay.

21 MS. WATKINS: But your comments were still
22 pertinent to, you know. You still had other comments that
23 were pertinent.

24 MS. COWGILL: Well, they're kind of general.

1 MS. WATKINS: But that particular one is a
2 different rule.

3 MS. COWGILL: It's very general. My comments
4 are general. The other lady was able to give you really
5 good words to fill in and replace along each section and I
6 thought that was great.

7 MS. MULLINS: Thank you.

8 MS. COSCO: Do we have another question?

9 MS. MULLINS: Do you know when you're going to
10 have a list of the Tier 3 streams would be filed? Do you
11 have an idea of when that's going to be filed at all? Is
12 there a draft list?

13 MS. WATKINS: After we finalize this rule, this
14 has to be done first.

15 MS. MULLINS: But it's not going to be filed at
16 the same time with the Secretary of State's Office?

17 MS. WATKINS: It will be published on the
18 agency's website. It's not like a rule or rule making.
19 It's not subject to that process so we would just be
20 putting it on our website sometime after we finalize this
21 rule. I don't know how much longer after -- at this point
22 Pat, you don't know? Do you have an idea? A matter of
23 weeks perhaps after we finalize the rules?

24 MR. CAMPBELL: Yeah, I think it's a bit of an

1 unknown. Clearly this rule sets out part of the
2 methodology that we use to develop the list. So once we
3 get this methodology out and filed, it won't be much longer
4 beyond that that we publish the list.

5 MS. MULLINS: Thank you.

6 MS. COSCO: All right, that concludes our
7 hearing. Thank you very much.

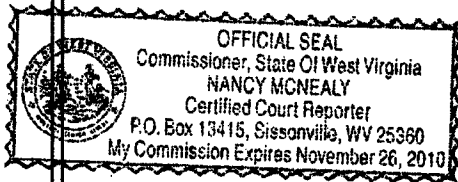
8 (WHEREUPON, the hearing was concluded.)

REPORTER'S CERTIFICATE

I, **NANCY MCNEALY**, Certified Verbatim Court Reporter and Commissioner of West Virginia, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof.

Given under my hand this *th day of June ,
2008.

My commission expires November 26, 2010.



Certified Verbatim Reporter
Commissioner of West Virginia

From: Frank Decker <dckrfrnk@yahoo.com>
To: <smandirola@wvdep.org>
Date: 5/21/2008 12:18:35 PM
Subject: Tier 3

MIME-Version: 1.0

Content-Type: multipart/alternative; boundary="0-1923150097-1211386700=:3025"

--0-1923150097-1211386700=:3025

Content-Type: text/plain; charset=us-ascii

Please take care of this oversight.

The waters in WV's four National Park Units deserve the highest level of protection like the waters in the state parks, national forests, and wilderness areas. The National Parks Conservation Association and National Park Service will be submitting comments asking the WV DEP to revise the wording of their proposed rule to include all waters "within units of the National Park System." We encourage you and your members and allies to do the same.

Please submit comments by June 3r

--0-1923150097-1211386700=:3025

Content-Type: text/html; charset=us-ascii

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<DIV><BR><FONT face=Arial size=2>The waters in WV's four National Park Units deserve the highest level of<BR>protection like the waters in the state parks, national forests, and<BR>wilderness areas. The National Parks Conservation Association and National<BR>Park Service will be submitting comments asking the WV DEP to revise the<BR>wording of their proposed rule to include all waters "within units of the<BR>National Park System." We encourage you and your members and allies to do<BR>the same.<BR><BR>Please submit comments by <SPAN class=yshortcuts id=lw_1211385915_22 style="CURSOR: hand; BORDER-BOTTOM: #0066cc 1px dashed">June 3r</SPAN></FONT><FONT color=#000000><FONT size=2><FONT face=Arial><BR></FONT></FONT></FONT></FONT></DIV></div><br>
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</body></html>
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--0-1923150097-1211386700=:3025--

From: "James Shumway" <jshumway@hsc.wvu.edu>
To: <smandirola@wvdep.org>
Date: 5/23/2008 4:19:19 PM
Subject: My comments on interpretive rule 47 CSR 2A, Designation of Tier 3 Waters

- I recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.

- I recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

- When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. I would recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

- The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Sincerely, — Jamie Shumway, 1465 Dogwood Ave. Morgantown, WV 26505

From: john mathwin <jmathwin@hotmail.com>
To: <smandirola@wvdep.org>
Date: 5/23/2008 5:42:49 PM
Subject: trout streams

Dear Mr. Mandirola,

Please keep the future and our children in mind when considering the fate of West Virginia trout streams. Keep as many as possible clean. Specifically I hope that all streams in national and state parks are given tier 3 classification and that the upstream portions of streams which have received tier 3 classification be kept clean and treated as tier 3 streams themselves otherwise the downstream portions will soon deteriorate.

As a grandfather of six who often visits West Virginia to fish, I hope to bring my grandkids there to experience some of the wonderful times I have had. Those good times always include clean streams.

Sincerely,

John and Judy Mathwin

Make every e-mail and IM count. Join the i'm Initiative from Microsoft.
http://im.live.com/Messenger/IM/Join/Default.aspx?source=EML_WL_MakeCount

From: "Chuck and Nancy Brabec" <thebrabecs@gmail.com>
To: <smandirola@wvdep.org>
Date: 5/23/2008 6:24:01 PM
Subject: Comments on interpretive rule 47 CSR 2A, Designation of Tier 3 Waters

Scott Mandirola
Assistant Director,
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304

Thank you for scheduling a the public hearing and comment period on a proposed new interpretive rule under its antidegradation program -- 47CSR2A, "Designation of Tier 3 Waters."

I will not be able to attend the hearing, so I am sending this email with my comments.

- The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

- When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. Waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

- The language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.

- The language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

Sincerely,

Charles Brabec
PO Box 273
Canvas, WV 26662-0273

From: "Robert E. Rutkowski" <rutkowski@terraworld.net>
To: <smandirola@wvdep.org>
Date: 5/23/2008 7:18:17 PM
Subject: Comments on interpretive rule 47 CSR 2A, Designation of Tier 3 Waters

Scott Mandirola
Assistant Director
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304
smandirola@wvdep.org

Re: Comments on interpretive rule 47 CSR 2A, Designation of Tier 3 Waters.

Dear Docket Manager:

I urge that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Pars, National Parks and National Forests.

I also recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. I recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Thank you for the opportunity to bring these remarks to your attention.

Mindful of the enormous responsibilities which stand before you, I am,

Yours sincerely,
Robert E. Rutkowski

cc:
House Leadership

2527 Faxon Court
Topeka, Kansas 66605-2086
P/F: 1 785 379-9671
E-mail: rutkowski@terraworld.net

CC: "House Democratic Leadership" <HouseDemocrats@mail.house.gov>

From: "Peggy Pings" <mpings@wvu.edu>
To: <smandirola@wvdep.org>
Date: 5/23/2008 7:26:16 PM
Subject: Comment on Interp Rule 47 CSR 2A - Tier 3 Waters

Dear Scott Mandirola, Assistant Director, Division of Water and Waste Management, WVDEP,

I would like to comment on interpretive rule 47 CSR 2A, Designation of Tier 3 Waters.

- Section 4.1 and 4.2. The language should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.

- Section 4. A section should be added to include Waters With State Protection. The WV Natural Streams Protection Act of 1969 include sections of the Greenbrier River, Anthony Creek, Cranberry River, Birch River and the New River. In addition, Commercial Whitewater Zones have been designated by WV Code section 20.2-23a, including segments of the Cheat, Gauley, New, Shenandoah, and Tygart Valley River. These important streams should also be protected from pollution and degradation, since they are critical to the Whitewater Industry. See page 66 (Natural Streams Protection Act of 1969) in the WV State Trails Plan, 2002. http://www.wvdot.com/3_roadways/rp/Trails/wvtrailplanbook.pdf

- Section 4.2.a. There are actually 4 National Parks in WV. The language should be amended to list the National Park units in WV as: New River Gorge National River, Gauley River National Recreation Area, Bluestone National Scenic River, Harpers Ferry National Historic Park.

- Section 4.3. The language that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system. In addition, the Wild & Scenic Rivers are listed on page 61 (Nationally-designated Rivers) in the WV State Trails Plan, 2002. http://www.wvdot.com/3_roadways/rp/Trails/wvtrailplanbook.pdf

- Section 5.1 and 5.1.a. Macroinvertebrate communities is only one measure for high quality water, and it is not the only measure. Therefore, in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

- Section 6.1. The current interpretive rule allows for water upstream of a tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment. This is very important! As you know, water flows downstream!
Thank you.

Peggy Pings
Outdoor Recreation Planner
Core, WV

From: <Duane330@aol.com>
To: <smandirola@wvdep.org>
Date: 5/23/2008 9:18:05 PM
Subject: Comments on interpretive rule 47 CSR 2A, Designation of Tier 3 Waters.

To: Scott Mandirola, Assistant Director
Division of Water and Waste Management
WV Department of Environmental Protection
601 57th Street S.E.
Charleston, WV 25304

RE: The interpretive rule 47 CSR 2A, "Designation of Tier 3 Waters in the State of West Virginia.

It is requested that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.

Let us also request that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

In determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We request that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

Given that the current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. This is a very dangerous situation. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Thank you for your attention to these important matters for the State of West Virginia.

Duane G. Nichols, President
Cheat Lake Environment & Recreation Association
330 Dream Catcher Circle
Morgantown, WV 26508

304-599-8040
duane330@aol.com (mailto:duane330@aol.com)

*****Get trade secrets for amazing burgers. Watch "Cooking with Tyler Florence" on AOL Food.
(<http://food.aol.com/tyler-florence?video=4&?NCID=aolfod00030000000002>)

CC: <clear@cheat.org>

From: <Panoramaatp@aol.com>
To: <smandirola@wvdep.org>
Date: 5/24/2008 7:53:34 AM
Subject: (no subject)

Dear Mr. Mandirola-

Please recommend and lobby others for the most stringent actions possible to protect our waters - and our health.

There is no resource more precious to our rich biodiversity here in West Virginia.

It is unconscionable to me to pass this mess along to future generations-even if you can bear the thought of continuing the damage that's been done to our streams, rivers and the Chesapeake Bay. WE HAVE OBLIGATIONS.

We must correct these problems now.

We are the only stewards this Earth. Today, we must do what we have to do. You, more than most.

People who think their economic interests override the interests of the environment/human health are just flat out wrong. This underlying conflict needs to be addressed head-on.

WE ARE OUT OF TIME.

Please measure all solutions as our Native American neighbors do - think of the consequences of your actions and weigh them over 7 generations.

We recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Pars, National Parks and National Forests.

- We recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

- When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We would recommend that in addition to healthy benthic macroivertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

- The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Please let me know if there is any way in which you need my support.

Thank you for your careful consideration of this matter.

Patti Miller
P.O. Box 98
Berkeley Springs, WV 25411

304.258.3827

Get trade secrets for amazing burgers. Watch "Cooking with Tyler Florence" on AOL Food.

(<http://food.aol.com/tyler-florence?video=4&?NCID=aolfod00030000000002>)

From: "Ed Sims" <e.sims@ampmedphysics.com>
To: <smandirola@wvdep.org>
Date: 5/24/2008 10:07:02 PM
Subject: Comments on Tier 3 Waters

Dear Mr. Mandirola,

I am writing on behalf of protecting our beautiful and acclaimed WV waters. An hour ago I watched an Iron Chef competition between Wolfgang Puk and a Japanese chef using large live golden and rainbow trout from WV which was commented on by Alton Brown. We need to keep and maintain this positive and unique spin of our State and rivers to the rest of the world. The connotation when one hears WV is usually not good unless you think football or our waters, specifically the New River and Gauley for rafting and kayaking. I have fiends that do both and the rest look at fishing in WV as a nirvana experience. Let's not take that away from ourselves and the country. I am allowing people much more involved with the politics to offer the comments below, but wanted you to know my genuine interest on this matter as a native West Virginian.

We recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Pars, National Parks and National Forests.

- We recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

- When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We would recommend that in addition to healthy benthic macroivertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

- The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Ed Sims

From: "Shanda Minney" <sminney@wvrivers.org>
To: <smandirola@wvdep.org>
Date: 5/27/2008 3:28:01 PM
Subject: Comments on Interpretive Rule 47 CSR 2A, Designation of Tier 3 Waters

Mr. Mandirola,

Please find attached comments on Interpretive Rule 47 CSR 2A, Designation of Tier 3 Waters, submitted by the West Virginia Rivers Coalition on behalf of those listed in the signatory section.

Thank you,

Shanda Minney

Shanda Minney

Executive Director

West Virginia Rivers Coalition

329 Davis Ave., Suite 7

Elkins, WV 26241

(304) 637-7201

cell: (304) 591-2526

sminney@wvrivers.org



WEST VIRGINIA RIVERS COALITION

329 Davis Avenue, Suite 7 • Elkins, WV 26241 • (304) 637-7201 • www.wvrivers.org

Lisa McClung, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: Comments on Interpretive Rule 47 CSR 2A, Designation of Tier 3 Waters

Dear Ms. McClung,

West Virginia Rivers Coalition submits these comments on behalf of its 2,500 members and in collaboration with the organizations listed on the signatory page of this document. Each signatory has a vested interest in the quality of West Virginia's waters, and believes that these comments are important to the future health of these valuable resources.

The following comments address WVDEP's proposed interpretive rule, 47CSR§2A, "Designation of Tier 3 Waters." In brief, we are supportive of legislation to strengthen and clarify Tier 3 designation, and show that support in many of our comments. However, we urge the WVDEP to more clearly define designation and selection criteria for waters covered under this rule, and we expand on these comments below.

§47-2A-4. Tier 3 Designation.

Section 4.1. Waters Located in Federal Wilderness Areas.

4.1.a. should be amended to read:

"All waters, and segments of 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."

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

4.2.a. should be amended to read:

“All high quality waters, naturally reproducing trout streams, segments of high quality waters or segments of 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.”

4.3 Specifically Designated Federal Waters

We support the designation of waters under the Wild and Scenic Rivers Act and the National Parks and Recreation Act as Tier 3. In addition to those Federal waters specifically named in section 4.3.a, that designation should be extended to all waters within units of the National Park System. This should include waters of federal importance as designated within National Recreation Areas, specifically the Gauley River National Recreation Area.

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

Section 5.1

5.1 should be amended to read:

"For purposes of subsection 4.2, waters will be considered high quality as defined in 47SCR§2-2.8."

This is consistent with the federal regulation (40CFR§131.12) which uses the phrase "high quality waters" when defining Tier 3. By "high quality water" this regulation specifically means waters that meet water quality standards, not waters with exceptional characteristics.

Section 5.1 proposes that waters will be considered Tier 3 solely based on healthy benthic macroinvertebrate communities. While it is appropriate to use benthic macroinvertebrates as *one* metric for listing waters as Tier 3, it is not appropriate to use this as the *only* metric for listing. Biological integrity and high quality can also be measured by fish communities. Waters can also be high quality based not on biological integrity, but based on chemical and physical measurements. In short, Section 5.1 is too restrictive by only allowing a single metric, the West Virginia Stream Condition Index, to be used to list a Tier 3 stream. In addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

Section 5.1.a should be deleted

Section 5.2

We support the proposed language in Section 5.2 regarding naturally reproducing trout waters.

Section 5.3

Section 5.3 seems to provide an unnecessary level of flexibility in terms of sample locations with respect to determinations of Tier 3 status. As written, it would allow sampling in “reasonably close proximity” to segments on public land. We cannot envision why sampling cannot be conducted on public land, as access should not be an issue. The phrase “reasonably close proximity” is undefined and potentially subject to abuse.

5.3.a. should be amended to read:

“When determining whether a water is high quality or a naturally reproducing trout stream the sampling site(s) shall be located within the public land segment, and shall be representative of the total segment. The number of sampling sites necessary to provide an accurate profile will be determined by the length and stream size of the segment.”

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

Section 6.1

This section states that upstream waters will be Tier 1 or Tier 2, as appropriate, without even the possibility that upstream waters can be Tier 3. In many situations, Tier 3 water will, in fact, be upstream from Tier 3 water. The first sentence in this section should therefore be changed to the following:

“Waters upstream of a Tier 3 segment will be considered Tier 1, Tier 2, or Tier 3, as appropriate.”

This section ends with the sentence: “The provisions of 60CSR§5-6.3 apply.” This is a critically important reference. The applicable paragraphs in 60CSR§5-6.3, among other things, state:

“Any proposed activity that would result in a permanent new or expanded discharge upstream of an ONRW [Tier 3] segment is prohibited except where such source would improve or not degrade the existing water quality of the downstream ONRW segment.”

It is critically important that the final sentence of §47-2A-6 remain as written, to clarify that even if an upstream water is Tier 1 or 2, it cannot degrade downstream Tier 3 waters. This is not only required by the rules, it also mirrors Secretary Timmermeyer’s public statements during the legislative debate over the new Tier 3 rules.

Additional Comments on the Tier 3 Nomination Process

While the Tier 3 nomination procedures are not contained in 47CSR2, but instead are contained in 60CSR§5, the Antidegradation Implementation Procedures rule, we feel strongly that the agency should clarify how it will handle Tier 3 nominations.

Previous language contained in section §60-5-8. Designation of Tier 2.5 and Tier 3 Waters contained differing language covering the nomination process for Tier 2.5 and Tier 3 waters.

Section 8.1.a.1 stated: "Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 2.5 water pursuant to the Board's State's antidegradation policy, the Board Secretary shall, **within 180 days of receipt of the nomination**, notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided."

Section 8.2.a.1 stated: "Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the Board's State's antidegradation policy, the Board Secretary shall notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided."

The specific language "**within 180 days of receipt of the nomination**" was not included in Section 8.2.a.1 dealing with Tier 3 nominations. With the elimination of the Tier 2.5 language from 60CSR§5, this language no longer appears anywhere in the rule. At a minimum that language should be added to the section covering Tier 3 nomination procedures.

In addition, the agency should be required to notify in a reasonable period of time the individual(s) submitting the nomination whether or not the nomination was sufficient for consideration.

We thank the West Virginia Department of Environmental Protection for consideration of our comments.

Sincerely,

Shanda Minney
Executive Director
West Virginia Rivers Coalition

Larry Orr
Chairman
WV State Council of Trout Unlimited

Larry Harris
Member
DEP Public Advisory Council

Don Garvin
Legislative Coordinator
West Virginia Environmental Council

Facility Comments - 05/27/2008

Extend CS to Pluto Road area. CG 5/27/08

Location Comments - 05/27/2008

Extend CS to serve Pluto Road area. CG 5/27/08

Close

From: Paula Finck <paulafinck@yahoo.com>
To: <smandirola@wvdep.org>
Date: 5/28/2008 11:10:48 PM
Subject: Re: keeping our streams from future degradation

Hi

Please do not allow WV streams to be ruined by future degradation. I know you will make sure that this will not occur by being clear in your writing of present legislation concerning our streams.

Sincerely, Paula Finck

From: Gibbins <gibbins@verizon.net>
To: <smandirola@wvdep.org>
Date: 5/29/2008 9:40:50 AM
Subject: Tier 3 protection

To: Scott Mandirola, Assistant Director, smandirola@wvdep.org

Division of Water and Waste Management

601 57th Street S.E. , Charleston, WV 25304

From: Helen Gibbins, League of Women Voters, 6128 Gideon Rd.,
Huntington, WV 25705; 304-736-3287; gibbins@verizon.net

Re: DEP Administrative Stream Protection Rule, 47CSR2A,
"Designation of Tier 3 Waters."

The League of Women Voters of WV strongly supports antidegradation of our waters. When the 2008 WV legislature finally passed protection for Tier 3 waters, it took an important step.

Now we must finish the job by ensuring all of WV's high quality waters eligible for Tier 3 classification receive antidegradation protection. These waters must define Tier 3 waters as all streams and stream segments located within National Wilderness Areas, State Parks, National Parks and National Forests, and should include all waters within units of the National Park system, including the Gauley River. Streams should be considered eligible for designation based on a consideration of all available biological, chemical, and physical measurements

The interpretive rule should also clearly state that any activity upstream of Tier 3 waters is not allowed to degrade downstream Tier 3 sections of streams. Otherwise how can the state protect Tier 3 streams?

Our Tier 3 quality streams are resources that many states do not have. We should ensure that these resources are fully protected.

Thank you for allowing the League of Women Voters to comment on the rule.

Kathy Stoltz, president, and Helen Gibbins, director, League of Women Voters of WV

From: "Sally Snyder" <priusowner01@gmail.com>
To: <smandirola@wvdep.org>
Date: 5/29/2008 9:33:50 PM
Subject: Stream degradation

TO WHOM IT MAY CONCERN:

Please be advised that I have a great fear that the streams and ultimately the water that is necessary to sustain life will be degraded until it is poison and unfit for consumption. We need to maintain the standards that will allow for the cleanest water possible.

Water is the most precious commodity on the face of the earth. Let's put forth some extra effort in West Virginia to keep it clean.

Sincerely
Sally Snyder



A nonprofit citizen's coalition working within the community to promote responsible economic development and sustainable environmental management.

PO Box 482 Fayetteville, WV 25840

304.574.4726

www.plateauactionnetwork.org

Scott Mandirola
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304

RECEIVED

MAY 30 2008

WATER QUALITY ~~STDS~~ 008

Topic: Designation of Tier 3 Waters.

Dear Mr. Mandirola,

I am writing this letter as the Chair of the watershed organization Plateau Action Network located in the lower New River watershed in Fayette County. The Clean Water Act and the issue of anti-degradation of our West Virginia streams has long been a concern of our 10 year old organization and its membership of nearly 300.

We work in partnership with you, WVDEP Division of Water, as well as the Resources and Office of Abandoned, Mine Lands and Reclamation (WVDEP), Office of Surface Mining (OSM), US Dept. of Agriculture, Farm Service Agency, Natural Resource Conservation Service (NRCS), National Park Service (NPS), United States Geological Survey (USGS), Army Corps of Engineers (COE), WV Soil Conservation Agency (WVSCA), WV Department of Natural Resources (WVDNR), Southern Soil Conservation District, National Parks Conservation Association (NPCA), Appalachian Coal County Watershed Team (ACCWT), WV Rivers Coalition (WVRC), WV Watershed Network (WVWN), Fayette County, and the Town of Fayetteville among others.

Our organization supports the following changes to interpretive rule 47 CSR 2A, as suggested by the WVRC.

We recommend that the language in sections 4.1 and 4.2 be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests, such as the Gauley River.

We also recommend that the language in section 4.3, laying out guidelines for Federally designated waters be amended to include all waters within units of the National Park system, including Bluestone National Scenic River, Gauley River National River Recreation Area, and the New River Gorge National River.

When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macro-invertebrate communities only. While this is one measure for high quality water, it is not the only measure. We recommend that in addition to healthy benthic macro-invertebrate communities, waters should also be eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1 and it made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.

Our membership believes the implementation of the above recommendations will enhance the interpretive rule 47 CSR 2A and better protect the water quality of our West Virginian treasured streams and waterways for our children and future generations.

With great sincerity and concern,

I am,

Mark Ehrnschwender

PAN Board Chair

From: <Snidergeo@aol.com>
To: <smandirola@wvdep.org>
Date: 6/2/2008 7:50:34 AM
Subject: 47 CSR 2A - Tier 3

Dear Mr. Mandirola,

In relation to upcoming decisions regarding 47 CSR 2A - Tier 3, I ask that DEP support change the language in sections 4.1 and 4.2 to include not only waters, but segments of waters located within National Wilderness Areas, State Pars, National Parks and National Forests.

Please amend the language in section 4.3 that lays out guidelines for Federally designated waters to include all waters within units of the National Park system.

When determining "High Quality and Naturally Reproducing Trout Streams", that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Thank you for working to keep our West Virginia waters clean.

George Snider
Martinsburg, WV

*****Get trade secrets for amazing burgers. Watch "Cooking with Tyler Florence" on AOL Food.
(<http://food.aol.com/tyler-florence?video=4&?NCID=aolfod00030000000002>)

From: "Steph" <steph.slater@comcast.net>
To: "Scott Mandirola" <SMANDIROLA@wvdep.org>
Date: 6/2/2008 7:52:33 AM
Subject: Comments on Tier 3 Interpretive Rule

I have a comment regarding:

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.

Why does the stream have to be bounded on both sides by the public land? These streams are rare in the state of WV. Streams running adjacent to public land, even if only on one side, should be included.

I have a comment regarding:

§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.

If a stream is rated Tier 1 or Tier 2 upstream from a Tier 3 segment, pollutants allowed to enter upstream would flow downstream into the Tier 3 segment thus polluting it. Again, these streams are so rare, let's keep the upstream portions protected as well. What would be the disadvantage to the entire stream getting a Tier 3 rating?

Thanks,
Stephanie Slater

From: "cindyrank" <clrank@hughes.net>
To: "Scott Mandirola" <smandirola@wvdep.org>
Date: 6/2/2008 7:54:32 AM
Subject: Interpretive Rule 47 CSR 2A - Designation of Tier 3 Waters

Scott,

Attached please find comments on the proposed Interpretive Rule 47 CSR 2A regarding Designation of Tier 3 Waters submitted on behalf of the Friends of the Little Kanawha and the West Virginia Highlands Conservancy.

Feel free to contact me with any questions you might have.

Cindy Rank
304-924-5802

CC: "Hugh Rogers" <hugh.rogers@gmail.com>

West Virginia Highlands Conservancy

Working since 1965 for the conservation of West Virginia's natural resources

June 3, 2008

Scott Mandirola, Assistant Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Via e-mail to smandirola@wvdep.org

RE: Comments on Interpretive Rule 47 CSR 2A Designation of Tier 3 Waters

Dear Scott,

1) **Comments submitted by West Virginia Rivers Coalition.** We participated in discussions leading up to the final set of comments submitted by the WV Rivers Coalition on behalf of four individual and group signatories. We support those comments and incorporate them as our own by reference.

2) **Waters within National Park Service Units.** We also support and would like to emphasize in particular the sentiments expressed by the National Park Service and the National Parks Conservation Association in regard to waters located within lands managed by the National Park Service.

- a) Sections 4.3 should extend Tier 3 protection to all waters within "units in the National Park System". As I understand it, each of these units is managed by the National Park Service under the same set of federal laws and deserves the same level of protection.
- b) At a minimum specific designation should be made for the Gauley National Recreation Area as created in Public Law 100-534 (The West Virginia National Interest River Conservation Act of 1988).
- c) Furthermore, the wording of Section 4.3 might possibly be interpreted to include only the main stem of the New and Bluestone Rivers. We submit that the rule should include not only the main stem of the New, Bluestone and Gauley Rivers within the boundaries of the appropriate park unit, but also tributaries to these rivers within each of the parks.

3) **High Quality Waters on Private Lands.** Finally, we would like to go on record as strongly objecting to the de facto demotion of the many high quality and naturally reproducing trout streams that were considered national resource waters for purposes of the WV anti-degradation policy until the early 1990's.

Under pressure from industry at that time many of our fine streams located outside the boundaries of national and state park and forest lands were summarily demoted to a newly created lesser-protective level known as Tier 2.5. Now, with the elimination of Tier 2.5 by the 2008 state legislature a whole host of valuable headwater streams have been demoted even further into Tier 2, an action that lessens even further the level of protection.

Admittedly there is a process to nominate waters for Tier 3. However, anyone who witnessed the embarrassing inability of our state regulators and legislators to provide even the intermediate Tier 2.5 protection to hundreds of documented trout and high quality waters these past few years will have little hope of meeting with anything more than a debacle of similar proportions.

Though the nomination process is not directly a part of the interpretive rule being discussed, the details of that process should also be clarified due to the alteration of the Tier system.

Finally, since at least 1981, members of FOLK (Friends of the Little Kanawha), the West Virginia Highlands Conservancy and myself personally have commented on and supported the most protective water quality regulations and proposals especially as they relate to headwater streams that run through our communities and non-public lands. We have been - and are - discouraged by the gradual weakening of the anti-degradation policy that originally protected these streams. The continued refining with regard to implementation of that policy these past few years has made it easier for industries to massage and manipulate the minutia of regulation and far more difficult for the ordinary citizen to understand and rely on those regulations to protect our most valuable water resources.

Thank you for the opportunity to comment.

Sincerely,

Cindy Rank
Chair, WVHC Mining Committee and
FOLK Organizational Representative to
The WV Highlands Conservancy Board

HC 78, Box 227
Rock Cave, WV 26234

Phone 304-924-5802
Email: clrank@hughes.net

From: "Ben Prior" <acwawv@gmail.com>
To: <smandirola@wvdep.org>
Date: 6/2/2008 10:20:45 AM
Subject: tier 3

Mr. Mandirola, On the topic of Tier 3 designation, I feel that all water upstream of a Tier 3 stream be considered to not harm the Tier 3 stream. Also, in sectionn 4.3 the language should be to include all water the National Park System. thank you, Ben Prior Fayette County resident and river guide.

From: Mary Ellen Cassidy <meacassidy@yahoo.com>
To: <smandirola@wvdep.org>
Date: 6/2/2008 11:57:49 AM
Subject: Tier 3 Interpretive Rule

47CSR2A, "Designation of Tier 3 Waters: I am unable to travel to Charleston tomorrow and so am emailing my comments.

I continually read about water disputes in other parts of the globe as well as here in the US. I worry that WV has little appreciation for the valuable economic and environmental water resources it presently possesses. The value and access to clean water will appreciate as time passes and become one of WV's most valuable assets. Please do all you can to protect these waters.

I would like to see the following three points addressed in the Tier 3 Legislation.

First of all, DEP proposes a definition of streams on public lands that is too narrow. Tier 3 protections should apply to all streams and stream segments located within National Wilderness Areas, State Parks, National Parks and National Forests, and should include all waters within units of the National Park system, including the Gauley River.

Secondly, DEP proposes to use only a benthic macroinvertebrate "bug score" to determine if a stream qualifies as a "High Quality" water. While this is one measure for high quality water, it is not the only measure. Streams should be considered eligible for designation based on a consideration of all available biological, chemical, and physical measurements.

Finally, the DEP interpretive rule is unclear about the interaction of Tier 3 streams with other waters. DEP should make it clear that activity upstream of a Tier 3 segment is not allowed to cause harm or degradation to the downstream Tier 3 segment.

Please include my comments in the record and use your wisdom to prevent our state from being a penny wise but pound foolish.

Mary Ellen Cassidy
39 Hamilton Avenue
Wheeling, WV 26003

From: <Robin_Perry@nps.gov>
To: <smandirola@wvdep.org>
Date: 6/2/2008 5:36:04 PM
Subject: Interpretive Rule 47 CSR Series 2A - Designation of Tier 3 Waters

Dear Mr. Mandirola,

Attached you will find NERI's comments concerning the above mentioned.
Hard copy to follow.

(See attached file: Tier 3 ltr - pg 1.pdf)(See attached file: Tier 3 ltr -
pg2.pdf)

Robin Perry
Superintendent's Secretary

CC: <Jesse_Purvis@nps.gov>, <Deborah_Darden@nps.gov>, <Lorrie_Sprague@nps.gov>,
<Don_Striker@nps.gov>



United States Department of the Interior

NATIONAL PARK SERVICE
NEW RIVER GORGE NATIONAL RIVER
GAULEY RIVER NATIONAL RECREATION AREA
BLUESTONE NATIONAL SCENIC RIVER
104 Main Street
P.O. Box 246
Glen Jean, West Virginia 25846



IN REPLY REFER TO:

June 2, 2008

N3617(NERI)

Scott Mandirola, Assistant Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Dear Mr. Mandirola:

The National Park Service appreciates the opportunity to comment on Interpretive Rule 47 CSR Series 2A – Designation of Tier 3 Waters. This rule provides guidance and clarification for designating Tier 3 waters within West Virginia for antidegradation purposes under the authority of the Clean Water Act (40 CFR 131).

We are encouraged by the inclusion of waters within units of the National Park system in the definition of waters afforded Tier 3 protection, but feel some rewording is necessary for clarification, and to afford the protection intended by Congress in establishing units of the National Park system in West Virginia.

Under §47-2A-4.2a, we urge that the words “national parks” be replaced by “units of the National Park system.” Federal law (16 USC §1a-1) dictates that all units administered by the National Park Service, regardless of the unit designation, be managed to the same high standard of protection of the outstanding natural resources for which these units were designated. Since New River Gorge National River, Gauley River National Recreation Area, and Bluestone National Scenic River were created in part for their outstanding aquatic resources, it is only appropriate that this be reflected in West Virginia regulations.

Such a wording change would also include waters located in Harpers Ferry National Historic Park, the sections of the Appalachian Trail within West Virginia, and any future additions to the National Park system within the state.

We also urge deleting the last sentence in §47-2A-4.2a. The Harpers Ferry unit is indeed a National (Historic) Park. Further, designations of units within the National Park system have been changed in the past, and may be changed again in the future. Eliminating this sentence would eliminate potential confusion, both now and in the future.

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We are also concerned about the wording in §47-2A-4.3a. While the reference to 16 USC §1274(a)65 specifically refers to Bluestone National Scenic River, the reference of 16 USC §466m et seq. to New River Gorge National River is erroneous. The correct reference to New River Gorge National River is 16 USC §460m et seq. Further, we are also concerned that Gauley River National Recreation Area (16USC 460ww et seq.) is not specifically mentioned in this section.

Additionally, we are concerned that this section restricts Tier 3 protection only to the main stem of the listed rivers. While the namesake rivers are the major features that led to establishment of these parks, the Congressionally established boundaries clearly include tributary streams.

Therefore we urge that §47-2A-4.3a be modified to correct the reference to New River Gorge National River and to specifically include Gauley River National Recreation Area. We further urge that this section be amended by deleting the interpretive reference to main stem rivers so that all streams within the park are afforded protection by West Virginia concomitant with that intended by Congress (16 USC §1a-1).

The National Park Service hopes that Tier 3 designation will lead to greater protection of these important aquatic resources. We also hope that this designation will lead to notification of the National Park Service when DEP receives permit applications that may affect Tier 3 waters on NPS lands.

We have heard rumors that establishment of Tier 3 protection will limit the ability of local entities to make needed infrastructure improvements (e.g. upgraded sewer systems) that will improve water quality. We are assured by Chapter 4 of EPA's Water Quality Handbook (particularly the examples given in Exhibit 4-1) that this is not the case. We believe that DEP should explicitly acknowledge the falsehood of such rumors, and assure the public that essential infrastructure improvements that will improve water quality are indeed allowed under Tier 3.

Again, we appreciate the opportunity to provide comments on the proposed rule, and look forward to a continued partnership with the West Virginia Department of Environmental Protection in protecting water quality. If you have any questions, or need clarification on the above comments, please contact our Fishery Biologist, Dr. Jesse M. Purvis, at 304 465-6513.

Sincerely,



Don Striker
Superintendent



United States Department of the Interior

NATIONAL PARK SERVICE
NEW RIVER GORGE NATIONAL RIVER
GAULEY RIVER NATIONAL RECREATION AREA
BLUESTONE NATIONAL SCENIC RIVER
104 Main Street
P.O. Box 246
Glen Jean, West Virginia 25846



IN REPLY REFER TO.

June 2, 2008

N3617(NERI)

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JUN 04 2008
WATER QUALITY STDS

Scott Mandirola, Assistant Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Dear Mr. Mandirola:

The National Park Service appreciates the opportunity to comment on Interpretive Rule 47 CSR Series 2A – Designation of Tier 3 Waters. This rule provides guidance and clarification for designating Tier 3 waters within West Virginia for antidegradation purposes under the authority of the Clean Water Act (40 CFR 131).

We are encouraged by the inclusion of waters within units of the National Park system in the definition of waters afforded Tier 3 protection, but feel some rewording is necessary for clarification, and to afford the protection intended by Congress in establishing units of the National Park system in West Virginia.

Under §47-2A-4.2a, we urge that the words “national parks” be replaced by “units of the National Park system.” Federal law (16 USC §1a-1) dictates that all units administered by the National Park Service, regardless of the unit designation, be managed to the same high standard of protection of the outstanding natural resources for which these units were designated. Since New River Gorge National River, Gauley River National Recreation Area, and Bluestone National Scenic River were created in part for their outstanding aquatic resources, it is only appropriate that this be reflected in West Virginia regulations.

Such a wording change would also include waters located in Harpers Ferry National Historic Park, the sections of the Appalachian Trail within West Virginia, and any future additions to the National Park system within the state.

We also urge deleting the last sentence in §47-2A-4.2a. The Harpers Ferry unit is indeed a National (Historic) Park. Further, designations of units within the National Park system have been changed in the past, and may be changed again in the future. Eliminating this sentence would eliminate potential confusion, both now and in the future.

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We are also concerned about the wording in §47-2A-4.3a. While the reference to 16 USC §1274(a)65 specifically refers to Bluestone National Scenic River, the reference of 16 USC §466m et seq. to New River Gorge National River is erroneous. The correct reference to New River Gorge National River is 16 USC §460m et seq. Further, we are also concerned that Gauley River National Recreation Area (16USC 460ww et seq.) is not specifically mentioned in this section.

Additionally, we are concerned that this section restricts Tier 3 protection only to the main stem of the listed rivers. While the namesake rivers are the major features that led to establishment of these parks, the Congressionally established boundaries clearly include tributary streams.

Therefore we urge that §47-2A-4.3a be modified to correct the reference to New River Gorge National River and to specifically include Gauley River National Recreation Area. We further urge that this section be amended by deleting the interpretive reference to main stem rivers so that all streams within the park are afforded protection by West Virginia concomitant with that intended by Congress (16 USC §1a-1).

The National Park Service hopes that Tier 3 designation will lead to greater protection of these important aquatic resources. We also hope that this designation will lead to notification of the National Park Service when DEP receives permit applications that may affect Tier 3 waters on NPS lands.

We have heard rumors that establishment of Tier 3 protection will limit the ability of local entities to make needed infrastructure improvements (e.g. upgraded sewer systems) that will improve water quality. We are assured by Chapter 4 of EPA's Water Quality Handbook (particularly the examples given in Exhibit 4-1) that this is not the case. We believe that DEP should explicitly acknowledge the falsehood of such rumors, and assure the public that essential infrastructure improvements that will improve water quality are indeed allowed under Tier 3.

Again, we appreciate the opportunity to provide comments on the proposed rule, and look forward to a continued partnership with the West Virginia Department of Environmental Protection in protecting water quality. If you have any questions, or need clarification on the above comments, please contact our Fishery Biologist, Dr. Jesse M. Purvis, at 304 465-6513.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Striker", written over a circular stamp or seal.

Don Striker
Superintendent

From: "Hooks, Steve" <Steve_Hooks@platts.com>
To: <smandirola@wvdep.org>, <jbostic@wvcoal.com>
Date: 6/2/2008 6:09:35 PM
Subject: Follow-up questions re: Tier 1, 2 and 3 streams.

Gentlemen:

Has WVDEP or WVCA come up with a number of streams affected by the potential Tier 3 regulations? I did find the map on WVDEP's site that shows the wilderness areas that would be covered.

What about Tier 1 and 2 streams? Is there any information you can give me that would give me an estimate of the streams affected under those categories and where they are located? I presume it would be "numerous" streams throughout the state, but any specific information you can give me or guide me to would be most appreciated.

Thanks and best wishes,

Steve

Steve Hooks
Associate Editor
Platts Coal Outlook/Platts Coal Trader
117 Poplar Grove Road
Galax, VA 24333
Voice: 276-236-0820
Fax: 276-236-4616

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From: "Chris Eads" <chriseads@gmail.com>
To: <smandirola@wvdep.org>
Date: 6/3/2008 8:58:33 AM
Subject: rule 47 CSR 2A, Designation of Tier 3 Waters

Mr. Mandirola,

I would like to comment on the upcoming Tier 3 designation discussion.

In the next 20 years, clean water will become the most valuable resource on the planet. Far more valuable than oil, gold, platinum, and coal. Wars are already beginning to be fought over water rights, and competition for clean water will intensify to a nearly unimaginable degree.

West Virginia is not only blessed to be abundant in coal, but we are doubly blessed to have some of the cleanest, purest water on the entire Eastern seaboard. Not only is that water valuable in the short term in all of the ways we all know are important but usually sacrifice for the sake of economic opportunism, i.e. healthy, balanced ecosystems, vibrant psychological and physical health of communities, peaceful places to escape from the pressures of the world and fish, camp, hunt, and relax. These things we know, and of course woefully undervalue. I am not so naive as to assume that these concerns alone will prevent industry from dirtying our water to create much-needed jobs in West Virginia. This will happen. But I would like to take this opportunity to refocus the whole debate, and reprioritize those clean, pure, healthy streams AS AN ECONOMIC ENGINE IN THEIR OWN RIGHT.

Granted, the short-term payoff is not nearly as great. Extractive industries need the water, and they need it NOW. The mindset of the old paradigm will never change. A new paradigm is coming, however, and West Virginia is in a powerful position to become a leader in the battle over, and usefulness of, clean water and healthy river ecosystems. West Virginia streams could be a laboratory for the world. Protected places are vanishing, and ours could become an international resource. Imagine the possibilities of a homegrown stream-restoration and biological sciences industry where human and technological capital is exported across the world. For example, heavily-polluted China will need massive investment in such capital in the coming decades, and West Virginia scientists, engineers and technicians could lead the way and of course, profit considerably. Fish are dying worldwide--what if West Virginia had some of the healthiest fish on the planet? The tourism opportunities of West Virginia as the last bastion of unpolluted outdoor rest and recreation in an increasingly chaotic and overpopulated world are manifold, and hardly need mentioning. And to reiterate my original point, the value of clean water ALONE in the coming years will surpass that of any other commodity on Earth. In West Virginia it is abundant, and will pay magnificently in the next 50 years.

This argument may not be compelling in the short-term, when there are industries today that can provide jobs right now in exchange for polluted water, polluted potentially for hundreds of years if acid-mine drainage can be used as an instructive yardstick. I submit that those short-term economic considerations will pale in comparison to the longer-term, yet-to-be-created 21st century industrial concerns that could make West Virginia a world-leader by the simple virtue of having one of the last RENEWABLE 21st century economic engines on Earth--clean water. While we are

faced with this historic opportunity, let's protect our Appalachian heritage—for ourselves and our communities right now, and for the economic well-being of future generations of West Virginians, who will look back at this moment in gratitude for the wisdom and foresight that we expressed by keeping the Tier 3 stream designations widespread, robust, and undiluted.

Thank you!

Christopher Eads
Fayetteville, WV

From: "Rebecca C. Croghan" <rcroghan@spilmanlaw.com>
To: <smandirola@wvdep.org>
Date: 6/3/2008 3:08:33 PM
Subject: Comments on Draft Interpretive Rule, Series 2A - Designation of Tier 3 Waters

Please see attached comments filed on behalf of IOGA.

Rebecca C. Croghan
Secretary
Spilman Thomas & Battle, PLLC
t 304.720.3438
f 304.340.3801
rcroghan@spilmanlaw.com

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CC: <cburd@iogawv.com>, <bsradabaugh@rtol.net>, "M. Ann Bradley"
<abradley@spilmanlaw.com>, "Andrew B. McCallister" <amccallister@spilmanlaw.com>



June 3, 2008

Mr. Scott Mandirola, Assistant Director
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25305

**Re: COMMENTS ON DRAFT INTERPRETIVE RULE, SERIES
2A – DESIGNATION OF TIER 3 WATERS**

Dear Mr. Mandirola:

These comments on the draft Interpretive Rule, Series 2A regarding the designation of Tier 3 waters pursuant to the state water quality standards (47 CSR 2) are submitted on behalf of the Independent Oil and Gas Association of West Virginia (“IOGA”). IOGA is a statewide nonprofit trade association that represents companies engaged in the extraction and production of natural gas and oil and the companies that support the extraction and production activities.

For a number of years IOGA has participated in the development of rules implementing West Virginia’s antidegradation program through the submission of comments on agency proposals and participating in legislative and agency hearings on this topic. Throughout that process IOGA has attempted to offer constructive input which was directed at adopting an effective antidegradation program which met the directives of the Legislature and which did not unnecessarily impede the development of our state’s natural resources. It is with these goals in mind that IOGA offers the following comments.

1. Application of Tier 3 Designations to Nonpoint Source Activities.

The Antidegradation Implementation Rule (60 CSR 5)(the “AIR”) provides that all “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. . .” 60 CSR 5, §1.5.b. The proposed Interpretive Rule does not address this provision of the AIR nor do we believe it is necessary to do so. However, we believe that the language of §1.5.b of the AIR with respect to nonpoint sources applies to activities which occur in the area of Tier 3 waters just as it applies to other waters of the state. We respectfully request that DEP confirm this interpretation of the language of §1.5.b.

2. §47-2A-3. Applicability.

For clarity, IOGA suggests that Sec. 3.1 be divided into two sentences and read as follows:

3.1. This rule applies to the West Virginia Department of Environmental Protection as it designates waters pursuant to the provisions of 47 CSR §2-4.1. This rule does not apply to the listing of Tier 3 waters pursuant to 60 CSR §5-7.1.

3. §47-2A-5. High Quality and Naturally Reproducing Trout Waters.

Section 5.2.a defines "documented reproduction" in part as consisting of "a DNR or DEP fish survey or other written documentation that verifies the presence of reproducing brown, brook or rainbow trout." There is not a restriction on the time when such survey or documentation was developed. IOGA urges the agency to require that such information be of recent vintage so as to accurately reflect the condition of the stream or water body at the time this Tier 3 designation is first applied. We are aware of some surveys that are limited in scope and decades old. While it may be argued that such information is relevant for the purpose of trout water use designations under the water quality standards, we are aware of no authority that would justify its use in a Tier 3 designation under the new standard approved by the legislature.

Section 5.3.a specifies that when determining whether a water is a high quality water 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." This language is vague and indefinite in two ways – in its use of the terms "in reasonably close proximity" and "representative." We do not understand why the agency does not simply require that the sampling site be located within the stream to be designated as a Tier 3 water. Surely the significance of this designation on future activities in these areas justifies a more precise location for any sampling used to support the designation.

IOGA appreciates the opportunity to provide these comments on the Interpretive Rule.

Sincerely,



Charlie Burd, Executive Director

From: <DSGJr@aol.com>
To: <smandirola@wvdep.org>
Date: 6/3/2008 3:41:20 PM
Subject: Tier 3 Interpretive Rule Additional Comments

Scott -- No this does not contain another Tier 3 nomination list. But please see attached anyway.

Don Garvin

*****Get trade secrets for amazing burgers. Watch "Cooking with Tyler Florence" on AOL Food.
(<http://food.aol.com/tyler-florence?video=4?&NCID=aolfod00030000000002>)



West Virginia Environmental Council
2206 Washington Street East ~ Charleston, WV 25311
(304) 414-0143 www.wvecouncil.org

June 3, 2008

Scott Mandirola, Assistant Director
DEP Division of Water and Waste Management
Via Email to: smandirola@wvdep.org

Re: Tier 3 Interpretive Rule

Hello, Scott:

I will be unable to attend the public hearing this evening. WVEC is a signatory to the extensive comments submitted by the West Virginia Rivers Coalition, and I wish to incorporate those comments here by reference.

However, I am going to take this opportunity to point out what I believe are deficiencies (that now exist as a result of the Legislature's recent actions) in the Antidegradation Rule in 60CSR5, and in the Antidegradation Implementation Procedures Rule, 47CSR2. I realize that these comments are beyond the scope of this administrative interpretive rule, but I feel strongly that these are issues that DEP will need to address sooner than later.

First of all, the agency must clarify how it will handle Tier 3 nominations, and this will require new legislative language in 60CSR5 (see the lengthier discussion in the WVRC comments).

But more importantly, we feel it is essential that DEP immediately address the removal of protection from future degradation for a significant number of outstanding high quality waters that now exists due to the elimination of the Tier 2.5 stream category. As a result of eliminating Tier 2.5, streams not on public land will now be treated as Tier 2, which means that they can be polluted ultimately down to their water quality standard.

So while the Legislature expanded the Tier 3 definition, it failed to address the definition of Tier 2 waters and whether the "de minimis" degradation provisions allowed under the existing Tier 2 definition will now provide adequate protection for the majority of high quality waters that will not qualify for Tier 3.

With the elimination of the Tier 2.5 category, WVEC feels strongly that the Tier 2 "de minimis" provisions are now inadequate to protect from future degradation a large number of outstanding high quality West Virginia streams, as required by the federal Clean Water Act.

We urge DEP to address this important issue soon.

Donald S. Garvin, Jr.
WVEC Legislative Coordinator
DSGJr@aol.com
Cell Phone: (304) 395-0078

**Representing West Virginia "Special Interests":
People Who Want to Breathe Clean Air and Drink Clean Water**

From: "Amy Cimarolli" <acimarolli@TNC.ORG>
To: <smandirola@wvdep.org>
Date: 6/3/2008 3:45:49 PM
Subject: Tier 3 streams designation rule comments

Hello Scott,

Attached please find our comments on the proposed Tier 3 streams designation rule.

Thank you!

Amy

Please consider the environment before printing this email

Amy L. Cimarolli
Conservation Ecologist

acimarolli@tnc.org
(304) 637-0160 (Phone)
(304) 637-0584 (Fax)

nature.org <<http://nature.org/>>
WV Field Office
PO Box 250
21 Third St
Elkins, WV 26241

The Nature Conservancy

CC: "Rodney Bartgis" <rbartgis@TNC.ORG>, "Beth Wheatley" <ewheatley@TNC.ORG>

June 3, 2008

Scott Mandirola
Assistant Director, Division of Water and Waste Management
Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

Dear Mr. Mandirola,

The Nature Conservancy (TNC) in West Virginia offers these comments on the proposed Interpretive Rule regarding the Designation of Tier 3 “outstanding national resource” waters.

Under section 47-2A-4, Tier 3 Designation, 4.2. “Waters located in State Parks, National Parks and National Forests”, TNC proposes the following changes to add clarity and consistency to the rule’s designations:

- 1) A potential classification of Tier 3 waters within the stated jurisdictional boundaries to include waters with national ecological significance due to the presence of habitat for federally threatened or endangered species, as listed by the U.S. Fish and Wildlife Service, or habitat for globally rare species as assessed by NatureServe (www.natureserve.org). Globally rare species can be considered those with a conservation status of the following:
 - a. G1 critically imperiled (very high risk of extinction),
 - b. G2 imperiled (high risk of extinction), or
 - c. G3 vulnerable (moderate risk to extinction)[for more information see <http://www.natureserve.org/explorer/ranking.htm#global>].

The presence of habitat for a federally listed freshwater species clearly makes a stream a resource with national significance. We argue that national ecological significance is also realized with the presence of habitat for globally rare (G1-G3) freshwater species because these streams serve as a repository of Appalachian freshwater diversity, including regionally endemic species (e.g. candy darter, *Etheostoma osburni*) that occur nowhere else in the world.

PROPOSED CLARIFICATION IN 4.2.a “All high quality waters, naturally reproducing trout streams, and *nationally ecologically significant waters*...

- 2) The potential location of Tier 3 waters to include waters bounded on both sides by all public lands managed by the National Park Service, such as streams within the New River Gorge National River unit, the Gauley River National Recreation Area, Harper’s Ferry National Historical Park unit, and the Bluestone National Scenic River unit.

PROPOSED CLARIFICATION IN 4.2.a "...streams located within the boundaries of State Parks, National Parks, National Forests, *National Rivers*, *National Recreation Areas*, *National Historical Parks*, and *National Scenic Rivers*.

Under Section 47-2A-5 "High Quality and Naturally Reproducing Trout Waters" 5.1, TNC supports the use of macroinvertebrate bioindices for determining the quality of a stream. We ask that the state continue its review of streams using this bioindex to consider if additional streams may qualify, especially for streams known for diversity of other fish species beyond trout.

Under Section 47-2A-6 "Waters upstream of Tier 3 Segments" 6.1, TNC proposes the following clarification:

As now described in proposed rule, waters upstream of a Tier 3 segment are automatically designated as Tier 1 or Tier 2. However, these streams segments may still be high quality waters, have reproducing populations of trout, or be of national ecological significance. Since all waters flow downstream, the protection of upstream segments will only benefit the freshwater habitats and species of a Tier 3 on public lands.

We propose that the DEP allow it to be a landowner's option for such an "upstream segment" to be listed as Tier 3, and not automatically be designated as Tier 1 or 2 as the rule now states.

PROPOSED CHANGE in 6.1 "Waters upstream of a Tier 3 segment on public lands will be considered Tier 1 or Tier 2, as appropriate, *unless Tier 3 classification is sought by the landowner...*

Thank you for the opportunity to comment on this rule. If you have any questions about these comments, please feel free to contact us at TNC's Elkins Field Office, 304-637-0160.

Sincerely,

Rodney Bartgis
State Director

Elizabeth Wheatley
Director of Government Relations

Scott Mandirola

From: "Sandi J Davison" <sdavison@wvcoal.com>
To: <smandirola@wvdep.org>
Date: 6/3/2008 4:16 PM

June 3, 2008

Scott Mandirola
Assistant Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

Re: The West Virginia Coal Association's Public Comments for 47CSR2A the Designation of Tier 3 Waters

Dear Mr. Mandirola:

The West Virginia Coal Association is pleased to submit these comments in response to WVDEP's public notice of its proposed interpretive rule entitled "Designation of Tier 3 Waters, which is proposed to appear at WVCSR Title 47 Series 2A:

Proposed Sections 4.2 and 4.3: The West Virginia Coal Association supports the WVDEP's position that the Gauley River is not a Tier 3.0 water. The Gauley River cannot be designated as Tier 3.0 because: (1) it is not located within a State Park, National Park, or National Forest and (2) it was not designated under the Wild and Scenic Rivers Act 16 U.S.C. §§ 1271-1287 (1968) or the National Parks and Recreation Act of 1973. 16 U.S.C. §§ 1-461nt (1978).

The Gauley River was designated as a Natural Recreation Area by the "West Virginia National Interest River Conservation Act of 1987." 16 USCA § 460ww (1988). The legislation stands alone and does not amend either the Wild and Scenic Rivers Act 16 U.S.C. §§ 1271-1287 (1968) or the National Parks and Recreation Act. 16 U.S.C. §§ 1-461nt (1978). The Act's purpose is to "protect and preserve the scenic, recreational, geological, and fish and wildlife resources of the Gauley River and its tributary, the Meadow River." 16 USCA § 460ww(a) (1988). A Tier 3.0 designation for the Gauley River is thus outside the scope of those waters that the West Virginia Legislature identified as candidates for a Tier 3.0 designation.

Please contact me if you have any questions.

Sincerely yours,

Jason Bostic

Enclosures



West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ www.wvcoal.com

June 3, 2008

Scott Mandirola
Assistant Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

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WATER QUALITY STDS

**Re: The West Virginia Coal Association's Public Comments for 47CSR2A
the Designation of Tier 3 Waters**

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Please contact me if you have any questions.

Sincerely yours,

Jason Bostic

From: "Conley-Rinehart, Laura A" <Laura.A.Conley-Rinehart@wv.gov>
To: <smandirola@wvdep.org>
Date: 6/3/2008 4:20:51 PM
Subject: WVDOH comments on the new interpretive rule under its antidegradation program

Scott Mandirola,

Assistant Director, Division of Water and Waste Management,

West Virginia Department of Environmental Protection

601 57th Street S.E.,

Charleston, WV 25304

Please accept these comments on behalf of the West Virginia Department of Transportation, Division of Highways (WVDOH) and Marvin G. Murphy, State Highway Engineer.

The WVDOH appreciates the West Virginia Department of Environmental Protection's (WVDEP) effort to protect the water quality in the State of West Virginia.

In response the WVDEP's public notice for the new interpretive rule under its antidegradation program -- 47CSR2A, Designation of Tier 3 Waters, the WVDOH would like to express our concern in view of the fact that the WVDOH is responsible for most of the roads in the State Parks, National Parks, and National Forests. While the WVDOH understands the need to protect the waters of the state, we hope that the designation and protection process does not result in excessive expenditures of resources and funds in order to maintain part of the West Virginia vital infrastructure of roads.

Additionally, the April 30, 2008 Public Meeting Power Point Presentation notes 2009 revision to Category A designated uses for the Waters of the State. The WVDOH is concerned that the codified rule 47CSR2 seems to designate essentially all waters of the state as being capable of being used for human consumptions. While this is an admirable desire, it is neither practical nor possible. The rule acknowledges that the WVDEP Secretary may determine in the permit process that the water may be unsuitable for Category A; however, the rule seems to further require surveys and data collection beyond the information necessary to determine unsuitability. The WVDOH understands the WVDEP's need for thorough review, but the WVDOH believes a logical, practical, and fiscally responsible approach to data collection and submission should include that information necessary for the WVDEP Secretary to make an informed decision and eliminate mandatory data and information collection which may not be needed or relevant.

Thank you for the opportunity to provide comments on WVDEP's rule making process.

Laura A. Conley-Rinehart

Office of the State Highway Engineer

1900 Kanawha Boulevard, E, Bld. 5, Rm A-164

Charleston, WV 25305-0430

Phone: 304-558-2804

e-mail: Laura.A.Conley-Rinehart@wv.gov

CC: "Murphy, Marvin G" <Marvin.G.Murphy@wv.gov>

Dear Mr. Mandirola,

Following are comments by the Mountaineer Chapter of the Izaak Walton League of America on the WV DEP proposed Tier 3 Interpretive Rule. This Chapter is located in Randolph County & has about 350 members from this general area. The Mountaineer Chapter is a conservation organization not a strict environmental group.

As a general statement the proposed regulations are much too restrictive & too narrowly defines Tier 3 waters. They do not give adequate consideration to the presence of reproducing trout populations & seem to be politically rather than biologically based. It is our opinion that the resulting list will not meet minimum US EPA requirements.

Following are more specific comments.

1. 47-2A-4- Tier 3 Designation

4.1a- Restricting designation of streams in designated wilderness areas to those bound on both sides by public land is biologically unreasonable. A stream that is biologically a National Resource Water remains as such whether the land is partially, totally or not at all public land. National Resource Water designation is based on biological conditions not on land ownership. To fail to designate an otherwise qualified stream because of land ownership defeats the purpose for having such a designation.

4.2a- Same comments as above.

4.3a The federal law establishing Wild & Scenic Rivers require that all streams within National Forest Proclamation Boundaries that were proposed for designation as Wild & Scenic Rivers must be managed as if designated until they are designated or removed from the list by Congress. The US Forest Service complies with this requirement.

2. 47-2A-5- High Quality & Naturally Reproducing Trout Waters

5.1- In spite of the title of this paragraph, only benthic macro-invertebrate community information will be used to designate the streams. Why not change the title of 47- 2A-5 to Naturally Reproducing Macro-Invertebrate. The best & only sure way to determine if a stream has a naturally reproducing trout population is to survey it. It is a faster, more certain method of determining the status of the fish population & is much better understood by the public.

5.1a- As long as the stream survey is the determining factor, it is OK to do the work necessary to determine the insect classification assuming you have the man power & time to do it. The DNR already have the stream surveys needed to designate almost all the streams.

5.2- If a naturally reproducing trout population is adequate for designation of 4.2 waters, why would another method be used on other streams? Why use 2 different standards?

6.1- Upstream activities above a Tier 3 stream section can not be ignored. Such activities as mining, timbering, land development & any number of water polluting activities pose a real danger to Tier 3 streams. Without upstream restrictions, Tier 3 designation will likely be only temporary.

There are several waters that are National Resource Waters under US EPA guidelines that have sections on both public & private property. An example is Seneca Creek of the North Fork of the South Branch, Pendleton County. Its headwaters are on

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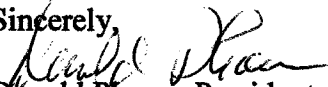
WATER QUALITY STDS

US Forest Service property with a middle section on private property & then back on Forest Service property. Are two of the sections going to be Tier 3 & the middle section Tier 2? If so how will the lower section be provided adequate protection without Tier 3 water quality restricts on the middle section?

The use of a macro- invertebrate classification system is an extremely time consuming, labor intensive technique. The public does not & will not understand this type of stream classification. At the same time a fish survey shows absolutely whether or not a stream has a reproducing trout population. The method is understood & accepted by the public plus the WV DNR already has the data for almost every stream in the State that might be proposed for Tier 3 classification. Why spend thousands of tax payer dollars to obtain information that is a less reliable indicator of trout reproduction that information already available?

It is time for the DEP to put the environment before politics. A reproducing trout population should be the only requirement for Tier 3 classification. There needs to be a quick, easy method to add qualifying streams to this classification. West Virginia has many high quality streams. Let's keep them that way.

Sincerely,



Donald Phares, President
Mountaineer Chapter IWLA

FAX TRANSMISSION
THE SENATE OF WEST VIRGINIA
COMMITTEE ON THE JUDICIARY
JEFFREY V. KESSLER, CHAIR

BUILDING 1, ROOM W-210, 1900 KANAWHA BOULEVARD, EAST
CHARLESTON, WEST VIRGINIA 25305
(304) 357-7880 - FAX: (304) 357-7978

To: *Scott Mandirola*

Date: *6/3/08*

FAX No.: *926-0447*

Pages: *2* (including cover sheet)

From: *Chairman Kessler -*

See attached letter please.

If all information is not received, please telephone sender at (304)357-7880. The information contained in this facsimile transmission is confidential and intended only for the person to whom it is sent. Please do not read or distribute without prior authorization.



JEFFREY V. KESSLER
CHAIRMAN
514 SEVENTH STREET
MOUNDSVILLE 26041

THE SENATE OF WEST VIRGINIA
COMMITTEE ON THE JUDICIARY
CHARLESTON 25306

June 3, 2008

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WATER QUALITY STDS

Sent Via Fax 6/3/08

Mr. Scott Mandirola, Assistant Director
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, WV 25304

Dear Mr. Mandirola:

As Chairman of the Senate Judiciary Committee, I am writing to express my concern regarding the proposed interpretative Rule 47CSR2A, which is the rule setting forth the process for selecting Tier 3 streams for West Virginia. During the course of negotiating the water quality standards rule, the Legislature established a two-prong test to determine Tier 3 streams, quality and location. I am concerned that your definition of "national parks" may be so narrow and restrictive that it would negate the Legislature's attempt to protect high quality waters and naturally reproducing trout streams on public land.

I would like the opportunity to discuss this with you further during the June Interim meetings. Please contact my office to arrange a meeting.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey V. Kessler".

Jeffrey V. Kessler
Chairman
Senate Judiciary Committee

JVK/RP/JL/sj

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JUN 03 2008

WATER QUALITY STDS

Eric Autenreith
RR 3 Box 554 A
Fayetteville, WV 25840
ericaut@citynet.net

Mr. Scott Mandirola
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304

June 3, 2008

Public Comments Re: 47CSR 2 A - Designation of Tier 3 Waters.

Dear Mr. Mandirola,

Re. Tier 3 Designation 4.2.a. Stating that "As of the effective date of this rule, there are no national parks ~~located~~ ^{§ 2-4.1.C} within West Virginia." is flawed and should be amended to emphasize the applicability of 47CSR ~~2A~~ to all of the National Park units located within West Virginia- New River Gorge National River, Bluestone National Scenic River and Gauley River National Recreation Area and Harpers Ferry National Historic Park.

In conversations with people who were present at the drafting of the legislation, including some legislators, it is clear that the words National Parks were meant to include the national park units whatever their designation and not *National Parks* as a designation applied to the crown jewels of the national park system.

The legislators who drafted this code are educated and surely know that there are no crown jewel national park units designated *National Parks* located in West Virginia and so they clearly meant to have the term applied to all national park units.

While West Virginia is a state that interprets laws by "plain meaning" rather than by "intent" the words national park/s are ambiguous and context and intent are to be taken into account when interpreting 47 CSR ~~2A~~ ^{§ 2-4.1.C}.

I recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

Re. Tier 3 Designation 4.1.a Designation of "waters located within the boundaries of federally designated wilderness areas". This should be amended to include those eligible streams that may be bounded by public land on one side. The streams are integral parts of an ecosystem and the national value of a Wilderness Area should not be compromised by neighboring private land-owners.

Re. determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macro-invertebrate communities only. While this is one measure for high quality water, it is not the only measure. In addition to healthy benthic macro-invertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.

I believe the implementation of these recommendations crafted above will enhance the interpretive rule 47 CSR 2A and better protect the water quality of our West Virginian treasured streams and waterways for our children and future generations.

Sincerely,



Eric Autenreith

304-574-1067

FRIENDS of BLACKWATER

501 Elizabeth St., Room 3 • Charleston, WV 25311 • 304-345-7663 • info@saveblackwater.org • ww.saveblackwater.org

Scott Mandirola
Assistant Director,
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304

RECEIVED

June 3, 2008

JUN 03 2008

WATER QUALITY STDS

Re: TITLE 47 INTERPRETIVE RULE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION DIVISION OF WATER AND WASTE MANAGEMENT SERIES 2A DESIGNATION OF TIER 3 WATERS.

Dear Mr. Mandirola,

Thank you for the opportunity to comment on the **TITLE 47 INTERPRETIVE RULE DEPARTMENT OF ENVIRONMENTAL PROTECTION DIVISION OF WATER AND WASTE MANAGEMENT SERIES 2A DESIGNATION OF TIER 3 WATERS**. The Friends of Blackwater respectfully submits these comments in response to the clarification of the aforementioned rule.

We appreciate the efforts of the WV Department of Environmental Protection and in particular the Division of Water and Waste Management to provide protection for West Virginia's rivers and streams. As the "Mother of Rivers" West Virginia is in the incredibly unique position to protect major headwater resources in the Mid-Atlantic. In addition, our rivers, streams and other waterways provide significant economic, scenic, recreational and ecological value not only to West Virginia residents but to all of those that visit and enjoy them.

It is for this reason that we should indeed all be concerned that they are provided the utmost protection afforded them under the Clean Water Act by providing solid anti-degradation policies that leave few if any gray areas. These laws must be clear and concise if they are to be enforceable and as such we must be careful that they meet at least the minimum federal requirements. The WVDEP has taken a huge step forward with these policies and is moving to the forefront of the anti-degradation questions that plague many states by providing clarification and a well publicized public comment period.

We do however feel that the following items need further clarification before they are on truly solid ground.

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. Of particular concern here is the need to clarify and indeed confirm what the status would be of streams and rivers bound on only one side by public land. It would seem that these streams should also be afforded Tier 3 protection status or that further investigation should be undertaken to determine whether these waterways provide significant recreational, scenic or ecological value to be included in the initial list of Tier 3 rivers and streams. Additionally, it should further be noted that the language should not limit

itself by saying all waters but should also include "and segments of waterways".

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. The comments previously applied to Section 4.1.a should again be applied here, however this interpretation should additionally account for state forests, and National Wildlife Refuges. Additionally, while there may be no National Park in West Virginia as of the date of this rule, there are units governed by the National Park Service, including but not limited to the Gauley River National Recreation Area, Harper's Ferry National Historical Park and the Wheeling National Heritage Area and all of these areas should be included for immediate inclusion. Of further consideration in this section should also be National Natural Landmarks such as Canaan Valley, and Gaudineer Scenic Area.

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. This particular section should be amended to include all waters flowing through federal public lands that are governed by the National Park Service. Additionally, consideration should be given to rivers deemed eligible for federal Wild and Scenic status where a proposed designation has either been deemed by the US Congress to be not necessary because State protection will be adequate or a proposed designation has not yet brought before the US Congress but the eligibility study has found favorably for designation.

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. The current determination depends solely on a measurement for healthy benthic macroinvertebrate communities. While this can be a determining factor for high quality waters it is far from the only measure that should be considered. It is urged that the eligibility of water should be made only after all available biological, chemical and physical measurements have been given heavy consideration.

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. It should be further clarified in this section that careful review of the impact of activities upstream from a Tier 3.0 section of a stream or river upon that Tier 3.0 section will be undertaken. It should be noted further that no degradation of Tier 3.0 segments is allowable regardless of the location of the initial potential impact. Further this should be applied proactively to streams that may be eligible to be added to the Tier 3.0 list via the nomination process where they meet multiple criteria for nomination.

The Friends of Blackwater believes that all of the Blackwater River should receive Tier 3 protection from its headwaters in Canaan Valley to its confluence with the Dry Fork at Hendricks. The Blackwater River and its tributaries flow through the Canaan Valley Wildlife Refuge, Monongahela National Forest, Canaan Valley State Park and Blackwater Falls State Park. The Blackwater River is treated as a Wild and Scenic River by the US Forest Service, has been nominated as a national natural landmark, is an important trout fishery where trout survive year round. This national recognized river and tourism magnet for outdoor recreation deserves the highest possible protection by the state of West Virginia.

In addition we support these comments from the West Virginia Rivers Coalition:

- We recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.

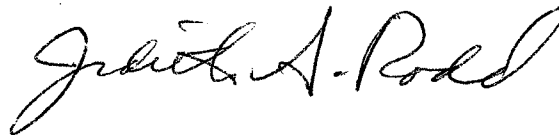
- We recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

- When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We would recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

- The current interpretive rule allows for water upstream of a tier 3 segment to be designated tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a tier 3 segment should not cause any harm or degradation to the downstream tier 3 segment.

Again, we thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith S. Rodd". The signature is fluid and cursive, written in a professional style.

Judith S. Rodd, Executive Director
Friends of Blackwater

REFERENCE FOR WVCTU COMMENTS
LEE ORR



WEST VIRGINIA RIVERS COALITION

328 Davis Avenue, Suite 7 • Elkins, WV 26241 • (304) 637-7201 • www.wvrivers.org

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JUN 03 2008

WATER QUALITY STDS

Lisa McClung, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: Comments on Interpretive Rule 47 CSR 2A, Designation of Tier 3 Waters

Dear Ms. McClung,

West Virginia Rivers Coalition submits these comments on behalf of its 2,500 members and in collaboration with the organizations listed on the signatory page of this document. Each signatory has a vested interest in the quality of West Virginia's waters, and believes that these comments are important to the future health of these valuable resources.

The following comments address WVDEP's proposed interpretive rule, 47CSR§2A, "Designation of Tier 3 Waters." In brief, we are supportive of legislation to strengthen and clarify Tier 3 designation, and show that support in many of our comments. However, we urge the WVDEP to more clearly define designation and selection criteria for waters covered under this rule, and we expand on these comments below.

§47-2A-4. Tier 3 Designation.

Section 4.1. Waters Located in Federal Wilderness Areas.

4.1.a. should be amended to read:

"All waters, and segments of 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."

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

4.2.a. should be amended to read:

“All high quality waters, naturally reproducing trout streams, segments of high quality waters or segments of 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.”

4.3 Specifically Designated Federal Waters

We support the designation of waters under the Wild and Scenic Rivers Act and the National Parks and Recreation Act as Tier 3. In addition to those Federal waters specifically named in section 4.3.a, that designation should be extended to all waters within units of the National Park System. This should include waters of federal importance as designated within National Recreation Areas, specifically the Gauley River National Recreation Area.

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

Section 5.1

5.1 should be amended to read:

"For purposes of subsection 4.2, waters will be considered high quality as defined in 47SCR§2-2.8."

This is consistent with the federal regulation (40CFR§131.12) which uses the phrase "high quality waters" when defining Tier 3. By "high quality water" this regulation specifically means waters that meet water quality standards, not waters with exceptional characteristics.

Section 5.1 proposes that waters will be considered Tier 3 solely based on healthy benthic macroinvertebrate communities. While it is appropriate to use benthic macroinvertebrates as *one* metric for listing waters as Tier 3, it is not appropriate to use this as the *only* metric for listing. Biological integrity and high quality can also be measured by fish communities. Waters can also be high quality based not on biological integrity, but based on chemical and physical measurements. In short, Section 5.1 is too restrictive by only allowing a single metric, the West Virginia Stream Condition Index, to be used to list a Tier 3 stream. In addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

Section 5.1.a should be deleted

Section 5.2

We support the proposed language in Section 5.2 regarding naturally reproducing trout waters.

Section 5.3

Section 5.3 seems to provide an unnecessary level of flexibility in terms of sample locations with respect to determinations of Tier 3 status. As written, it would allow sampling in "reasonably close proximity" to segments on public land. We cannot envision why sampling cannot be conducted on public land, as access should not be an issue. The phrase "reasonably close proximity" is undefined and potentially subject to abuse.

5.3.a. should be amended to read:

"When determining whether a water is high quality or a naturally reproducing trout stream the sampling site(s) shall be located within the public land segment, and shall be representative of the total segment. The number of sampling sites necessary to provide an accurate profile will be determined by the length and stream size of the segment."

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

Section 6.1

This section states that upstream waters will be Tier 1 or Tier 2, as appropriate, without even the possibility that upstream waters can be Tier 3. In many situations, Tier 3 water will, in fact, be upstream from Tier 3 water. The first sentence in this section should therefore be changed to the following:

"Waters upstream of a Tier 3 segment will be considered Tier 1, Tier 2, or Tier 3, as appropriate."

This section ends with the sentence: "The provisions of 60CSR§5-6.3 apply." This is a critically important reference. The applicable paragraphs in 60CSR§5-6.3, among other things, state:

"Any proposed activity that would result in a permanent new or expanded discharge upstream of an ONRW [Tier 3] segment is prohibited except where such source would improve or not degrade the existing water quality of the downstream ONRW segment."

It is critically important that the final sentence of §47-2A-6 remain as written, to clarify that even if an upstream water is Tier 1 or 2, it cannot degrade downstream Tier 3 waters. This is not only required by the rules, it also mirrors Secretary Timmermeyer's public statements during the legislative debate over the new Tier 3 rules.

Additional Comments on the Tier 3 Nomination Process

While the Tier 3 nomination procedures are not contained in 47CSR2, but instead are contained in 60CSR§5, the Antidegradation Implementation Procedures rule, we feel strongly that the agency should clarify how it will handle Tier 3 nominations.

Previous language contained in section **§60-5-8. Designation of Tier 2.5 and Tier 3 Waters** contained differing language covering the nomination process for Tier 2.5 and Tier 3 waters.

Section 8.1.a.1 stated: "Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 2.5 water pursuant to the Board's State's antidegradation policy, the Board Secretary shall, **within 180 days of receipt of the nomination**, notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided."

Section 8.2.a.1 stated: "Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the Board's State's antidegradation policy, the Board Secretary shall notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided."

The specific language "**within 180 days of receipt of the nomination**" was not included in Section 8.2.a.1 dealing with Tier 3 nominations. With the elimination of the Tier 2.5 language from 60CSR§5, this language no longer appears anywhere in the rule. At a minimum that language should be added to the section covering Tier 3 nomination procedures.

In addition, the agency should be required to notify in a reasonable period of time the individual(s) submitting the nomination whether or not the nomination was sufficient for consideration.

We thank the West Virginia Department of Environmental Protection for consideration of our comments.

Sincerely,

Shanda Minney
Executive Director
West Virginia Rivers Coalition

Larry Orr
Chairman
WV State Council of Trout Unlimited

Larry Harris
Member
DEP Public Advisory Council

Don Garvin
Legislative Coordinator
West Virginia Environmental Council

REFERENCE FOR WVCTU COMMENTS
LEE ORR

West Virginia Highlands Conservancy

Working since 1965 for the conservation of West Virginia's natural resources

June 3, 2008

Scott Mandirola, Assistant Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

RECEIVED

JUN 03 2008

WATER QUALITY STDS

Via e-mail to

**RE: Comments on Interpretive Rule 47 CSR 2A
Designation of Tier 3 Waters**

Dear Scott,

1) **Comments submitted by West Virginia Rivers Coalition.** We participated in discussions leading up to the final set of comments submitted by the WV Rivers Coalition on behalf of four individual and group signatories. We support those comments and incorporate them as our own by reference.

2) **Waters within National Park Service Units.** We also support and would like to emphasize in particular the sentiments expressed by the National Park Service and the National Parks Conservation Association in regard to waters located within lands managed by the National Park Service.

- a) Sections 4.3 should extend Tier 3 protection to all waters within "units in the National Park System". As I understand it, each of these units is managed by the National Park Service under the same set of federal laws and deserves the same level of protection.
- b) At a minimum specific designation should be made for the Gauley National Recreation Area as created in Public Law 100-534 (The West Virginia National Interest River Conservation Act of 1988).
- c) Furthermore, the wording of Section 4.3 might possibly be interpreted to include only the main stem of the New and Bluestone Rivers. We submit that the rule should include not only the main stem of the New, Bluestone and Gauley Rivers within the boundaries of the appropriate park unit, but also tributaries to these rivers within each of the parks.

3) **High Quality Waters on Private Lands.** Finally, we would like to go on record as strongly objecting to the de facto demotion of the many high quality and naturally reproducing trout streams that were considered national resource waters for purposes of the WV anti-degradation policy until the early 1990's.

Under pressure from industry at that time many of our fine streams located outside the boundaries of national and state park and forest lands were summarily demoted to a newly created lesser-protective level known as Tier 2.5. Now, with the elimination of Tier 2.5 by the 2008 state legislature a whole host of valuable headwater streams have been demoted even further into Tier 2, an action that lessens even further the level of protection.

Admittedly there is a process to nominate waters for Tier 3. However, anyone who witnessed the embarrassing inability of our state regulators and legislators to provide even the intermediate Tier 2.5 protection to hundreds of documented trout and high quality waters these past few years will have little hope of meeting with anything more than a debacle of similar proportions.

Though the nomination process is not directly a part of the interpretive rule being discussed, the details of that process should also be clarified due to the alteration of the Tier system.

Finally, since at least 1981, members of FOLK (Friends of the Little Kanawha), the West Virginia Highlands Conservancy and myself personally have commented on and supported the most protective water quality regulations and proposals especially as they relate to headwater streams that run through our communities and non-public lands. We have been - and are - discouraged by the gradual weakening of the anti-degradation policy that originally protected these streams. The continued refining with regard to implementation of that policy these past few years has made it easier for industries to massage and manipulate the minutia of regulation and far more difficult for the ordinary citizen to understand and rely on those regulations to protect our most valuable water resources.

Thank you for the opportunity to comment.

Sincerely,

Cindy Rank
Chair, WVHC Mining Committee and
FOLK Organizational Representative to
The WV Highlands Conservancy Board

HC 78, Box 227
Rock Cave, WV 26234

Phone 304-924-5802

Email:

WEST VIRGINIA HOUSE OF DELEGATES COMMITTEE ON THE JUDICIARY

Phone: (304-340-3252) - Capitol Office
Fax: (304-340-3231) - Capitol Office

FAX COVER SHEET
PLEASE DELIVER IMMEDIATELY

To: *Karen Watson - Scott Medirolo*

Fax No. *726-0447*

Re: *47 CSR 24*

Date: *6-3-08*

From: *Del. Webster*

of Pages *4*, Including Cover Sheet

Message:

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CARRIE WEBSTER, Chair
COMMITTEE ON THE JUDICIARY

Other Committees:
Constitutional Revision
Rules

June 3, 2008

Mr. Scott Mandirola
Assistant Director
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, WV 25304

Dear Mr. Mandirola:

I am writing to express my concerns and strong objection to the Department of Environmental Protection's [DEP] Division of Water and Waste Management proposed interpretative rule, 47CSR2A. It is my understanding that based upon DEP's interpretation of certain language contained in a legislative rule recently passed by the West Virginia State Legislature, neither the New River Gorge National Park or any other "national park" in West Virginia will receive or be eligible to receive 3.0 tier designation that is reserved for only those exceptional state streams that deserve special protection based on their water quality.

As Chair of the House of Delegates Judiciary Committee, I was personally involved in the lengthy discussions which led to the passage of a Committee amendment that adopted language creating the current 3.0 stream designation process and incorporated the term "national park." Former DEP Secretary Stephanie Timmermyer and her legal counsel, Karen Watson, were also present and significantly involved in crafting language that specifically included and referred to "national park" in the section of the rule involving the 3.0 stream designation process.

In pertinent part, the statute reads:

All Federally designated rivers under the "Wild and Scenic Rivers Act", 16 U.S.C. §1271 et seq.; all streams and other bodies of water in state parks which are high quality waters or naturally reproducing trout streams; waters in *national parks and forests* which are high quality waters or naturally reproducing trout streams; waters designated under the "National Parks and Recreation Act of 1978", as amended; and pursuant to subsection 7.1. of 60CSR5, those waters whose unique

character, ecological or recreational value, or pristine nature constitutes a valuable national or state resource.

(Emphasis added)

Because this language is the subject of this proposed interpretative rule, I offer my personal comments regarding my understanding of what "national parks" was intended to mean.

First, after conferring with my legislative counsel about this matter, I am convinced that DEP is taking the wrong legal approach in interpreting this rule language. Instead of focusing on what the term "national park" means on the federal level, DEP should apply the usual practices of statutory construction in this state and begin with a legal analysis of what the West Virginia State Legislature understood the term "national park" to mean. Any federal definition or understanding might be suggestive of what this term means but in *no* way is it controlling or particularly persuasive in this matter. Pursuant to long-standing legal precedent, what the West Virginia State Legislature understood controls the analysis of what the intent of this legislation is. Not the federal definition. In other words, it is the West Virginia Legislature who defines and establishes our state laws. Not the United States Congress.

Second, it is important to point out that our state code and rules contain many terms that are defined in a different manner than our federal counterpart. For example, W.Va. Code § 20-2-23a, relating to the Whitewater Commission, refers in *our state statute* to the "New River Gorge National Park." Thus, if our statute says "national park," then for purposes of our state statute, it is referred to as a "National Park," and is one, even if there is disagreement with the federal use of the term "National Park."

The present rule contains language that should allow the DEP to reasonably and inescapably conclude that the term "national park" was meant in the broader sense and would include "units" of the national Park system. Thus, prior to final promulgation of this rule, I implore you to undertake a meaningful legal analysis of what the plain meaning of national park, as the West Virginia State Legislature understood it, meant when it passed a law including this term. Also, please consider that your interpretation would merely lend the words of our Committee amendment without any meaning or force. This flies right in the face of our rules of statutory construction. Importantly, *if the Legislature used the words "national park" to refer to non-existent parks in this state, then there is no reason for those words to be inserted into that legislation.* Rules of statutory construction in West Virginia require you to give meaning to all words enacted by the Legislature.

In conclusion, as someone who was directly involved with the DEP and others in reaching agreement on the precise wording of the amendment containing this language, I can assure you that the words "national park" were intentionally included and only after hours of discussion and debate with many stakeholders, including DEP's ranking official and chief legal counsel.

I strongly urge you to reconsider your interpretive rule and refile it with the correct, broader use of the term "national park." Failure to do so could result in future legislative action and/or legal

action by other stakeholders who were involved in these same discussions and understood the words "national parks" to include certain national parks in West Virginia. I prefer to avoid both. Eight years of debate and discussion about this rule is long enough.

Sincerely,

Handwritten signature of Carrie Webster in cursive script, followed by the initials "CA" in a small, stylized font.

Delegate Carrie Webster
Chair, House Judiciary Committee

From: <Atkinson.Cheryl@epamail.epa.gov>
To: <smandirola@wvdep.org>
Date: 6/3/2008 6:05:20 PM
Subject: Comments on the Antidegradation Interpretive rule

Dear Scott,

On April 18, 2008, the West Virginia Department of Environmental Protection (DEP) began its public review and comment period on a proposed new interpretive rule under its Antidegradation program (47CSR§2A) "Designation of Tier 3 Waters" (Interpretive Rule). This Interpretive 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. (Note EPA has not yet received the new language in a final rule for our review and action).

The Environmental Protection Agency (EPA) appreciates the opportunity to provide comments for your consideration. Our comments on the proposed Interpretive Rule are as follows.

1. In addition to waters located in federal wilderness areas, state and national parks, national forests, and specifically designated federal waters. West Virginia should consider wildlife refuges and waters of exceptional recreational or ecological significance as high quality waters that constitute an outstanding national resource.
2. "Waters Located in State Parks, National Parks and National Forests" are defined as "all high quality waters . . . within the boundaries of parks and forests" (as stated in Section 4.2.a.). And these waters will be considered high quality based on "their biological integrity as evidenced by an exceptionally healthy benthic macro invertebrate community" (as stated in Section 2A-5). In addition to basing the State's high quality waters on biological integrity the State may want to explain in their Interpretive Rule how, and to what extent, the State will evaluate the chemical and physical integrity for Tier 3 waters. If the State is not using chemical and physical integrity it should explain why not.
3. While it is the state's discretion, which waters to designate Tier 3 (including water segments upstream of Tier 3), the State should note that the criteria (and subsequent permits with water quality based effluent) must protect the downstream Tier 3 water.

Please note that the comments and questions listed above, regarding either existing or proposed WQS, are preliminary in nature and do not constitute a disapproval or determination by EPA under Clean Water Act Section 303(c).

EPA continues to commend the DEP's for thier antidegradation efforts to protect existing water quality and prevent further pollution of West Virginia rivers, streams, and lakes. If you have any questions concerning these comments please contact me at (215) 814-3392.

Cheryl Atkinson

Water Quality Standards
Middle Atlantic Region
U.S. Environmental Protection Agency
215 814 3392
215 814 2318 (Fax:)

Cheryl Atkinson

Water Quality Standards
Middle Atlantic Region
U.S. Environmental Protection Agency
215 814 3392
215 814 2318 (Fax:)

CC: <Koroncai.Robert@epamail.epa.gov>, <Merrill.Larry@epamail.epa.gov>,
<Whitehead.Caroline@epamail.epa.gov>, <Connor.Timothy@epamail.epa.gov>

From: "Erin St. John" <estjohn@NPCA.ORG>
To: <smandirola@wvdep.org>
Date: 6/3/2008 6:19:51 PM
Subject: Comments in Interpretive Rule

Dear Mr. Mandirola,

See comments attached. Please feel free to contact me with any questions.

Thanks for your time.

All the best,
Erin

Erin Haddix St. John
Mid-Atlantic Field Representative
National Parks Conservation Association
Protecting Parks for Future Generations
PO Box 626
Fayetteville, WV 25840
304.250.7833
202.744.3532 (cell)



National Parks Conservation Association®
Protecting Our National Parks for Future Generations®

June 3, 2008

Mr. Scott Mandirola
Assistant Director
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304

Sent via. email and post

Dear Mr. Mandirola:

Thank you for the opportunity to provide comments on Interpretive Rule 47 Series 2A, Designation of Tier 3 Waters. I am submitting the comments below on behalf of the National Parks Conservation Association (NPCA) and our more than 340,000 members across the country and more than 1800 members in West Virginia. Our nonpartisan, non-profit organization is dedicated to protecting and enhancing America's national parks for this and future generations.

We were pleased to see that portions of the waters of both the New River Gorge National River and the Bluestone National Scenic River were given Tier 3 designation. However, we are concerned with the current wording of the proposed section 47-2A-4.2.a which states "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 within West Virginia."

We suggest changing the wording above from "national parks" to "units of the National Park system" and striking the last sentence. This change would allow waters in the New River Gorge National River, the Bluestone National Scenic River, the Gauley National Recreation Area, and Harpers Ferry National Historical Park to be considered for Tier 3 protection.

Although the various designations of the units of the national park system (National Park, National River, National Recreation Area, National Historic Park, etc.) can cause confusion, Congress clearly mandated in the Redwoods Amendment of 1978 (16 U.S.C. 1a) a system-wide standard of protection. Thus the natural and cultural resources of any unit of the National Park system are provided equal protection regardless of specific designation. Thus the



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national park units in West Virginia, although not designated National Parks, do legally have the same level of protection. The change above would afford these federally designated parks in West Virginia the same level of protection currently proposed for state parks and national forests and more clearly reflect the protections intended by Congress.

In order to fully avoid the confusion surrounding designations of the park system and be consistent with the changes suggested above, we recommend that the language in section 4.2 be changed from "National Park" to "units of the National Park system."

Furthermore, while we are pleased that some waters of the New River Gorge National River and the Bluestone National Scenic River are protected under section 4.3.a we are concerned that this section both is limited to portions of the main stem of these rivers and does not afford protection to the Gauley River National Recreation Area. We suggest removing the reference to the rivers main stem and rewording 4.3.a to all waters within these units of the National Park system. Furthermore, we request that specific protections be afforded the Gauley River National Recreation Area.

Thank you for receiving and considering these comments.

Sincerely,

Erin Haddix St. John
Mid-Atlantic Field Representative
National Parks Conservation Association
estjohn@npca.org
304.250.7833

From: "Robert Radabaugh" <bsradabaugh@rtol.net>
To: "Rebecca C. Croghan" <rcroghan@spilmanlaw.com>, <smandirola@wvdep.org>
Date: 6/3/2008 7:35:50 PM
Subject: Re: Comments on Draft Interpretive Rule, Series 2A - Designation of Tier 3 Waters

Rebecca

I have no problem with the comments.

Bob

----- Original Message -----

From: Rebecca C. Croghan

To: smandirola@wvdep.org

Cc: cburd@iogawv.com ; bsradabaugh@rtol.net ; M. Ann Bradley ; Andrew B. McCallister

Sent: Tuesday, June 03, 2008 3:04 PM

Subject: Comments on Draft Interpretive Rule, Series 2A - Designation of Tier 3 Waters

Please see attached comments filed on behalf of IOGA.

Rebecca C. Croghan
Secretary
Spilman Thomas & Battle, PLLC
t 304.720.3438
f 304.340.3801
rcroghan@spilmanlaw.com

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CC: <cburd@iogawv.com>, "M. Ann Bradley" <abradley@spilmanlaw.com>, "Andrew B. McCallister" <amccallister@spilmanlaw.com>

From: <schultzlance@aol.com>
To: <smandirola@wvdep.org>
Date: 6/3/2008 9:12:37 PM
Subject: Public Comment - Proposed Interpretive Rule -- 47CSR2A, "Degradation of Tier 3 Waters."

This rule making proposal whose scope suggests its intent is to provide guidance and clarification for designating Tier 3 waters does not really accomplish its stated objective. While it may have been an improvement from its predecessor, not having anything else firsthand to review it would appear to me to be highly subjective and ambiguous in nature throughout the content of the draft proposed rule. In the section titled 4.3. Specifically Designated Federal Waters it states "currently limited to portions of the main stem of the Bluestone River and portions of the main stem of the New River." I must ask that you clarify specifically which "portions" by latitude and longitude for clarification.

Section 5.1.a. High Quality and Naturally Reproducing Trout Waters characterizes or defines "high quality" and "naturally reproducing" trout waters as "exceptionally healthy benthic macroinvertebrate community" further defining such as "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 25th percentile of the applicable reference streams. (e.g., West Virginia Stream Condition Index score greater than 78).

What does this mean? What are the DEP protocols? How were they applied? What qualifies anyone at DEP to establish a "baseline" for "healthy water." What was the sample size? Is it a "representative sample? Were samples taken before, during or after discharge rainfall events? What defines a "reference" stream? Are samples statistically representative or significant? How often were samples recorded? How "old" is the data set? Is it even relevant anymore? What has changed since these stream results were tabulated? Are such results relevant today? What specific criteria did DEP adopt in establishing its protocols?

Section 5.2. Considers a stream naturally reproducing trout waters based on "documented reproduction" further defining "documented reproduction" as a DNR or DEP fish survey or other written documentation that verifies the presence of reproducing brown, brook or rainbow trout. Does a "single" fish define "presence?" What qualifies anyone at DNR or DEP to establish a "fish survey" to test for "documented reproduction.?" How are these evidences really "documented" or "verified.?" It further states, "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."

What does this mean? What "considerations" are given to the stream?
Sent via BlackBerry by AT&T

From: "David Moryc" <dmoryc@americanrivers.org>
To: <smandirola@wvdep.org>
Date: 6/4/2008 6:05:52 PM
Subject: Designation of Tier 3 Waters

Please accept these comments on behalf of American Rivers.

Thanks,

David

<<American Rivers' Comments.doc>>

David Moryc

Director Go Wild! Initiative

American Rivers

1101 14th St. NW, Suite 1400

Washington, D.C. 20005

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Scott Mandirola
Assistant Director,
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304

Assistant Director Mandirola,

American Rivers appreciates this opportunity to comment on West Virginia Department of Environmental Protection's (WV-DEP) proposed administrative rule interpreting Tier 3 waters protected within the state's recently adopted Antidegradation Implementation Rule (Title 60, Series 5). The integrity of antidegradation policy, particularly as it relates to protecting the highest quality waterways defined as Tier 3, is a crucial tool toward the goals of the Clean Water Act (CWA) to eliminate pollution that degrades "the chemical, physical and biological integrity of the Nation's waters."

American Rivers is a member based organization founded shortly after passage of the CWA. Today, our 65,000 members and supporters in communities across the Nation rely on the integrity of the Clean Water Act because of their reliance on healthy rivers.

American Rivers asserts that the Tier 3 interpretation proposed by WV-DEP is too narrow. The definition will narrow the effectiveness of antidegradation policy on West Virginia's headwater streams which supply our Nation's capital, the agricultural and industrial communities along the Ohio River and the rural strongholds throughout West Virginia's most visited landscapes. We ask the WV-DEP to restore the strength of the state's Tier 3 definition in order to insure healthy rivers and healthy communities can thrive in West Virginia and neighboring states.

Specifically, the WV-DEP proposes (Title 47, Series 2A) the following interpretation of Tier 3 waters which require broadening to allow more stringent application of antidegradation policy on these outstanding waterways:

- Sections 4.1, Water Located in Federal Wilderness Areas.

The interpretation in this section may inadvertently narrow the necessary scope of Tier 3 protection to these federally protected waters. In order to properly broaden the scope of Tier 3 interpretation, the language of section 4.1 should eliminate the restriction, "bounded on both sides of the stream by public land."

- Sections 4.2, Waters Located in State Parks, National Parks and National Forests and 4.3 Specifically Designated Federal Waters.

These section improperly excludes streams within public lands by not sufficiently including all streams within the jurisdiction of the National Forest Service and National Park Service and not correctly recognizing all streams protected under the Wild and Scenic Act.

It is particularly important to note that federal management is applied with equal resource protection to each of the river systems within the national park system including all of the New River Gorge National River, the Gauley National Recreational Area, the Bluestone National Scenic River and Harpers Ferry National Historical Park. For example, the CWA expects the inclusion of outstanding rivers that are the most recreationally popular therefore the definition of Tier 3 waters should assure protection to the Gauley River, one of West Virginia Division of Tourism's prime promotional resources.

Additionally, it is important to note the scope of federal protection on the many rivers studied for Wild and Scenic designation within West Virginia. All study rivers require equal protection to streams adopted into the system. Although a couple of these resources fall within Wilderness areas, defined as Tier 3 in section 4.1, many additional miles are apart of the Wild and Scenic system.

Language in Section 4.2 must narrow the qualifier "high quality waters or naturally reproducing trout streams" which admirably defines the CWA's need to protect the cleanest but potentially limits other outstanding waters characteristics including ecologically significant and sensitive. It is no coincidence that the national park system in West Virginia is focused on river corridors. The legislation that appoints National Park Service management to these resources has recognized the need to maintain and protect the rivers within these resource areas, so too should this administrative rule.

We request striking the language "bounded on both sides of the stream by public land" in Section 4.2. Also, WV-DEP's statement that "there are no national parks located within West Virginia" must be corrected since it is factually incorrect. The national park system of West Virginia is the focal point of one of the state's most vibrant industries, tourism.

- Section 5.1 defining high quality waters as "exceptionally healthy benthic macroinvertebrate community."

Although this is one measure of the health of a stream, it should be only one of an assortment of measures applicable to defining "high quality" waters. The health of a stream may be determined by an array of chemical, biological or physical parameters. The proposed narrow definition may exclude important high quality characteristics and burden the process of assessment.

- Section 5.2 pertaining to the definition of "naturally reproducing trout waters."

The interpretation in this section dismisses the expertise of DNR and DEP personnel who have compiled lists without such specific documentation. Although documentation may be appropriate for any expansion of the list, it may unnecessarily limit protection to deserving Tier 3 streams. Written or visual documentation should be considered adequate.

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

Sampling locations should be able to include points upstream or downstream of the segment on public lands as long as no additional tributaries contribute to the sample's water quality.

Finally, regarding all sub-sections of Section 5, High Quality and Naturally Reproducing Trout Waters, WV-DEP must acknowledge through its interpretation of Tier 3 waters that the CWA expects protection to be extended to waters of "exceptional ecological significance" on the basis of special ecological importance or sensitivity, whether or not water quality is particularly high.

- Section 6, Water Upstream of Tier 3 Segments.

WV-DEP proposes to consider Tier 1 or Tier 2 designation for stream segments upstream of Tier 3 waters under the provision of Title 60, Series 5, Section 6.3, "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." Unfortunately, the sub-sections of Section 6.3 are riddled with exclusions that are open to interpretation and not in the best interest of Tier 3 waters.

Because this public comment opportunity is not applicable specifically to the Antidegradation Implementation Rule (Title 60, Series 5), we request that Section 6.1 be reworded to provide Tier 3 protection to all waters upstream of designated Tier 3 segments unless downgrading such a section can be determined not to jeopardize the qualifications of designated Tier 3 waters.

Thank you for your consideration and please include me on any further correspondence regarding this matter. Also, feel free to contact me at (717) 763-0742 or lgarland@amrivers.org if you have any questions.

Sincerely,
Liz Garland
Associate Director
American Rivers
Healthy Waters Campaign

June 3, 2008

Scott Mandirola
Assistant Director, Division of Water and Waste Management
Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

RECEIVED

JUN 06 2008

WATER QUALITY STDS

Dear Mr. Mandirola,

The Nature Conservancy (TNC) in West Virginia offers these comments on the proposed Interpretive Rule regarding the Designation of Tier 3 “outstanding national resource” waters.

Under section 47-2A-4, Tier 3 Designation, 4.2. “Waters located in State Parks, National Parks and National Forests”, TNC proposes the following changes to add clarity and consistency to the rule’s designations:

- 1) A potential classification of Tier 3 waters within the stated jurisdictional boundaries to include waters with national ecological significance due to the presence of habitat for federally threatened or endangered species, as listed by the U.S. Fish and Wildlife Service, or habitat for globally rare species as assessed by NatureServe (www.natureserve.org). Globally rare species can be considered those with a conservation status of the following:
 - a. G1 critically imperiled (very high risk of extinction),
 - b. G2 imperiled (high risk of extinction), or
 - c. G3 vulnerable (moderate risk to extinction)[for more information see <http://www.natureserve.org/explorer/ranking.htm#global>].

The presence of habitat for a federally listed freshwater species clearly makes a stream a resource with national significance. We argue that national ecological significance is also realized with the presence of habitat for globally rare (G1-G3) freshwater species because these streams serve as a repository of Appalachian freshwater diversity, including regionally endemic species (e.g. candy darter, *Etheostoma osburni*) that occur nowhere else in the world.

PROPOSED CLARIFICATION IN 4.2.a “All high quality waters, naturally reproducing trout streams, and *nationally ecologically significant waters*...

- 2) The potential location of Tier 3 waters to include waters bounded on both sides by all public lands managed by the National Park Service, such as streams within the New River Gorge National River unit, the Gauley River National Recreation Area, Harper’s Ferry National Historical Park unit, and the Bluestone National Scenic River unit.

PROPOSED CLARIFICATION IN 4.2.a "...streams located within the boundaries of State Parks, National Parks, National Forests, *National Rivers*, *National Recreation Areas*, *National Historical Parks*, and *National Scenic Rivers*.

Under Section 47-2A-5 "High Quality and Naturally Reproducing Trout Waters" 5.1, TNC supports the use of macroinvertebrate bioindices for determining the quality of a stream. We ask that the state continue its review of streams using this bioindex to consider if additional streams may qualify, especially for streams known for diversity of other fish species beyond trout.

Under Section 47-2A-6 "Waters upstream of Tier 3 Segments" 6.1, TNC proposes the following clarification:

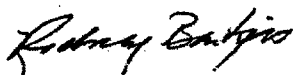
As now described in proposed rule, waters upstream of a Tier 3 segment are automatically designated as Tier 1 or Tier 2. However, these streams segments may still be high quality waters, have reproducing populations of trout, or be of national ecological significance. Since all waters flow downstream, the protection of upstream segments will only benefit the freshwater habitats and species of a Tier 3 on public lands.

We propose that the DEP allow it to be a landowner's option for such an "upstream segment" to be listed as Tier 3, and not automatically be designated as Tier 1 or 2 as the rule now states.

PROPOSED CHANGE in 6.1 "Waters upstream of a Tier 3 segment on public lands will be considered Tier 1 or Tier 2, as appropriate, *unless Tier 3 classification is sought by the landowner...*

Thank you for the opportunity to comment on this rule. If you have any questions about these comments, please feel free to contact us at TNC's Elkins Field Office, 304-637-0160.

Sincerely,



Rodney Bartgis
State Director



Elizabeth Wheatley
Director of Government Relations

RESPONSE TO COMMENTS -- INTERPRETIVE RULE 47CSR2A

The following is a response to the comments provided during the public comment period on the Department of Environmental Protection's (DEP's) interpretive rule, 47CSR2A-- "Designation of Tier 3 Waters." Written comments were accepted until June 3, 2008. A public hearing was held on June 3, 2008. Both oral and written comments were received and each will be addressed below.

I. COMMENTER: Frank Decker

COMMENT A. *The waters in WV's four National Park Units deserve the highest level of protection like the waters in the state parks, national forests, and wilderness areas. The National Parks Conservation Association and National Park Service will be submitting comments asking the WV DEP to revise the wording of the proposed rule to include all waters "within units of the National Park System."*

RESPONSE A. When originally drafting the interpretive rule, an issue arose as to the meaning of the term "national park" that was included in new section 4.1.c of 47CSR2, describing Tier 3 waters. The DEP reviewed applicable federal law relating to national parks and units within the national park system to better understand the term and decided to limit the term to "national parks," not "units within the national park system." Since there were in fact no national parks located within the State, the agency thought it was imperative to inform the public of this interpretation, which resulted in the sentence at the end of section 4.2.a of the proposed rule, "[a]s of the effective date of this rule, there are no national parks located within West Virginia." Based upon the amount of interest that had been shown on the whole Tier 3 issue, coupled with the uncertain meaning of the term "national park," the agency expected this interpretation might elicit comments directed to the point.

The sentence did in fact elicit much comment, almost all in disagreement with the agency's interpretation. After reviewing all of the public comments and further researching the applicable law, both state and federal, the DEP believes it erred by using the literal, narrow meaning of the term instead of its more commonly understood meaning, as evidenced by the large majority of comments. One commenter summarized many others' when he said the term used in the legislative rule was meant to include the national park units, whatever their designation, and not "National Parks" as a designation applied to the "crown jewels" of the national park system. (The commenter further pointed out that state legislators would certainly know that there were no crown jewel *National Parks* located in West Virginia and that they must have meant the term to include all national park units.)

The large majority of comments commonly mentioned four particular units within the park system, the New River Gorge National River, the Bluestone National Scenic River, the Gauley River National Recreation Area and the Harpers Ferry National Historic Park, although two other units were also mentioned. Clearly, the general public's common understanding of the term "national park" includes units like these, i.e., ones that are managed by the National Park Service as part of the national park system.

That being said, the term “national park” used in the legislative rule is sufficiently ambiguous that it is necessary to ascertain the legislative intent behind the term. Indeed, the two legislative chairs of the primary standing committees in the House and the Senate that passed the legislation also provided comments to the agency, urging that it consider the Legislature’s intention in passing the rule and that it more broadly construe the language.

One of the particularly weighty principles of statutory construction cited by the House Judiciary Committee Chair was that of giving meaning to every word used in legislation, in other words, interpreting language in a manner that does not render it meaningless. The DEP agrees that this cardinal rule of statutory construction dictates against the DEP’s proposed interpretation, for the DEP’s interpretation of the term “national park” did indeed render it meaningless. As further evidence that the term “national park” was intentionally used in the rule, the DEP notes that the term was not included in the version of the rule that was passed several days earlier by the Senate.

There are other well-recognized principles of statutory construction applicable to this matter. The first place one starts in ascertaining legislative intent is the language of the rule itself, informed by the policy it is designed to serve. In this case, the overall purpose and objective of this particular provision is to protect the State’s high quality waters by not allowing any degradation. At issue are the waters that will be assigned a Tier 3 level, the highest degree of protection. Tier 3 waters are “outstanding national resource waters,” further defined in section 2.10 of the legislative rule as “waters whose unique character, ecological or recreational value or pristine nature constitutes a valuable national or state resource.” It would be difficult to argue that the relatively few national park units located within West Virginia do not rise to this definition, especially after the public outcry over the DEP’s proposed exclusion of such units.

Furthermore, as the Senate Judiciary Chair noted in his comments, the Legislature is attempting to protect high quality waters on “public land” with this rule, and the DEP’s proposed interpretation would seriously undercut that effort. When one examines the language in section 4.1.c of the rule, one sees a clear emphasis upon special locations in the State that, by and large, consist of public lands. In addition to the waters specifically protected by two pieces of federal legislation, the rule names three types of public lands where high quality waters are to be protected: state parks, national parks and national forests. To not give meaning to one of these three types of public lands would seriously undermine the legislative intent in this matter.

Rather than interpreting the language very literally, and creating a result contrary to the intention of the Legislature, the term should be given its more common meaning and interpreted to effectuate the purpose of the rule. This is particularly true where the issue involved is a matter of important public interest, such as protecting the State’s high quality waters. Where a public interest is affected, an interpretation is preferred that favors the public, not a narrow construction that undermines the policy behind the rule.

Moreover, the applicable federal law also supports treating national park units in the same manner as National Parks. The National Park Service, the federal agency charged with administering

the national park system, provided comments on the rule that should be given special weight since it is the very agency charged with administering the system. The Park Service stated, "Federal law (16 USC §1a-1) dictates that all units administered by the National Park Service, regardless of the unit designation, be managed to the same high standard of protection of the outstanding natural resources for which these units were designated." The National Parks Conservation Association in its comments made a similar point that "although the various designations of the units of the national park system . . . can cause confusion, Congress clearly mandated a system-wide standard of protection."

In summary, both state and federal law support a meaningful, broad interpretation of the term "national park" that will fulfill the public policy and purpose behind the rule, as opposed to a narrow construction that undermines the clear legislative intent behind the rule. The DEP will replace the language in section 4.2.a of the interpretive rule stating "national parks" with "units within the national park system." It will also remove the last sentence from that section.

II. COMMENTER: Jamie Shumway

COMMENT A. *I recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. This was the DEP's intention. To clarify the language in the rule a definition will be added in section 2 to say that "water" or "waters" means a "lake, stream or stream segment." Also as a result of this change, the word "stream" has been replaced with "water" in sections 4.1.a and 4.2.a, and the word "streams" replaced with "waters" in section 5.1.a.

COMMENT B. *I recommend that the language in section 4.3 that lays out guidelines for federally designated waters should be amended to include all waters within units of the National Park system.*

RESPONSE B. See response to Comment I. A. Additionally the DEP believes the commenter may have misinterpreted the meaning of section 4.3. That section is intended solely to address the waters designated under the two federal statutes cited in section 4.1.c of 47CSR2. It is section 4.2 of the interpretive rule that deals with national parks, and that is where the DEP will make changes in the language as discussed in the response to Comment I.A.

COMMENT C. *When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. I would recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. The language “high quality waters” and “naturally reproducing trout streams” comes from the legislative rule, section 4.1.c of 47CSR2, and relates only to waters located in state parks, national parks and national forests. Either one of these criteria, if existing in one of the locations just mentioned, qualifies a stream for Tier 3 protection. Section 5 of the interpretive rule is intended to further define and clarify these two criteria - - section 5.1 for “high quality waters” and section 5.2 for “naturally reproducing trout streams.” This comment takes issue with the fact that the DEP, in section 5.1 and 5.1.a defining “high quality,” relies solely upon biological integrity and benthic macroinvertebrate communities as the method for determining whether a stream is “high quality.” Comments related to the other criterion, “naturally reproducing trout streams,” will be dealt with in separate responses contained later in this document.

The DEP believes that biological monitoring, in particular assessment of benthic macroinvertebrate communities, is the most quantitative and reliable means of determining the ecological health, or high quality, of a stream. For this reason, the DEP has been using biological measurement tools, such as the West Virginia Stream Condition Index, for many years, and the U.S. EPA has likewise been a strong proponent of this approach. Other types of measurements, whether chemical, physical or biological, have their limitations, which is why benthic sampling is widely accepted in the scientific community. The DEP notes, however, that these other types of measurements may have relevance in the individual stream nomination process established under section 7.1 of 60CSR5.

Finally, using a biological scoring system like the one described in section 5.1.a of the interpretive rule, is consistent with the approach used by the agency for the last several years in determining which streams to assign Tier 2.5 status, along with the other criterion of “naturally reproducing trout streams.” As the Legislature has now removed Tier 2.5 and largely replaced it with Tier 3, the DEP believes it is appropriate to continue using the same type of approach for determining “high quality” as it relates to Tier 3 streams.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. The primary purpose behind sections 6 and 6.1 of the interpretive rule was to clarify whether the segment immediately upstream of a Tier 3 segment becomes a Tier 3 segment by virtue of the fact that 60CSR5 prohibits an upstream activity from degrading the downstream Tier 3 segment. There had been several questions raised about this issue during the legislative session. The short answer, as shown by the proposed language, is no, the upstream segment does not become a Tier 3 stream; rather, it would be a Tier 1 or 2, as otherwise prescribed by the terms of 60CSR5.

After reviewing the comments, however, the DEP realizes there could be situations where the immediate upstream segment becomes a Tier 3 stream in the future, after this present exercise of assigning Tier 3 status to waters falling under one of the categories listed in section 4.1.c of 47CSR2. This could happen by the upstream segment successfully completing the nomination

process or by the agency determining in the future that the segment qualifies as a "high quality" stream or a "naturally reproducing trout water" and otherwise meets the criteria of section 4.2.a. of the interpretive rule. (Of course, a stream which flows into and out of a qualifying area may have Tier 3 waters located further upstream, but this is not what the agency is addressing in this section of the interpretive rule.)

Section 6.1 therefore will be modified to read: "Waters immediately upstream of a Tier 3 segment will be considered Tier 1 or Tier 2, as appropriate, unless subsequently designated Tier 3."

The next portion of the comment concerns the agency's reference to 60CSR§5-6.3. The comment states that it should be made clear that upstream activities should not cause harm or degradation to the downstream Tier 3 segment. It was for this reason that the agency included the reference to section 6.3 of 60CSR5. Section 6.3 is entitled "Sources upstream from an ONRW," and deals comprehensively with the issue of activities upstream of a Tier 3 segment and their impacts upon the segment. The agency did not think it was necessary to repeat all of the language from this section of 60CSR5, but did think it was prudent to make the public aware that this is the section of 60CSR5 pertinent to the issue. To assist with this understanding, the agency has modified the sentence to read as follows: "With respect to the protection of downstream Tier 3 segments, the provisions of 60CSR§5-6.3 apply."

III. COMMENTER: John and Judy Mathwin

COMMENT A. *Keep as many trout streams as possible clean. Specifically I hope that all streams in national and state parks are given tier 3 classification and that the upstream portions of streams which have received tier 3 classification be kept clean and treated as tier 3 streams themselves otherwise the downstream portions will soon deteriorate.*

RESPONSE A. See response to Comment II. D. As far as treating all streams in national and state parks as Tier 3, the underlying legislative rule, 47CSR§2-4.1.c, limits Tier 3 protection to "high quality" or "naturally reproducing trout waters."

IV. COMMENTER: Charles Barabec

COMMENT A. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE A. See response to Comment II. D.

COMMENT B. *When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure.*

Waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

RESPONSE B. See response to Comment II. C.

COMMENT C. *The language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE C. See response to Comment II. A.

COMMENT D. *The language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.*

RESPONSE D. See response to Comment I. A.

V. COMMENTER: Robert E. Rutkowski

COMMENT A. *I urge that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. See response to Comment II. A.

COMMENT B. *I recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. I recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. See response to Comment II. D.

VI. COMMENTER: Peggy Pings

COMMENT A. *Section 4.1 and 4.2. The language should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. See response to Comment II. A.

COMMENT B. *Section 4. A section should be added to include Waters With State Protection. The WV Natural Streams Protection Act of 1969 includes sections of the Greenbrier River, Anthony Creek, Cranberry River, Birch River and the New River. In addition, Commercial Whitewater Zones have been designated by WV Code section 20.2-23a, including segments of the Cheat, Gauley, New, Shenandoah, and Tygart Valley River. These important streams should also be protected from pollution and degradation, since they are critical to the Whitewater Industry. See page 66 (Natural Streams Protection Act of 1969) in the WV State Trails Plan, 2002. http://www.wvdot.com/3_roadways/rp/Trails/wvtrailplanbook.pdf*

RESPONSE B. The commenter's suggestions are inconsistent with the language in the underlying legislative rule, 47CSR2. The agency does agree that the aforementioned streams are afforded certain other protections as outlined in State code, and this is a factor to be considered, should one of these streams be nominated for Tier 3 protection pursuant to 60CSR§5-7.1.

COMMENT C. *Section 4.2.a. There are actually four (4) National Parks in WV. The language should be amended to list the National Park units in WV as: New River Gorge National River, Gauley River National Recreation Area, Bluestone National Scenic River, Harpers Ferry National Historic Park.*

RESPONSE C. See response to Comment I. A.

COMMENT D. *Section 4.3. The language that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system. In addition, the Wild & Scenic Rivers are listed on page 61 (Nationally-designated Rivers) in the WV State Trails Plan, 2002. http://www.wvdot.com/3_roadways/rp/Trails/wvtrailplanbook.pdf*

RESPONSE D. See response to Comment I. A.

COMMENT E. *Section 5.1 and 5.1.a. Macroinvertebrate communities are only one measure for high quality waters, and it is not the only measure. Therefore, in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE E. See response to Comment II. C.

COMMENT F. *Section 6.1. The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment. This is very important! As you know, water flows downstream!*

RESPONSE F. See response to Comment II. D.

VII. COMMENTER: Cheat Lake Environmental & Recreation Association (Duane G. Nichols, President)

COMMENT A. *It is requested that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. See response to Comment II. A.

COMMENT B. *It is requested that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *In determining “High Quality and Naturally Reproducing Trout Streams”, the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We request that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. See response to Comment II. D.

VIII. COMMENTER: Patti Miller

COMMENT A. *We recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. See response to Comment II. A.

COMMENT B. *We recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *When determining “High Quality and Naturally Reproducing Trout Streams”, the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We would recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. See response to Comment II. D.

IX. COMMENTER: Ed Sims

COMMENT A. *I am allowing people much more involved with the politics to offer the comments below, but wanted you to know my genuine interest on this matter as a native West Virginian. We recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. See response to Comment II. A.

COMMENT B. *We recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. We would recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. See response to Comment II. D.

X. COMMENTER: West Virginia Rivers Coalition (Shana Minney, Larry Harris, Larry Orr and Don Garvin)

COMMENT A. *4.1.a. should be amended to read: "All waters, and segments of 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."*

RESPONSE A. See response to Comment II. A.

COMMENT B. *4.2.a. should be amended to read: "All high quality waters, naturally reproducing trout streams, segments of high quality waters or segments of 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."*

RESPONSE B. See response to Comment II. A.

COMMENT C. *We support the designation of waters under the Wild and Scenic Rivers Act and the National Parks and Recreation Act as Tier 3. In addition to those Federal waters specifically named in section 4.3.a, that designation should be extended to all waters within units of the National Park System. This should include waters of federal importance as designated within National Recreation Areas, specifically the Gauley River National Recreation Area.*

RESPONSE C. See response to Comment I. A.

COMMENT D. *5.1 should be amended to read: "For purposes of subsection 4.2, waters will be considered high quality as defined in 47SCR§2-2.8." This is consistent with the federal regulation (40CFR§131.12) which uses the phrase "high quality waters" when defining Tier 3. By*

“high quality water” this regulation specifically means waters that meet water quality standards, not waters with exceptional characteristics.

RESPONSE D. DEP agrees that the term “high quality waters” is used and defined in the aforementioned federal and state regulations differently than in the proposed 47CSR2A. As defined in those regulations, “high quality” can mean waters minimally meeting their designated uses and are considered Tier 2 waters. While it is true that Tier 2 “high quality” waters also include waters whose quality exceeds levels necessary to meet designated uses, the DEP, when contemplating how to qualify waters for Tier 3 protection, was necessarily looking for a different, higher standard than the standard applicable to Tier 2 waters -- hence, the DEP’s reliance on indicators of biological integrity and the specific recognition that the term was being applied differently than in other related regulations.

COMMENT E. *Section 5.1 proposes that waters will be considered Tier 3 solely based on healthy benthic macroinvertebrate communities. While it is appropriate to use benthic macroinvertebrates as one metric for listing waters as Tier 3, it is not appropriate to use this as the only metric for listing. Biological integrity and high quality can also be measured by fish communities. Waters can also be high quality based not on biological integrity, but based on chemical and physical measurements. In short, section 5.1 is too restrictive by only allowing a single metric, the West Virginia Stream Condition Index, to be used to list a Tier 3 stream. In addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE E. See response to Comment II. C. Also, please note that the reference to the West Virginia Stream Condition Index in section 5.1.a is not limited to that method. The use of the term “e.g.” means “for example.”

COMMENT F. *Section 5.1.a should be deleted.*

RESPONSE F. Based on the response to the commenter’s previous comment, Comment D, section 5.1.a. is a necessary section in the rule to clarify what is meant by “exceptionally healthy benthic macroinvertebrate community.”

COMMENT G. *We support the proposed language in section 5.2 regarding naturally reproducing trout waters.*

RESPONSE G. The DEP acknowledges the commenter’s support and appreciates the comment.

COMMENT H. *Section 5.3 seems to provide an unnecessary level of flexibility in terms of sample locations with respect to determinations of Tier 3 status. As written, it would allow sampling in “reasonably close proximity” to segments on public land. We cannot envision why sampling cannot be conducted on public land, as access should not be an issue. The phrase “reasonably close proximity” is undefined and potentially subject to abuse. 5.3.a. should be amended to*

read: "When determining whether a water is high quality or a naturally reproducing trout stream the sampling site(s) shall be located within the public land segment, and shall be representative of the total segment. The number of sampling sites necessary to provide an accurate profile will be determined by the length and stream size of the segment."

RESPONSE H. The agency believes the commenter may have misinterpreted the intent of the language in section 5.3. Section 5.3. is written to allow the agency to use information previously collected on a different segment that is determined to be representative. In most cases, the agency data has been or will be collected on the public land portion of the stream or stream segment. However, there are a fair number of cases where sampling data exists in a nearby representative segment demonstrating an exceptionally healthy benthic macroinvertebrate community or naturally reproducing trout stream. As such, it would be a waste of public resources to sample again.

COMMENT I. *Section 6.1 states that upstream waters will be Tier 1 or Tier 2, as appropriate, without even the possibility that upstream waters can be Tier 3. In many situations, Tier 3 water will, in fact, be upstream from Tier 3 water. The first sentence in this section should therefore be changed to the following: "Waters upstream of a Tier 3 segment will be considered Tier 1, Tier 2, or Tier 3, as appropriate." Section 6.1 ends with the sentence: "The provisions of 60CSR§5-6.3 apply." This is a critically important reference. The applicable paragraphs in 60CSR§5-6.3, among other things, state:*

"Any proposed activity that would result in a permanent new or expanded discharge upstream of an ONRW [Tier 3] segment is prohibited except where such source would improve or not degrade the existing water quality of the downstream ONRW segment."

It is critically important that the final sentence of §47-2A-6 remain as written, to clarify that even if an upstream water is Tier 1 or 2, it cannot degrade downstream Tier 3 waters. This is not only required by the rules, it also mirrors Secretary Timmermeyer's public statements during the legislative debate over the new Tier 3 rules.

RESPONSE I. See response to Comment II. D.

COMMENT J. *While the Tier 3 nomination procedures are not contained in 47CSR2, but instead are contained in 60CSR§5, the Antidegradation Implementation Procedures rule, we feel strongly that the agency should clarify how it will handle Tier 3 nominations.*

Previous language contained in section §60-5-8. Designation of Tier 2.5 and Tier 3 Waters contained differing language covering the nomination process for Tier 2.5 and Tier 3 waters.

Section 8.1.a.1 *stated: "Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 2.5 water pursuant to the Board's State's antidegradation policy, the Board Secretary shall, **within 180 days of receipt of the nomination**, notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided."*

Section 8.2.a.1 stated: "Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the Board's State's antidegradation policy, the Board Secretary shall notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided."

The specific language "within 180 days of receipt of the nomination" was not included in section 8.2.a.1 dealing with Tier 3 nominations. With the elimination of the Tier 2.5 language from 60CSR§5, this language no longer appears anywhere in the rule. At a minimum that language should be added to the section covering Tier 3 nomination procedures.

In addition, the agency should be required to notify in a reasonable period of time the individual(s) submitting the nomination whether or not the nomination was sufficient for consideration.

RESPONSE J. The commenter's suggestions are inconsistent with the language in the underlying legislative rule, 60CSR5. The agency does agree that individuals making a nomination for Tier 3 should be notified within a reasonable period of time whether the nomination is sufficient for consideration.

XI. COMMENTER: Paula Finck

COMMENT A. *Please do not allow WV streams to be ruined by future degradation by being clear in your writing of present legislation concerning our streams.*

RESPONSE A. The DEP acknowledges the commenter's concern about future degradation of streams, and the purpose of the interpretive rule is to clarify the designation of Tier 3 waters.

XII. COMMENTER: League of Women Voters of WV (Kathy Stoltz, President and Helen Gibbins, Director)

COMMENT A. *Tier 3 waters must be defined as all streams and stream segments located within National Wilderness Areas, State Parks, National Parks and National Forests, and should include all waters within units of the National Park system, including the Gauley River.*

RESPONSE A. See response to Comment II. A. and response to Comment I. A.

COMMENT B. *Streams should be considered eligible for designation based on a consideration of all available biological, chemical, and physical measurements*

RESPONSE B. See response to Comment II. C.

COMMENT C. *The interpretive rule should also clearly state that any activity upstream of Tier 3 waters is not allowed to degrade downstream Tier 3 sections of streams. Otherwise how can the state protect Tier 3 streams? Our Tier 3 quality streams are resources that many states do not have. We should ensure that these resources are fully protected.*

RESPONSE C. See response to Comment II. D.

XIII. COMMENTER: Sally Snyder

COMMENT A. *We need to maintain the standards that will allow for the cleanest water possible. Water is the most precious commodity and extra effort should be used in West Virginia to keep it clean.*

RESPONSE A. The DEP acknowledges the comment and appreciates the commenter's support.

XIV. COMMENTER: Plateau Action Network (Mark Ehrnschwender, PAN Board Chair)

COMMENT A. *We recommend that the language in sections 4.1 and 4.2 be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests, such as the Gauley River.*

RESPONSE A. See response to Comment II. A. and response to Comment I. A.

COMMENT B. *We recommend that the language in section 4.3 laying out guidelines for Federally designated waters be amended to include all waters within units of the National Park system, including Bluestone National Scenic river, Gauley River National River Recreation Area, and the New River Gorge National River.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *When determining "High Quality and Naturally Reproducing Trout Streams", the current interpretive rule calls for measurement based on healthy benthic macro-invertebrate communities only. While this is one measure for high quality water, it is not the only measure. We recommend that in addition to healthy benthic macro-invertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1,*

and it be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.

RESPONSE D. See response to Comment II. D.

XV. COMMENTER: George Snider

COMMENT A. *I ask that DEP support changing the language in sections 4.1 and 4.2 to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.*

RESPONSE A. See response to Comment II. A.

COMMENT B. *Please amend the language in section 4.3 that lays out guidelines for Federally designated waters to include all waters within units of the National Park system.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *When determining “High Quality and Naturally Reproducing Trout Streams”, that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. See response to Comment II. D.

XVI. COMMENTER: Stephanie Slater

COMMENT A. *I have a comment regarding: “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.” Why does the stream have to be bounded on both sides by the public land? These streams are rare in the state of WV. Streams running adjacent to public land, even if only on one side, should be included.*

RESPONSE A. During the 2008 legislative session, before various legislative committees, the agency stated that only those waters bounded on both sides by public land, in areas such as state and national parks and forests, would be included on the initial list of Tier 3 waters. Waters not bounded on both sides by public lands, which are naturally reproducing trout waters or high quality waters, would be good candidates for individual Tier 3 nomination. The agency does not, however, believe this interpretation applies to the specially designated waters cited under the rule language, i.e., “Wild and Scenic Rivers” and waters designated under the “National Parks and Recreation Act of 1978.”

COMMENT B. *I have a comment regarding: “§47-2A-6. Waters Upstream of Tier3 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.” If a stream in rated Tier 1 or Tier 2 upstream from a Tier 3 segment, pollutants allowed to enter the upstream segment would flow downstream into the Tier 3 segment, thus polluting it. Again, these streams are so rare, let's keep the upstream portions protected as well. What would be the disadvantage to the entire stream getting a Tier 3 rating?*

RESPONSE B. See response to Comment II. D. Further, the definition of Tier 3, as passed by the Legislature, only gives the authority to afford Tier 3 protection, outside the nomination process outlined in 60CSR5, to waters within the boundaries of federal wilderness areas, waters specifically designated under two federal laws and to qualifying streams within the boundaries of state parks, national parks or national forests. Upstream segments of Tier 3 streams not on public lands may be nominated for Tier 3 protection.

XVII. COMMENTER: West Virginia Highlands Conservancy (Cindy Rank Chair, WVHC Mining Committee)

COMMENT A. *Comments submitted by West Virginia Rivers Coalition.* *We participated in discussions leading up to the final set of comments submitted by the WV Rivers Coalition on behalf of four individual and group signatories. We support those comments and incorporate them as our own by reference.*

RESPONSE A. See response to Comment X., A through K.

COMMENT B. *Sections 4.3 should extend Tier 3 protection to all waters within “units in the National Park System”. As I understand it, each of these units is managed by the National Park Service under the same set of federal laws and deserves the same level of protection. At a minimum specific designation should be made for the Gauley National Recreation Area as created in Public Law 100-534 (The West Virginia National Interest River Conservation Act of 1988).*

RESPONSE B. See response to Comment I. A

COMMENT C. *The wording of section 4.3 might possibly be interpreted to include only the main stem of the New and Bluestone Rivers. We submit that the rule should include not only the*

main stem of the New, Bluestone and Gauley Rivers within the boundaries of the appropriate park unit, but also tributaries to these rivers within each of the parks.

RESPONSE C. The wording of section 4.3 did in fact include only the main stem of the New and Bluestone Rivers because only the main stems were clearly designated by the particular federal legislation referenced in the legislative rule, i.e., the Wild and Scenic Rivers Act and the National Parks and Recreation Act of 1978.

However, both the Bluestone Scenic River and the New River Gorge National River fall under another category of Tier 3 waters - - "national parks," for each is a unit within the national park system administered by the National Park Service. As discussed in response to Comment I.A., national park units are considered Tier 3 waters, and this includes all waters located within the national park units, whether tributaries or main stems, as long as those waters meet either the "high quality" or "naturally reproducing trout stream" criterion.

Therefore, the DEP will retain the proposed language in section 4.3 of the interpretive rule and treat only the main stems of these two rivers as Tier 3 waters regardless of whether they are "high quality" or "naturally reproducing trout streams." The tributaries of these two rivers will be considered Tier 3 waters, if they are "high quality" or "naturally reproducing trout streams," under the national park language of section 4.2 of the interpretive rule. With respect to the Gauley River National Recreation Area, it does not fall under either of the two specifically designated federal statutes addressed in section 4.3 of the interpretive rule, but does fall under the rule's section 4.2 coverage of "national park units."

COMMENT D. *High Quality Waters on Private Lands.* Finally, we would like to go on record as strongly objecting to the *de facto* demotion of the many high quality and naturally reproducing trout streams that were considered national resource waters for purposes of the WV anti-degradation policy until the early 1990's.

Under pressure from industry at that time many of our fine streams located outside the boundaries of national and state park and forest lands were summarily demoted to a newly created lesser-protective level known as Tier 2.5. Now, with the elimination of Tier 2.5 by the 2008 state legislature a whole host of valuable headwater streams have been demoted even further into Tier 2, an action that lessens even further the level of protection.

Admittedly there is a process to nominate waters for Tier 3. However, anyone who witnessed the embarrassing inability of our state regulators and legislators to provide even the intermediate Tier 2.5 protection to hundreds of documented trout and high quality waters these past few years will have little hope of meeting with anything more than a debacle of similar proportions.

Though the nomination process is not directly a part of the interpretive rule being discussed, the details of that process should also be clarified due to the alteration of the Tier system.

RESPONSE D. The agency acknowledges it has been a long and arduous process finalizing the Antidegradation Implementation Procedures and that there have been changes to the definition of

Tier 3 waters along the way. The individual nomination process for Tier 3 streams is contained in 60CSR§5-7.1, and has remained essentially unchanged through the process. This nomination process is outlined and should expedite the identification of Tier 3 streams. As the agency gains experience with the Tier 3 nomination process, additional clarification may be supplied.

XVIII. COMMENTER: Ben Prior

COMMENT A. *On the topic of Tier 3 designation, I feel that all water upstream of a Tier 3 stream be considered to not harm the Tier 3 stream.*

RESPONSE A. See response to Comment II. D.

COMMENT B. *In section 4.3 the language should be such to include all waters in the National Park System.*

RESPONSE B. See response to Comment I. A.

XIX. COMMENTER: Mary Ellen Cassidy

COMMENT A. *The DEP proposes a definition of streams on public lands that is too narrow. Tier 3 protections should apply to all streams and stream segments located within National Wilderness Areas, State Parks, National Parks and National Forests, and should include all waters within units of the National Park system, including the Gauley River.*

RESPONSE A. The description of Tier 3 waters was modified and adopted by the Legislature during the 2008 legislative session. The DEP, in this interpretive rule, is clarifying the description of Tier 3 waters, and does not have the authority to change the language in the underlying legislative rule. See response to Comment I. A.

COMMENT B. *DEP proposes to use only a benthic macroinvertebrate "bug score" to determine if a stream qualifies as a "High Quality" water. While this is one measure for high quality water, it is not the only measure. Streams should be considered eligible for designation based on a consideration of all available biological, chemical, and physical measurements.*

RESPONSE B. See response to Comment II. C.

COMMENT C. *The DEP interpretive rule is unclear about the interaction of Tier 3 streams with other waters. DEP should make it clear that activity upstream of a Tier 3 segment is not allowed to cause harm or degradation to the downstream Tier 3 segment.*

RESPONSE C. See response to Comment II. D.

XX. COMMENTER: National Parks Service (Don Striker, Superintendent)

COMMENT A. *Under §47-2A-4.2a, we urge that the words “national parks” be replaced by “units of the National Parks system.” Federal law (16 USC §1a-1) dictates that all units administered by the National Parks Service, regardless of the unit designation, be managed to the same high standard of protection of the outstanding natural resources for which these units were designated. Since New River Gorge National river, Gauley river National Recreation Area, and Bluestone National Scenic River were created in part for their outstanding aquatic resources, it is only appropriate that this be reflected in West Virginia regulations. Such a wording change would also include waters located in Harpers Ferry National Historic Park, the sections of the Appalachian Trail within West Virginia, and any future additions to the National Parks system within the state.*

RESPONSE A. See response to Comment I. A.

COMMENT B. *We urge the deleting of the last sentence in §47-2A-4.2a. Harpers Ferry unit is indeed a National (Historic) Park. Further, designations of units within the National Park system have been changed in the past, and may be changed in the future. Eliminating this sentence would eliminate potential confusion, both now and in the future.*

RESPONSE B. See response to Comment I. A.

COMMENT C. *We are concerned about the wording in §47-2A-4.3a. While the reference to 16 USC §1274(a)65 specifically refers to Bluestone National Scenic River, the reference of 16 USC§466m et seq. to New River Gorge National River is erroneous. The correct reference to New River Gorge National River is 16 USC§460m et seq. We also are concerned that the Gauley River National Recreation Area (16USC 460ww et seq.) is not specifically mentioned in this section. Therefore we urge that §47-2A-4.3a be modified to correct the reference and to include the Gauley River National Recreation Area (16USC 460ww et seq.).*

RESPONSE C. The DEP acknowledges the commenter’s correction to the New River reference and will make that change. In response to the inclusion of the Gauley River National Recreation Area, see response to Comment I. A. Because the Gauley River National Recreation Area is a unit within the national park system, its qualifying waters will receive Tier 3 protection.

COMMENT D. *We are concerned that §47-2A-4.3a also restricts Tier 3 protection only to the main stem of the listed rivers. While the namesake rivers are the major features that led to establishment of these parks, the Congressionally established boundaries clearly include tributary streams. We urge that this section be amended by deleting the interpretive reference to main stem rivers so that all streams within the park are afforded protection by the West Virginia concomitant with that intended by Congress.*

RESPONSE D. See response to Comment XVII. C.

COMMENT E. *We have heard rumors that establishment of Tier 3 protection will limit the ability of local entities to make needed infrastructure improvements (e.g. upgraded sewer systems) that will improve water quality. We are assured by Chapter 4 of EPA's Water Quality Handbook that this is not the case. We believe that DEP should explicitly acknowledge that falsehood of such rumors, and assure the public that essential infrastructure improvements that will improve water quality are indeed allowed under Tier 3.*

RESPONSE E. See response to Comment II. D. The DEP agrees to modify section 6.1 for clarification to read: "Waters immediately upstream of a Tier 3 segment will be considered Tier 1 or Tier 2, as appropriate, unless subsequently designated Tier 3. With respect to the protection of downstream Tier 3 segments, the provisions of 60CSR§5-6.3 apply." Additionally, 60CSR§5-6.3 specifically addresses activities which would improve the quality. This change should alleviate the commenter's concerns.

XXI. COMMENTER: Steve Hooks (Associate Editor, Platts Coal Outlook/Platts Coal Trader)

COMMENT A. *Has WVDEP or WVCA come up with a number of streams affected by the potential Tier 3 regulations? I did find the map on WVDEP's site that shows the wilderness areas that would be covered.*

RESPONSE A. Until the interpretive rule is finalized, an accurate number of streams affected by Tier 3 designation is not available.

COMMENT B. *Tier 1 and 2 streams: Is there any information you can give me that would give me an estimate of the streams affected under those categories and where they are located? I presume it would be "numerous" streams throughout the state, but any specific information you can give me or guide me to would be most appreciated.*

RESPONSE B. At the 1:100,000 mapping scale, there are approximately 9,500 streams in West Virginia, and many of these streams can be further subdivided into segments. Segments are lengths, or portions thereof, of a stream between tributaries. For purposes of antidegradation review, each of these streams is considered on a segment by segment and pollutant by pollutant basis. For example, depending on its quality, a stream segment may be given Tier 1 protection for iron (it is violating the iron water quality standard) but still receive Tier 2 protection for other pollutants in a proposed discharge.

Recognizing the boundless combination of stream, segment, pollutant and tier combinations, it is not possible to provide the number of stream/stream segments for all tiers. However, consistent with 60CSR§5-3.5.d., the DEP will, to the extent practicable, maintain a list of Tier 3 waters on its website. Further, those streams and stream segments receiving Tier 1 protection, for select pollutants, can be found on the agency's most recent Section 303(d) list, also available on the web or in hard copy.

XXII. COMMENTER: Christopher Eads

COMMENT A. *In the next 20 years, clean water will become the most valuable resource on the planet. Far more valuable than oil, gold, platinum, and coal. Wars are already beginning to be fought over water rights, and competition for clean water will intensify to a nearly unimaginable degree.*

West Virginia is not only blessed to be abundant in coal, but we are doubly blessed to have some of the cleanest, purest water on the entire Eastern seaboard. Not only is that water valuable in the short term in all of the ways we all know are important but usually sacrifice for the sake of economic opportunism, i.e. healthy, balanced ecosystems, vibrant psychological and physical health of communities, peaceful places to escape from the pressures of the world and fish, camp, hunt, and relax. These things we know, and of course woefully undervalue. I am not so naive as to assume that these concerns alone will prevent industry from dirtying our water to create much-needed jobs in West Virginia. This will happen. But I would like to take this opportunity to refocus the whole debate, and reprioritize those clean, pure, healthy streams AS AN ECONOMIC ENGINE IN THEIR OWN RIGHT.

Granted, the short-term payoff is not nearly as great. Extractive industries need the water, and they need it NOW. The mindset of the old paradigm will never change. A new paradigm is coming, however, and West Virginia is in a powerful position to become a leader in the battle over, and usefulness of, clean water and healthy river ecosystems. West Virginia streams could be a laboratory for the world. Protected places are vanishing, and ours could become an international resource. Imagine the possibilities of a homegrown stream-restoration and biological sciences industry where human and technological capital is exported across the world. For example, heavily-polluted China will need massive investment in such capital in the coming decades, and West Virginia scientists, engineers and technicians could lead the way and of course, profit considerably. Fish are dying worldwide--what if West Virginia had some of the healthiest fish on the planet? The tourism opportunities of West Virginia as the last bastion of unpolluted outdoor rest and recreation in an increasingly chaotic and overpopulated world are manifold, and hardly need mentioning. And to reiterate my original point, the value of clean water ALONE in the coming years will surpass that of any other commodity on Earth. In West Virginia it is abundant, and will pay magnificently in the next 50 years.

This argument may not be compelling in the short-term, when there are industries today that can provide jobs right now in exchange for polluted water, polluted potentially for hundreds of years if acid-mine drainage can be used as an instructive yardstick. I submit that those short-term economic considerations will pale in comparison to the longer-term, yet-to-be-created 21st century industrial concerns that could make West Virginia a world-leader by the simple virtue of having one of the last RENEWABLE 21st century economic engines on Earth--clean water. While we are faced with this historic opportunity, let's protect our Appalachian heritage--for ourselves and our communities right now, and for the economic well-being of future generations of West Virginians, who will look back at this moment in gratitude for the wisdom and foresight that we expressed by keeping the Tier 3 stream designations widespread, robust, and undiluted.

RESPONSE A. The DEP acknowledges the comment and appreciates the commenter's concern for the value of clean water.

XXIII. COMMENTER: Independent Oil & Gas Association of West Virginia (IOGA), (Charlie Burd, Executive Director)

COMMENT A. *The Antidegradation Implementation Rule (60CSR5)(the "AIR") provides that all "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...." 60CSR 5, §1.5.b. The proposed interpretive rule does not address this provision of the AIR nor do we believe it is necessary to do so. However, we believe that the language of §1.5.b. of the AIR with respect to nonpoint sources applies to activities which occur in the area of Tier 3 waters just as it applies to other waters of the state. We respectfully request that DEP confirm this interpretation of the language of §1.5.b.*

RESPONSE A. The DEP agrees that nonpoint source activities that are following the best management practices established for those activities will be deemed to be in compliance with all antidegradation requirements, whether Tier 1, 2 or 3.

COMMENT B. *§47-2A-3. For clarity, IOGO suggests that Sec. 3.1 be divided into two sentences to read as follows: 3.1. This rule applies to the West Virginia Department of Environmental Protection as it designates waters pursuant to the provisions of 47 CSR §2-4.1. This rule does not apply to the listing of Tier 3 waters pursuant to 60 CSR §5-7.1.*

RESPONSE B. DEP agrees that the language structure could be improved by separating the section into two sentences, to read as follow: "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. This rule does not apply to the listing of Tier 3 waters pursuant to 60CSR§5-7.1."

COMMENT C. *Section 5.2.a defines "documented reproduction" in part as consisting of a "a DNR or DEP fish survey or other written documentation that verifies the presence of reproducing brown, brook of rainbow trout." There is not a restriction on the time when such survey or documentation was developed. IOGA urges the agency to require that such information be of recent vintage so as to accurately reflect the condition of the stream or water body at the time this Tier 3 designation is first applied. We are aware of some surveys that are limited in scope and decades old. While it may be argued that such information is relevant for the purpose of trout water use designations under the water quality standards, we are aware of no authority that would justify its use in a Tier 3 designation under the new standard approved by legislature.*

RESPONSE C. In drafting section 5.2.a., DEP was aware that no limitation was put on the age of survey data used to make the "documented reproduction" determination. DEP was further aware that the November 28, 1975 date set forth in 47CSR2, section 2.5, is only applicable to existing use determinations.

Throughout the Tier 2.5, and more recently Tier 3 processes, DEP has worked closely with DNR officials to carefully review trout survey data for accuracy and current applicability. Many times during the antidegradation proceedings, both agencies have represented that in absence of some catastrophic event, or greatly changed land use patterns, streams that have past evidence of reproducing trout should continue to provide for reproduction.

COMMENT D. *Section 5.3.a defines that when determining whether a water is a high quality water 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.” This language is vague and indefinite in two ways – in its use of the terms “in reasonably close proximity” and “representative.” We do not understand why the agency does not simply require that the sampling site be located within the stream to be designated as a Tier 3 water. Surely the significance of this designation on future activities in these areas justifies a more precise location for any sampling used to support the designation.*

RESPONSE D. See response to Comment X.H.

XXIV. COMMENTER: West Virginia Environmental Council (Don Garvin)

COMMENT A. *WVEC is a signatory to the extensive comments submitted by the West Virginia Rivers Coalition, and the commenter wishes to incorporate those comments here by reference.*

RESPONSE A. See response to Comment X.A. through J.

COMMENT B. *The agency must clarify how it will handle Tier 3 nominations, and this will require new legislative language in 60CSR5 (see the lengthier discussion in the WVRC comments).*

RESPONSE B. See response to Comment X.J. and response to Comment XVII.D.

COMMENT C. *The commenter takes this opportunity to point out what he believes are deficiencies (that now exist as a result of the Legislature’s recent actions) in the Antidegradation Rule in 60CSR5, and in the Antidegradation Implementation Procedures Rule, 47CSR2. He realizes that these comments are beyond the scope of this administrative interpretive rule, but feels strongly that these are issues that DEP will need to address sooner than later.*

The commenter feels it is essential that DEP immediately address the removal of protection from future degradation for a significant number of outstanding high quality waters that now exists due to the elimination of the Tier 2.5 stream category. As a result of eliminating Tier 2.5, streams not on public land will now be treated as Tier 2, which means that they can be polluted ultimately down to their water quality standard.

The commenter states, while the Legislature expanded the Tier 3 definition, it failed to address the definition of Tier 2 waters and whether the “de minimis” degradation provisions allowed under the existing Tier 2 definition will now provide adequate protection for the majority of high quality waters that will not qualify for Tier 3.

Also with the elimination of the Tier 2.5 category, WVEC feels strongly that the Tier 2 “de minimis” provisions are now inadequate to protect from future degradation a large number of outstanding high quality West Virginia streams, as required by the federal Clean Water Act.

The commenter urges DEP to address this important issue soon.

RESPONSE C. As the commenter stated, the concerns are beyond the scope of the interpretive rule and changes would need to be made to the legislative rules, 47CSR2 and 60CSR5. Also see response to Comment XVII. D.

XXV. COMMENTER: The Nature Conservancy (Rodney Bartgis, State Director; Elizabeth Wheatley, Director of Government Relations)

COMMENT A. *Under section 47-2A-4, Tier 3 Designation, 4.2. The TNC proposes the following change to add clarity and consistency to the rule’s designations: A potential classification of Tier 3 waters within the stated jurisdictional boundaries to include waters with national ecological significance due to the presence of habitat for federally threatened or endangered species, as listed by the U.S. Fish and Wildlife Service, or habitat for globally rare species as assessed by NatureServe (www.natureserve.org). Globally rare species can be considered those with a conservation status of the following:*

- a. G1 critically imperiled (very high risk of extinction),*
- b. G2 imperiled (high risk of extinction), or*
- c. G3 vulnerable (moderate risk to extinction)*

[for more information see <http://www.natureserve.org/explorer/ranking.htm#global>].

*The presence of habitat for a federally listed freshwater species clearly makes a stream a resource with national significance. We argue that national ecological significance is also realized with the presence of habitat for globally rare (G1-G3) freshwater species because these streams serve as a repository of Appalachian freshwater diversity, including regionally endemic species (e.g. candy darter, *Etheostoma osburni*) that occur nowhere else in the world.*

PROPOSED CLARIFICATION IN 4.2.a *“All high quality waters, naturally reproducing trout streams, and nationally ecologically significant waters...”*

RESPONSE A. The addition of the words “nationally ecologically” cannot be included in this rule as this language would then conflict with section 4.1.c of the parent legislative rule. Waters with federally listed freshwater species, however, would be good candidates for nomination under 60CSR§5-7.1.

COMMENT B. *Under section 47-2A-4, Tier 3 Designation, 4.2. The TNC proposes the following change to add clarity and consistency to the rule's designations: The potential location of Tier 3 waters to include waters bounded on both sides by all public lands managed by the National Park Service, such as streams within the New River Gorge National River unit, the Gauley River National Recreation Area, Harper's Ferry National Historical Park unit, and the Bluestone National Scenic River unit.*

PROPOSED CLARIFICATION IN 4.2.a "...streams located within the boundaries of State Parks, National Parks, National Forests, National Rivers, National Recreation Areas, National Historical Parks, and National Scenic Rivers."

RESPONSE B. See response to Comment I. A.

COMMENT C. *Under section 47-2A-5 "High Quality and Naturally Reproducing Trout Waters" 5.1, TNC supports the use of macroinvertebrate bioindices for determining the quality of a stream. We ask that the state continue its review of streams using this bioindex to consider if additional streams may qualify, especially for streams known for diversity of other fish species beyond trout.*

RESPONSE C. The DEP acknowledges the commenter's support and intends to continue the use of macroinvertebrate bioindices to assess stream quality.

COMMENT D. *Under section 47-2A-6 "Waters upstream of Tier 3 Segments" 6.1, TNC proposes the following clarification: As now described in proposed rule, waters upstream of a Tier 3 segment are automatically designated as Tier 1 or Tier 2. However, these streams segments may still be high quality waters, have reproducing populations of trout, or be of national ecological significance. Since all waters flow downstream, the protection of upstream segments will only benefit the freshwater habitats and species of a Tier 3 on public lands.*

We propose that the DEP allow it to be a landowner's option for such an "upstream segment" to be listed as Tier 3, and not automatically be designated as Tier 1 or 2 as the rule now states.

PROPOSED CHANGE in 6.1 "Waters upstream of a Tier 3 segment on public lands will be considered Tier 1 or Tier 2, as appropriate, unless Tier 3 classification is sought by the landowner...."

RESPONSE D. See response to Comment II. D. The process is in place in rule 60CSR5 to allow any stream or stream segment to be nominated for Tier 3 protection. Further, 60CSR§5-7.1 allows for the specific consideration of the impact of a Tier 3 designation on private property owners.

XXVI. COMMENTER: The West Virginia Coal Association (Jason Bostic)

COMMENT A. *Proposed sections 4.2 and 4.3: The West Virginia Coal Association supports the WVDEP's position that the Gauley River is not a Tier 3.0 water. The Gauley River cannot be designated as Tier 3.0 because: (1) it is not located within a State Park, National Park, or National Forest and (2) it was not designated under the Wild and Scenic Rivers Act 16 U.S.C. §§ 1271-1287 (1968) or the National Parks and Recreation Act of 1973. 16 U.S.C. §§ 1-461nt (1978).*

The Gauley River was designated as a Natural Recreation Area by the "West Virginia National Interest River Conservation Act of 1987." 16 USCA § 460ww (1988). The legislation stands alone and does not amend either the Wild and Scenic Rivers Act 16 U.S.C. §§ 1271-1287 (1968) or the National Parks and Recreation Act. 16 U.S.C. §§ 1-461nt (1978). The Act's purpose is to "protect and preserve the scenic, recreational, geological, and fish and wildlife resources of the Gauley River and its tributary, the Meadow River." 16 USCA § 460ww(a) (1988). A Tier 3.0 designation for the Gauley River is thus outside the scope of those waters that the West Virginia Legislature identified as candidates for a Tier 3.0 designation.

RESPONSE A. The DEP agrees that the Gauley River National Recreation Area is not designated under the Wild and Scenic Rivers Act or the National Parks and Recreation Act of 1978. However, in accordance with response to Comment I. A., the Recreation Area would be included under the term "national park" as a national park unit. Therefore, any waters, main stem or tributaries, within the boundaries of the National Recreation Area that meet either of the qualifying criteria, would be afforded Tier 3 protection.

XXVII. COMMENTER: West Virginia Department of Transportation, Division of Highways (Marvin G. Murphy, State Highway Engineer)

COMMENT A. *In response the WVDEP's public notice for the new interpretive rule under its antidegradation program -- 47CSR2A, Designation of Tier 3 Waters, the WVDOH would like to express our concern in view of the fact that the WVDOH is responsible for most of the roads in the State Parks, National Parks, and National Forests. While the WVDOH understands the need to protect the waters of the state, we hope that the designation and protection process does not result in excessive expenditures of resources and funds in order to maintain part of the West Virginia vital infrastructure of roads.*

RESPONSE A. The DEP recognizes the concerns of its sister agency regarding road infrastructure. Most highway activity would be considered a nonpoint source and thus deemed to be in compliance with antidegradation requirements pursuant to 60CSR§5-1.5.b, provided established BMPs are being followed. Those highway activities that require an NPDES permit would be expected to adhere to permit terms and conditions.

COMMENT B. *The April 30, 2008 Public Meeting Power Point Presentation notes 2009 revision to Category A designated uses for the Waters of the State. The WVDOH is concerned that the codified rule 47CSR2 seems to designate essentially all waters of the state as being capable*

of being used for human consumptions. While this is an admirable desire, it is neither practical nor possible. The rule acknowledges that the WVDEP Secretary may determine in the permit process that the water may be unsuitable for Category A; however, the rule seems to further require surveys and data collection beyond the information necessary to determine unsuitability. The WVDOH understands the WVDEP's need for thorough review, but the WVDOH believes a logical, practical, and fiscally responsible approach to data collection and submission should include that information necessary for the WVDEP Secretary to make an informed decision and eliminate mandatory data and information collection which may not be needed or relevant

RESPONSE B. The Category A revision referenced by the commenter is unrelated to the interpretive rule. The DEP notes that the proposed revisions to Category A have been withdrawn.

XXVIII. COMMENTER: Mountaineer Chapter Izaak Walton League of America (Donald Phares)

COMMENT A. *47-2A-4.1a and 47-2A-4.2a – Restricting designation of streams in designated wilderness areas and state parks, national parks and national forests to those bound on both sides by public land is biologically unreasonable. A stream that is biologically a National Resource Water remains as such whether the land is partially, totally or not at all public land. National Resource Water designation is based on biological conditions not on land ownership. To fail to designate an otherwise qualified stream because of land ownership defeats the purpose for having such a designation.*

RESPONSE A. See response to Comment XVI. A.

COMMENT B. *47-2A-4.3a – The federal law establishing Wild & Scenic Rivers require that all streams within National Forest Proclamation Boundaries that were proposed for designation as Wild & Scenic Rivers must be managed as if designated until they are designated or removed from the list by Congress. The US Forest Service complies with this requirement.*

RESPONSE B. The definition of Tier 3 waters, as passed by the Legislature in 47CSR2, is very specific in stating what waters are to be initially included as Tier 3 waters. As far as “Wild and Scenic Rivers,” the language only includes waters currently designated. However, those streams that have been proposed for designation may be good candidates for consideration in the nomination process.

COMMENT C. *47-2A-5.1 – In spite of the title of this paragraph, “High Quality & Naturally Reproducing Trout Waters”, only benthic macro-invertebrate community information will be used to designate the streams. Why not change the title of 47-2A-5 to Naturally Reproducing Macro-Invertebrate. The best & only sure way to determine if a stream has a naturally reproduc-*

ing trout population is to survey it. It is a faster, more certain method of determining the status of the fish population & is much better understood by the public.

RESPONSE C. DEP would like to clarify that waters qualifying as either “high quality waters” or “naturally reproducing trout waters” are Tier 3 waters in accordance with this section. For further clarification see response to Comment II. C.

COMMENT D. *47-2A-5.1a – As long as the stream survey is the determining factor, it is OK to do the work necessary to determine the insect classification assuming you have the manpower & time to do it. The DNR already have the stream surveys needed to designate almost all the streams.*

RESPONSE D. See response to Comment XXVIII. C. Either a determination of “high quality” or “naturally reproducing trout” can be used to qualify a stream. The agency acknowledges that the DNR has many stream trout surveys and other written documentation that can be used to identify qualifying streams. The DEP has many benthic surveys which have been done as part of the monitoring and assessment program, which also can be used for this purpose.

COMMENT E. *47-2A-5.2 – If a naturally reproducing trout population is adequate for designation of 4.2 waters, why would another method be used on other streams? Why use 2 different standards?*

RESPONSE E. The use of two independent qualifying criteria comes from the language describing Tier 3 waters in 47CSR§2-4.1.c., “high quality” or “naturally reproducing trout streams.”

COMMENT F. *47-2A-6.1 – Upstream activities above a Tier 3 stream section cannot be ignored. Such activities as mining, timbering, land development & any number of water polluting activities pose a real danger to Tier 3 streams. Without upstream restrictions, Tier 3 designation will likely be only temporary.*

There are several waters that are National Resource Waters under US EPA guidelines that have sections on both public & private property. An example is Seneca Creek of the North Fork of the South Branch, Pendleton County. Its headwaters are on US Forest Service property with a middle section on private property & then back on Forest Service property. Are two of the sections going to be Tier 3 & the middle section Tier 2? If so how will the lower section be provided adequate protection without Tier 3 water quality restricts on the middle section?

RESPONSE F. States have some discretion when defining Outstanding National Resource Waters (ONRW). The new description of Tier 3 waters in 47CSR2-4.1.c. contains West Virginia’s proposal resulting from the 2008 legislative session. This proposal has been submitted to EPA for approval.

Sections of high quality or naturally reproducing trout streams which do not meet the “bounded on both sides of the stream by public land” definition will not be afforded Tier 3 status, without going through the nomination process. See response to Comment II. D.

COMMENT G. *The use of a macro-invertebrate classification system is an extremely time consuming, labor intensive technique. The public does not & will not understand this type of stream classification. At the same time a fish survey shows absolutely whether or not a stream has a reproducing trout population. The method is understood & accepted by the public plus the WV DNR already has the data for almost every stream in the State that might be proposed for Tier 3 classification. Why spend thousands of tax payer dollars to obtain information that is a less reliable indicator of trout reproduction when that information is already available?*

It is time for the DEP to put the environment before politics. A reproducing trout population should be the only requirement for Tier 3 classification. There needs to be a quick, easy method to add qualifying streams to this classification. West Virginia has many high quality streams. Let's keep them that way.

RESPONSE G. A stream survey showing trout reproduction is sufficient to qualify a stream for Tier 3. It is not required to be both high quality and reproducing trout. As stated above, the description passed by the Legislature clearly identified two methods to qualify a stream for Tier 3, high quality or naturally reproducing trout. By limiting it to only reproducing trout, as the commenter suggests, any possibility for a high quality warm water stream to be considered and protected as a Tier 3 water would be eliminated.

XXIX. COMMENTER: Senator Jeffrey V. Kessler (Chair, Senate Judiciary Committee)

COMMENT A. *I am writing to express my concern regarding the proposed interpretive Rule 47CSR2A, which is the rule setting forth the process for selecting Tier 3 streams for West Virginia. During the course of negotiating the water quality standards rule, the Legislature established a two-prong test to determine Tier 3 streams, quality and location. I am concerned that your definition of “national parks” may be so narrow and restrictive that it would negate the Legislature’s attempt to protect high quality waters and naturally reproducing trout streams on public land.*

RESPONSE A. See response to Comment I. A.

XXX. COMMENTER: Eric Autenreith

COMMENT A. *Re. Tier 3 Designation 4.2.a. Stating that “As of the effective date of this rule, there are no national parks located within West Virginia.” is flawed and should be amended to emphasize the applicability of 47CSR§2-4.1c to all of the national Park units located within West Virginia – New River Gorge National River, Bluestone National Scenic River and Gauley River National Recreation Area and Harpers Ferry National Historic Park.*

In conversations with people who were present at the drafting of the legislation, including some legislators, it is clear that the words National Parks were meant to include the national park units whatever their designation and not National Parks as a designation applied to the crown jewels of the national park system.

The legislators who drafted this code are educated and surely know that there are no crown jewel national park units designated National Parks located in West Virginia and so they clearly meant to have the term applied to all national park units.

While West Virginia is a state that interprets laws by “plain meaning” rather than by “intent” the words national park/s are ambiguous and context and intent are to be taken into account when interpreting 47CSR§2-4.1.c.

I recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

RESPONSE A. See response to Comment I. A.

COMMENT B. *Re. Tier 3 Designation 4.1.a Designation of “waters located within the boundaries of federally designated wilderness areas”. This should be amended to include those eligible streams that may be bounded by public land on one side. The streams are integral parts of an ecosystem and the national value of a Wilderness Area should not be compromised by neighboring private land-owners.*

RESPONSE B. Very few streams captured under the wilderness stream designation are bounded by private land. Those segments that are located upstream of a Tier 3 water would be subject to 60CSR§5-6.3. Additionally, these streams would be candidates for the nomination process. Also see response to Comment XXVIII. A.

COMMENT C. *Re. Determining “High Quality and Naturally Reproducing Trout Streams”, the current interpretive rule calls for measurement based on healthy benthic macro-invertebrate communities only. While this is one measure for high quality water, it is not the only measure. In addition to healthy benthic macro-invertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.*

RESPONSE C. See response to Comment II. C.

COMMENT D. *The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.*

RESPONSE D. See response to Comment II. D.

XXXI. COMMENTER: Friends of Blackwater (Judith S. Rodd, Executive Director)

COMMENT A. *We appreciate the efforts of the WV Department of Environmental Protection and in particular the Division of Water and Waste Management to provide protection for West Virginia's rivers and streams. In addition, our rivers, streams and other waterways provide significant economic, scenic, recreational and ecological value not only to West Virginia residents but to all of those that visit and enjoy them.*

RESPONSE A. The DEP acknowledges the commenter's support.

COMMENT B. *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. Of particular concern here is the need to clarify and indeed confirm what the status would be of streams and rivers bound on only one side by public land. It would seem that these streams should also be afforded Tier 3 protection status or that further investigation should be undertaken to determine whether these waterways provide significant recreational, scenic or ecological value to be included in the initial list of Tier 3 rivers and streams. Additionally, it should further be noted that the language should not limit itself by saying all waters but should also include "and segments of waterways".*

RESPONSE B. See response to Comment II.A., response to Comment XVI.A. and response to Comment XXX.B.

COMMENT C. *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. The comments previously applied to section 4.1.a should again be applied here, however this interpretation should additionally account for state forests, and National Wildlife Refuges. Additionally, while there may be no National Park in West Virginia as of the date of this rule, there are units governed by the National park Service, including but not limited to the Gauley River National Recreation Area, Harper's Ferry National Historical Park and the Wheeling National Heritage Area and all of these areas should be included for immediate inclusion. Of further consideration in this section should also be National Natural Landmarks such as Canaan Valley, and Gaudineer Scenic Area.*

RESPONSE C. See response to Comment I. A. and XVI.A. Additionally, state forests, National Wildlife Refuges, National Natural Landmarks such as Canaan Valley, and Gaudineer Scenic Area were not included in the description of areas in which streams would be initially afforded Tier 3 status. The description of Tier 3 waters, as passed by the Legislature in rule 47CSR2, is very specific in stating what is initially included as Tier 3 waters. Any waters, not included in the description, are eligible for the nomination process as outlined in rule 60CSR5, and these types of areas would be good candidates.

COMMENT D. 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. This particular section should be amended to include all waters flowing through federal public lands that are governed by the National Park Service. Additionally, consideration should be given to rivers deemed eligible for federal Wild and Scenic status where a proposed designation has either been deemed by the US Congress to be not necessary because State protection will be adequate or a proposed designation has not yet been brought before the US Congress but the eligibility study has found favorably for designation.

RESPONSE D. See response to Comment I. A. and response to Comment XXVIII. B.

COMMENT E. 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. The current determination depends solely on a measurement for healthy benthic macroinvertebrate communities. While this can be a determining factor for high quality waters it is far from the only measure that should be considered. It is urged that the eligibility of water should be made only after all available biological, chemical and physical measurements have been given heavy consideration.

RESPONSE E. See response to Comment II. C.

COMMENT F. 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. It should be further clarified in this section that careful review of the impact of activities upstream from a Tier 3.0 section of a stream or river upon that Tier 3.0 section will be undertaken. It should be noted further that no degradation of Tier 3.0 segments is allowable regardless of the location of the initial potential impact. Further this should be applied proactively to streams that may be eligible to be added to the Tier 3.0 list via the nomination process where they meet multiple criteria for nomination.

RESPONSE F. See response to Comment II. D. Additionally, the application of protection proactively based on the fact that a stream may be nominated as a Tier 3 water is not consistent with the antidegradation provisions of 47CSR2 and 60CSR5.

COMMENT G. *The Friends of Blackwater believe that all of the Blackwater River should receive Tier 3 protection from its headwaters in Canaan Valley to its confluence with the Dry Fork at Hendricks. The Blackwater River and its tributaries flow through the Canaan Valley Wildlife Refuge, Monongahela National Forest, Canaan Valley State Park and Blackwater Falls State Park. The Blackwater River is treated as a Wild and Scenic River by the US Forest Service, has been nominated as a national natural landmark, and is an important trout fishery where trout survive year round. This national recognized river and tourism magnet for outdoor recreation deserves the highest possible protection by the state of West Virginia.*

RESPONSE G. All sections of the Blackwater River which are 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. The remaining sections of the Blackwater River, which do not meet the aforementioned criteria, can be nominated for future Tier 3 protection.

COMMENT H. *The Friends of Blackwater support these comments from the West Virginia Rivers Coalition:*

We recommend that the language in sections 4.1 and 4.2 should be changed to include not only waters, but segments of waters located within National Wilderness Areas, State Parks, National Parks and National Forests.

We recommend that the language in section 4.3 that lays out guidelines for Federally designated waters should be amended to include all waters within units of the National Park system.

When determining “High Quality and Naturally Reproducing Trout Streams”, the current interpretive rule calls for measurement based on healthy benthic macroinvertebrate communities only. While this is one measure for high quality water, it is not the only measure. I would recommend that in addition to healthy benthic macroinvertebrate communities, waters should also be considered eligible for designation based on a consideration of all available biological, chemical, or physical measurements.

The current interpretive rule allows for water upstream of a Tier 3 segment to be designated Tier 1 or 2. The possibility of Tier 3 designation should be added to section 6.1, and it should be made clear that activity upstream from a Tier 3 segment should not cause any harm or degradation to the downstream Tier 3 segment.

RESPONSE H. See response to Comment II. A, B, C and D.

XXXII. COMMENTER: West Virginia Trout Unlimited (Lee Orr, Fisheries Committee Chair)

COMMENT A. *Trout Unlimited supports and is a signatory on the comments provided by West Virginia Rivers Coalition.*

RESPONSE A. See response to Comment X., A through J.

COMMENT B. *Trout Unlimited supports the comments provided by West Virginia Highlands Conservancy.*

RESPONSE B. See response to Comment XVII., A through D.

COMMENT C. *West Virginia Trout Unlimited would like to voice its disapproval of the wholesale elimination of protection on streams that had been designated Tier 2.5. These were hundreds of streams that contained wild natural reproducing trout. Streams that are owned by all the citizens of West Virginia and that's regardless of whether they flow through private or public land, and we would just like to be on record that we disapprove of the rule as it stands now.*

RESPONSE C. See response to Comment XVI.A., response to Comment XVII.D. and response to Comment XXIV.C.

XXXIII. COMMENTER: Delegate Carrie Webster (Chair, House Judiciary Committee)

COMMENT A. *I am writing to express my concerns and strong objection to the Department of Environmental Protection's [DEP] Division of Water and Waste Management proposed interpretive rule, 47CSR2A. It is my understanding that based upon DEP's interpretation of certain language contained in a legislative rule recently passed by the West Virginia State Legislature; neither the New River Gorge National Park or any other 'national park' in West Virginia will receive or be eligible to receive 3.0 Tier designation that is reserved for only those exceptional state streams that deserve special protection based on their water quality.*

As Chair of the House of Delegates Judiciary Committee, I was personally involved in the lengthy discussions which led to the passage of a Committee amendment that adopted language creating the current 3.0 stream designation process and incorporated the term "national park." Former DEP Secretary Stephanie Timmermyer and her legal counsel, Karen Watson, were also present and significantly involved in crafting language that specifically included and referred to "national park" in the section of the rule involving the 3.0 stream designation process.

In pertinent part, the statute reads:

All Federally designated rivers under the "Wild and Scenic Rivers Act", 16 U.S.C. §1271 et seq.; all streams and other bodies of water in state parks which are high quality waters or naturally reproducing trout streams; waters in national parks and forests which are high quality waters or naturally reproducing trout streams; waters designated under the "National Parks and Recreation Act of 1978", as amended; and pursuant to subsection 7.1. of 60CSR5, those waters whose unique character, ecological or recreational value, or pristine nature constitutes a valuable national or state resource. (Emphasis added)

Because this language is the subject of this proposed interpretive rule, I offer my personal comments regarding my understanding of what "national parks" was intended to mean.

First, after conferring with my legislative counsel about this matter, I am convinced that DEP is taking the wrong legal approach in interpreting this rule language. Instead of focusing on what the term "national park" means on the federal level, DEP should apply the usual practices of

statutory construction in this state and begin with a legal analysis of what the West Virginia State Legislature understood the term "national park" to mean. Any federal definition or understanding might be suggestive of what this term means but in no way is it controlling or particularly persuasive in this matter. Pursuant to long-standing legal precedent, what the West Virginia State Legislature understood controls the analysis of what the intent of this legislation is. Not the federal definition. In other words, it is the West Virginia Legislature who defines and establishes our state laws. Not the United States Congress.

Second, it is important to point out that our state code and rules contain many terms that are defined in a different manner than our federal counterpart. For example, W.Va.Code § 20-2-23a, relating to the White water Commission, refers in our state statute to the "New River Gorge National Park." Thus, if our statute says "national park," then for purposes of our state statute, it is referred to as a "National Park," and is one, even if there is disagreement with the federal use of the term "National Park."

The present rule contains language that should allow the DEP to reasonably and inescapably conclude that the term "national park" was meant in the broader sense and would include "units" of the national Park system. Thus, prior to final promulgation of this rule, I implore you to undertake a meaningful legal analysis of what the plain meaning of national park, as the West Virginia State Legislature understood it, meant when it passed a law including this term. Also, please consider that your interpretation would merely lend the words of our Committee amendment without any meaning or force. This flies right in the face of our rules of statutory construction. Importantly, if the Legislature used the words "national park" to refer to non-existent parks in this state, then there is no reason for those words to be inserted into that legislation. Rules of statutory construction in West Virginia require you to give meaning to all words enacted by the Legislature.

In conclusion, as someone who was directly involved with the DEP and others in reaching agreement on the precise wording of the amendment containing this language, I can assure you that the words "national park" were intentionally included and only after hours of discussion and debate with many stakeholders, including DEP's ranking official and chief legal counsel.

I strongly urge you to reconsider your interpretive rule and refile it with the correct, broader use of the term "national park." Failure to do so could result in future legislative action and/or legal action by other stakeholders who were involved in these same discussions and understood the words "national parks" to include certain national parks in West Virginia. I prefer to avoid both. Eight years of debate and discussion about this rule is long enough.

RESPONSE A. See response to Comment I. A.

XXXIV. COMMENTER: U.S.EPA Region III (Cheryl Atkinson)

COMMENT A. *In addition to waters located in federal wilderness areas, state and national parks, national forests, and specifically designated federal waters. West Virginia should consider*

wildlife refuges and waters of exceptional recreational or ecological significance as high quality waters that constitute an outstanding national resource.

RESPONSE A. Although we appreciate the comments, the agency must adopt language that is authorized by and consistent with the underlying rule passed by the Legislature. Other waters with unique characteristics can be nominated for Tier 3 protection in accordance with 60CSR§5-7.1.

COMMENT B. *“Waters Located in State Parks, National Parks and National Forests” are defined as “all high quality waters . . . within the boundaries of parks and forests” (as stated in section 4.2.a.). And these waters will be considered high quality based on “their biological integrity as evidenced by an exceptionally healthy benthic macro invertebrate community” (as stated in section 2A-5). In addition to basing the State’s high quality waters on biological integrity the State may want to explain in their Interpretive Rule how, and to what extent, the State will evaluate the chemical and physical integrity for Tier 3 waters. If the State is not using chemical and physical integrity it should explain why not.*

RESPONSE B. See response to Comment II. C.

COMMENT C. *While it is the state’s discretion, which waters to designate Tier 3 (including water segments upstream of Tier 3), the State should note that the criteria (and subsequent permits with water quality based effluent) must protect the downstream Tier 3 water.*

RESPONSE C. See response to Comment II. D.

XXXV. COMMENTER: National Parks Conservation Association (Erin Haddix St. John)

COMMENT A. *We were pleased to see that portions of the waters of both the New River Gorge National River and the Bluestone National Scenic River were given Tier 3 designation. However, we are concerned with the current wording of the proposed section 47-2A-4.2.a which states “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 within West Virginia.”*

We suggest changing the wording above from “national parks” to “units of the National Park system” and striking the last sentence. This change would allow waters in the New River Gorge National River, the Bluestone National Scenic River, the Gauley National Recreation Area, and Harpers Ferry National Historical Park to be considered for Tier 3 protection.

Although the various designations of the units of the national park system (National Park, National River, National Recreation Area, National Historic Park, etc.) can cause confusion, Congress clearly mandated in the Redwoods Amendment of 1978 (16 U.S.C. 1a) a system-wide standard of protection. Thus the natural and cultural resources of any unit of the National Park sys-

tem are provided equal protection regardless of specific designation. Thus the national park units in West Virginia, although not designated National Parks, do legally have the same level of protection. The change above would afford these federally designated parks in West Virginia the same level of protection currently proposed for state parks and national forests and more clearly reflect the protections intended by Congress.

RESPONSE A. See response to Comment I.A. As outlined in response to Comment I.A., all high quality waters or naturally reproducing trout streams located within units of the national park system would be considered Tier 3 waters. This would include the four units specifically mentioned by the commenter, as well as any other units in the park system. With respect to the New River Gorge National River and the Bluestone National Scenic River, however, please see response to Comment XVII.C. explaining that the main stems will be Tier 3, regardless of whether they are high quality or naturally reproducing trout streams. Also, see response to Comment XXXV.B. and response to Comment XVII.C.

COMMENT B. *While we are pleased that some waters of the New River Gorge National River and the Bluestone National Scenic River are protected under section 4.3.a we are concerned that this section both is limited to portions of the main stem of these rivers and does not afford protection to the Gauley River National Recreation Area. We suggest removing the reference to the rivers main stem and rewording 4.3.a to all waters within these units of the National Park system. Furthermore, we request that specific protections be afforded the Gauley River National Recreation Area.*

RESPONSE B. See response to Comment I. A. and response to Comment XVII.C.

XXXVI. COMMENTER: Robert Radabaugh

COMMENT A. *Commenter referenced the comments supplied by IOGA.*

RESPONSE A. See response to Comment XXIII. A through D.

XXXVII. COMMENTER: Lance Schultz

COMMENT A. *This rule appears to me to be highly subjective and ambiguous in nature throughout the content of the draft proposed rule. In the section titled 4.3. Specifically Designated Federal Waters it states "currently limited to portions of the main stem of the Bluestone River and portions of the main stem of the New River." I must ask that you clarify specifically which "portions" by latitude and longitude for clarification.*

RESPONSE A. Soon after 47CSR2A becomes effective, DEP will make available maps and GIS coverages depicting the segments of all waters receiving Tier 3 protection. The segments of the New and Bluestone are currently known as they are illustrated on maps associated with the federal designations. The specific coordinates are as follows: from Latitude 37 31 29 Longitude

81 01 43 (upstream terminus) to Latitude 37 32 41 Longitude 80 59 59 (downstream terminus) on the Bluestone River and from Latitude 37 40 41 Longitude 80 53 31 (upstream terminus) to Latitude 38 04 37 Longitude 81 05 07 (downstream terminus) on the New River.

COMMENT B. *Section 5.1.a. High Quality and Naturally Reproducing Trout Waters characterizes or defines "high quality" and "naturally reproducing" trout waters as "exceptionally healthy benthic macroinvertebrate community" further defining such as "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 25th percentile of the applicable reference streams. (e.g., West Virginia Stream Condition Index score greater than 78).*

What does this mean? What are the DEP protocols? How were they applied? What qualifies anyone at DEP to establish a "baseline" for "healthy water." What was the sample size? Is it a "representative sample? Were samples taken before, during or after discharge rainfall events? What defines a "reference" stream? Are samples statistically representative or significant? How often were samples recorded? How "old" is the data set? Is it even relevant anymore? What has changed since these stream results were tabulated? Are such results relevant today? What specific criteria did DEP adopt in establishing its protocols?

RESPONSE B. Both federal and state law task DEP with assessing the health of West Virginia's waters and reporting on their condition. One of the primary tools for determining the health is by assessing the benthic macroinvertebrate community. DEP has done this type of monitoring since 1996 and has published protocols which can be found on the web at this link: http://www.wvdep.org/Docs/536_WV-Index.pdf.

Similarly, the protocol for defining a reference stream is found at this link: http://www.wvdep.org/Docs/15670_Reference_Criteria_March_2007.pdf.

Biological monitoring is relied heavily upon for assessment purposes because the observed organisms are indicators of long-term stream health. Episodic events which may temporarily negatively alter a stream's quality (e.g., rainfall event) are thus not used to judge a stream's overall health. Macroinvertebrate data used to make Tier 3 determinations is no older than 1996, and decisions relative to a stream's health can be made with only one properly collected benthic macroinvertebrate community sample. Simply put, if the benthic community scores high (e.g., 78 or greater West Virginia Stream Condition Index points) the stream has had desirable water quality and physical habitat for some time. Also see response to Comment II.C.

COMMENT C. *Section 5.2. Considers a stream naturally reproducing trout waters based on "documented reproduction" further defining "documented reproduction" as a DNR or DEP fish survey or other written documentation that verifies the presence of reproducing brown, brook or rainbow trout. Does a "single" fish define "presence?" What qualifies anyone at DNR or DEP to establish a "fish survey" to test for "documented reproduction?" How are these evidences really "documented" or "verified?" It further states, "reproduction may also be evidenced by the pres-*

ence of a single year class after consideration of the stream, its location and stocking practices in the area." What does this mean? What "considerations" are given to the stream?

RESPONSE C. Both DNR and DEP employ professional biologists who are schooled and experienced in fishery and aquatic resources. Many of these biologists have spent their careers surveying differing fisheries and as a result have developed a vast knowledge of the range of fishery conditions found within the state. One of the primary tools used in assessing a fishery is electroshocking.

Using this collection method, biologists collect fish and record the length, weight and quantity of fish encountered in a particular stream segment. With their knowledge of the biology, the previous stream stocking records and the stream characteristics, they make the professional decision as to whether the stream contains a reproducing trout population. A documented stream survey or other written documentation, demonstrating the trout reproduction, is necessary before any stream will receive Tier 3 protection based on the fishery.

The rule contains language allowing for the presence of a single year class to qualify for reproduction as the agency was trying to capture the wide range of ecological scenarios. Specifically an electroshocking survey may take place in an undisturbed area of national forest and only one year class of brook trout may be found. In this scenario, brook trout are known by the biologist to have never been stocked in that water, habitat conditions are suitable, and the biologist may also know that the prior two spawning seasons were unsuccessful due to extreme weather conditions. Thus, since the brook trout were not stocked, weather conditions precluded successful spawning and the habitat is supportive - the one year class reflects that the brook trout have successfully spawned in the stream and are likely to spawn again when conditions permit. It is not uncommon to lose year classes in fish populations. Further, the presence of one fish would not be used to classify a stream as reproducing, absent consideration of other supporting information including, but not limited to, location, habitat, previous surveys, stocking history, time of year and weather.

XXXVIII. COMMENTER: Sara Cowgill

COMMENT A. *I believe that water is a very valuable resource and that we need to protect the resources we have. We should be protecting more than 70 percent of the water in the state, not just the national or state forests. Water needs to be protected, not just for drinking water for people but for the use of the game and trees and fish. West Virginia has one of the most stable, mature ecosystems in the world and it needs to be protected. If we continue to destroy our streams and forests we are going to be in trouble.*

RESPONSE A. The DEP acknowledges the comment and agrees that water is a very valuable resource which needs to be protected. The passing of the Water Quality Standards rule (47CSR2) and the Antidegradation Implementation Procedures rule (60CSR5) during the 2008 legislative session and the creation of the interpretive rule to aid in their implementation are positive steps towards protecting this valuable resource.

COMMENT B. *The most disturbing part of the rule is 3.8, “And regulated activities that qualify for coverage under the Corps of Engineers, regional or nationwide permit, pursuant to § 404 of the Federal Act will not be required to undergo a Tier 2 antidegradation review.” This amounts to the filling in of waters and that is not good. The DEP should be taking care of our streams.*

RESPONSE B. The commenter’s concern is outside of the scope of authority for this rule. The section being referred to by the commenter is contained in rule 60CSR5, “Antidegradation Implementation Procedures”, not the interpretive rule, 47CSR2A, which was out for public comment.

COMMENT C. *I also support the comments of the Rivers Coalition, the Highlands Conservancy and Lee Orr who spoke first.*

RESPONSE C. See response to Comments X. A through J, Comments XVII. A through E and Comments XXXII. A through C.