

Do Not Mark In This Box

7006 JUL 28 P 2:07

OFFICE WEST VIRGINIA
PROPOSED RULE OF STATE

TITLE OF RULE BEING PROPOSED:_____

Sophia R. Timmerman
Authorized Signature

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

SERIES 5
ANTIDEGRADATION IMPLEMENTATION PROCEDURES

2006 JUL 28 P 2:07

FILED

§60-5-1. General.

1.1. Scope. -- This rule establishes the procedures by which the Department of Environmental Protection shall implement the State's water quality anti-degradation policy found at ~~46 CSR 1-4~~. 47 CSR 2-4.

1.2. Authority. -- W. Va. Code §§~~22-11-7b (a)&(b)~~ §22-11-7b(d). ~~House Bills 3240 and 2663~~.

1.3. Filing Date. -- ~~July 19, 2002~~.

1.4. Effective Date. -- ~~July 19, 2002~~.

1.5. Applicability

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

1.5.b. Nonpoint source activities will be deemed to be in compliance with antidegradation requirements with the installation and maintenance of cost-effective and reasonable best management practices in accordance with ~~46 CSR 1-4.1.b.~~ 47 CSR 2-4.1.b. herein. These include, but are not limited to, best management practice programs for silviculture administered by the Division of Forestry, programs for oil and gas operations administered by the Office of Oil and Gas of the Department of Environmental Protection, nonpoint source construction activities, and reasonable land, soil and water conservation

measures and practices applied to agricultural nonpoint sources

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

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

§60-5-2. Definitions.

2.1. ~~For purposes of this rule the term "agency"~~ "Agency" or "agencies" refers to means the Department of Environmental Protection or other federal, state, or local governmental entities with regulatory authority over activities that may affect water quality.

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

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

2.4. "Baseline water quality" means that ambient concentration established at the time of an

initial antidegradation review under rules effective May 17, 2001, for a stream or stream segment or any other water(s) of the state.

2.5. For purposes of this rule references to the "Board" or "EQB" mean means the West Virginia Environmental Quality Board.

~~2.3.~~ 2.6. For purposes of this rule the term "minimum uses" refers to "Minimum uses" means recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

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

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

~~2.2.~~ 2.9. For purposes of this rule the term "regulated entity" "Regulated entity" refers generally to means any regulated entity that affects or is proposing an activity that will affect water quality. For example, an applicant for a WV/NPDES permit, a WV/NPDES permit holder, or an owner or operator of an activity that discharges pollutants into a water of the state would be a regulated entity.

~~2.4.~~ 2.10. For purposes of this rule the term "Secretary" refers to means the Secretary of the Department of Environmental Protection or its successor.

2.11. "Trading" means establishing upstream controls for a parameter of concern to compensate for new or increased downstream sources for the same parameter resulting in

improved water quality for the parameter traded. More than one parameter of concern may be traded on a given stream. Trading may involve point sources, nonpoint sources or a combination of point and nonpoint sources. Unused permitted capacity cannot be traded.

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

~~2.6.~~ For purposes of this rule the definitions contained in 46 CSR 1-2 effective May 17, 2001 are hereby incorporated herein.

§60-5-3. Antidegradation Review Process.

3.1. As set forth in ~~46 CSR 1-4.1~~ 47 CSR 2-4.1, the State's antidegradation policy requires that existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. This requirement applies to all waters of the state.

3.2. Except where a water segment is specifically listed as a Tier 2.5 or Tier 3 water, the following sections outline how the agency conducting the antidegradation review will determine the level of protection ("tier") assigned to the receiving water body associated with the activity subject to this rule.

3.3. Uses. The Secretary, in conducting an antidegradation review, must determine the existing uses of the receiving water body associated with the proposed activity. The Secretary shall determine the existing uses of the water body by identifying the uses set forth in ~~46 CSR 1 Section 6~~ 47 CSR 2-6 that the water body currently supports, or has supported since November 28, 1975. The regulated entity may be required to provide data sufficient for the

permitting agency to determine the existing uses of the water segment.

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

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

3.5.a. Water segments listed in Appendix A of this rule shall receive Tier 2.5 protection.

3.5.b. Water segments within a federally designated Wilderness Area, as well as other water segments specifically listed ~~in this rule~~ as an outstanding national resource water pursuant to subsection 8.2 shall receive Tier 3

protection.

3.5.c. Water segments not within a federally designated Wilderness Area, not listed pursuant to subsection 8.2 and not listed in Appendix A of this rule shall receive Tier 1 protection, and shall receive Tier 2 protection if the water segment is determined, pursuant to subsections 5.1. through 5.3. of this rule, to be a high quality water for purposes of antidegradation review.

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

3.5.e. To the extent practicable, a list of water segments protected under Tier 2.5 or Tier 3 will be maintained on the West Virginia Department of Environmental Protection's website.

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

3.7. On or after July 2, 2001, the effective date of these implementation procedures, new and reissued WV/NPDES general permits will be evaluated to consider the potential for significant degradation as a result of the permitted activity. Regulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier 2 antidegradation review as part of the permit registration process. Regulated activities that are granted coverage by a WV/NPDES permit that will degrade a Tier 2.5 or Tier 3 water segment must comply with the requirements of sections 6 and 7 herein.

3.8. Regulated activities that qualify for coverage under a Corps of Engineers regional or nationwide permit pursuant to section 404 of the Federal Act that has been certified by the state pursuant to section 401 of the Federal Act will not be required to undergo a Tier 2 antidegradation review, provided, however, that where an individual 401 certification is required, the Secretary may require an appropriate antidegradation review. Where an activity covered

by a regional or nationwide permit pursuant to section 404 of the Federal Act and certified pursuant to section 401 of the Federal Act allows for filling of a water, this exemption only applies to the site of the fill, and does not apply to activities downstream of the site of the fill. Regulated activities that are granted section 401 certification that will degrade a Tier 2.5 or Tier 3 water segment must comply with the requirements of sections 6 and 7 herein.

3.9. The Secretary shall develop guidance which addresses these implementation procedures and provides additional information to persons conducting regulated activities that are affected by these procedures. Such guidance shall include, but shall not be limited to, information regarding the following: (a) the determination of baseline water quality; (b) social and economic importance pursuant to subsection 5.8; and (c) the reasonable alternatives analysis required by subsection 5.7. The Secretary shall provide an opportunity for public review and comment before finalizing any guidance. ~~Within twelve months of the effective date of this rule, the Secretary shall report to the advisory committee established pursuant to W. Va. Code §22-1-9 regarding the status of its implementation.~~

§60-5-4. Tier 1 Protection.

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

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

4.3. In determining whether a water segment is afforded only Tier 1 protection, the agency will focus on whether the water segment is meeting or failing to meet minimum uses, except that, notwithstanding any other provision of this rule, the main stems of the Monongahela

River, and the Kanawha River from milepoint 72 to the confluence with the Ohio River shall be afforded Tier 1 protection only.

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

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

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

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

4.8. Where a proposed activity will result in a new or expanded discharge that would otherwise prevent attainment of an existing use in a water subject to Tier 1 protection, the applicant may be allowed to satisfy antidegradation review requirements by implementing or financing upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading

assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trade must be enforceable.

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

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

5.2. Tier 2 waters need not exceed the level of quality needed to meet or exceed numeric criteria for every parameter. ~~Water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection.~~ For example, a water segment listed on the state's 303(d) impaired waters list can qualify for Tier 2 protection, but where the impairment that caused the water segment to be listed results in failure to attain minimum uses, that water segment will be afforded only Tier 1 protection.

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

ecological, health and public use perspective.

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

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

5.6. Tier 2 antidegradation review.

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

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

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

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

~~5.6.c. The Secretary may determine that certain types or classes of activities should be exempt from Tier 2 review after balancing the relative impact of the activities on~~

~~water quality against the overall benefit of the activities to public health and welfare or the environment. The Secretary's discretion to exempt activities from review pursuant to this section shall be exercised and construed narrowly. Such types or classes of activities may include, for example, expansions or improvements to publicly owned wastewater treatment facilities or activities, public benefit activities by governmental entities, or discharges related to environmental remediation activities. Where the agency tentatively determines to grant an exemption under this provision, notice of this determination must be included in any required public notice, such as public notice required prior to issuance of an NPDES permit. The Secretary's final determination is a final decision and subject to appeal to the Environmental Quality Board. A proposed new or expanded discharge from a publicly owned or publicly owned and privately operated sanitary wastewater treatment plant constructed or operated to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage, is exempt from Tier 2 review. This exemption would include combined sewer overflow elimination or reduction projects affecting one or more water bodies and applies only where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters.~~

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

critical flow conditions for the parameters of concern: except that discharges affecting dissolved oxygen, pH, fecal coliform or temperature will be deemed insignificant provided that:

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

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

5.6.c.3. Thermal discharges will be consistent with 316(a) of the Federal Act or will not increase the temperature more than two degrees Fahrenheit at any time or cause other violations of applicable criteria in 47 CSR 2-8.28 through 8.28.4, Appendix E, Table 1.

5.6.c.4. For fecal coliform, necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

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

5.6.f. 5.6.e. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 2 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of

safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trades must be enforceable.

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

5.7. Review of alternatives.

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

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

5.7.b.1. Pollution prevention measures;

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

5.7.b.3. Water recycle or reuse;

5.7.b.4. Process changes;

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

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

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

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

5.7.b.9. Alternative discharge locations.

5.7.c. After alternatives to allowing degradation have been adequately evaluated, a determination shall be made regarding whether cost-effective and reasonable non-degrading or less-degrading alternatives to the proposed activity shall be required. This determination will be based primarily on the alternatives analysis developed by the regulated entity, but may be supplemented with other information and data. As a rule of thumb, cost effective and reasonable non-degrading or less-degrading pollution control alternatives with costs that are less than 110% of the costs of the pollution control measures associated with the proposed activity shall be considered reasonable.

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

5.8. Review of social and economic importance.

5.8.a. If significant degradation would occur, even after application of reasonable

less-degrading or non-degrading alternatives, a determination shall be made as to whether the proposed activity is necessary to accommodate important economic or social development in the area in which the waters are located.

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

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

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

5.8.c.2. Increased production;

5.8.c.3. Improved community tax base;

5.8.c.4. Housing;

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

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

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

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

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

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

5.8.d.4. Government

fiscal base; and

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

5.8.e. Once the available information pertaining to the socio-economic importance of the proposed activity has been reviewed by the agency, a preliminary determination regarding importance shall be made. In evaluating the regulated activity's demonstration of socio-economic importance, the agency may use EPA's Interim Economic Guidance for Water Quality Standards Workbook (EPA 823-B-95-002, March, 1995). Where there is a request for a variance from groundwater standards pursuant to 47 CSR 57 for existing sites where activities on those sites have the potential to impact surface water from contaminated groundwater and the activity is otherwise subject to this rule, the socio-economic justification process required under 47 CSR 57 subdivision 6.2.i will satisfy the requirements of this section. If the proposed activity is determined to have social or economic importance in the area in which the affected waters are located, the substance and basis for that preliminary determination shall be documented and the Tier 2 review shall continue.

5.9. Intergovernmental coordination for Tier 2 reviews.

5.9.a. The intergovernmental coordination requirements in ~~46 CSR 1-4.1.b.~~ 47 CSR 2-4.1.b. will be accomplished by providing notice to those agencies listed in Appendix B that the Secretary believes may have regulatory oversight of the regulated activity of the preliminary determination of the socio-economic review and requesting comments from those agencies regarding that review.

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

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

documented and made a part of the public record.

§60-5-6. Tier 2.5 Protection Review Procedures (Waters of Special Concern). See ~~46 CSR 1-4.1.c~~ 47 CSR 2-4.1.c and ~~46 CSR 1-2.29~~ 47 CSR 2-2.19 for a description and definition of Waters of Special Concern.

6.1. Any proposed activity that would degrade a water segment listed in Appendix A of this rule as waters of special concern will go through the Tier 2.5 antidegradation review process. Discharges from publicly-owned or publicly-owned and privately operated sanitary wastewater treatment plants that expand to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage, shall be permissible in a Tier 2.5 water segment where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters: Provided, That less degrading alternative treatment technologies are considered and used where costs for such technologies are within budgets and rates approved for such expansion project. This provision may extend to combined sewer overflow elimination or reduction projects. ~~Except as provided in subdivisions 6.2.a. and b. of this rule, the listing procedure for Tier 2.5 waters is set forth in section 8.1. herein. Currently listed Tier 2.5 waters are included in Appendix A to this rule.~~

~~6.2. Initial Presumptive Listing for Tier 2.5.~~

~~6.2.a. The stream or stream segments that appear on Appendix C shall be presumed to qualify as Tier 2.5 waters. Before any such stream or stream segment is protected as Tier 2.5 waters (and listed on Appendix A) the Secretary shall do the following:~~

~~6.1.a.1. Assure compliance with all provisions of article one-a of chapter twenty-two; and~~

~~6.1.a.2. No sooner than six months and no later than twelve months from the effective date of this rule, provide, where practicable, individual notice to property~~

~~owners along such stream or stream segment. In addition, notice by publication shall be provided to all property owners and others with a legal interest in the property. The notice shall include at a minimum, the information set forth in subparagraphs 8.1.a.1.A. through 8.1.a.1.D. of this rule. The notice shall indicate that a property owner or holder of legal interest in the property shall have thirty days to file an objection to the inclusion of the stream or stream segment as a Tier 2.5 water.~~

~~6.2.b. Should an objection be received from an owner or holder of a legal interest in property adjoining any stream on Appendix C, the Secretary shall provide written justification for the inclusion of the stream as a Tier 2.5 stream with reference to the criteria set out in paragraph 8.1.a.2. of this rule. The Secretary shall then provide a thirty-day comment period on the proposed action.~~

~~6.2.b.1. Where no objection is made to the inclusion of a stream or stream segment as a Tier 2.5 water, the stream shall be included by the Secretary on Appendix A without further justification.~~

~~6.2.b.2. Any final decision by the Secretary with regard to the inclusion of a stream in Tier 2.5 made following the procedure set forth in this paragraph, may be appealed to the EQB. For those streams for which the Secretary receives an objection to inclusion of the stream as a Tier 2.5 stream, the Secretary shall make a decision whether to include the stream on the initial listing on Appendix A and shall provide a written justification for the decision.~~

~~6.2.c. Following the initial listing for Tier 2.5 waters, as described in subdivisions 6.2.a. and b. above, subsequent additions or deletions from Appendix A shall be in accordance with section 8.1., herein.~~

6.2. Currently listed Tier 2.5 waters are included in Appendix A to this rule. Subsequent additions or deletions from Appendix A shall be in accordance with subsection 8.1.

6.3. Tier 2.5 antidegradation review.

6.3.a. No significant degradation

of Tier 2.5 waters will be allowed. For Tier 2.5 waters, degradation will be deemed significant if it exceeds the baseline water quality plus ten percent of available assimilative capacity (the difference between the baseline water quality and the water quality criteria), whether from a single activity or cumulatively, except that discharges affecting dissolved oxygen, pH, fecal coliform or temperature will be deemed insignificant provided that:

6.3.a.1. For dissolved oxygen, the maximum DO sag will not be greater than 0.4 ppm based on an appropriate wasteload allocation model, unless that reduction is projected to cause a violation of ~~46 CSR 1-8.12 through 8.12.3~~, 47 CSR 2-8.12 through 8.12.3, Appendix E, Table 1;

6.3.a.2. pH is maintained within the 6.0 to 9.0 range;

6.3.a.3. Thermal discharges will be consistent with 316(a) of the Federal Act or will not increase the temperature more than two degrees Fahrenheit at any time or cause other violations of applicable criteria in ~~46 CSR 1-8.28 through 8.28.4~~ 47 CSR 2-8.28 through 8.28.4, Appendix E, Table 1.

6.3.a.4. For fecal coliform, necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

6.3.b. Where a Tier 2.5 water has one or more parameters that fail to meet water quality criteria, the Secretary shall use best professional judgment in setting appropriate limitations for such parameters, with the goal of improving baseline water quality for such parameters over time.

6.3.c. Where baseline water quality has not been established for the Tier 2.5 water segment for a parameter of concern that is reasonably expected to be discharged into the water segment as a result of a new or expanded regulated activity, a determination of the baseline water quality for the receiving water segment must be established for that parameter

of concern prior to allowing any new or expanded discharge.

6.3.d. The Secretary may consider data for establishing the baseline water quality from a federal or state agency, the regulated entity, the public, or any other source, as long as the data are recent and reliable. The regulated entity may be required to provide baseline water quality for those parameters of concern that are reasonably expected to be discharged as a result of the regulated activity into the affected water segment.

6.3.e. After the baseline water quality has been established for the parameters of concern reasonably expected to be discharged by the proposed activity, the *de facto* criteria for those parameters of concern will equal the established baseline water quality plus ten percent of available assimilative capacity.

6.3.f. Regulated entities with discharges existing on or before July 2, 2001, the effective date of this rule, that discharge into a Tier 2.5 water may be required to submit an alternatives analysis upon renewal of its application or upon the written request of the Secretary to evaluate reasonable and cost-effective alternatives that would reduce the activity's impact to a Tier 2.5 water.

6.3.g. Discharges from activities in waters upstream of a water of special concern shall not result in the ambient water quality within the Tier 2.5 water exceeding the *de facto* criteria.

6.3.h. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 2.5 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists

regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trades must be enforceable.

6.3.i. If a determination is made that the activity will result in significant degradation of a Tier 2.5 water, the activity shall not be allowed.

6.3.j. If the activity is determined not to result in significant degradation of a Tier 2.5 water, the activity may be allowed. In such case the antidegradation review findings will be documented in writing and public notice activities will be initiated consistent with subsections 9.1 through 9.5 herein.

6.3.k. Short-term water quality impacts. The Secretary shall determine whether a proposed activity is short term in nature and the resulting changes in water quality will be temporary and have limited effects. Notwithstanding subdivisions 6.3.a. and 6.3.e. herein, short-term activities which result in less than a 10% change in the available assimilative capacity may be deemed to have limited effects. Determinations will be made on a case-by-case basis and shall be made after consideration of the following factors:

6.3.k.1. The length of time during which the water quality will be lowered;

6.3.k.2. The percent change in ambient concentrations;

6.3.k.3. The parameters affected;

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

6.3.k.5. The degree to which achieving applicable water quality standards during the proposed activity may be at

risk;

6.3.k.6. The potential for any residual long-term influences on existing uses; and

6.3.k.7. The cumulative impacts from all sources for the parameters affected.

§60-5-7. Tier 3 Protection Review Procedures (Outstanding National Resource Waters). See ~~46 CSR 1-4.1.d and 46 CSR 1-2.15~~ 47 CSR 2-4.1.d and 47 CSR 2-2.9 for a description of Outstanding National Resource Waters (ONRW).

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

7.2. Tier 3 antidegradation review. The agency shall use the following antidegradation implementation procedures for evaluating new or expanded regulated activities that have the potential to affect Outstanding National Resource Waters (ONRWs), as described in ~~46 CSR 1-4.1.c; 47 CSR 2 - 4.1.d.~~ and as ~~nominated and approved~~ listed in accordance with ~~the provisions of this rule.~~ subsection 8.2.

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

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

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

7.2.a.3. The parameters affected;

7.2.a.4. The likelihood for long-term water quality benefits to the segment

(e.g., as may result from dredging of contaminated sediments);

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

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

7.2.b. If after review of the factors in paragraphs 7.2.a.1 through 7.2.a.6, the agency determines that the proposed activity will be short term in nature and the changes in water quality will be temporary and limited, the proposed activity may be authorized. In such case the antidegradation review findings shall be documented and public notice activities shall be initiated. If after review of the factors in paragraphs 7.2.a.1 through 7.2.a.6, the agency determines that the proposed activity will not be short term in nature or that changes in water quality will not be temporary and limited, the proposed activity shall be denied.

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

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

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

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

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

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

7.3.a.5. Potential for cumulative effects;

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

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

7.3.b. If a preliminary determination is made that the applicable criteria in paragraphs 7.3.a.1. through 7.3.a.7. will be met, the antidegradation review findings shall be documented and the applicable public notice activities shall be initiated. If after review of the factors in paragraphs 7.3.a.1. through 7.3.a.7., the Secretary determines that the proposed activity will result in the lowering of water quality in the downstream ONRW stream segment, the proposed activity shall be denied.

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

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

expanded discharge; and (4) the trade must be enforceable.

§60-5-8. Designation of Tier 2.5 and Tier 3 Waters.

8.1. Listing process for Tier 2.5.

8.1.a. Tier 2.5 Nomination Procedures. Any interested party or the ~~Board Secretary~~ may nominate a water to be listed as a Water of Special Concern. After reviewing the nomination the ~~Board Secretary~~ shall consider the qualification criteria and may designate the nominated water as a Tier 2.5 water in accordance with the ~~notice and comment provisions of 46 CSR 6, Procedural Rules Governing Site Specific Revisions to Water Quality Standards, legislative rulemaking process pursuant to W.Va. Code § 29A-3-1 et seq.~~ The address for filing such petitions is ~~West Virginia Environmental Quality Board, 1615 Washington Street, East, Room 301, Charleston, West Virginia 25311-2126. West Virginia Department of Environmental Protection, Attn: Tier 2.5 List, 601 57th Street, SE, Charleston, WV 25304.~~ The nominating party has the burden of establishing a basis for listing of a water segment as a Tier 2.5 water. The ~~Board Secretary~~ shall return insufficient nominations to the nominating party. Generally, nominations that fail to address at least three of the qualification criteria shall be considered insufficient.

8.1.a.1. 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. The written notice shall include, at a minimum:

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

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

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

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

8.1.a.2. Qualification Criteria. Factors to be considered in determining whether to assign a Water of Special Concern designation to a water from another category shall include the following:

+

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

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

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

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

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

8.1.a.2.F. Factors that indicate unique or exceptional ecological, recreational or aesthetic resource value;

8.1.a.2.G. Impact on economic development in the area, including development of demonstrated natural resources; and

8.1.a.2.H. Other factors determined by the ~~Board Secretary~~ Secretary, when applicable.

8.1.a.3. Reclassification of

a Water of Special Concern. The Board Secretary may on its own, or at the request of an interested party, consider reclassifying a Water of Special Concern to another antidegradation tier after following notice and comment procedures consistent with paragraph 8.1.a.1. In considering a reclassification, the Board Secretary shall review the criteria outlined in subparagraphs 8.1.a.2.A. through 8.1.a.2.H. above. After such consideration, the Board Secretary may reclassify a Tier 2.5 water in accordance with the ~~notice and comment provisions of 46 CSR 6, Procedural Rules Governing Site Specific Revisions to Water Quality Standards.~~ legislative rulemaking process pursuant to W.Va. Code §29A-3-1 et seq.

8.2. Listing process for Tier 3 waters.

8.2.a. Tier 3 Nomination Procedures. Any interested party or the Board Secretary may nominate a water as an ONRW. After reviewing the nomination the Board Secretary shall consider the qualification criteria and may classify the nominated water as a Tier 3 water in accordance with the notice and comment provisions of ~~46 CSR 6, Procedural Rules Governing Site Specific Revisions to Water Quality Standards.~~ this subsection. The address for filing such petitions is ~~West Virginia Environmental Quality Board, 1615 Washington Street, East, Room 301, Charleston, West Virginia 25311-2126.~~ West Virginia Department of Environmental Protection, Attn: Tier 3 List, 601 57th Street, SE, Charleston, WV 25304. The nominating party has the burden of establishing a basis for listing of a water segment as a Tier 3 water. The Board Secretary shall return insufficient nominations to the nominating party. Generally, nominations that fail to address at least three of the qualification criteria set out in paragraph 8.2.a.2. of this rule shall be considered insufficient.

8.2.a.1. Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the ~~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 written notice shall include, at a minimum:

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

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

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

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

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

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

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

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

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

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

8.2.a.2.F. Outstanding ecological value;

8.2.a.2.G.

Outstanding recreational or aesthetic value; and

8.2.a.2.H.

Other factors determined by the Board Secretary, when applicable.

§60-5-9. Public Participation in Antidegradation Reviews/Appeals.

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

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

9.3. Public notice, opportunity for public comment, and opportunity for a public hearing, consistent with the requirements of 47 CSR 10-12, will be provided of all activities proposed to be allowed after a Tier 1, 2, 2.5, or 3 antidegradation review. Such public notice may be combined with other required notifications, such as notification to agencies as part of required intergovernmental coordination or notification of a proposed permit decision. Public notice is not required to be provided for proposed activities on Tier 1 or Tier 2 waters for which a review process has not been required, such as activities covered by a WV/NPDES general permits, except that any trading approved by the Secretary for antidegradation purposes will require public notice consistent with the requirements of 47 CSR 10-12.

9.4. Public notice of Tier 2 antidegradation reviews.

9.4.a. After a full Tier 2 review has been completed for a proposed activity, the public notice shall include notice of the availability of the following:

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

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

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

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

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

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

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

9.6. Appeals-Final agency decisions, made after public comment, that identify applicable uses, designate tiers, or that find regulated activities to be allowed or prohibited, are final actions that are appealable ~~as set forth in the Administrative Procedures Act. Final agency actions made by the Secretary are appealable to the Board;~~ provided that the designation of waters as Tier 2.5 waters pursuant to subsections 6.2 and 8.1 shall not be subject to appeal.

APPENDIX A

~~WV DNR and WV DEP~~ Waters of Special Concern (Tier 2.5 Waters)

~~(This page intentionally left blank at this time)~~

<u>STREAM CODE</u>	<u>STREAM NAME</u>	<u>LOCATION</u>	<u>LENGTH (MILES)</u>
<u>Tug Fork Watershed</u>			
<u>BST-60-D</u>	<u>CUB BRANCH</u>	<u>The section of stream within Panther Creek State Park, - tributary of Panther Creek of Tug Fork River</u>	<u>0.3</u>
<u>BST-99</u>	<u>ELKHORN CREEK</u>	<u>Headwaters downstream to 2.2 miles upstream of confluence with North Fork</u>	<u>6.2</u>
<u>James River Watershed</u>			
<u>J-1-A</u>	<u>EWING RUN</u>	<u>Entire length within WV - tributary of Potts Creek</u>	<u>2.6</u>
<u>J-1-D</u>	<u>NORTH FORK/POTTS CREEK</u>	<u>Entire length - tributary (fork) of Potts Creek</u>	<u>5.7</u>
<u>Kanawha River Watershed (Upper & Lower)</u>			
<u>K-13</u>	<u>LITTLE SIXTEENMILE CREEK</u>	<u>Upper section of stream that is within Chief Cornstalk WMA - tributary of the (Lower) Kanawha River</u>	<u>1.2</u>
<u>K-14-B-1</u>	<u>UNT OF FIVEFORK BRANCH</u>	<u>Entire length of unnamed tributary that drains into Fivefork Branch approx. 0.45 miles upstream of its confluence with Sixteenmile Creek of (Lower) Kanawha River</u>	<u>1.9</u>
<u>K-39-E-3</u>	<u>BAYS FORK</u>	<u>Entire length - tributary of Middle Fork of Davis Creek of (Lower) Kanawha River</u>	<u>1.9</u>
<u>K-39-M-1-A</u>	<u>HOFFMAN HOLLOW</u>	<u>Entire length - tributary of Middlelick Branch of Davis Creek of (Lower) Kanawha River</u>	<u>2.3</u>
<u>K-39-O</u>	<u>SHREWSBURY HOLLOW</u>	<u>Entire length - tributary of Davis Creek of (Lower) Kanawha River</u>	<u>1.5</u>
<u>Elk River Watershed</u>			
<u>KE</u>	<u>ELK RIVER</u>	<u>Begins at its headwater forks (Big Spring, Laurel Run, and Old Field Fork meet) downstream to confluence of Dry Fork</u>	<u>5</u>
<u>KE-111-K</u>	<u>SUGAR CREEK</u>	<u>Headwaters to confluence of Little Sugar Creek - tributary of Elk River</u>	<u>10.5</u>
<u>KE-111-K-2</u>	<u>LITTLE SUGAR CREEK</u>	<u>Entire length - tributary of Sugar Creek of Elk River</u>	<u>7.6</u>
<u>KE-129</u>	<u>VALLEY FORK</u>	<u>Headwaters downstream to confluence of Redlick Run - tributary of Elk River</u>	<u>2.7</u>
<u>KE-133</u>	<u>DRY FORK</u>	<u>Headwaters downstream to confluence of Douglas Fork - tributary of Elk River</u>	<u>3.8</u>
<u>KE-135</u>	<u>BIG RUN</u>	<u>Entire length (south headwater fork incl.) This stream is located approx. 1.78 mi. upstream Blackhole Run - tributary of Elk River</u>	<u>1.9</u>
<u>KE-136</u>	<u>PROPS RUN</u>	<u>Begins with headwater forks downstream to mouth - tributary of Elk River</u>	<u>1.4</u>

<u>KE-137</u>	<u>LAUREL RUN/ELK RIVER</u>	<u>Entire length (south headwater fork included) - tributary of Elk River</u>	<u>2.6</u>
<u>KE-139-0.5A</u>	<u>SLATY FORK</u>	<u>Entire length - tributary of Old Field Fork of Elk River</u>	<u>4.8</u>
<u>KE-139-B</u>	<u>CROOKED FORK</u>	<u>Begins with headwater forks downstream to mouth - tributary of Old Field Fork of Elk River</u>	<u>2.5</u>
<u>KE-98-B-16</u>	<u>DESERT FORK</u>	<u>Begins at headwaters downstream to the confluence of Roaring Run - tributary of Right Fork of Holly River</u>	<u>5</u>
<u>KE-98-C</u>	<u>LEFT FORK HOLLY RIVER</u>	<u>Tributary of Holly River - section from headwaters downstream to Laurel Fork.</u>	<u>5.8</u>
<u>KE-98-C-1</u>	<u>LAUREL PATCH RUN</u>	<u>Tributary of Left Fork of Holly River of Elk River - section within Elk River WMA</u>	<u>1.5</u>
<u>KE-98-C-11</u>	<u>LAUREL FORK/LEFT FORK HOLLY</u>	<u>Begins at the confluence of Right Fork/Middle Fork/Left Fork of Laurel Fork downstream to mouth - tributary of Left Fork of Holly River</u>	<u>5.6</u>
<u>KE-98-C-14</u>	<u>FALL RUN</u>	<u>Entire length - tributary of Left Fork of Holly River</u>	<u>6.1</u>
<u>Gauley River Watershed</u>			
<u>KG-19-G</u>	<u>ANGLINS CREEK</u>	<u>Headwaters downstream to approx. 1.0 mi. downstream of Sugar Grove Creek at the confluence of an unnamed trib - tributary of Meadow River</u>	<u>12.8</u>
<u>KG-19-U-1</u>	<u>BROWN CREEK</u>	<u>Begins with headwater forks downstream to mouth - tributary of Big Clear Creek of Meadow River</u>	<u>3.2</u>
<u>KG-19-U-2-C</u>	<u>OLD FIELD BRANCH</u>	<u>Entire length - tributary of South Fork of Big Clear Creek of Meadow River</u>	<u>2.9</u>
<u>KG-19-U-2-D</u>	<u>JOB KNOB BRANCH</u>	<u>Entire length - tributary of South Fork of Big Clear Creek of Meadow River</u>	<u>3.8</u>
<u>KG-19-V-7</u>	<u>KUHN BRANCH</u>	<u>Entire length - tributary of Little Clear Creek of Meadow River of Gauley River</u>	<u>1.9</u>
<u>KG-20</u>	<u>COLLISON CREEK</u>	<u>Entire length - tributary of Gauley River</u>	<u>6.1</u>
<u>KG-24-E-2</u>	<u>BRUSHY MEADOW CREEK</u>	<u>Begins with headwater forks downstream to mouth - tributary of Grassy Creek of Hominy Creek</u>	<u>5.2</u>
<u>KG-24-H.8</u>	<u>PRICE FORK</u>	<u>Entire length - tributary of Hominy Creek of Gauley River</u>	<u>2.8</u>
<u>KG-32-J</u>	<u>CRANES NEST RUN</u>	<u>Entire length - tributary of Panther Creek of Gauley River</u>	<u>2.3</u>
<u>KG-34-B</u>	<u>COAL SIDING RUN</u>	<u>Begins with headwater forks downstream to mouth - tributary of Cherry River</u>	<u>1.5</u>
<u>KG-34-E</u>	<u>LAUREL CREEK/CHERRY RIVER</u>	<u>From Headwaters downstream to McMillion Ck - tributary of Cherry River</u>	<u>9.2</u>
<u>KG-34-E-11</u>	<u>MIDDLE BRANCH</u>	<u>Entire length - tributary of Laurel Creek of Cherry River</u>	<u>3.3</u>

<u>KG-34-E-13</u>	<u>COLD SPRING BRANCH</u>	<u>Entire length - tributary of Laurel Creek of Cherry River</u>	<u>3.1</u>
<u>KG-34-E-8</u>	<u>BEECH RUN</u>	<u>Entire length - tributary of Laurel Creek of Cherry River</u>	<u>3.1</u>
<u>KG-34-E-9</u>	<u>HOGCAMP RUN</u>	<u>Entire length - tributary of Laurel Creek of Cherry River</u>	<u>2.6</u>
<u>KG-34-F</u>	<u>LITTLE LAUREL CREEK</u>	<u>Entire length - tributary of Cherry River</u>	<u>9.9</u>
<u>KG-34-G</u>	<u>SOUTH FORK CHERRY RIVER</u>	<u>Headwaters downstream to Rocky Run - tributary of Cherry River of Gauley River</u>	<u>9.2</u>
<u>KG-34-G-10</u>	<u>COLD KNOB FORK</u>	<u>Entire length - tributary of South Fork of Cherry River of Gauley River</u>	<u>5.6</u>
<u>KG-34-G-6</u>	<u>ROCKY RUN</u>	<u>From confluence of headwater forks downstream to mouth - tributary of South Fork of Cherry River of Gauley River</u>	<u>3.5</u>
<u>KG-34-G-13</u>	<u>BIG RUN</u>	<u>Entire length - tributary of South Fork of Cherry River</u>	<u>1.4</u>
<u>KG-34-G-5</u>	<u>ELKLICK RUN</u>	<u>Entire length - tributary of South Fork of Cherry River</u>	<u>2.1</u>
<u>KG-34-G-8</u>	<u>BECKY RUN</u>	<u>Entire length - tributary of South Fork of Cherry River</u>	<u>2.6</u>
<u>KG-34-H</u>	<u>NORTH FORK /CHERRY RIVER</u>	<u>Entire length - tributary of Cherry River</u>	<u>16.3</u>
<u>KG-34-H-14</u>	<u>BEAR RUN</u>	<u>Entire length - tributary of North Fork of Cherry River</u>	<u>2.2</u>
<u>KG-34-H-4</u>	<u>HUNTERS RUN</u>	<u>Entire length - tributary of North Fork of Cherry River</u>	<u>3.1</u>
<u>KG-34-H-5</u>	<u>COATS RUN</u>	<u>Entire length downstream of Summit Lake - tributary of North Fork Cherry</u>	<u>1.1</u>
<u>KG-34-H-9</u>	<u>ARMSTRONG RUN</u>	<u>Entire length - tributary of North Fork of Cherry River</u>	<u>1.2</u>
<u>KG-45</u>	<u>BIG LAUREL CREEK</u>	<u>Entire length - tributary of the Gauley River</u>	<u>6.6</u>
<u>KG-57</u>	<u>MILLER MILL RUN</u>	<u>Entire length - tributary of the Gauley River</u>	<u>4.4</u>
<u>KG-59</u>	<u>BIG RUN</u>	<u>Entire length - tributary of the Gauley River</u>	<u>2.2</u>
<u>KG-60</u>	<u>TURKEY CREEK</u>	<u>Entire length - tributary of the Gauley River</u>	<u>4.9</u>
<u>KG-67</u>	<u>STRAIGHT CREEK</u>	<u>Begins with headwater forks downstream to mouth - tributary of Gauley River</u>	<u>2.7</u>
<u>KG-70</u>	<u>BIG RUN/GAULEY RIVER</u>	<u>Entire length - tributary of the Gauley River</u>	<u>4.1</u>
<u>KG-72</u>	<u>MIDDLE FORK/GAULEY RIVER</u>	<u>Entire length - tributary of the Gauley River</u>	<u>3</u>
<u>KGC</u>	<u>CRANBERRY RIVER</u>	<u>Section from the South Fork shelter (between Red Run and Lost Run) downstream to mouth - tributary of the Gauley River</u>	<u>26.6</u>
<u>KGC-14</u>	<u>LICK BRANCH</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>1.2</u>
<u>KGC-15</u>	<u>HANGING ROCK BRANCH</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>1.2</u>
<u>KGC-19</u>	<u>DOGWAY FORK</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>8.8</u>
<u>KGC-21</u>	<u>BIRCHLOG RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.2</u>
<u>KGC-3</u>	<u>JAKEMAN RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>3.2</u>
<u>KGC-4</u>	<u>BARRENSHREE RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>4.6</u>
<u>KGC-7</u>	<u>BEE RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.2</u>
<u>KGC-8</u>	<u>FOXTREE RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.3</u>
<u>KGC-9</u>	<u>ALDRICH BRANCH</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.2</u>

<u>KGW</u>	<u>WILLIAMS RIVER</u>	<u>Tributary of the Gauley River - section from Lick Branch upstream to headwaters.</u>	<u>23.2</u>
<u>KGW-1</u>	<u>CRAIG RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.7</u>
<u>KGW-19</u>	<u>UPPER BANNOCK SHOALS RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.8</u>
<u>KGW-2</u>	<u>JONATHAN RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.4</u>
<u>KGW-20</u>	<u>TEA CREEK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>6</u>
<u>KGW-20-A</u>	<u>LICK CREEK</u>	<u>Entire length - tributary of Tea Creek of Williams River of Gauley River</u>	<u>1.8</u>
<u>KGW-21</u>	<u>SUGAR CREEK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>3.6</u>
<u>KGW-22</u>	<u>LITTLE LAUREL CREEK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.5</u>
<u>KGW-25</u>	<u>DAY RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>3.1</u>
<u>KGW-26</u>	<u>BLACK MOUNTAIN RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.7</u>
<u>KGW-27</u>	<u>MOUNTAIN LICK RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.1</u>
<u>KGW-3</u>	<u>SAWYER RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.3</u>
<u>KGW-4</u>	<u>SPICE RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.8</u>
<u>KGW-8</u>	<u>WHITE OAK FORK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.7</u>
<u>KGW-9</u>	<u>LICK BRANCH</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.4</u>

New River Watershed

<u>KN-17</u>	<u>MANNS CREEK</u>	<u>Entire length within Babcock State park Boundaries</u>	<u>5.2</u>
<u>KN-23</u>	<u>BUFFALO CREEK</u>	<u>From mouth upstream approx 2.5 mi. to headwater forks - tributary of (Lower) New River</u>	<u>2.4</u>
<u>KN-24</u>	<u>SLATER CREEK</u>	<u>Section within New River Gorge Nat. River - tributary of (Lower) New River</u>	<u>0.8</u>
<u>KN-27-C</u>	<u>CHESTNUT KNOB FORK</u>	<u>Entire length - tributary of Laurel Creek of (Lower) New River</u>	<u>3.5</u>
<u>KN-32</u>	<u>MEADOW CREEK</u>	<u>Section w/n New River Gorge National River that is upstream of Lefthand Fork) - tributary of (Lower) New River</u>	<u>2.6</u>
<u>KN-37</u>	<u>FALL BRANCH</u>	<u>Section w/n New River Gorge National River - tributary of (Lower) New River</u>	<u>1.9</u>
<u>KN-51-O</u>	<u>TURKEY CREEK</u>	<u>From headwater forks downstream to mouth - tributary of Indian Creek of (Upper) New River</u>	<u>9.2</u>
<u>KNB-13</u>	<u>CAMP CREEK</u>	<u>from HW downstream to confluence w/ Mash Fork</u>	<u>9.3</u>
<u>KNB-13-D</u>	<u>MASH FORK</u>	<u>Begins at confluence of Sugar Camp Branch downstream to the confluence of Marsh Fork approx. 0.89 mi. above mouth - tributary of Camp Creek of Bluestone River of (Lower) New River</u>	<u>2.9</u>

Greenbrier River

<u>Watershed</u>	<u>MILLIGAN CREEK</u>	<u>Two segments - Northern segment begins near State Rt.60 (near Richlands) to "mouth" or where it sinks and; the entire second segment is included - located near boundary of Asbury/Lewisburg topo quads</u>	<u>5.7</u>
<u>KNK-22-E-1-B</u>	<u>FLYNN CREEK</u>	<u>Entire length (sinking creek) - to confluence w/ Sinking Ck.</u>	<u>4.3</u>
<u>KNK-28-P-2</u>	<u>TWOMILE RUN</u>	<u>Entire length - tributary of North Fork of Anthony Creek of Greenbrier River</u>	<u>1.6</u>
<u>KNK-28-Q-1</u>	<u>LAUREL RUN / MEADOW CREEK</u>	<u>Entire length - tributary of Meadow Creek of Anthony Creek of Greenbrier River</u>	<u>4.2</u>
<u>KNK-30-0.5A-1-A</u>	<u>BURNS RUN</u>	<u>Entire length (sinking creek) - to confluence w/ Culverson Ck.</u>	<u>4.1</u>
<u>KNK-49</u>	<u>SWAGO CREEK</u>	<u>Entire length - tributary of Greenbrier River</u>	<u>3.8</u>
<u>KNK-53-G</u>	<u>BARCLAY RUN</u>	<u>Entire length - tributary of Knapps Creek of Greenbrier River</u>	<u>1.7</u>
<u>KNK-53-H</u>	<u>DOUTHAT CREEK</u>	<u>Entire length - tributary of Knapps Creek of Greenbrier R.</u>	<u>9</u>
<u>KNK-60</u>	<u>LAUREL RUN / GREENBRIER R</u>	<u>Entire length - tributary of Greenbrier R.</u>	<u>3</u>
<u>KNK-66-D</u>	<u>SHOCK RUN</u>	<u>Entire length - tributary of Sittling Creek of Greenbrier River</u>	<u>4.5</u>
<u>KNK-66-E-4</u>	<u>LEFT PRONG</u>	<u>Entire length - tributary of Galford Run of Sittling Creek of Greenbrier River</u>	<u>3.3</u>
<u>KNK-68-A</u>	<u>NORTH FORK DEER CREEK</u>	<u>Tributary of Deer Creek of Greenbrier River - section from headwaters downstream to Sutton Run</u>	<u>6</u>
<u>KNK-68-A-3</u>	<u>SUTTON RUN</u>	<u>Entire length - tributary of North Fork of Deer Creek of Greenbrier River</u>	<u>3</u>
<u>KNK-68-A-4</u>	<u>TACKER FORK</u>	<u>Entire length - tributary of North Fork of Deer Creek of Greenbrier River</u>	<u>2.5</u>
<u>KNK-68-A-5</u>	<u>BLACK RUN</u>	<u>Entire length - tributary of North Fork of Deer Creek of Greenbrier River</u>	<u>2.4</u>
<u>KNK-68-A-6</u>	<u>ELLEBER RUN</u>	<u>Entire length - tributary of North Fork of Deer Creek of Greenbrier River</u>	<u>3.1</u>
<u>KNK-68-A-6-A</u>	<u>GRIFFIN RUN</u>	<u>Entire length - tributary of North Fork of Deer Creek of Greenbrier River</u>	<u>1.7</u>
<u>KNK-70</u>	<u>LEATHERBARK RUN</u>	<u>Entire length - tributary of Elleber Run of North Fork of Deer Creek of Greenbrier River</u>	<u>5.8</u>
<u>KNK-74</u>	<u>TROUT RUN</u>	<u>Entire length - tributary of Greenbrier River</u>	<u>1.1</u>
<u>KNK-78</u>	<u>EAST FORK GREENBRIER RIVER</u>	<u>Entire length - tributary of Greenbrier River</u>	<u>5.5</u>
<u>KNK-78-C</u>	<u>LITTLE RIVER / EAST FORK GREENBRIER</u>	<u>uppermost 5.5 miles (above Abes Run) - Entire length - tributary of Greenbrier River</u>	
<u>KNK-78-G</u>	<u>FIVEMILE HOLLOW</u>	<u>From headwaters to confluence of Buffalo Fork - tributary of East Fork of Greenbrier River</u>	<u>6.3</u>
<u>KNK-78-H</u>	<u>POCA RUN</u>	<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>2.3</u>
		<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>3</u>

<u>KNG-78-H-1</u>	<u>LONG RUN</u>	<u>Entire length - tributary of Poca Run of East Fork of Greenbrier River</u>	<u>2.8</u>
<u>KNG-78-K</u>	<u>MULLENAX RUN</u>	<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>2.9</u>
<u>KNG-78-L</u>	<u>ABES RUN</u>	<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>2.6</u>
<u>KNG-79</u>	<u>WEST FORK GREENBRIER RIVER</u>	<u>Entire length - tributary of Greenbrier River</u>	<u>18.7</u>
<u>KNG-79-B</u>	<u>FILL RUN</u>	<u>Entire length - tributary of West Fork of Greenbrier River</u>	<u>1.9</u>
<u>KNG-79-C</u>	<u>LITTLE RIVER</u>	<u>From headwater forks downstream to mouth - tributary of West Fork of Greenbrier River</u>	<u>7.6</u>
<u>KNG-79-C-1</u>	<u>SPAN OAK RUN</u>	<u>Entire length - tributary of Little River of West Fork of Greenbrier River</u>	<u>2.3</u>
<u>KNG-79-C-2</u>	<u>CLUBHOUSE RUN</u>	<u>Entire length - tributary of Little River of West Fork of Greenbrier River</u>	<u>2.7</u>
<u>KNG-79-C-3</u>	<u>HINKLE RUN</u>	<u>Entire length - tributary of Little River of West Fork of Greenbrier River</u>	<u>2.6</u>
<u>Little Kanawha River Watershed</u>			
<u>LK-131</u>	<u>GETOUT RUN</u>	<u>Entire length - tributary of Little Kanawha River</u>	<u>3</u>
<u>Cheat River Watershed</u>			
<u>MC-12-B-6</u>	<u>MILL RUN</u>	<u>Section from Headwaters downstream to unnamed tributary at Hazelton - tributary of Little Sandy Creek</u>	<u>3.5</u>
<u>MC-18</u>	<u>ROARING CREEK</u>	<u>Section from headwaters downstream to 1.2 miles above mouth entering Cheat</u>	<u>8</u>
<u>MC-20</u>	<u>ELSEY RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>3.4</u>
<u>MC-2-A</u>	<u>DARNELL HOLLOW</u>	<u>Section within Coopers Rock State Forest - tributary of Morgan Run of Cheat (Lake)</u>	<u>1.6</u>
<u>MC-33-A</u>	<u>FLAG RUN</u>	<u>Entire length - tributary to Buffalo Creek of Cheat</u>	<u>5.5</u>
<u>MC-33-A-2</u>	<u>WATKINS RUN</u>	<u>Entire length - tributary of Flag Run</u>	<u>1.5</u>
<u>MC-36</u>	<u>WOLF CREEK</u>	<u>Tributary of Cheat - section from headwaters downstream to point 2 miles from Cheat River.</u>	<u>5</u>
<u>MC-41</u>	<u>LONG RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>2.1</u>
<u>MC-45</u>	<u>TOBES RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>1.2</u>
<u>MC-46-B</u>	<u>RIGHT FORK BULL RUN</u>	<u>Entire length - tributary of Bull Run of Cheat</u>	<u>3.8</u>
<u>MC-51-A</u>	<u>RIGHT FORK CLOVER RUN</u>	<u>Entire length - Rt Fork of Clover Run of Cheat</u>	<u>5.5</u>
<u>MC-51-B</u>	<u>LEFT FORK CLOVER RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>9.2</u>

<u>MC-51-B-5</u>	<u>INDIAN RUN</u>	<u>Entire length - Left Fork of Clover Run of Cheat</u>	<u>4.2</u>
<u>MC-52</u>	<u>MINEAR RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>4.3</u>
<u>MC-52-0.7A</u>	<u>BRIDGE RUN</u>	<u>Entire length - tributary of Minear Run of Cheat. Mainstem entirely on Pub Land</u>	<u>1.1</u>
<u>MC-54</u>	<u>HORSESHOE RUN</u>	<u>Headwaters downstream to Laurel Run (MC-54-F) - tributary of Cheat</u>	<u>9.5</u>
<u>MC-54-A</u>	<u>MIKE RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat. Mainstem entirely on Pub Land</u>	<u>3.9</u>
<u>MC-54-C</u>	<u>MAXWELL RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>2.9</u>
<u>MC-54-D</u>	<u>HYLE RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>3.9</u>
<u>MC-54-E</u>	<u>LICK DRAIN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>1.8</u>
<u>MC-54-G</u>	<u>LYNN RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>1.3</u>
<u>MC-54-H</u>	<u>THUNDERSTRUCK RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>3.9</u>
<u>MC-54-I</u>	<u>LEADMINE RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>4.8</u>
<u>MC-54-K</u>	<u>TWELVEMILE RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>2.2</u>
<u>MC-55</u>	<u>DRY RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>3.2</u>
<u>MC-56</u>	<u>MILL RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>2.7</u>
<u>MC-57</u>	<u>WOLF RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>1.9</u>
<u>MC-60-D</u>	<u>BLACKWATER RIVER</u>	<u>Section from North Fork upstream approx. 2.6 miles to Blackwater Falls S.P. border.</u>	<u>2.6</u>
<u>MC-60-G</u>	<u>RED RUN</u>	<u>Beginning at the North/South Forks downstream to edge of Forest boundary, 0.8 miles from mouth - tributary of Dry Fork</u>	<u>4.8</u>
<u>MC-60-K-1</u>	<u>THREE SPRING RUN</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-11</u>	<u>MCCRAY CREEK</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>2.4</u>
<u>MC-60-K-14</u>	<u>DANIELS CREEK</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>3.2</u>
<u>MC-60-K-16</u>	<u>WEST FORK GLADY FORK</u>	<u>From headwaters downstream to 2.0 miles from confluence w/ East Fork - tributary of Glady Fork of Dry Fork</u>	<u>4.1</u>
<u>MC-60-K-17</u>	<u>EAST FORK GLADY FORK</u>	<u>Section upstream of Louk Run - tributary of Glady Fork</u>	<u>4.8</u>
<u>MC-60-K-17-A</u>	<u>LOUK RUN</u>	<u>Entire length - tributary of East Fork of Glady Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-2</u>	<u>PANTHER CAMP RUN</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>1.7</u>
<u>MC-60-K-2-A</u>	<u>HOG RUN</u>	<u>Entire length - tributary of Panther Camp Run of Glady Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-4</u>	<u>FIVE LICK CREEK</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>1.7</u>
<u>MC-60-K-5</u>	<u>WOODFORD RUN</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>1.1</u>
<u>MC-60-K-6</u>	<u>BAKER CAMP RUN</u>	<u>Entire length - tributary of Glady Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-N-4</u>	<u>BEAVERDAM RUN</u>	<u>Headwaters downstream to confluence of unnamed tributary - tributary of Laurel Fork of Dry Fork</u>	<u>2.1</u>
<u>MC-60-O-2</u>	<u>FLATROCK RUN</u>	<u>Entire length - tributary of Red Creek of Dry Fork</u>	<u>2.9</u>

<u>MT-44</u>	<u>MATHIUS RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>1.7</u>
<u>MT-45-C</u>	<u>RIGHT FORK CHENOWETH CREEK</u>	<u>Entire length - tributary of Chenoweth Creek of Tygart Valley</u>	<u>3.2</u>
<u>MT-47</u>	<u>BEAVER CREEK</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>6.2</u>
<u>MT-50-A</u>	<u>RIGHT FORK FILES CREEK</u>	<u>Entire length - tributary of Files Creek of Tygart Valley</u>	<u>8.3</u>
<u>MT-50-A-1</u>	<u>LIMEKILN RUN</u>	<u>Entire length - tributary of Right Fork of Files Creek of Tygart Valley</u>	<u>2.1</u>
<u>MT-50-B</u>	<u>LEFT FORK FILES CREEK</u>	<u>Confluence of Hill Run downstream to mouth - tributary of Files Creek of Tygart Valley</u>	<u>2.8</u>
<u>MT-61</u>	<u>SHAVERS RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>7</u>
<u>MT-64</u>	<u>MILL CREEK</u>	<u>Begins with headwater forks downstream to confluence of unnamed trib approx. 0.47 mi. above the confluence of Buck Run - tributary of Tygart Valley</u>	<u>10.7</u>
<u>MT-64-C</u>	<u>GLADE RUN</u>	<u>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>1.6</u>
<u>MT-64-E</u>	<u>MEATBOX RUN</u>	<u>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>1.2</u>
<u>MT-64-F</u>	<u>POTATOHOLE RUN</u>	<u>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>1.8</u>
<u>MT-66</u>	<u>RIFFLE CREEK</u>	<u>Headwaters downstream to confluence of McGee Run - tributary of Tygart Valley</u>	<u>1.9</u>
<u>MT-66-B</u>	<u>MCGEE RUN</u>	<u>Entire length - tributary of Riffle Creek Tygart Valley</u>	<u>3.4</u>
<u>MT-66-C</u>	<u>BACK FORK</u>	<u>Entire length - tributary of Riffle Creek Tygart Valley</u>	<u>2</u>
<u>MT-67</u>	<u>RAFE RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>1.5</u>
<u>MT-68</u>	<u>BECKY CREEK</u>	<u>from CR 56 bridge upstream</u>	<u>7.5</u>
<u>MT-68-A</u>	<u>BIG BRANCH</u>	<u>Entire length - tributary of Becky Creek of Tygart Valley</u>	<u>2.3</u>
<u>MT-72</u>	<u>HAMILTON RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>2.5</u>
<u>MT-73</u>	<u>CLAY RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>2.6</u>
<u>MT-74</u>	<u>ELKWATER FORK</u>	<u>Headwaters downstream to confluence of Mowry Run - tributary of Tygart Valley</u>	<u>5.2</u>
<u>MT-74-A</u>	<u>MOWRY RUN</u>	<u>Entire length - tributary of Elkwater Fork of Tygart Valley</u>	<u>2.3</u>
<u>MT-74-B</u>	<u>LIMEKILN RUN</u>	<u>Entire length - tributary of Elkwater Fork of Tygart Valley</u>	<u>1.9</u>
<u>MT-75</u>	<u>STEWART RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>8.1</u>
<u>MT-77</u>	<u>CONLEY RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>4.3</u>
<u>MT-78</u>	<u>RALSTON RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>7</u>
<u>MT-79</u>	<u>WINDY RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>4.6</u>
<u>MT-80</u>	<u>LOGAN RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>2.5</u>
<u>MT-81</u>	<u>BIG RUN</u>	<u>Entire length - tributary of Tygart Valley</u>	<u>5.1</u>
<u>MTB-28</u>	<u>BIG RUN</u>	<u>Entire length - tributary of Buckhannon of Tygart Valley</u>	<u>4.7</u>
<u>MTB-31</u>	<u>RIGHT FORK BUCKHANNON RIVER</u>	<u>From headwaters downstream to UNT at Pickens</u>	<u>2.1</u>
<u>MTB-31-B</u>	<u>REGER RUN</u>	<u>Entire length - tributary of Right Fork of Buckhannon of Tygart Valley</u>	<u>1.1</u>

<u>MTB-31-C</u>	<u>ALEC RUN</u>	<u>Entire length - tributary of Right Fork of Buckhannon of Tygart Valley</u>	<u>1.9</u>
<u>MTB-31-D</u>	<u>MILLSITE RUN</u>	<u>Entire length - tributary of Right Fork of Buckhannon of Tygart Valley</u>	<u>3.8</u>
<u>MTM</u>	<u>MIDDLE FORK RIVER</u>	<u>Begins at confluence of Birch Fork (at Adolph) downstream to confluence of Cassity Fork - tributary of Tygart Valley</u>	<u>7.3</u>
<u>MTM-11-D</u>	<u>JACKSON FORK</u>	<u>Entire length - tributary of Right Fork of Middle Fork of Tygart Valley</u>	<u>3.9</u>
<u>MTM-16</u>	<u>CASSITY FORK</u>	<u>Headwaters downstream to confluence of Mulberry Fork - tributary of Middle Fork of Tygart Valley</u>	<u>4.2</u>
<u>MTM-16-A</u>	<u>PANTHER RUN</u>	<u>Headwaters downstream to confluence of an unnamed tributary approx. 0.64 mi. above mouth - tributary of Cassity Fork of Middle Fork of Tygart Valley</u>	<u>4.4</u>
<u>MTM-21</u>	<u>PLEASANT RUN</u>	<u>Entire length - tributary of Middle Fork of Tygart Valley</u>	<u>1.8</u>
<u>MTM-22</u>	<u>LAUREL RUN</u>	<u>Entire length - tributary of Middle Fork of Tygart Valley</u>	<u>2.6</u>
<u>MTM-23</u>	<u>LAUREL BRANCH</u>	<u>Entire length - tributary of Middle Fork of Tygart Valley</u>	<u>4</u>
<u>MTM-24</u>	<u>SUGAR RUN</u>	<u>Entire length - tributary of Middle Fork of Tygart Valley</u>	<u>2.3</u>
<u>MTM-25</u>	<u>SCHOOLCRAFT RUN</u>	<u>Entire length - tributary of Middle Fork of Tygart Valley</u>	<u>3.1</u>
<u>MTM-26</u>	<u>BIRCH FORK</u>	<u>Begins at confluence of Sugar Drain downstream - tributary of Middle Fork of Tygart Valley</u>	<u>3.6</u>
<u>MTM-27</u>	<u>MITCHELL LICK FORK</u>	<u>Entire length - tributary of Middle Fork of Tygart Valley</u>	<u>2.5</u>
<u>Upper Ohio North</u>			
<u>O-102-A</u>	<u>WHITEOAK RUN</u>	<u>Section of White Oak Run (including forks) w/n Tomlinson Run S.P. - tributary of Tomlinson Run of Ohio River</u>	<u>0.5</u>
<u>Twelvepole Creek Watershed</u>			
<u>O-2-H-2-A</u>	<u>STOWERS BRANCH</u>	<u>Begins with headwater forks downstream to entering Beech Fork Lake - tributary of Beech Fork of Twelvepole Creek</u>	<u>1</u>
<u>O-2-P-23</u>	<u>ARKANSAS BRANCH</u>	<u>Entire length - tributary of West Fork of Twelvepole Creek</u>	<u>2</u>
<u>O-2-P-25</u>	<u>SWEETWATER BRANCH</u>	<u>Entire length w/n Cabwaylingo S.P. - tributary of West Fork of Twelvepole Creek</u>	<u>0.9</u>
<u>O-2-P-26</u>	<u>LONG BRANCH</u>	<u>Entire length - tributary of West Fork of Twelvepole Creek</u>	<u>2.6</u>
<u>O-2-P-27</u>	<u>SPRUCE FORK</u>	<u>Entire length - tributary of West Fork of Twelvepole Creek</u>	<u>1.8</u>
<u>O-2-Q-14</u>	<u>RICH CREEK</u>	<u>The section of Rich Creek w/n East Lynn Lake WMA - tributary of East Fork of Twelvepole Creek</u>	<u>1.3</u>
<u>O-2-Q-16</u>	<u>BLUELICK BRANCH</u>	<u>Entire length to East Lynn Lake - tributary of East Fork of Twelvepole Creek</u>	<u>2.3</u>

<u>Guyandotte River Watershed</u>	
<u>OG-102</u>	<u>BRICKLE BRANCH</u>
<u>OG-29-C</u>	<u>HORSESHOE BRANCH</u>
<u>OG-38-D</u>	<u>LAUREL CREEK</u>
<u>OG-61</u>	<u>BUFFALO CREEK</u>
<u>OG-96-A</u>	<u>STURGEON BRANCH</u>
<u>OGM-8-B</u>	<u>LEFT FORK MILL CREEK</u>
	<u>SOUTH FORK INDIAN RUN</u>
<u>Potomac Direct Drains</u>	
<u>Watershed</u>	
<u>P-9-G-2</u>	<u>Entire length - tributary of Indian Creek</u>
	<u>3.8</u>
<u>Cacapon River Watershed</u>	
<u>PC-0.9</u>	<u>Entire length - tributary of Cacapon</u>
<u>PC-1</u>	<u>Entire length - tributary of Cacapon</u>
<u>PC-10</u>	<u>Headwaters downstream to about 0.9 mi. from mouth - tributary of Cacapon</u>
<u>PC-17</u>	<u>Entire length - tributary of Cacapon</u>
<u>PC-23</u>	<u>Entire length - tributary of Cacapon</u>
<u>PC-24-H</u>	<u>Entire length - tributary of Lost River of Cacapon</u>
	<u>4.6</u>
	<u>16.6</u>
	<u>4.6</u>
<u>North Branch/Potomac River</u>	
<u>Watershed</u>	
<u>PNB-14</u>	<u>Entire length - tributary of North Branch Potomac</u>
<u>PNB-15</u>	<u>Entire length - tributary of North Branch Potomac</u>
<u>PNB-15-A</u>	<u>Entire length - tributary of Deep Run of North Branch Potomac</u>
	<u>3.8</u>
	<u>4.8</u>
	<u>2.7</u>
<u>South Branch/Potomac River</u>	
<u>Watershed</u>	
<u>PSB-13</u>	<u>Entire length - tributary of South Branch Potomac</u>
<u>PSB-21-F</u>	<u>Beginning at the headwater forks to mouth - tributary of South Fork of South Branch Potomac</u>
	<u>8.9</u>
	<u>2.6</u>

<u>PSB-21-K</u>	<u>ROUGH RUN</u>	<u>Entire length - tributary of South Fork of South Branch Potomac</u>	<u>6.9</u>
<u>PSB-25-C-2</u>	<u>SPRING RUN</u>	<u>Entire length - tributary of South Mill Creek of Mill Creek of South Branch Potomac</u>	<u>3</u>
<u>PSB-28-A-1</u>	<u>BIG RUN</u>	<u>Entire length - tributary of Jordan Run of North Fork of South Branch Potomac</u>	<u>2.6</u>
<u>PSB-28-A-2</u>	<u>LAUREL RUN / JORDAN RUN</u>	<u>Entire length - tributary of Jordan Run of North Fork of South Branch Potomac</u>	<u>3.2</u>
<u>PSB-28-B</u>	<u>SAMUEL RUN</u>	<u>Entire length - tributary of North Fork of South Branch Potomac</u>	<u>2.8</u>
<u>PSB-28-C</u>	<u>BROAD RUN</u>	<u>Entire length - tributary of North Fork of South Branch Potomac</u>	<u>2.4</u>
<u>PSB-28-E</u>	<u>HIGH RIDGE RUN</u>	<u>Entire length - tributary of North Fork of South Branch Potomac</u>	<u>2.3</u>
<u>PSB-28-EE</u>	<u>BIG RUN</u>	<u>Entire length - tributary of North Fork of South Branch Potomac</u>	<u>12.8</u>
<u>PSB-28-EE-2</u>	<u>SAWMILL BRANCH</u>	<u>Entire length - tributary of North Fork of the South Branch Potomac</u>	<u>3.2</u>
<u>PSB-28-EE-2-A</u>	<u>BACK RUN</u>	<u>Entire length - tributary of Sawmill Branch of Big Run of North Fork of the South Branch Potomac</u>	<u>3.4</u>
<u>PSB-28-EE-3</u>	<u>TEETER CAMP RUN</u>	<u>Entire length - tributary of Big Run of North Fork of the South Branch Potomac</u>	<u>3.7</u>
<u>PSB-28-EE-3-A</u>	<u>HEMLOCK RUN</u>	<u>Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac</u>	<u>1.9</u>
<u>PSB-28-EE-3-B</u>	<u>LEONARD SPRING HOLLOW</u>	<u>Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac</u>	<u>1.2</u>
<u>PSB-28-EE-3-C</u>	<u>MIDDLE RIDGE HOLLOW</u>	<u>Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac</u>	<u>1.2</u>
<u>PSB-28-EE-3-D</u>	<u>BUD HOLLOW</u>	<u>Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac</u>	<u>0.9</u>
<u>PSB-28-EE-4</u>	<u>ELK RUN</u>	<u>Entire length - tributary of Big Run of North Fork of the South Branch Potomac</u>	<u>3.9</u>
<u>PSB-28-G</u>	<u>ZEKE RUN</u>	<u>Entire length - tributary of North Fork of South Branch Potomac</u>	<u>3.7</u>
<u>PSB-28-GG-1</u>	<u>VANCE RUN</u>	<u>Entire length - tributary of Laurel Fork of North Fork of South Branch Potomac</u>	<u>3.3</u>
<u>PSB-28-GG-1-A</u>	<u>SAMS RUN</u>	<u>Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac</u>	<u>1.1</u>
<u>PSB-28-GG-1-B</u>	<u>LITTLE LOW PLACE HOLLOW</u>	<u>Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac</u>	<u>1.1</u>
<u>PSB-28-I</u>	<u>POWDERMILL RUN</u>	<u>Entire length - tributary of North Fork of South Branch Potomac</u>	<u>2.8</u>
<u>PSB-28-K</u>	<u>SENECA CREEK</u>	<u>Headwaters (Slab Camp Run) to mouth - tributary of North Fork of South Branch Potomac</u>	<u>20.3</u>
<u>PSB-28-K-1</u>	<u>BRUSHY RUN</u>	<u>Entire length - tributary of Seneca Creek</u>	<u>7.8</u>

PSB-28-K-2
PSB-28-K-2-B

ROARING CREEK
LONG RUN

Entire length - tributary of Seneca Creek
Beginning at the N/S Forks downstream to mouth - tributary of
Roaring Creek of Seneca Creek

6.1
2.2

PSB-28-K-3
PSB-28-K-3-B
PSB-28-K-4
PSB-28-K-6
PSB-28-K-6-B
PSB-28-R

HORSECAMP RUN
WAMSLEY RUN
STRADER RUN
WHITES RUN
UPPER GULF RUN
BLIZZARD RUN

Headwaters to mouth - tributary of Seneca Creek
Entire length - tributary of Horsecamp Run of Seneca Creek
Entire length - tributary of Seneca Creek
Entire length - tributary of Seneca Creek
Entire length - tributary of Whites Run of Seneca Creek
Section from headwaters downstream to within 0.5 miles of mouth
- tributary of North Fork of South Branch Potomac

4.1
1.5
2.6
3.9
2.7
3.1

PSB-28-S
PSB-28-T
PSB-29
PSB-30
PSB-32
PSB-33

BRIERY GAP RUN
LAUREL RUN
REDMAN RUN
LONG RUN
BRIGGS RUN
REEDS CREEK

Entire length - tributary of North Fork of South Branch Potomac
Entire length - tributary of North Fork of South Branch Potomac
Entire length - tributary of South Branch Potomac
Entire length - tributary of South Branch Potomac
Entire length - tributary of South Branch Potomac
From headwater downstream to the convergence of Long Hollow -
tributary of South Branch Potomac

2.7
2.7
3.4
2.9
4.6
11.2

PSB-47

Begins at forks of Blackthorn Creek and Whitethorn Creek to
mouth - tributary of South Branch Potomac

9.1

Shenandoah River
Watershed (Hardy County)
SNF-1

CAPON RUN

Headwater section downstream to Hunkerson Gap - Tributary of
the Shenandoah River

2.2

APPENDIX B

**ANTIDEGRADATION IMPLEMENTATION PROCEDURES
INTERGOVERNMENTAL COORDINATION AGENCIES**

STATE AGENCIES

Bureau of Commerce

Department of Natural Resources

Division of Forestry

Development Office

Department of Health and Human Resources

Bureau for Public Health

Bureau of the Environment

Department of Environmental Protection - all offices

Department of Agriculture

Soil Conservation Agency

Department of Transportation

Division of Highways

FEDERAL AGENCIES

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

APPENDIX C

Initial Presumptive Listing for Tier 2.5

<u>DNR CODE</u>	<u>STREAM NAME</u>	<u>LENGTH (miles)</u>
Tug Fork Watershed		
BST-60-D	CUB BRANCH	0.72
BST-60-E	GEORGE BRANCH	3.79
BST-60-F	CRANE CREEK	1.22
BST-60-G	HURRICANE BRANCH	2.99
BST-60-H-2	WHITE OAK BRANCH	1.78
BST-70-N	LITTLE SLATE CREEK	3.42
BST-70-U-1	BIG BRANCH	1.86
BST-70-W	JACOBS FORK	10.50
BST-70-Z	VALL CREEK	2.31
BST-76-E	DAYGAMP BRANCH	1.67
BST-99	ELKHORN CREEK	8.41
		38.68 total miles
James River Watershed		
J-1-A	EWING RUN	2.64
J-1-C	NORTH FORK	5.88
J-2	SWEET SPRINGS CREEK	6.10
J-3	COVE CREEK	6.66
		21.27 total miles
Kanawha River Watershed (Upper & Lower)		
K-13	LITTLE SIXTEENMILE CREEK	4.45
K-14-B-1	UNT OF FIVEFORK BRANCH	1.87
K-39-E-3	BAYS BRANCH	1.89

K-39-M-1	HOFFMAN HOLLOW	2.32
K-39-O	SHREWSBURY HOLLOW	1.54
K-76	LOOP CREEK	19.98
		32.06 total miles

Goal River Watershed

KG-10-22	WHITE OAK BRANCH	2.08
KG-31-B	HOPKINS FORK	8.95
		11.03 total miles

Elk River Watershed

KE	ELK RIVER	5.00
KE-102-A	CAMP CREEK	14.19
KE-111-K	SUGAR CREEK	10.51
KE-111-K-2	LITTLE SUGAR CREEK	7.61
KE-117-B	RIGHT FORK	13.60
KE-118	BERGOO CREEK	8.19
KE-127	BIG RUN	2.53
KE-129	VALLEY FORK	2.68
KE-133	DRY FORK	3.80
KE-135	BIG RUN	1.94
KE-136	PROPS RUN	1.38
KE-137	LAUREL RUN	2.63
KE-138	BIG SPRING FORK	9.67
KE-138-B	CUP RUN	2.02
KE-139-5A	SLATY FORK	4.79
KE-139-B	CROOKED FORK	2.51
KE-14-P	PANTHER HOLLOW	1.55
KE-50-B-10	IKE FORK	1.88
KE-50-I	ROCKGAMP RUN	6.66
KE-76-L-5	TUG FORK	3.83
KE-76-O	POPLAR CREEK	6.29
KE-76-U	JOHNSON BRANCH	2.44
KE-98-B-16	DESERT FORK	4.97
KE-98-C	LEFT FORK	5.73
KE-98-C-1	LAURELPATCH RUN	1.51
KE-98-C-11	LAUREL FORK	5.59
KE-98-C-14	FALL RUN	6.06
KE-98-C-15	BIG RUN	3.79
KE-98-C-1-A	LONG FORK	2.56

Gauley River Watershed

KG	GAULEY RIVER	26.56
KG-19-A	DOGWOOD CREEK	5.08
KG-19-G	ANGLINS CREEK	12.77
KG-19-J	BRACKENS CREEK	6.55
KG-19-U-1	BROWN CREEK	3.19
KG-19-U-2-C	OLD FIELD BRANCH	2.88
KG-19-U-2-D	JOB KNOB BRANCH	3.85
KG-19-V-5	LAUREL CREEK	3.64
KG-19-V-7	KUHIN BRANCH	1.94
KG-20	COLLISON CREEK	4.98
KG-24	HOMINY CREEK	23.40
KG-24-E	GRASSY CREEK	5.68
KG-24-E-2	BRUSHY MEADOW CREEK	5.23
KG-24-J	PRICE FORK	2.83
KG-26-K	BRUSHY FORK	5.53
KG-32-J	CRANES NEST RUN	2.26
KG-34-B	COAL SIDING RUN	1.50
KG-34-E	LAUREL CREEK	9.18
KG-34-E-11	MIDDLE BRANCH	3.34
KG-34-E-13	GOLD SPRING BRANCH	1.74
KG-34-E-3	SPRING RUN	1.52
KG-34-E-8	BEECH RUN	3.08
KG-34-E-9	HOGGAMP RUN	2.55
KG-34-F	LITTLE LAUREL CREEK	9.87
KG-34-F-2	IMPROVEMENT BRANCH	1.86
KG-34-G	SOUTH FORK	7.24
KG-34-G-10	GOLD KNOB FORK	5.60
KG-34-G-13	BIG RUN	1.44
KG-34-G-5	ELKLICK RUN	2.10
KG-34-G-6	ROCKY RUN	3.54
KG-34-G-8	BECKY RUN	2.56
KG-34-H	NORTH FORK	16.37
KG-34-H-14	BEAR RUN	2.24
KG-34-H-4	HUNTERS RUN	3.09
KG-34-H-5	COATS RUN	1.08
KG-34-H-9	ARMSTRONG RUN	1.24
KG-45-BIG	LAUREL CREEK	6.56

KG-57	MILLER MILL RUN	4.37
KG-58	LAUREL CREEK	2.07
KG-59	BIG RUN	1.32
KG-5-F-3	BEARPEN FORK	1.27
KG-5-H	ASH FORK	3.09
KG-5-J	NEIL BRANCH	2.65
KG-6	RICH CREEK	6.74
KG-60	TURKEY CREEK	4.86
KG-61	HUGHES RUN	2.79
KG-65	WILLIAMS CAMP RUN	1.66
KG-67	STRAIGHT CREEK	1.83
KG-70	BIG RUN	3.22
KG-72	MIDDLE FORK	1.96
KG-73	NORTH FORK	3.29
KGC	GRANBERRY RIVER	38.39
KGC-14	LICK BRANCH	1.22
KGC-15	HANGING ROCK BRANCH	1.24
KGC-19	DOGWAY FORK	8.75
KGC-21	BIRCHLONG RUN	2.18
KGC-23-E	CHARLES CREEK	2.59
KGC-24-G	LEFT FORK	1.52
KGC-3	JAKEMAN RUN	2.06
KGC-4	BARRENSHE RUN	4.59
KGC-7	BEE RUN	1.57
KGC-8	FOXTREE RUN	1.56
KGC-9	ALDRIGH BRANCH	1.25
KGW	WILLIAMS RIVER	34.70
KGW-1	CRAIG RUN	2.00
KGW-19	UPPER DANNOCK SHOALS RUN	1.83
KGW-2	JONATHAN RUN	1.38
KGW-20	TEA CREEK	5.96
KGW-20-A	LICK CREEK	1.82
KGW-21	SUGAR CREEK	3.63
KGW-22	LITTLE LAUREL CREEK	2.47
KGW-25	DAY RUN	3.08
KGW-26	BLACK MOUNTAIN RUN	1.65
KGW-27	MOUNTAIN LICK RUN	2.11
KGW-3	SAWYER RUN	1.33
KGW-4	SPIGE RUN	1.81
KGW-8	WHITE OAK FORK	2.14

KGW-9 _____ LICK BRANCH _____ 1.43
 _____ 379.30 total miles

New River Watershed (Upper & Lower)

KN-17 _____ MANNS CREEK _____ 3.37
 KN-18 _____ EPHRAIM CREEK _____ 4.22
 KN-23 _____ BUFFALO CREEK _____ 2.41
 KN-24 _____ SLATER CREEK _____ 5.08
 KN-26 _____ PINEY CREEK _____ 16.91
 KN-26-B _____ FAT CREEK _____ 6.56
 KN-27 _____ LAUREL CREEK _____ 12.37
 KN-27-C _____ CHESTNUT KNOB FORK _____ 3.54
 KN-29 _____ GLADE CREEK _____ 5.76
 KN-29-E _____ PING CREEK _____ 5.71
 KN-32 _____ MEADOW CREEK _____ 2.59
 KN-37 _____ FALL BRANCH _____ 1.93
 KN-51-O _____ TURKEY CREEK _____ 9.19
 KN-61 _____ RICH CREEK _____ 2.85
 KNB-12-B _____ LAUREL CREEK _____ 4.86
 KNB-13 _____ CAMP CREEK _____ 9.29
 KNB-13-D _____ MASH FORK _____ 2.91
 KNB-13-G _____ SENG BRANCH _____ 1.48
 KNB-3 _____ LITTLE BLUESTONE RIVER _____ 4.73
 KNB-30 _____ GRANE CREEK _____ 5.40
 _____ 111.16 total miles

Greenbrier River Watershed

KNG _____ GREENBRIER RIVER _____ 25.30
 KNG(S)-1 _____ MILLIGAN CREEK _____ 5.71
 KNG(S)-2-B _____ FLYNN CREEK _____ 4.27
 KNG(S)-3-A _____ BURNS RUN _____ 4.08
 KNG-23 _____ SECOND CREEK _____ 6.06
 KNG-28 _____ ANTHONY CREEK _____ 15.70
 KNG-28-D _____ LITTLE CREEK _____ 8.08
 KNG-28-P-1 _____ LAUREL RUN _____ 4.20
 KNG-28-Q-2 _____ TWOMILE RUN _____ 1.55
 KNG-47 _____ BEAVER CREEK _____ 8.18
 KNG-49 _____ SWAGO CREEK _____ 3.77
 KNG-53-G _____ BARGLAY RUN _____ 1.74
 KNG-53-H _____ DOUTHAT CREEK _____ 9.02

KNG-60	LAUREL RUN	3.00
KNG-66-D	SHOCK RUN	4.46
KNG-66-H-2	LEFT PRONG	3.29
KNG-68	DEER CREEK	8.75
KNG-68-A	NORTH FORK	10.73
KNG-68-A-3	SUTTON RUN	1.60
KNG-68-A-4	TACKER FORK	2.46
KNG-68-A-5	BLACK RUN	2.43
KNG-68-A-6	ELLEBER RUN	3.08
KNG-68-A-6-A	GRIFFIN RUN	1.69
KNG-70	LEATHERBARK RUN	4.69
KNG-74	TROUT RUN	1.14
KNG-75	ALLEGHENY RUN	5.33
KNG-77	ELK CREEK	2.56
KNG-78	EAST FORK	19.87
KNG-78-A	JOHNS RUN	2.24
KNG-78-C	LITTLE RIVER	6.28
KNG-78-G	FIVEMILE HOLLOW	2.29
KNG-78-H	POCA RUN	2.73
KNG-78-H-1	LONG RUN	2.85
KNG-78-K	MULLENAX RUN	2.92
KNG-78-L	ABES RUN	2.65
KNG-79	WEST FORK	17.68
KNG-79-B	FILL RUN	1.94
KNG-79-C	LITTLE RIVER	7.59
KNG-79-C-1	SPAN OAK RUN	2.32
KNG-79-C-2	CLUBHOUSE RUN	11.02
KNG-79-C-3	HINKLE RUN	10.41
		245.59 total miles

Little Kanawha River Watershed

LK-111	LAUREL RUN	6.04
LK-131	GETOUT RUN	3.04
LK-86-E-4	PINE RUN	1.57
LK-95-L	CARPENTER FORK	5.04
		15.66 total miles

Gheat River Watershed

MG-12-A	LAUREL RUN	6.13
MG-12-B-3	HOG RUN	4.42

MC-12-B-6	MILL RUN	3.95
MC-18	ROARING CREEK	8.03
MC-1-A	RYAN HOLLOW	2.33
MC-20	ELSEY RUN	3.40
MC-2-A	DARNELL RUN	2.08
MC-33-A	FLAG RUN	5.51
MC-36	WOLF CREEK	6.90
MC-41	LONG RUN	1.22
MC-45	TOBES RUN	1.16
MC-46-B	RIGHT FORK	3.80
MC-47	JOHNATHAN RUN	1.86
MC-50	UPPER JOHNATHAN RUN	2.53
MC-51	CLOVER RUN	1.34
MC-51-	LEFT FORK	9.16
MC-51-A	RIGHT FORK	5.45
MC-51-B	INDIAN FORK	4.16
MC-52	MINEAR RUN	6.63
MC-52-0.7	BRIDGE RUN	1.12
MC-52-A	ROARING RUN	2.12
MC-53	DRY RUN	2.73
MC-54	HORSESHOE RUN	15.55
MC-54-A	MIKE RUN	3.86
MC-54-C	MAXWELL RUN	2.92
MC-54-D	HYLE RUN	3.92
MC-54-E	LICK DRAIN	1.79
MC-54-F	LAUREL RUN	2.87
MC-54-G	LYNN RUN	1.33
MC-54-H	THUNDERSTRUCK RUN	3.89
MC-54-I	LEADMINE RUN	4.81
MC-54-I-1	LIME HOLLOW RUN	1.14
MC-54-J	WOLF RUN	1.80
MC-54-K	TWELVEMILE RUN	2.25
MC-55	DRY RUN	3.19
MC-56	MILL RUN	4.77
MC-57	WOLF RUN	1.90
MC-60	DRY FORK	3.76
MC-60-A	ROARING RUN	0.77
MC-60-C	ELKICK RUN	4.52
MC-60-C-3	JOHN B. HOLLOW	1.12
MC-60-D-10	SAND RUN	3.19

MG-60-D-11	YOAKUM RUN	2.48
MG-60-D	LOWER BLACKWATER RIVER	2.62
MG-60-G	RED RUN	5.56
MG-60-I	MILL RUN	2.92
MG-60-J	ELKICK RUN	2.59
MG-60-K	GLADY FORK	31.34
MG-60-K-1	THREE SPRING RUN	1.25
MG-60-K-11	MCGRAY CREEK	2.41
MG-60-K-15	DANIELS CREEK	3.18
MG-60-K-16	WEST FORK GLADY FORK	6.13
MG-60-K-16	WEST FORK GLADY FORK	4.27
MG-60-K-17	EAST FORK GLADY FORK	7.28
MG-60-K-17-A	LOUK RUN	1.19
MG-60-K-2	PANTHER CAMP RUN	1.73
MG-60-K-2-A	HOG RUN	1.17
MG-60-K-4	FIVE LICK CREEK	1.74
MG-60-K-5	WOODFORD RUN	1.14
MG-60-K-6	BAKER CAMP RUN	1.19
MG-60-L	BIG RUN	3.69
MG-60-N	LAUREL FORK	21.52
MG-60-N-4	BEAVERDAM RUN	2.12
MG-60-N-8	FIVE LICK RUN	2.45
MG-60-O	RED CREEK	6.77
MG-60-O-1	BIG RUN	3.47
MG-60-O-2	FLATROCK RUN	2.89
MG-60-O-3	GANDY RUN	2.26
MG-60-P	SPRUGE RUN	3.25
MG-60-Q	HORSECAMP RUN	4.59
MG-60-R	TORY CAMP RUN	2.43
MG-60-T	GANDY CREEK	15.68
MG-60-T-1	LOWER TWO SPRING RUN	2.29
MG-60-T-10	NARROW RIDGE RUN	2.16
MG-60-T-11	WARNER RUN	2.21
MG-60-T-2	UPPER TWO SPRING RUN	2.53
MG-60-T-3	SWALLOW ROCK RUN	1.82
MG-60-T-6	TAYLOR RUN	0.87
MG-60-T-8	BIG RUN	3.75
MG-60-T-9	GRANTS BRANCH	2.80
MCS	SHAVERS FORK	7.26
MCS-12	LITTLE LAUREL RUN	1.34

MGS-13	LITTLE BLACK RUN	4.74
MGS-14	CLIFTON RUN	2.41
MGS-15	RATTLESNAKE RUN	5.03
MGS-16	JOHNS RUN	2.70
MGS-2	HAWK RUN	1.09
MGS-22	TAYLOR RUN	2.97
MGS-22-A	STALNAKER RUN	1.61
MGS-28	UPPER POND LICK	6.29
MGS-3	HADDIT RUN	2.68
MGS-33	FISHING HAWK CREEK	3.60
MGS-3-A	SOUTH BRANCH	3.56
MGS-4	JOBS RUN	1.72
MGS-40	YOKUM RUN	2.56
MGS-43	GLADE RUN	2.67
MGS-46	RED RUN	2.75
MGS-47	BLISTER RUN	1.95
MGS-48	FISH HATCHERY RUN	2.66
MGS-49	LAMBERT RUN	3.23
MGS-5	LAUREL RUN	3.48
MGS-50	FIRST FORK	5.42
MGS-54	BEAVER CREEK	1.74
MGS-55	SECOND FORK	4.15
MGS-57	BLACK RUN	2.28
MGS-6	PLEASANT RUN	3.52
MGS-6-B	AARONS RUN	2.35
MGS-7	STONELICK RUN	1.68
MGS-8	LAUREL RUN	1.18
MGS-9	NAIL RUN	1.74
		415.11 total miles

Tygart River Watershed		
MT-18-E-5-B	FROG RUN	2.36
MT-23-F	MILL RUN	4.03
MT-23-H	MILL RUN	3.72
MT-38	ZEB'S CREEK	4.04
MT-44	MATHEUS RUN	1.66
MT-45-C	RIGHT FORK	3.24
MT-47	BEAVER CREEK	6.20
MT-50-A	RIGHT FORK OF FILES CREEK	8.33
MT-50-A-1	LIMEKILN RUN	2.12

MT-50-B	LEFT FORK FILES CREEK	2.84
MT-61	SHAVERS RUN	6.95
MT-64	MILL CREEK	10.69
MT-64-C	GLADE RUN	1.59
MT-64-E	MEATBOX RUN	1.19
MT-64-F	POTATOHOLE FORK	1.84
MT-66	RIFFLE CREEK	1.91
MT-66-B	MC GEE RUN	3.40
MT-66-C	BACK FORK	2.01
MT-67	RAFE RUN	1.54
MT-68	BEGKY CREEK	9.41
MT-68-A	BIG BRANCH	2.25
MT-72	HAMILTON RUN	2.49
MT-73	CLAY RUN	2.61
MT-74	ELK WATER FORK	5.20
MT-74-A	MOWRY RUN	2.34
MT-74-B	LIMEKILN RUN	1.93
MT-75	STEWART RUN	0.08
MT-77	CONLEY RUN	7.10
MT-78	RALSTON RUN	6.99
MT-79	WINDY RUN	4.60
MT-80	LOGAN RUN	2.49
MT-81	BIG RUN	5.14
MTB-25-A	RIGHT FORK	3.88
MTB-27	PANTHER FORK	4.08
MTB-28	BIG RUN	3.03
MTB-31	RIGHT FORK	2.24
MTB-31-B	REGER RUN	1.13
MTB-31-C	ALEC RUN	1.93
MTB-31-D	MILLSITE RUN	3.76
MTB-32	LEFT FORK	6.85
MTB-32-D	BEARCAMP RUN	5.00
MTB-32-H	BEECH RUN	4.62
MTM	MIDDLE FORK RIVER	7.32
MTM-1	HANGING RUN	4.68
MTM-11	RIGHT FORK MIDDLE FORK RIVER	7.42
MTM-11-D	JACKSON FORK	3.88
MTM-11-E	JENKS FORK	3.70
MTM-13	LONG RUN	7.66
MTM-16	CASSITY FORK	4.25

MTM-16-A	PANTHER RUN	4.43
MTM-21	PLEASANT RUN	1.82
MTM-22	LAUREL RUN	2.57
MTM-23	LAUREL BRANCH	4.00
MTM-24	SUGAR RUN	2.30
MTM-25	SCHOOLCRAFT RUN	3.08
MTM-25-A	BIRCH FORK	1.48
MTM-26	BIRCH FORK	3.56
MTM-27	MITCHELL LICK FORK	2.52
		231.49 total miles

Upper Ohio North

O-102-A	WHITEOAK RUN	0.48
---------	--------------	------

Twelvepole Creek Watershed

O-2-H-2-A	STOWERS BRANCH	0.46
O-2-P-23	ARKANSAS BRANCH	0.75
O-2-P-25	SWEETWATER BRANCH	2.00
O-2-P-26	LONG BRANCH	2.59
O-2-P-27	SPRUGE FORK	1.84
O-2-Q-14	RICH CREEK	1.32
O-2-Q-16	BLUELICK BRANCH	2.28
O-2-Q-18-A	LITTLE LAUREL CREEK	2.09
		13.33 total miles

Upper Ohio South

O-77-B	LONG RUN	4.51
--------	----------	------

Guyandotte River Watershed

OG-102	BRICKLE BRANCH	1.64
OG-29-C	HORSESHOE BRANCH	1.98
OG-32-F	PLUM BRANCH	2.35
OG-34-E	STEER FORK	1.64
OG-37	LITTLE UGLY CREEK	1.42
OG-38	BIG UGLY CREEK	8.49
OG-38-A	PIGEONROOST CREEK	3.62
OG-38-B	LAUREL CREEK	2.60
OG-61	BUFFALO CREEK	3.04
OG-96-A	STURGEON BRANCH	1.57
OGM-8-B	LEFT FORK	2.75

31.06 total miles

Potomac Direct Drains Watershed

P-16 ROCKWELL RUN 10.39
P-9-G-1 NORTH FORK INDIAN RUN 1.49
P-9-G-2 SOUTH FORK INDIAN RUN 3.76

15.63 total miles

Gacapon River Watershed

PG-0-9 GONGOR HOLLOW 7.73
PG-1 CONSTANT RUN 5.23
PG-10 EDWARDS RUN 7.00
PG-17 HAWK RUN 4.62
PG-23 TROUT RUN 16.62
PG-24-H LOWER COVE RUN 4.63

45.83 total miles

North Branch / Potomac River Watershed

PNB-14 HOWELL RUN 3.83
PNB-15 DEEP RUN 4.75
PNB-15-A GRANBERRY RUN 2.66
PNB-16-B WYCKOFF RUN 2.43
PNB-18 DIFFICULT CREEK 5.17
PNB-18-B-1 JOHNNYCAKE RUN 3.28

22.11 total miles

South Branch / Potomac River Watershed

PSB-13 MILL RUN 8.95
PSB-21-F DUMPLING RUN 2.60
PSB-21-K ROUGH RUN 6.92
PSB-25-C-2 SPRING RUN 2.98
PSB-28-A-1 BIG RUN 2.61
PSB-28-A-2 LAUREL RUN 3.17
PSB-28-B SAMUEL RUN 2.85
PSB-28-C BROAD RUN 2.39
PSB-28-D MOYER FORK 7.92
PSB-28-E HIGH RIDGE RUN 2.28
PSB-28-EE BIG RUN 12.84
PSB-28-EE-2 SAWMILL BRANCH 3.22
PSB-28-EE-2-A BACK RUN 3.39
PSB-28-EE-3 TEETER CAMP RUN 3.74
PSB-28-EE-3-A HEMLOCK RUN 1.91

PSB-28-EE-3-B	LEONARD SPRING HOLLOW	4.64
PSB-28-EE-3-C	MIDDLE RIDGE HOLLOW	4.81
PSB-28-EE-3-D	BUD HOLLOW	3.54
PSB-28-EE-4	ELK RUN	3.93
PSB-28-G	ZEKE RUN	3.70
PSB-28-GG-1	VANCE RUN	3.27
PSB-28-GG-2	SAMS RUN	1.10
PSB-28-GG-2-A	LITTLE LOW PLAGE HOLLOW	1.10
PSB-28-I	POWDERMILL RUN	2.84
PSB-28-K	SENEGA CREEK	20.26
PSB-28-K-1	BRUSHY RUN	7.79
PSB-28-K-2	ROARING CREEK	6.13
PSB-28-K-2-B	LONG RUN	2.23
PSB-28-K-3	HORSE CAMP RUN	4.06
PSB-28-K-3-B	WAMSLEY RUN	1.52
PSB-28-K-4	STRADER RUN	2.56
PSB-28-K-5	GULF RUN	1.46
PSB-28-K-6	WHITES RUN	3.86
PSB-28-K-6-A	LOWER GULF RUN	4.67
PSB-28-K-6-B	UPPER GULF RUN	2.67
PSB-28-R	BLIZZARD RUN	3.60
PSB-28-S	BRIERY GAP RUN	2.65
PSB-28-T	LAUREL RUN	2.74
PSB-29	REDMAN RUN	3.41
PSB-30	LONG RUN	2.88
PSB-32	BRIGGS RUN	4.57
PSB-33	REEDS CREEK	11.16
PSB-40	PETERS RUN	5.08
PSB-47	THORN CREEK	9.08
PSB-9	MILL CREEK	25.38
		224.40

Shenandoah River Watershed (Hardy County)

S-9-A CAPON RUN 2.19

Total number of streams 444

Total Miles 2006.80

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 28, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Department of Environmental Protection
Division of Water and Waste Management
601 57th Street S.E.
Charleston, WV 25304-2345
Telephone: (304) 926-0495

LEGISLATIVE RULE TITLE: 60CSR5
Antidegradation 2.5

1. Authorizing statute(s) citation WV Code 22-11-7b(d)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 2, 2006

b. What other notice, including advertising, did you give of the hearing?
News release, Public Notice in newspaper

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 10, 2006

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 28, 2006

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Lisa A. McClung, Director

WV Department of Environmental Protection

Division of Water and Waste Management

601 57th Street S.E.

Charleston, WV 25304-2345

Telephone: (304) 926-0495

Fax: (304) 926-0463

email: lmcclung@wvdep.org

- g. **IF DIFFERENT FROM ITEM 'f',** please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title:

"Antidegradation Implementation Procedures," 60CSR5

A. AUTHORITY:

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

B. SUMMARY OF RULE:

Antidegradation is a requirement of the federal Clean Water Act intended to preserve the existing quality of the State's waters and to prevent and/or minimize future degradation. The rule was first adopted in 2001 and establishes four levels, or tiers, of protection for State waters, Tiers 1, 2, 2.5 and 3. Each tier provides a graduated level of protection used during the NPDES permit issuance process.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

The proposed revisions to the rule carry forward the agency's antidegradation implementation efforts, and move the Tier 2.5 streams that had been on the "presumptive" list in Appendix C to a final proposed list in Appendix A, that is now subject to the legislative rulemaking review process, as clarified by passage of House Bill No. 4550 in the 2006 legislative session. Changes have been made to the rule clarifying that the agency's listing of streams on Appendix A is subject only to the legislative process and not the appellate process through the Environmental Quality Board. The Board will still hear appeals of certain final agency actions specified under section 9.6 of the rule, but will not hear appeals concerning the designation of Tier 2.5 waters.

Section 6.2 of the current rule has been largely deleted because it related to the procedures the Department was required to follow in reviewing the list of 444 streams that had initially been placed on the presumptive list for Tier 2.5 waters and making a final decision prior to legislative review. These procedures have recently been completed and thus the rule language is no longer necessary. The proposed rule states that the Tier 2.5 list is now in Appendix A and refers to the applicable sections for making subsequent additions or deletions to the list. These particular sections have also been amended to clarify the applicable public notice procedures and that the subsequent listing or delisting of Tier 2.5 waters is subject to legislative review.

The process for including streams in Appendix A included two separate opportunities for public comment and hearing. The agency has prepared a Responsiveness Summary to all of the public comments received, and a copy of this document is available at www.wvdep.org/antideg.

Other changes that have been proposed are cross-references to the Water Quality Standards rule (formerly 46CSR1, now 47CSR2) and other clerical corrections to the rule consistent with Senate Bill No. 278 that transferred all water quality standards authority to the Secretary from the Environmental Quality Board. One additional change was made to incorporate the same approach for determining significant degradation in Tier 2 waters as is currently established for Tier 2.5 waters. This change relates only to pH, fecal coliform, temperature and dissolved oxygen and reflects the fact that due to their nature, application of a percentage change in assimilative capacity is not an appropriate measure of degradation for these pollutants.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

Although the federal Clean Water Act requires the State to adopt implementation procedures related to the federal antidegradation policy, there is no direct federal counterpart regulation specifying the details of these procedures. Because there is no direct federal counterpart, no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its meeting on May 31, 2006, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Antidegradation Implementation Procedures, 60CSR5

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Department of Environmental Protection

Address: 601 57th Street, SE
Charleston, WV 25304

Phone Number: (304) 926-0495 Email: lmcclung@wvdep.org

Fiscal Note Summary

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

No fiscal impacts on state government are anticipated.

Fiscal Note Detail

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

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: Antidegradation Implementation Procedures, 60CSR5

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

None anticipated

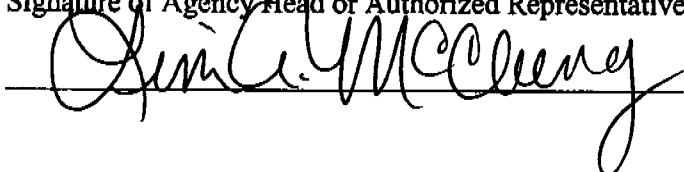
MEMORANDUM

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

The proposed revisions carry forward the agency's implementation efforts, and costs of implementing the changes will be absorbed in the agency's current budget.

Date: July 28, 2006

Signature of Agency Head or Authorized Representative



1 WEST VIRGINIA
2 DEPARTMENT OF ENVIRONMENTAL PROTECTION
3 DIVISION OF WATER AND WASTE MANAGEMENT

4 ANTIDegradation PUBLIC HEARING

5 IMPLEMENTATION OF 60CSR5

6 JULY 10, 2006
7
8
9
10

11 On the 10th day of July, 2006, beginning at
12 6:00 p.m., at the offices of the West Virginia
13 Department of Environmental Protection, 601 57th
14 Street, Kanawha City, Kanawha County, West
15 Virginia, before James D. Nielsen, Court Reporter
16 and a Notary Public in and for the State of West
17 Virginia, a public hearing was taken in the
18 above-named action pursuant to notice of the West
19 Virginia Department of Environmental Protection,
20 Division of Water and Waste Management.

21
22 ACCURATE REPORTING SERVICE, INC.
23 526 SEVENTH STREET
24 HUNTINGTON, WEST VIRGINIA 25701

(304) 345-9891 * (304) 522-9637 * (606) 329-2154

1 APPEARANCES:

2 On Behalf of the West Virginia Department of
3 Environmental Protection:

4 Karen Watson: Assistant General Counsel for
5 the Division of Environmental Protection

6 Patrick Campbell: Assistant Director of the
7 Division of Water and Waste Management

8 William Brannon: Deputy Director of the
9 Division of Water and Waste Management

10 Lalena Price: Public Information Office,
11 Department of Environmental Protection

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

I N D E X

SPEAKERS:

PAGE

Vikki Jo Kennedy Sims	7
Vernon Haltom	9
Jennifer Cohen Jordan	13
Ernie Nester	15
Jack Williams	17
Matt Noerpel	18
Ed Hayne	19
Liz Garland	32
OC Spaulding	39
George Phillips	40
Don Gartman	44
John David	46
Brook Thompson	48
Dave Yaussy	49
Leighton Cobb	50
Larry Orr	51
Jeff Holland	54
Julian Martin	55
Richard Squire	59
Adam Webster	62
Eric Olmstead	70
David Payne	72
Jason Sanders	74
Bob Radspinner	75
Debbie Stevens	75
Sarah Tonkin	79
Mary Ellen O'Ferrell	80
Carol Warren	81

PROCEEDING

MS. PRICE: It looks like we have 21 of you who want to comment. We're also running some Division of Air Quality hearings down the hallway, so I think there is only one of you who has requested to also speak at that hearing. So what I'm going to do is call her first after I give you some information about the hearing.

First of all, welcome to the Department of Environmental Protection. My name is Lalena Price and I work for the Public Information Office here at the DEP. This is the Antidegradation Implementation Procedures Public Hearing on 60CSR5. Please make sure you have signed in and indicated whether you would like to make a comment.

We are very pleased that you made the trip to Charleston to comment on this rule. We will be accepting comments, both written and oral, this evening. Please note that the comment period officially ends at the end of this hearing.

If you have written comments, please give them to me by the end of the hearing. If you have already submitted or are going to submit

1 written comments, you do not have to also make
2 them orally, but you're welcome to if you like.
3 Written comments are considered as much a part of
4 the record as ones that you give in a public
5 hearing.

6 We are here tonight to listen to you and to
7 include your thoughts in the official record. We
8 understand that you may have some questions. A
9 question in and of itself is a very meaningful
10 comment to us. So please enter your questions
11 into the record along with your comments and we
12 will respond to those as well.

13 We have several representatives of the DEP
14 here listening to your comments, including Bill
15 Brannon, Deputy Director of the Division of Water
16 and Waste Management. Patrick Campbell,
17 Assistant Director of the DWWM. And then we have
18 Karen Watson, Assistant General Counsel for the
19 DEP. And in the front row here we have Scott
20 Mandirola who is a program manager for Water
21 Quality Centers.

22 I'll tell you, I'll just read a little bit
23 about the rules in case you're not sure why
24 you're hear. Antidegradation is a requirement of

1 the Federal Clean Water Act intended to preserve
2 the existing quality of the state's water and to
3 prevent or minimize future degradation.

4 The rule was first adopted in 2001 and
5 establishes four levels or tiers of protection
6 for state waters, Tiers 1, 2, 2.5 and 3. Each
7 tier provides a graduated level of protection
8 used during the National Pollutant Discharge
9 Elimination System, NPDES, permit issuance
10 process.

11 The proposed revisions to the rule move the
12 Tier 2.5 streams that had been on the presumptive
13 list in Appendix C to a final proposed list in
14 Appendix A. The process for including streams in
15 Appendix A included two separate opportunities
16 for public comment and hearing. The agency has
17 prepared a responsiveness summary to all of the
18 public comments we have received, and a copy of
19 this document is available at our web site at
20 www.wvdep.org.

21 Before we begin accepting comments I'm going
22 to ask those of you who also want to make the
23 comments in Air to come forward. After you're
24 finished making your comments we'll take you down

1 the hall and bring you back if you want or --
2 we'll probably bring you back and let you go out
3 this way.

4 So thanks so much for your patience and for
5 coming and taking part in our process, we
6 appreciate it.

7 So the first person is Vikki Jo. If you want
8 to come up here and make your comment at the
9 microphone that would be great.

10 MS. VIKKI JO KENNEDY SIMS: I'll add my
11 own little sign (indicating), Future Home of West
12 Virginia, could be a garbage camp.

13 My name is Vikki Jo Kennedy Sims and I
14 hail from Kodiak Island, Alaska, but I have
15 probably made West-By-God-Virginia my home for
16 the last three years and nine months. And all
17 this talk about Tier 1, Tier 2, Tier 3, Tier 4,
18 I've shed a hundred tears and there's probably
19 going to be more.

20 Now, this is an outrage and I know this
21 is coming down from the federal level to put
22 pressure on the DEP to let up on these coal
23 mines, these logging operations and everything
24 else. The people of West Virginia and the great

1 state of West Virginia has given all it can, and
2 now they deserve to have the clean water. It's
3 just a nightmare that these rules were made and
4 now they're going to be let up. I don't
5 understand it. I think it's an outrage and I
6 think you're going to see the people of West
7 Virginia really stand up and scream out over this
8 one, because if you indeed lower the standards
9 for the drinking water in this state, the
10 watershed in West-By-God-Virginia goes clear down
11 to the Gulf of Mexico and also over to Chesapeake
12 Bay. Now, you're messing with my living when
13 you're messing with the fishing living.

14 So do not lower the standards of the
15 water in West Virginia under no circumstances.
16 They need to be brought up, not down. Because if
17 you lower them I'm going to throw the towel in,
18 West Virginia trout fishing, gone, and anything
19 else that's going to have to do with water in the
20 state of West Virginia.

21 I'm begging you now, as a very concerned
22 mother and grandmother living in the state of
23 West Virginia and as an American citizen, not to
24 let this happen. Say no. It's a real simple

1 word. We teach it to the two year olds. It's
2 N-O, no. Thank you.

3 MS. PRICE: Thank you, Vikki. Now we'll
4 hear from Vernon Haltom.

5 MR. VERNON HALTOM: Thank you for the
6 opportunity to comment. My name is Vernon
7 Haltom, I live in Naoma, West Virginia. I live
8 right next to a river. I work for Coal River
9 Mountain Watch, which is right next door.

10 My shirt says Stop Destroying My
11 Mountain, that could as well say Stop Destroying
12 My Stream. And what you are doing by removing
13 streams from your list of Tier 2.5 streams is to
14 in fact destroy them, okay. The list of 444
15 streams should be a start that we add to, not one
16 that we randomly or arbitrarily remove from
17 because a few people representing a few special
18 interests oppose those streams being on the
19 list.

20 The waters of West Virginia do not
21 belong to a select few special interests, they
22 belong to all West Virginians. All West
23 Virginians should have access to clean water.
24 All of West Virginia streams should be afforded

1 the same protection as the 303 or whatever that
2 was left after you removed those from your
3 original list.

4 The people in this room are in large
5 measure trout fisherman; am I right? I see a lot
6 of heads nodding. There is some who are not
7 trout fishermen or trout fisherwomen in some
8 cases, but there are many of us who would like to
9 be. But you know what, when your river runs
10 black, you can't be a trout fisherman in a black
11 stream because the fish are dead.

12 There are other representatives of
13 various other tourism industries here in this
14 room, I'm sure. You cannot do white water
15 rafting in a black river, that's just not safe,
16 it's just not healthy, it's just not done. But
17 by removing these streams from the Tier 2.5 list
18 what you're doing is condemning them to an
19 eternity of pollution. You're condemning the
20 people who live downstream, upstream, adjacent to
21 those streams to a lifetime and their descendants
22 to a lifetime of not being able to use their
23 streams in the way that they could be used, in
24 the way that they should be used, in the way that

1 the people of West Virginia deserve to be able to
2 use them.

3 We are tired of streams of West Virginia
4 becoming a cesspool for somebody else's money
5 making outfit. I don't want the stream that runs
6 in my front yard to be polluted, but it's not on
7 your list. So apparently I don't matter. There
8 are fish in that stream, there are trout in that
9 stream, reproducing trout in that stream, but
10 apparently I don't matter. Apparently that
11 stream doesn't matter, and the trout in that
12 stream doesn't matter and everybody along that
13 stream who could have either a kayaking business
14 or a rafting business or a fishing guide business
15 or a bed and breakfast business or any of a dozen
16 other tourism related businesses don't matter
17 because that stream doesn't matter, it's not on
18 your list. And I'm tired of it, and most of you
19 are too.

20 So my comments are that the 303 streams
21 that are on your list need to remain on the
22 list. The streams that were removed from the
23 list need to be put back on the list. There is
24 no valid justification to remove them from the

1 list. Tier 2.5 is a compromise.

2 We were just told that the Clean Water
3 Act says that you're supposed to protect the
4 streams. Antidegradation means you don't degrade
5 the water. By removing streams from the list
6 you're degrading the water. Even Tier 2.5 is a
7 compromise so the people can operate whatever
8 businesses that they're operating and still add
9 pollutants to the water. So Tier 2.5 is a
10 compromise and those who object to having streams
11 on that list have a false argument. They want it
12 all at the expense of everyone else.

13 So I'm going to keep my comments brief,
14 I know there are a lot of other people who would
15 like to speak. Thank you for this opportunity.
16 But hopefully this time the West Virginia
17 Department of Environmental Protection will pay
18 attention to when the people talk, because so far
19 they haven't.

20 We deal with coal mining hearings quite
21 frequently, and what we find is that coal mine
22 permits are granted in spite of people speaking
23 out. We find that streams are polluted with
24 black water in spite of minor fines, little slaps

1 on the wrist. These streams need to be enforced,
2 they need to be added to, not detracted from, and
3 they need to be enforced. That's the other key
4 to the equation.

5 DEP in dealing with black water spills
6 and dealing with other mine related violations
7 does not do an adequate job of enforcing the
8 rules and regulations, because if they did we
9 wouldn't have so many of these violations. So if
10 you're going to put these streams on the list you
11 need to enforce it and not just make a token
12 effort. Thank you.

13 MS. PRICE: Some of you indicated that
14 you might want to speak, so I'll just call those
15 names as I come to them on the list.

16 Jennifer Cohen-Jordan, do you want to speak?

17 MS. JENNIFER COHEN JORDAN: My name is
18 Jennifer. I'm a student of Appalachian State
19 University in North Carolina, and I'm doing an
20 internship at Coal River Mountain Watch. I'm a
21 trout fisherman and I am concerned for the trout
22 population, that's one of the reasons I'm here.
23 But I'm also concerned about increasing pressures
24 on our water supplies and the health of our water

1 supplies.

2 Anybody that's paying attention knows
3 that water is going to be the next big issue, or
4 one of the next big issues in our country. And
5 if we're not careful it could lead to major
6 social and political upheaval. We need to pay
7 attention to that. We need to protect our waters
8 right now.

9 I also question what the point is in
10 having a protective agency when industries can
11 come in and wield such power over these agencies
12 and have streams removed from protected lists
13 like this at will. Where is the justice? Where
14 is the point in having agencies like this when
15 they're so easily manipulated? To me it's kind of
16 akin to allowing industries to police themselves
17 for safety and pollution, it just doesn't make
18 sense. That's all I have to say. Thank you.

19 MS. PRICE: Sara Tonkin?

20 MS. SARA TONKIN: Is there any way I can
21 hold my comments until later?

22 MS. PRICE: Sure. If I forget to come
23 back to you, let me know.

24 Ernie Nester?

1 MR. ERNIE NESTER: Thank you. I'm Ernie
2 Nester. I live in Fallsvew, Fayette County. I
3 came to West Virginia in 1966, so I've been trout
4 fishing in West Virginia since 1966. I'm a civil
5 engineer, worked at West Virginia Tech for 30 and
6 a half years.

7 Now, trout fishing is my primary hobby.
8 And when I saw the large number of reproducing
9 trout streams that were removed from the Tier 2.5
10 list I was very disappointed. And there is a
11 whole bunch of reproducing trout streams that
12 were removed, but I'm just going to make comments
13 about a very few of the many trout streams that I
14 fish.

15 I fish Tug Fork, which is a native brook
16 trout stream in Nicholas County, for many years.
17 Tug Fork was removed from the Tier 2.5 list. In
18 1982 my wife and I stocked some brown trout
19 fingerlings in Loop Creek in Fayette County, and
20 that stream has received brown trout fingerlings
21 ever since. We were delighted when the brown
22 trout started reproducing in the upper section of
23 Loop Creek. Well, Loop Creek was removed from
24 the Tier 2.5 list.

1 Now, I have fished Elkhorn Creek in
2 McDowell County for about 18 years now. Elkhorn
3 Creek has a very good reproducing rainbow trout
4 population. It also has a very good brown trout
5 reproducing population. Apparently having two
6 species of trout reproducing in that stream
7 wasn't enough to keep it on the 2.5 list, it's
8 gone.

9 Another stream that I have fished is Big
10 Spring Fork in Pocahontas County. It is one of
11 the two streams that come together to form what
12 is called the Slaty Fork section of the Elk
13 River. Big Spring Fork has native brook trout,
14 it has reproducing rainbow trout, it has
15 reproducing brown trout, but apparently -- and
16 that may be the only stream in West Virginia
17 where all three species reproduce, but that was
18 not enough to keep it on the Tier 2.5 list.

19 Now, the reproducing trout streams in
20 West Virginia should be a treasured resource. I
21 do not understand how any good citizen of West
22 Virginia could be opposed to placing the
23 reproducing trout streams on the Tier 2.5 list
24 which provides a reasonable degree of

1 protection.

2 I hope that DEP will reconsider and
3 restore all of the reproducing trout streams to
4 the Tier 2.5 list. From the outside it appeared
5 that it was fairly easy to remove several of the
6 reproducing trout streams from the Tier 2.5 list,
7 so I would assume that it would also be fairly
8 easy for DEP to place the reproducing trout
9 streams back on the Tier 2.5 list where they
10 belong. Thank you.

11 MS. PRICE: Next up, Jack Williams.

12 MR. JACK WILLIAMS: Thank you so much
13 for affording me this opportunity to speak. My
14 name is Jack Williams. I live in Cross Lanes
15 here in Kanawha County. I have been a trout
16 fisherman in West Virginia for 55 years. And I
17 can tell you this without any fear of
18 contradiction, trout fishing in the great state
19 of West Virginia is better now than it has ever
20 been.

21 I firmly believe that the credit for
22 this must be given to the West Virginia Division
23 of Natural Resources, the old Environmental
24 Quality Board, the Department of Environmental

1 Protection, the responsible landowners,
2 responsible industry, responsible conservation
3 groups and responsible individual citizens.

4 We have together done a great, great job
5 interpreting and applying the principals of the
6 Clean Water Act. My singular question for the
7 record is, Why stop now? It has worked. Why
8 stop now? If we do stop, shame on all of us; not
9 just shame on you, but shame on all of us. The
10 arbitrary deletion of the 141 streams from the
11 Tier 2.5 list in my opinion is irresponsible and
12 is in no way associated with protecting the
13 environment. Thank you.

14 MS. PRICE: Marcia and Gary Ogelvie, are
15 you interested in speaking?

16 MR. GARY OGELVIE: No. People are doing
17 a good job.

18 MS. PRICE: Matt Noerpel?

19 MR. MATT NOERPEL: I live down in Coal
20 River Valley, there aren't too many 2.5 streams
21 down there, because the Environmental Protection
22 hasn't really been too top of the line down
23 there. They stock the trout there a lot right in
24 front of my house, they don't seem to stay too

1 long.

2 I think what I want to ask is that you
3 put these streams back on and also add to it more
4 streams and actually protect the environment like
5 the Department of Environmental Protection should
6 be doing.

7 MS. PRICE: Ed Hayne?

8 MR. ED HAYNE: My name is Ed Hayne, I'm
9 from Charleston. I'd like to speak to the group
10 tonight on behalf of wild trout. They're quite a
11 disenfranchised group. They can't talk. They're
12 not up here with me. But believe me, they're
13 very important to the state of West Virginia and
14 to a lot of people here in the room.

15 For 40 years I've pursued wild trout in
16 West Virginia, that's been my passion, except for
17 my family and my two college age daughters. I
18 fish and I hike and I hunt, as far as hunting for
19 streams, not so much deer hunting. But I love
20 the wild places that you find trout in and I love
21 wild trout. Like I said, for 40 years I pursued
22 them in West Virginia. In our beautiful mountain
23 streams, the rainbows, the brooks, the browns,
24 you name it, I like to fish for all of them. I'm

1 primarily a native brook trout fisherman.

2 But what I'd like to say is that much
3 like people that are into birding keep a list,
4 I've kept detailed fishing logs for 40 years.
5 And I've also set up an Excel spreadsheet, a data
6 base, and this is my data base. I've currently
7 made my data base available to Mike Shingleton
8 and people in the DNR that are hunting for
9 southern brook trout in West Virginia. I put a
10 lot of effort into my list and I'm going to refer
11 to my list as we go through this, because I think
12 it's going to point out the problem with the very
13 heart of this Tier 2.5 program.

14 First of all, I'd like to begin my
15 remarks by talking about this misconception of
16 444 reproducing trout streams in the state of
17 West Virginia. That figure is so far off base
18 that it's embarrassing. Now, there's a lot of
19 reasons that that number is so low. And one of
20 the reasons, if you'll talk to some of our good
21 friends in the DNR, some of which I've known for
22 more than 30 years that are now retired -- I was
23 on the phone with one of them, I interrupted his
24 vacation in Wyoming unexpectedly with the

1 question about a couple of these streams on the
2 141 delisted streams list.

3 But I think what you're going to find
4 out if you talk to these people, these
5 biologists, and you talk to fisherman -- I see
6 people out here in this audience that know as
7 much about streams as I do in this state, and the
8 DNR fellows are going to tell you the reason that
9 there's 444 streams is because we don't have the
10 survey work.

11 If you start looking, if you take the
12 444 streams and overlay it, I did it with my data
13 base, there is another glaring point that comes
14 out that I think needs to be addressed, and that
15 is, an awful lot of streams on private property,
16 some of the absolute best reproducing trout
17 streams in this state, did not show up on the
18 presumptive list. Now, I tend to think that's an
19 oversight on the DNR's part in the sense that
20 they've never completed their survey work.

21 I can remember sitting in a meeting 25
22 years ago and discussing this very problem with
23 the head of the DNR's Cold Water Fisheries
24 Program, and he acknowledged that they were not

1 getting the surveys done. And to this day
2 they're not up to speed. That is why we have
3 444, and now 303 streams.

4 Now, when you look at them, 50 of them
5 were removed for technical deficiencies, well
6 that's probably a lack of data. I'm only
7 speculating. But get out and get the data. I
8 can tell you looking at those 50 streams there's
9 a whole bunch of them that are reproducing trout
10 streams. Get the data, it's important.

11 Now we're looking at no objections, 38
12 went onto the list, or 37. The refined list is
13 down to 303. Well, there is 582 streams on this
14 list that I bet is 95 percent correct. Now, why
15 the difference in the numbers? That's what
16 really is upsetting me about this whole process,
17 is the fact that it didn't start from the point
18 it really needed to start at.

19 Native brook trout streams, there is 478
20 of them on here, and there's another 210 that I
21 have on here that I didn't list as brook trout
22 streams because I haven't been able to double
23 verify them. And I'm sure there's a lot of
24 people sitting out there that I'm looking at

1 right now that can sit there and name dozens and
2 dozens and dozens and dozens of trout streams
3 that aren't on the DEP list.

4 I want to talk about Second Creek, it
5 was eliminated because I think of a lack of
6 data. I'm not sure about Second Creek, I've
7 heard of people catching little small fish, but I
8 keep falling back and thinking, Okay, you want to
9 delist it; well, fine. Well, are you sure that
10 it's not a reproducing trout stream? I know
11 anglers that swear they're catching wild fish in
12 Second Creek, and that could be right. Resurvey
13 it, go back. There has to be a fallback method
14 to get more data on these streams.

15 There is four rainbow streams that are
16 delisted. I want to talk about rainbow trout
17 because when you talk about numbers of rainbow
18 trout streams, reproducing streams, you're
19 talking about very few numbers, it's easier to
20 get a picture of what's going on.

21 Four of the 141 streams delisted are
22 reproducing rainbow streams. Jacobs Fork,
23 Elkhorn, Big Spring and Crane Creek in Mercer
24 County, all have great populations of reproducing

1 rainbow trout. They're delisted. The DNR has
2 only verified rainbow reproduction in two of
3 them. They've verified reproduction in two of
4 the streams that are delisted.

5 Now, if the data isn't good enough or
6 it's too old, it was surveyed 15 years ago, go
7 back and get new data. Why were those streams
8 taken off? Jacobs and Elkhorn, I can't
9 understand why they didn't appear. Don Farris of
10 the DNR, I remember 15 years ago he would bet his
11 last nickle that the next brown trout record in
12 the state of West Virginia would come from
13 Elkhorn Creek. I'm not so sure that's not going
14 to happen, that's how good a stream it is that
15 you want to delist.

16 Most anglers believe there is about a
17 dozen reproducing rainbow streams in the state,
18 I'm here to tell you there is about 35. And the
19 DNR has only verified seven of them. Now, I'm
20 using data that I got from the DNR biologists
21 within the last six months. I don't think that
22 is a very good track record, seven verified out
23 of what probably is three dozen.

24 And where are all the southern West

1 Virginia rainbow streams? For those of you-all
2 that don't know, there are very great streams in
3 southern West Virginia in what are called the
4 coal fields. And I can tell you that the DNR did
5 a survey on a stream recently in southern West
6 Virginia, they turned the electroshocking gear
7 off because so many younglings came up they
8 couldn't handle it, they couldn't handle the
9 numbers, so they killed the generator. That
10 stream is not on this list. Where is that data?

11 Four of the very best brown trout
12 streams in West Virginia are set to be delisted
13 as part of that 141. The biggest brown trout
14 I've ever seen in my life in this state I saw in
15 Hominy Creek. Others in our TU chapters saw it
16 too, it was a monster, a world class brown trout,
17 delisted.

18 I submit the reason that so many are not
19 considered is because they haven't been surveyed,
20 either recently or ever. And my question about
21 how to fix this problem is: Are there funds in
22 the Tier 2.5 program to do these surveys? And if
23 there is not, why not? This a critical aspect of
24 this program that I think is not up to speed.

1 Maybe we need a cooperative project between the
2 biology department at maybe WVU or Marshall or
3 some college or maybe the environmental community
4 needs to consider getting together and hiring our
5 own biologist to do shocking surveys. Somehow
6 we've got to get that data. It's the only way
7 we're ever going to know what is truly out there,
8 is to survey.

9 I'm especially upset about two streams
10 being delisted, Rich Creek at Jody and Hominy
11 Creek, which I just spoke about, because I was
12 with the DNR survey crews and I held in my hand
13 young-of-the-year brown trout. I held them right
14 in my hand. They were dead, of course, from the
15 electrical charge, but they were right there in
16 my hand. Now, if that is not reproduction I
17 don't know what is. Delisted.

18 Another thing I'm upset about is the
19 appearance of streams on the list that are limed
20 and are being delisted, why? Privately limed,
21 delisted? South Fork at Cherry and some of the
22 tributaries the DNR is liming. There is 68
23 streams, 336 miles, and 250 miles of native brook
24 trout streams that are being brought back because

1 the lime.

2 Now, my question to the DEP is, What
3 next? You took off the properly limed streams,
4 are you going to take off all the DNR streams
5 that were liming to save the brook trout
6 population? Where is this going and why were
7 those three taken off?

8 Also, as an example, the Mill Creek
9 Water Shed in Kumbrabow is limed by the DNR. And
10 you know, you compared the tribes in Mill Creek,
11 what's the difference between Mill Creek and the
12 South Fork Cherry? Well, the only thing I can
13 see right off is Mill Creek is within the State
14 Forest, it's on State property, guess what, it
15 stays on the list. The other stream is on
16 private property, off it goes.

17 I want to discuss what I think is the
18 major problem with this whole 2.5 program. It's
19 the perception of what value is the wild trout,
20 what value does the trout have. And I'm
21 disappointed so many people consider trout as
22 nothing but a burden, an inconvenience, a
23 stumbling block to getting something done in the
24 way of business or progress. I hear it

1 repeatedly. You can't have both.

2 If you look closely at the reason for
3 delisting you cannot escape that feeling, because
4 a lot of the delisting is for proposed coal
5 mining, proposed this, proposed development. I'm
6 telling you, you can have both. You can have
7 responsible timbering, mining, all of it. And
8 you can still have wild trout.

9 I can take you to places and we can
10 stand right below a clear cut and catch native
11 brook trout on coastal lumber property. I can
12 take you to mine out flues from mining areas
13 where the water is treated properly and the
14 sedimentation dam and everything is in order and
15 there is wild trout swimming there. It can be
16 done.

17 Now, the problem is you can't assign a
18 value to a trout, as far as a monetary value.
19 That's the biggest problem I see in people I talk
20 to. What is your day on the stream worth? What
21 is that brook trout you caught worth? A ton of
22 coal, I can tell you what the price of that is, a
23 board foot of lumber, a bushel of corn; the
24 problem is we cannot effectively value in this

1 current system the worth of a trout. I think
2 they're priceless, personally.

3 But here's something to think about.
4 Clean water and wild trout go together. You
5 can't have one of those without the other. You
6 just cannot do it. And I truly believe, I
7 honestly believe in my heart that in the future
8 the clean water is going to be West Virginia's
9 greatest natural resource. The day is coming.
10 It's not that far off.

11 Now, wild trout also have a lot of value
12 if you talk about land. A lot of private
13 landowners have brook trout streams and wild
14 trout streams through their property. You don't
15 think it has value, ask a real estate agent, ask
16 a broker. Get on line and look up trout streams
17 and second homes, West Virginia leads the country
18 in second home development and we're the top
19 three in urban sprawl. Everything is spreading
20 out. We need protection for these waters.

21 And I'm here to submit to you I know a
22 lot of property owners in Pendleton County,
23 Randolph County, some of them are very good, dear
24 friends, and they take care of their property.

1 And some of those people feel disenfranchised by
2 this Tier 2.5 thing because streams in their
3 property are off the list. And I'm here to tell
4 you they've got some value. People want to see
5 some of these streams listed.

6 I was glad to see Thorn Creek and Reeds
7 Creek on the list, because fortunately I've got
8 some access to both and I've got friends that
9 live in the watershed. And I can tell you
10 without a bit of doubt that I have fished right
11 below all of these poultry, and cattle activity
12 on Thorn Creek and caught some of the biggest
13 brook trout you can imagine. They're there.

14 The farmers in Pendleton County did not
15 listen to all the pressure from the farm bureau
16 and they wanted to see Thorn Creek and Reeds
17 Creek on the list. They realized the value of
18 their property and the wild trout that are in
19 their streams, and they take care of them too.

20 Another thing to think about from an
21 economic standpoint is the value of wild trout
22 and tourism. Tourism has never done justice to
23 wild trout in the state of West Virginia, they
24 just haven't done it. A lot of people are

1 uncomfortable with advertising streams and I
2 understand that. But I'm here to tell you that I
3 travel all the way from New York to Georgia and
4 out west to fish, and I'll tell you where the
5 money is, it's in wild trout. And in all the
6 seminars I teach and in all the classes I teach
7 out at Capital High School I can count on one
8 hand the questions I've ever been asked about
9 stocked trout.

10 Now, I'm not knocking the stocked trout
11 program, it's got a lot of value, it does a lot
12 of good. Those people wanted to know where to go
13 to fish for wild trout. And I had someone ask me
14 one time about stocked trout, he said, Where do I
15 go to catch a golden trout, and I said, You go to
16 California. That's a joke. That's the only
17 place there is wild golden trout.

18 Now, consider your days on the stream, I
19 consider mine priceless. And I want to clear up
20 one misconception also about economic activity,
21 that all businesses are against wild trout;
22 that's a bunch of baloney. Because I can point
23 to three projects, Cabot Oil and Gas, Dominion
24 Resources and the Timberline Ski Resort that

1 Trout Unlimited helped with that added value to
2 the economic activity, that allowed them to
3 complete their project, and guess what, the trout
4 are still swimming in the creek. It can be done
5 if they want to do it.

6 Finally I want to thank -- I'm thankful
7 that there's a program now to protect wild trout
8 in West Virginia, even though 2.5 was a
9 compromise, at least we're off the ground and
10 running. And hopefully more of the missing
11 streams will make the list. And in closing I
12 want to thank the professionals in the DEP and
13 the DNR, some of them are my very good friends,
14 for all the work that they've done to date, and
15 I'll see some of you guys on the stream.

16 MS. PRICE: Liz Garland?

17 MS. LIZ GARLAND: My name is Liz
18 Garland, Executive Director of the West Virginia
19 Rivers Coalition. The constituents of the West
20 Virginia Rivers Coalition are deeply concerned
21 about the health of West Virginia's rivers, and
22 particularly the state's high quality waters.
23 These rivers deserve not to be degraded.

24 Trout are a great indicator of high

1 quality water, and thus fairly they're used as an
2 indicator of Tier 2.5 rivers. The importance of
3 trout waters to the West Virginia citizens is
4 evidenced by the audience here, by the great
5 number of fisherman in particular here, but these
6 high quality rivers are also important for other
7 purposes, for drinking, for business, for
8 recreation. I speak today for West Virginia
9 Rivers Coalition and our constituents that both
10 fish and hunt and drink the water and use West
11 Virginia's water for their livelihood, and also
12 for myself.

13 I'm in West Virginia because of the
14 state's rivers. Today I happen to live on the
15 Shavers Fork, Shavers Fork of the Cheat that is.
16 I don't fish, but I do travel the rivers on a
17 regular basis, almost daily. And when I'm on the
18 rivers and I see fish or I see fish eggs I
19 recognize that is high quality, they are truly an
20 indicator of healthy, clean water.

21 The West Virginia Rivers Coalition has
22 put together lengthy comments which have been
23 submitted earlier today. And those comments are
24 done on behalf of and in collaboration with a

1 very diverse audience. And briefly I'll list,
2 the Appalachian Center for the Economy and
3 Environment, West Virginia Highland Conservancy,
4 West Virginia Environmental Council, The Stewards
5 of the Potomac Highland, American Whitewater,
6 Greenbrier River Watershed Association, Plateau
7 Action Network, Winnie Fox, League of Women
8 Voters West Virginia, the Stanley Heirs
9 Foundation, West Virginia Sierra Club, Keepers of
10 the Mountain, Friends of the Capon River, the
11 Ohio Valley Environmental Coalition, West
12 Virginia Citizen Action Group, Friends of the
13 Little Kanawha, Friends of the Cheat, Ms. Regina
14 Hendricks, I believe is here today, and Coal
15 River Mountain Watch. I give you that list to
16 let you know that the interests of West Virginia
17 rivers hit a broad array of constituents.

18 West Virginia Rivers Coalition
19 definitely supports the inclusion of the 303
20 streams that are presently being proposed on the
21 Tier 2.5 list. In addition we ask that DEP
22 restore the 141 streams that have been removed
23 through this process in the creation of the
24 list.

1 We also request the DEP make changes to
2 the proposed underlying antidegradation rule that
3 reflects Judge Goodwin's decision in our lawsuit
4 as was determined back in 2004.

5 And I'd like to concentrate on those.
6 More than 15 years ago the West Virginia citizens
7 began advocating for a fully implemented
8 antidegradation policy. And for the last three
9 years citizens have waited and watched while DEP
10 and EPA played ping-pong with the specifics for
11 the state's implementation procedures for
12 antidegradation policy.

13 It is in our citizens' best interest to
14 have a sound anti-deg policy and procedures for
15 implementing it. We must use this policy to
16 protect our high quality streams and to keep
17 those of lesser quality from slipping too far
18 from the Clean Water Act objective of no
19 pollution by restoring and maintaining the
20 chemical and physical and biological integrity of
21 our nation's rivers.

22 Anti-deg is especially critical in West
23 Virginia where we have many pristine streams,
24 where we rely heavily on our water for our

1 livelihood, our recreation and our health and
2 where we are upstream of millions of neighbors
3 hungry for water.

4 DEP has thus far failed to adequately
5 correct the anti-deg policy in response to Judge
6 Goodwin's ruling of 2003. Specifically DEP has
7 not deleted language in sections 5.2 and 5.6(c)
8 as was recommend by EPA. Additionally DEP has
9 not publicly addressed the four issues from Judge
10 Goodwin's ruling that I'll briefly outline.

11 The Judge found EPA approval of section
12 4.3 which classifies large segments of the
13 Kanawha and Monongahela Rivers as Tier 1 waters,
14 our lowest designation, and determined that they
15 were not based on adequate evidence of
16 recordkeeping -- of records regarding the quality
17 of water in those rivers.

18 The Judge further found EPA's approval
19 of Section 3.7 which requires Tier 2 anti-deg
20 review for discharges under Section 402 or
21 Section 404 permit only at the time a general
22 permit is issued and not for individual
23 discharges under such permits. The Judge
24 determined that was an arbitrary and capricious

1 ruling.

2 The Judge found EPA's approval of
3 Section 5.6(a)1 that allows for 20 percent
4 cumulative reduction from all discharges before
5 Tier 2 review is required was not supported by
6 any evidence in the record. And the Judge found
7 EPA's approval of Section 63(a) 1 through 4 which
8 set numerical criteria for four individual
9 pollutant parameters was not supported by any
10 evidence in the record and was therefore, again,
11 arbitrary and capricious.

12 In the briefing document presented by
13 DEP on the proposed anti-deg rule DEP has
14 remained silent on its decision to retain
15 language related to these overturned points.
16 These need to be addressed.

17 Let me elaborate on one other issue.
18 DEP actually adds language at 5.6(d) that is
19 identical to language that was overturned at
20 5.63(a). There are only two sentences in the
21 briefing document that support this change. The
22 briefing document states, One additional change
23 was made to incorporate the same approach for
24 determining significant degradation in Tier 2

1 waters as is currently established for Tier 2.5
2 waters. This change relates only to pH, fecal
3 coliform, temperature and dissolved oxygen, and
4 reflects the fact that due to their nature
5 application of a percentage change in a
6 cumulative capacity is not an appropriate measure
7 of degradation to these pollutants. The
8 implication that these thresholds are currently
9 established for Tier 2.5 water is false. As
10 stated above, these thresholds were overturned in
11 court and then deferred by EPA. DEP provides no
12 additional information as to why a 10 percent
13 assimilative capacity could not be used to
14 calculate the diminutives on a stream by stream
15 basis, or why these levels of degradation are in
16 fact insignificant.

17 I'm going to leave the details, the
18 supportive details, to our written comments,
19 which are fairly broad. And I just want to
20 reiterate that we ask DEP at this time to move
21 forward and make changes to the proposed anti-deg
22 rule that do reflect Judge Goodwin's decision.
23 And again, we support the restoration of 141
24 streams to the Tier 2.5 list and definitely

1 support the inclusion of the 303 that are
2 currently on the list. Thank you.

3 MS. PRICE: Next up is Mike Warwick.

4 MR. MIKE WARWICK: No.

5 MS. PRICE: OC Spaulding?

6 OC SPAULDING: I don't have any great
7 words of wisdom. I just decided I need to make a
8 personal statement. Karen, I've known you for
9 25, 30 years? I'll tell you people in here, I'm
10 a judge. I fish, it's my sanity, it's what keeps
11 me alive.

12 And you're looking at the South Fork of
13 the Cherry River, South Fork of the Cherry River
14 I fished the last two years. I came in over top
15 of Coal Knob Mountain. I came in on the back
16 side rather than going through Richwood. I can
17 tell you that they're developing up there right
18 now, at least in the last two years. They were
19 timbering up there. You go up the upper end of
20 South Fork of the Cherry and it's just a brown
21 line right there, you see exactly where it's
22 filling in the streams.

23 You know, I just didn't have time to
24 make a written statement. I panicked today, I

1 learned this was at six o'clock tonight and I
2 signed up to speak because I just at least want
3 to live with myself, say that I made my
4 statement.

5 I would say to you that all of these
6 streams, the South Fork of the Cherry, all of
7 these streams, they're God's gift to me, they're
8 God's gift to these people and our future
9 generations. I would remind you that it's the
10 Division of Environmental Protection.

11 And lastly to tell you, I know, our
12 governor tells us all the time, West Virginia is
13 open for business. But you know, fisherman are a
14 business, tourism is a business, it's the kind of
15 business that keeps growing, it doesn't take it
16 out and gone and forever. And all I would ask
17 the DEP is to seriously look at this, return
18 these streams to where they at a minimum ought to
19 be, and that's in Tier 2.5.

20 Thank you for giving me the opportunity
21 to clear my conscious.

22 MS. PRICE: George Phillips?

23 MR. GEORGE PHILLIPS: My name is George
24 Phillips. I'm from Scott Depot, originally from

1 Green Bank in Pocahontas County. I've been
2 fishing in West Virginia for the past 30 years.
3 I'm sorry to say the first 10 were with bait, but
4 the last 20 were not.

5 I hadn't planned to speak tonight but I
6 got an e-mail from a friend of mine, Mr. Tom
7 Shipley, who some of you may know, is the owner
8 of Sharps Bed and Breakfast in Slaty Fork. And
9 Tom has been in battle for the past couple of
10 years to try to protect his farm and also the Big
11 Spring Fork. So I wanted to submit his letter
12 that he wrote to the EPA yesterday and into the
13 meeting minutes tonight. I'll also read an
14 excerpt that I thought was pretty meaningful for
15 this group.

16 He is talking about the County
17 Commission in Pocahontas County that's comprised
18 of three members with ties to socio-development.
19 They have received thousands of signed petitions
20 from all four corners of the county asking them
21 to move the proposed treatment plant off the
22 Sharp Farm and away from the Big Spring Fork.
23 Trout Unlimited, The National Ichthyological
24 Society, The Friends of Elk, the West Virginia

1 Outdoor Sportsmen's Association, The Isaac Walton
2 League, the Mid Atlantic Fly Fisherman
3 Association, the Elkhead Waters Watershed
4 Association and many more have expressed their
5 grave concern about the proposed treatment plant
6 location.

7 Curiously the West Virginia Department
8 of Environmental Protection on June 1st, 2006,
9 lifted the Tier 2.5 protection off the entire Big
10 Spring Fork River citing development or planned
11 development as the reason. During the reopen
12 Tier 2.5 comment period I wrote to the WVDEP
13 stating my support for the Tier 2.5 protection of
14 Big Spring Fork, as a property owner for some
15 distance on both sides of the river, about a half
16 mile before Big Spring Fork and Old Fuel Fork
17 form the Elk River. I believe other family
18 members owning more property along the river did
19 likewise.

20 It's my understanding that the DEP
21 received many letters from property owners
22 several years ago when the idea of Tier 2.5 was a
23 new one and may well have been misunderstood.
24 The majority of landowners were timber, gas and

1 coal companies, their complaint was that Tier 2.5
2 designation would not allow them to develop their
3 land.

4 At some point a small sacrifice has to
5 be made in order to protect our God given river.
6 Is it not the mandate of the EPA, via the WVDEP,
7 to protect pristine rivers as required by the
8 National Clean Water Act? Is the reason
9 development or planned development reason enough
10 to take away the protection afforded the Big
11 Spring Fork River? Was the review of this
12 classification brought on as well from pressures
13 by officials to be able to discharge effluent
14 into the Big Spring Fork? After all, now they
15 can do it without any legal recourse, because --
16 wink, wink -- it's not a reproducing trout stream
17 anymore.

18 I invite you or any EPA official to walk
19 on our farm and fish this river. You will have
20 tears in your eyes from the sheer beauty of it
21 all, as I did when I recently gave up my business
22 and home and moved back to my native West
23 Virginia to look after this long, proud
24 heritage.

1 Please encourage the WVDEP to reinstate
2 Tier 2.5 protection for the Big Spring Fork as
3 West Virginia and the United States, the
4 fisherman from all around the world come to fish
5 the upper Elkhorn will lose a precious resource.

6 Tom was not able to be here tonight
7 because his uncle, Dave Sharp, who is the owner
8 of the farm, is in the hospital. I would like to
9 submit this letter. I hope that tonight the
10 input that we heard and the comments are taken
11 and listened to and this doesn't just become a
12 check-the-box activity that we had a public
13 hearing. Thank you.

14 MS. PRICE: Don Gartman?

15 MR. DON GARTMAN: My name is Don
16 Gartman. I live here in Charleston. My wife and
17 I moved here about eight years ago from
18 Delaware. We moved here, we decided to come
19 here, not go away another place. When I came
20 here an acquaintance told me, he said, Don, you
21 know in West Virginia everything is political,
22 except politics, and that's personal. And I've
23 seen some of these situations, but I'm not giving
24 up.

1 One of the first conferences I went to
2 when I moved here, one of the speakers was
3 ex-Governor Underwood. As you recall he was a
4 very pro-business kind of guy. But I remember
5 the statement that he made, and it said, You
6 know, we've got to start getting out of the
7 extractive business and into the attractive
8 business. I loved it. You know, that's tourism,
9 it's renewable. We're not going to have anymore
10 coal for, let's say, 300 million years, so it was
11 a great saying.

12 This proposal -- well, these streams
13 that we've got here in West Virginia, it's almost
14 like Mother Nature said, Here, West Virginia,
15 here's my report card on your trout streams.
16 They all get an A. And this proposal basically
17 turns the concept of environmental protection on
18 its head and says, It's okay, they can get by
19 with a C. I don't think so.

20 And my only comment is, from my wife and
21 me, please go back and leave these streams an A
22 on the report card, don't let them slip down to a
23 C. Thank you.

24 MS. PRICE: John David?

1 MR. JOHN DAVID: Thank you. I come here
2 from a different perspective perhaps because I'm
3 a founding member and fellow commissioner of the
4 Page-Kincaid Public Service District in Fayette
5 County. I was stunned to find Loop Creek, which
6 is the service area that we have, on this list
7 that would no longer be Tier 2.5.

8 I'll tell you that 30 years ago three of
9 us founded the Page-Kincaid Public Service
10 District to clean up the area, to provide public
11 water, to provide wastewater services, to make a
12 better place and a healthier community for the
13 people along Loop Creek between Oak Hill and
14 Montgomery. We attracted a lot of grant money
15 from the taxpayers to do so.

16 On the water side everything from AML
17 money to who knows what, and then on the
18 wastewater side, tens of millions of dollars has
19 been spent to clean up Loop Creek with various
20 wastewater facilities. Two are on the drawing
21 board, one is in operation in Page, one in
22 Kincaid, one in Beards Fork, and we have cleaned
23 up Loop Creek. And we want Loop Creek to stay
24 basically a pristine 2.5 Tier, whatever you want

1 to call it, area, for the benefit not only of
2 folks here who are sports people and fisherman,
3 but also for a healthy community.

4 We are outraged that a mining company
5 has come to the Loop Creek area. We are
6 concerned that they plan to draw 100,000 gallons
7 per day out of Loop Creek to clean coal at a
8 cleaning plant they just built on the mountain
9 side halfway between Kincaid and Oak Hill. We
10 are concerned about the impoundment, the three
11 impoundments that they plan to construct or have
12 constructed there. We feel that 30 years of our
13 work has gone forward to do what needs to be
14 done, and a single call was made from that firm
15 to the DEP to say, Hey, we've got some drainage
16 and seepage and acid water and we aren't going to
17 be able to comply, so therefore we want that
18 stream, all 20 miles of it, taken off the list.

19 Now, we put in an innovative system. We
20 have all kinds of folks running around from the
21 Department of Natural Resources and DEP telling
22 us if we are not in compliance. We use
23 ultraviolet, we have cells, we have an innovative
24 system in a rural area, we are in compliance.

1 We feel that if we're in compliance and
2 have been in compliance and we want to be in
3 compliance and it is properly designated as a
4 Tier 2.5, then the company needs to do the same
5 thing. What's fair is fair. And so we say to
6 the DEP, basically, tell the firm that made the
7 call that if they're going to put acid water in
8 Loop Creek, or whatever they're going to put in
9 there, they've got to figure out how to do it
10 properly just like we have to do, because we're
11 not happy with the situation being changed the
12 way it's planned. Thank you very much.

13 MS. PRICE: Brook Thompson.

14 MS. BROOK THOMPSON: Hi, my name is
15 Brook. I just want to say that when you take the
16 streams off the list you're putting the interests
17 of others above West Virginians. The coal is
18 mostly going to leave the state while the quality
19 of life in West Virginia is going to get hurt.
20 And it's them that pay your salary and it's them
21 you're supposed to be protecting and it's them
22 who you work for; so you're putting the interest
23 of big business above them. That's all I have to
24 say.

1 MS. PRICE: Dave Yaussy?

2 MR. DAVE YAUSSY. My name is Dave
3 Yaussy, I'm here on behalf of the Antidegradation
4 Coalition, a group of trade associations and
5 businesses whose members are affected by the rule
6 that we're discussing this evening.

7 We have reviewed the proposed changes to
8 60CSR5 and the date on which those changes were
9 based and prepared written comments which I have
10 provided to the DEP tonight. Those comments can
11 be summarized as follows.

12 The DEP has not complied with the
13 procedural requirements for listing Tier 2.5
14 streams. Among other things there was
15 insufficient notice to property owners as more
16 fully detailed in our December 30, 2005 letter,
17 and that's been attached to the comment.

18 The DEP has failed to individually
19 evaluate the streams for compliance with the Tier
20 2.5 criteria.

21 Third, the DEP has not developed
22 sufficient data to justify listing the streams on
23 Appendix A as naturally reproducing trout
24 streams.

1 Four, reference streams have not been
2 adequately defined, and until there is a
3 definition of reference streams that can be used
4 by the regulated community they cannot be
5 considered water as a special concern. Even
6 without the Tier 2.5 listing, the streams that
7 would otherwise be on Appendix A that we're
8 discussing tonight would still be protected by
9 the trout stream criteria found in the water
10 quality standards, the B2 use designation, and
11 they are entitled to Tier 2 Review of
12 Degradation. They are protected in the state.

13 On behalf of the Coalition we urge the
14 DEP to withdraw Appendix A as proposed, to
15 develop data to establish natural reproduction,
16 and to fully document which streams truly warrant
17 Tier 2.5 protection. Thank you.

18 MS. PRICE: Leighton Cobb.

19 MR. LEIGHTON COBB: As I sit back here
20 and I think, those people are smart up there,
21 they know what they're doing. You're going to go
22 up there and make a fool out of yourself, so I'm
23 going to keep this brief.

24 I just loved seeing this little girl.

1 As you can see, I'm an emotional person. This is
2 serious to me. When my grand kids and great
3 grand kids get to be her age, are we going to
4 have anything for them to fish?

5 I think this is environmental protection
6 (indicating). I think they're paid for out of my
7 tax money, and your-alls and everyone else's.
8 Are we getting shafted by our taxes? That's what
9 it looks to me like. I don't see anything
10 protecting about taking streams off of the list.

11 I guess maybe I'm -- I said, I'm not
12 real well-educated, you know, like some of these
13 people, but I'm a West Virginian, and I like to
14 be proud to be a West Virginian. But when our
15 taxes go to pay people to shaft us, that's
16 nothing to be proud of. Thank you.

17 MS. PRICE: Larry Orr?

18 MR. LARRY ORR: Thank you. My name is
19 Larry Orr. I'm chairman of the West Virginia
20 Council of Trout Unlimited, 1,600 dues paying
21 members strong. Our mission is to conserve,
22 protect and restore cold water fisheries of West
23 Virginia and their watersheds.

24 Recently there was a survey done by the

1 Eastern Brook Trout Joint Venture, and what this
2 is, is a multi-state, multi-agency task force
3 sponsored by Trout Unlimited National, and the
4 first part of their work was to do a survey on
5 the status of the eastern brook trout streams,
6 including 17 states and West Virginia. And the
7 report was produced, I'm leaving two copies as a
8 brochure for the West Virginia report and the
9 eastern brook trout summary report status. But
10 what it basically says, in West Virginia the
11 majority of the West Virginia brook trout streams
12 have had their population and habitat greatly
13 reduced due to poor water quality. I leave this
14 as part of the record. I've got more comments.

15 Our concern is the logic of the removal
16 of one-third of this presumptive 2.5 list. Many
17 of the streams were removed because there's
18 planned development. Well, if it wasn't related
19 to water quality it was planned development. If
20 it's planned development then that's all the more
21 reason that the streams should be on the
22 protected list, to get the protection they need.
23 The 2.5 list, as the people in DEP know, was a
24 compromise to avoid having to put all the streams

1 on the 3.0 list, which is the wilderness
2 classification and special categories
3 classification.

4 We felt that the original 2.5
5 presumptive list was a good start, a good start.
6 As there has been explanations of here tonight,
7 there is many streams that are not on that list.
8 But we felt that we could add them at a
9 reasonable rate.

10 Well, it appears fairly easy to remove a
11 stream, but to add a stream, as evidenced by
12 Watkins Run in Preston County, it takes between
13 two and three years. And we removed one-third of
14 them in one fell swoop, and we took two or three
15 years to add one stream. That is very
16 difficult. The signs on the interstate now say
17 West Virginia, Open For Business, as OC mentioned
18 earlier. And we are open for business, but not
19 for the businesses that require clean water, such
20 as tourism and recreation.

21 I sent a letter in December, I sent a
22 letter on behalf of The West Virginia Council of
23 Trout Unlimited, supporting, still supporting the
24 original 2.5 presumptive list. That's still the

1 position of the West Virginia Council of Trout
2 Unlimited.

3 The most important resource in this
4 state, as mentioned that it would be at sometime,
5 the most important resource in this state right
6 now is water, not coal, not oil, not timber, not
7 any of the extractive industries, the most
8 important resource is water. And we still
9 support the original 444 streams on the
10 presumptive Tier 2.5 list.

11 Thank you for your consideration.

12 MS. PRICE: Jeff Holland.

13 MR. JEFF HOLLAND: Hi, my name is Jeff
14 Holland, I'm a professor of business and
15 economics for West Virginia University. We've
16 had some great speakers up here today, but I came
17 to speak on behalf of Friends of the Elk. We
18 were interested in two streams in particular,
19 that being the Big Spring Fork and the Old
20 Field. Big Spring is documented to reproduce all
21 three species of trout, and yet it has been taken
22 off the list. It combines with Old Field to form
23 the main stem of the Elk, which is a 2.5 stream.
24 We don't know why the exclusion of the other half

1 of it.

2 The point has been brought up many times
3 that we need to progress and that money talks,
4 we're here to make money. How much did you guys
5 spend in gas to get here today?

6 I'm here to tell you that tourism does bring
7 in a lot of money. Those trout streams bring a
8 ton of money into this state. This is big
9 business. If you take all these off the list
10 you're going to lose all this money that gets
11 spent year after year after year. It doesn't
12 cost anyone a cent. That's it, thank you very
13 much.

14 MS. PRICE: Julian Martin?

15 MR. JULIAN MARTIN: I'm vice president
16 of State Affairs for the West Virginia Highland
17 Conservancy, and we have a representative of the
18 West Virginia Rivers Coalition on our Board of
19 Directors and also Trout Unlimited. So we have
20 an interest in it. And also we work with the
21 Kanawha State Forest Foundation, I'm vice
22 chairman of that.

23 I would like to ask that if Davis Creek
24 is not a 2.5 stream that you put it on there. It

1 runs through Kanawha State Forest and if we're
2 not real careful Equitable Gas is going to
3 destroy it with their drilling. They bulldozed a
4 road a mile long and went, Oops, that was a
5 mistake, sorry. Now, if I had bulldozed a road a
6 mile long I'd be in jail by now I'm sure.

7 Now, one of the things that amazed me
8 when I got this notice about this meeting, I read
9 it in the paper or somewhere, I think it was a
10 press release, it said, DEP seeks protection for
11 more than 300 high quality streams. I said,
12 Well, that's really good.

13 Then I read down there and I went,
14 Whoops, what they're really doing is removing 141
15 streams. I think you-all must have hired Karl
16 Rove. So you know something is fishy when the
17 thing that they point out is that they're saving
18 300 streams and down in the fine print they're
19 going to let 141 streams essentially be
20 destroyed.

21 And then they say, it's only 3.7 percent
22 of West Virginia's total stream miles, see, we're
23 not protecting very much, the coal companies,
24 timber companies, whoever, you don't have to get

1 worried about this, it's only 3.7 percent.

2 It is amazing what I see happening, you
3 know, like everybody says, the Department of
4 Environmental Protection, right on. They've
5 already protected 500,000 acres of mountaintops
6 by destroying them, filled in the headwaters of a
7 thousand miles of streams. They're protecting
8 the environment all right. Hell, I don't know if
9 they've ever turned down a permit.

10 As a matter of fact, in this very room
11 one time we asked the head of the DEP, we caught
12 her off guard, she didn't know we were going to
13 be here and we had a whole room full of people.
14 We said, Do you know of a mining permit that has
15 ever been turned down? She could not think of
16 one. She could not think of one.

17 Now, the problem is, this isn't finished
18 here. See, what's happened, this is a coal
19 company operation. The coal companies looked at
20 this and said, Okay, we want to poop in 141
21 streams, so you take those off. And they said,
22 All right, we'll take them off. Because if you
23 don't take them off, when they get to the
24 legislature they're going to take them off.

1 But what's really going to happen when
2 you get to the legislature, those 300 high
3 quality streams, the legislature is going to try
4 to take a bunch of those off. This isn't over,
5 this is going to happen in the legislature. They
6 can take this thing and junk it. They can take
7 every one of those streams off.

8 And that's one of the reasons the coal
9 companies aren't here right now and the timber
10 industry is not here right now, that's the reason
11 they're not speaking, because they know if they
12 get up here and talk they're going to get boo'd
13 and people are going to throw stuff at them.
14 Because they're the ones destroying everything.
15 They're going to wait and take care of it in the
16 legislature. So you guys and women better get
17 there when the legislation is in session and make
18 sure that your representatives hear you.

19 And I want to tell you something else, I
20 am really impressed with the turnout here. I
21 have never been with so many people that I agreed
22 with 100 percent. That's just wonderful.

23 On behalf of the West Virginia Highland
24 Conservancy we have already entered our statement

1 with the West Virginia Rivers Coalition and we
2 want you to stop this nonsense.

3 MS. PRICE: Richard Squire?

4 MR. RICHARD SQUIRE: My name is Richard
5 Squire, and I guess I have a foot in both camps
6 in the sense that I spent 30 years in the
7 chemical industry, I'm now a professor at West
8 Virginia Tech and we're working on taking mercury
9 out of coal.

10 I guess the one thing that really has
11 stunned me is, as I sit and I look at the coal
12 industry and try to compare it with all the NPDES
13 work that the chemical industry did over the last
14 20 to 25 years, the coal industry is really not a
15 very technologically advanced industry.

16 I guess I agree with several of the
17 speakers that no matter what kind of development
18 you do, it seems with the development of the
19 land, the coal lands or building or whatnot, that
20 there are existing technologies, there has been
21 for 10 or 15 years, that you can clean up these
22 streams, clean up the waters. And so it really
23 to me is a non-issue. The question is, do you
24 hold your feet to the fire on the regulation.

1 And let me give you an insiders view on that.

2 When the NPDES permit first came out I
3 was working at the Belle plant of DuPont and
4 there were provisions in there that we had no
5 idea what we were going to do, much like the
6 mercury emissions from today's power plants,
7 there's a regulation in 2007 that's going to come
8 to pass.

9 We sat down and innovated and created
10 technologies to solve that problem. Those
11 technologies exist in the open literature. If
12 people decided, yes, we want to run this kind of
13 business, we want to take this out, we want to
14 keep these streams pristine, you can do this. So
15 that's the first piece I want to make.

16 The second piece is, it seems to me that
17 I've talked to several people today and I've just
18 done a little bit of thinking about this, but
19 there is several streams, if you go back and
20 read, that said outstanding natural resource,
21 that's what Tier 3 is. And these streams that
22 have reproduction seem to me to be one of the
23 beauties of the country that's left. This is a
24 reproducing stream.

1 I ask the question, in the industry you
2 look at levels of protection, when you have an
3 NPDES permit or something else you want to have
4 at least two levels of protection so that if
5 something fails it doesn't go into the stream, it
6 doesn't go into the water. Most of these
7 industries have zero levels of protection and
8 that's part of the issue, because you ask, If I
9 put this in a 2.5 or 2.0 tier and there is a
10 spill, what's going to happen to that stream? Is
11 it a reversible process? From what I've seen of
12 the coal business and coal in itself, it doesn't
13 seem to me to be like it's that much of a
14 reversible process, you may damage a stream
15 irreparably, or at least for years.

16 My question is, why does the regulation
17 not say something like, The industry needs to do
18 these things to keep these streams Tier 2.5 or 3
19 and keep them pristine so they can reproduce.
20 And I thought, Well, some of the 2.5 streams are
21 just looking at the Tier 3 regulation, like Big
22 Spring Fork, Hominy Creek, Grassy Creek, South
23 Fork of the Cherry River, Yokum Run, seems to me
24 they ought to go from 2.5 back up to 3, because

1 those are streams that need to be protected.

2 I always try to deal on the technical
3 part because when I go trout fishing with my wife
4 I'm the person -- my emotional part kicks in
5 because I'm the person that has to beat the
6 bushes to make sure there's no snakes or
7 anything, but we went out and talked to 36
8 people, and all 36 of them signed this petition.
9 They don't want this to happen. Thank you.

10 MS. PRICE: Adam Webster?

11 MR. ADAM WEBSTER: If you will stick
12 with me here, we've been here a while. My name
13 is Adam Webster. I'm also speaking on behalf of
14 West Virginia Rivers Coalition. I'm speaking on
15 behalf of myself as well. I'm a sixth generation
16 West Virginian, possibly seven, my great, great
17 granddad was up on Black Mountain somewhere lost,
18 we're not sure about that, but anyhow...

19 West Virginia Rivers Coalition, as Liz
20 mentioned, is representing 18 different groups.
21 We're also going to submit detailed comments. In
22 brief, those comments, we support 303 streams
23 that are being listed with Tier 2.5 designation.
24 We oppose the delisting of 141 streams and we

1 recommend the DEP seriously consider relisting
2 those streams.

3 We also, as Liz mentioned, request the
4 DEP make changes to the rule reflecting the
5 judge's decision in the 2004 lawsuit. Now, I'm
6 going to speak a little specifically about Tier
7 2.5 designation, as many, many people have this
8 evening. I won't go over anti-deg, the
9 Department of Environmental Protection is very
10 familiar with the antidegradation policy, the
11 Clean Water Act mandate.

12 There's some ways to be listed on the
13 Tier 2.5 list, and this is the criteria the DEP
14 used. It can be a naturally reproducing trout
15 stream, it can be a high quality stream on public
16 land or it can be a DEP determined reference
17 stream. Someone talked about the reference
18 streams earlier, the ones on private land are
19 gone. It doesn't make much sense that the high
20 quality criteria is just removed because the
21 stream's on private land.

22 I'm also going to address a comment that
23 was made earlier about there are procedures for
24 this listing and there are some criteria that the

1 DEP hasn't considered when both listing and
2 delisting. And there is a procedure, DEP has
3 followed this procedure. And there are also
4 eight criteria which they weigh within that
5 procedure, but this is where they strayed.

6 The comment period for the 2.5 listing
7 was two years long. It specifically solicited
8 information about objections to streams being
9 listed for Tier 2.5 listing. Now, in the rules
10 there is criteria that says that they do have to
11 solicit comments from objectors, that's in the
12 rules. What is not in the rule is that they
13 specifically solicited information, additional
14 information from objectors.

15 For example, economic criteria, they did
16 not solicit that from people that support. We
17 have 30 days to respond to two years of
18 objections. Let me look at my notes here.

19 So in that two year objection the DEP
20 worded this, it was a process that when they
21 solicited additional information from objectors
22 they called it an exemption. They said, if you
23 provide us additional information we can provide
24 an exemption. This is not an exemption process,

1 this is a process to list streams as high
2 quality.

3 So I believe someone made a comment
4 earlier that the DEP did not weigh the criteria,
5 and you're right, they did not weigh the
6 criteria, because there was two years of
7 objections, they weighted very heavily in favor
8 of private interests and very heavily in favor of
9 industry. I went through these letters, there is
10 thousands of them, there is thousands and
11 thousands of objection letters. There is also
12 support letters, there are also support letters.
13 But the process is heavily, heavily, heavily
14 weighted in favor of industry objections.

15 In the delisting process there is some
16 criteria that they're not following. I'm going
17 to go through each of these criteria one at a
18 time just to let everyone understand what
19 happened when these streams were delisted. And
20 I'm also going urge DEP to hear us out on this
21 and that we don't feel that the process was
22 weighted equally because there was a two year
23 objection period. And the letters specifically
24 requested information about objections.

1 This section is called 8.1.8.2, I'm
2 pretty familiar with it now days. One of the
3 criteria is the impact on private property
4 owners. Well, as you can see the impact on
5 private property owners from the delistings
6 obviously deals with private interest
7 specifically, it is not -- the public good was
8 largely excluded from this process.

9 Another criteria is whether the
10 interests of all affected parties have adequately
11 been represented during the nomination and
12 designation process. Well, the interests of all
13 affected parties -- and I will give this to the
14 DEP, they spent a lot of time on the public
15 process, they spent a lot of time, but that
16 process was specifically aimed at objections, so
17 have all the parties adequately been
18 represented? No, they have not.

19 8.182(c) is the location of the water.
20 Generally in the removal, DEP, the rule says that
21 they have to issue a justification for the
22 removal. Well, in the removal they just say --
23 the location for example, let's say Elkhorn in
24 McDowell County, they do not say headwater

1 stream. We strongly feel the DEP should consider
2 the location of the stream with surrounding land
3 uses, for example.

4 Let's take Elkhorn in McDowell County.
5 McDowell, Boone and Logan County have three
6 streams listed on them, they equal, I believe,
7 less than three miles. There is many, many
8 streams in McDowell County that were removed,
9 from the southern coal field, these streams were
10 removed.

11 One of the other criteria you must
12 consider is factors that indicate unique or
13 exceptional, ecological recreational or esthetic
14 resource value. So let's jump to the southern
15 coal fields. We can take this anywhere in the
16 state, but let's jump to the southern coal
17 fields.

18 We have three streams listed. My dad
19 grew up Wyoming County, when he was growing up
20 the streams ran black. Today some of them still
21 do. So there is three streams listed in that
22 county. It says factors that indicate unique or
23 exceptional, ecological, recreational or esthetic
24 resource value. That needs to be weighted very,

1 very, very, very, very heavily, because there are
2 only one, two, three streams left in these
3 counties, surrounded by many, many, many, more
4 headwater streams, headwater streams that have
5 been filled, buried, by mountaintop removal. So
6 these factors have not been weighted adequately
7 or equally. Once again, there was a two year
8 objection process.

9 Another criteria is impact an economic
10 development in the area, including development of
11 demonstrated natural resources. I think we've
12 heard from plenty of people tonight that have
13 proven that trout are a demonstrated natural
14 resource. Clean water is a demonstrated natural
15 resource.

16 There was a gentleman earlier that was
17 talking about the economic value of a trout
18 stream, there has been a value of a trout
19 stream. The Fish and Wildlife Service comes out
20 with a number every five years. I haven't been
21 able to find the number from 2005, but in 2000
22 and 2001 it was \$40,000 per mile. If you take
23 the original list, which was 444 streams, that's
24 a potential economic impact of over \$80 million,

1 that's significant, that's very significant.

2 So we ask the DEP not just weigh the
3 private interest side, not just the industry
4 side, but the tourism side, the resource value
5 side, the exception or unique ecological,
6 recreational and esthetic value. The southern
7 coal field streams must be relisted. They're
8 alone, they're the only streams left. And these
9 gentlemen mentioned other streams earlier that
10 aren't on the list at all.

11 Once again, I'll come back to
12 exemptions. I would like to repeat again this is
13 not an exemption process, it's a process to
14 protect high quality streams and antidegradation
15 as the Clean Water Act mandates.

16 One more thing here is with trout
17 streams, I'm going to come back around to some of
18 the trout issues. Concerning the location of a
19 stream, another factor that needs to be
20 considered in that, beyond just the general
21 location, is whether or not it's a headwater. We
22 have headwaters in Pocahontas, we have headwaters
23 all over the place being delisted. We're
24 supposed to be protecting high quality waters,

1 one of those characteristics is a reproducing
2 trout stream, we're not going to have reproducing
3 trout streams if we don't protect the headwaters
4 down to the mouth, really. Because trout are
5 related to salmon, they spawn, they spawn in the
6 headwaters. When we remove those headwaters from
7 these high quality protections we're not going to
8 have the reproducing trout streams, the native
9 streams particularly.

10 Once again, thank you, and I hope you'll
11 consider our comments and here's our written
12 comments.

13 MS. PRICE: Eric Olmstead?

14 MR. ERIC OLMSTEAD: My name is Eric
15 Olmstead, I live in Clarksburg. Many of you know
16 me, some of you have heard of me. I am not a
17 native West Virginian, I came here through the
18 grace of God. The main reason why I'm in West
19 Virginia and the only reason why I'm in West
20 Virginia and the only reason why my family is
21 being raised in West Virginia is for the trout
22 fishing, bottom line, I have no other reason to
23 be in this state.

24 My wife, she's a photographer, Ed Hayne

1 asked a question, How much is a trout worth? I
2 know a picture that runs about 250 bucks if you
3 want it from my wife. If you want a personalized
4 calendar it's about 450. That's quite a bit of
5 money. I have a gentleman from Virginia that's
6 going to be coming up willing to spend a thousand
7 dollars for some personalized photography work
8 while he fishes for our trout, same thing with a
9 gentleman from Georgia.

10 I came here -- I grew up in Vermont, we
11 have battled acid rain and industry for years.
12 They wanted to put in Vermont nuclear waste in
13 our granite quarries, because it would hold there
14 very well they said. Vermonsters didn't like that
15 idea at all. Big business does not run Vermont,
16 tourism runs Vermont.

17 Here in this state I found big business
18 runs West Virginia. And there have been a lot of
19 people that have been talking lately about why
20 isn't tourism tapped into. And we have these
21 streams that you're wanting to take off that I
22 realize and know, these all have reproducing
23 trout in them, and I don't understand why exactly
24 you would possibly go through with this. Because

1 I have quit my job based on ethical reasons,
2 okay, and when my four year old just the other
3 day -- perhaps you people could answer this
4 question for him, he asked me, Dad, when you know
5 you're doing something wrong, do you stop? I
6 said, I do. And he knew what was going on,
7 because he sees me every night, and I take him
8 out. And we saw an orange stream, and he said,
9 Daddy, why don't we fish there? I said, Because
10 that stream is dead. Why is that stream dead?
11 For electricity. So this is what he said, I
12 guess people need to start turning their lights
13 off.

14 MS. PRICE: David Payne.

15 MR. DAVID PAYNE: I think the fact that
16 there is about a hundred people here on a day
17 where most us who don't live in Charleston had to
18 either take off work or make some kind of
19 arrangements, I think the fact that there's so
20 many here is a lot of people in the state feel
21 betrayed by what is coming out of the DEP.

22 One problem that I had is on the press
23 release that came out, it starts out by
24 mentioning the streams that we are protecting,

1 and we actually have to read and look into it and
2 know what's going on before you realize that
3 streams are about to be delisted. One thing that
4 really bothered me was the streams that were
5 being delisted because of some sort of planned
6 development, coal for instance.

7 Why do we even have the list at all? I
8 wish somebody would tell me that. Why do we have
9 it at all? Because it appears to me the only
10 time a stream is protected from any kind of major
11 development on this list is if no one plans any
12 major development in those watersheds.

13 And also I would like to see some kind
14 of argument. I'd like some kind of explanation
15 why. I'd like to get some data. I looked at
16 what the DEP puts out, I looked at a list with
17 stream names on it, there is the county and then
18 two or three words telling why they should be on
19 there. And there is so much habitat in this
20 state that is not on there, we should be adding
21 some. We should be adding a lot. And there is
22 so many streams that could produce if the water
23 quality were better. We need more data.

24 I have no idea what we're doing. I have

1 no idea. We made so many improvements over the
2 past 40 years, over the past 100 years, and I
3 think most of use will agree this is a major step
4 backwards. And this is something that -- the DEP
5 has been with us for so long to help us protect
6 streams, I just wonder when you guys jumped off
7 our ship. What's going on? I thought we had a
8 Department of Commerce.

9 I would like some kind of explanation
10 and information, first of all. Are we running
11 out of coal in this state? Do we need to be
12 listing streams because we have no place to run
13 coal? I think Boone County alone has 18 billion
14 tons of coal in reserve, and that's just what we
15 can get to with today's technology.

16 We've got this much coal in this state
17 in so many places that aren't being mined, aren't
18 being extracted, I don't know why we have to go
19 in the headwaters of these streams and mine.
20 There is so many other places. And if somebody
21 can tell me what our vision is I'd appreciate
22 that.

23 MS. PRICE: Jason Sanders?

24 MR. JASON SANDERS: Hi, my name is Jason

1 Sanders, I'm from Parkersburg, West Virginia. I
2 don't have any fancy title. I just want to say I
3 support the streams they have listed, I don't
4 support the streams they delisted. I feel there
5 should be more. I have two little girls, I look
6 forward to enjoying many years of trout fishing
7 with them. And just be careful we don't get
8 fooled by a suit with lots of fancy language.

9 MS. PRICE: Bob Radspinner?

10 MR. BOB RADSPINNER: I'm Bob Radspinner,
11 I'm a forester from Plumb Creek Timber Company.
12 We just had a couple of technical questions
13 regarding some streams. We submitted that in a
14 letter that should have been received today, but
15 I just wanted to make sure you-all had it.

16 MS. PRICE: Delegate Debbie Stevens.

17 MS. DEBBIE STEVENS: I'm here this
18 evening, I represent 17,000 people, I'm a
19 representative from Tucker and southern Preston
20 County. One thing I've learned serving in the
21 legislature is that we must learn to take both
22 sides of the story and that we all must
23 compromise and come together on what's good for
24 our state, because it's a big state.

1 4,500 letters came from Tucker County
2 objecting to Tier 2.5 on the first round.
3 Through a streamline process 1,500 were
4 submitted -- and these are round, they're not
5 exact -- the second time in our comment period.

6 I believe I probably have a little bit
7 of a different take on this than most people.
8 Tucker County used to be a viable county with a
9 population near 12,000, we're down to 7,000 now,
10 and you couldn't buy a job. We have a lot of
11 fine streams and fisheries and we do have a lot
12 of tourism. But I'm not proud of what my people
13 make at Blackwater Falls and Canaan Valley.

14 Now, there is not a soul in Tucker
15 County that wants to see a stream that has
16 anything in it but the good bugs and the fish.
17 But the people are concerned about the regulation
18 of Tier 2.5. I'm here as a servant and I've
19 listened to their many, many, many requests and
20 questions.

21 The streams in Tucker County, with the
22 exception of a very few, and if they're dead they
23 definitely need to be corrected, we do have a
24 few, but we don't have a coal mine, deep mine

1 open, unless it's the Matiki right on the edge,
2 right now all the rest are closed.

3 But the private landowner in my county
4 feels betrayed. They feel that they have taken
5 excellent care of their streams on their land,
6 whether it goes in through the Monongahela
7 National Forest and comes out on the other side
8 or not. They feel that -- most of them are fifth
9 and sixth generation people that have managed to
10 stay there, and they feel that they have done an
11 excellent job of taking care of streams or
12 whatever, and they're to say, exact quote, "West
13 by God happy to be a 2.0 stream." They do not
14 want anymore degradation, but they do not want
15 anymore regulation.

16 One of the reasons is that we've been to
17 many of these hearings the DEP has been kind
18 enough to come and educate us, continually, the
19 future of a county that's dying off is hard to
20 project. There is so many points that are
21 allowed on a stream and the younger generation is
22 talking about how can I go away and make money so
23 that if I plan to do something on my family farm
24 that I can get mine in first, like there's going

1 to be a race for the points, a competition.
2 That's not what's best. It's what best for each
3 person.

4 So we must realize that if you've got a
5 stream that's been damaged by a large coal
6 company or something like that, I feel it needs
7 regulated, it needs cleaned up. I'm not speaking
8 for that kind of growth problem at all. But
9 family farmers have relatives in other states
10 that have had to fence their wild life and crops,
11 their animals, water off roofs of barns. And I
12 just can't tell them, I've told them what the
13 gentleman did to me, I told them that, but they
14 feel that 2.0 is a good solid base for Tucker
15 County.

16 Now, I don't speak for anywhere else but
17 Tucker County, because those are the folks that
18 elected me. But we cannot regulate the future
19 generations, and where streams are and where
20 they've been extremely well maintained.

21 We have to give the credit to the
22 landowners and I think we said here that we have
23 a lot of producing trout streams, and I think as
24 one gentleman said, that's to the good of all the

1 regulatory agencies and the landowners, and we
2 have to remember that. 65 to 70 percent of
3 Tucker County is already owned by state and
4 federal entities, so for us to produce 4,500
5 letters from landowners, that will surely attest
6 to you that there are a lot of people who are
7 concerned.

8 Obviously we have a lot of good streams
9 or we wouldn't have made the list in the first
10 shot. So I appreciate all the comments that I've
11 heard, because if I'm sitting there next year in
12 January I'm going to realize that there are
13 definitely problems wherever the river runs black
14 and they're just, you know, interested in coal
15 mining. I believe if we put a man on the moon we
16 can also have our clean trout streams and we can
17 have jobs for our people. I thank you.

18 MS. PRICE: Sarah, do you want to speak?
19 Sarah Tonkin.

20 MS. SARAH TONKIN: What I have to say is
21 very basic, and that is, that we need water. We
22 don't need coal. It's a nice commodity perhaps
23 to have electric, but we do not need coal. We
24 need clean water to survive. And so I feel that

1 the DEP should protect what we need to survive,
2 not protect the things that are a luxury.

3 MS. PRICE: I've gone through the whole
4 sign in sheet, did anyone come in late that
5 wished to speak that maybe didn't get to sign in.

6 MS. MARY ELLEN O'FERRELL: Good evening,
7 my name is Mary Ellen O'Ferrell. I live here in
8 Charleston and I've lived in West Virginia almost
9 all my life. And it makes me very sad to have to
10 realize that in West Virginia it's almost
11 impossible to protect anything permanently. As
12 soon as someone wants to make a dollar from it,
13 then all protections are off.

14 I think that what the DEP has done in this
15 instance, the delisting of streams which might be
16 part of a potential development, is exactly
17 backwards. It's the development that ought to be
18 restricted. The streams should be allowed to
19 live. Our children will need clean water. What
20 will we offer our children in exchange for clean
21 air and clean water.

22 To foul our streams and to poison our air is
23 to betray the God who created the world that we
24 live in. The world that we live in is God's gift

1 to us. We didn't make it, God did. And we are
2 responsible for protecting it. Whether we like
3 it or not we are God's governors and we need to
4 be accountable to our children as well as to our
5 creator. Thank you.

6 MS. PRICE: Anyone else?

7 MS. CAROL WARREN: Hi, my name is Carol
8 Warren, and I work with the Catholic Diocese, and
9 I'm here tonight representing the Catholic
10 Conference of West Virginia.

11 Water, as a number of people have said,
12 is a necessity for life. People have pointed out
13 that the trout need it, the people need it,
14 animals need it, birds need it. There's not a
15 creature on the planet that can survive without
16 clean water. We can't drink sludge, we can't
17 drink heavy metal, we can't drink toxic waste.
18 If we could we wouldn't have any problem because
19 there are plenty of places in the United States
20 where we can find a lot of that.

21 West Virginia is one of the few places
22 where we can find some really excellent high
23 quality water. Fortune 500 magazine had an
24 article a couple years ago which they stated that

1 water would be for the 21st century what oil was
2 to the 20th. If that doesn't scare you out of
3 your wits, I don't know what will.

4 That means that West Virginia is going
5 to be a target, because we're sort of sitting on
6 the mother load. We have an abundance of
7 wonderful streams that are highly clean at this
8 point.

9 Now, it seems to me, as a number of
10 other people have said, that it's a no-brainer to
11 think that we should want to provide the maximum
12 protections to the maximum number of these clean
13 streams that we possibly can. We owe that to our
14 grandchildren and our great grandchildren. It's
15 not a matter of money, it's a matter of life.
16 Thank you.

17 MS. PRICE: Anyone else? This completes
18 our official comment period. If you have any
19 written comments that you've been holding onto
20 during the session you can bring them up and give
21 them to us after we adjourn. We will file our
22 rule with our responses to your comments on or
23 before July 28th with the Secretary of State's
24 office.

1 You will also have the opportunity to comment
2 on the water quality standards rule next Monday
3 here at 6:00 p.m. Thanks so much for coming, we
4 appreciate you participating in this process, and
5 drive safely.

6 (This hearing concluded at 8:00 p.m.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1 STATE OF WEST VIRGINIA,
2 COUNTY OF KANAWHA, to-wit:
3

4 I, James D. Nielsen, Court Reporter and a
5 notary public within and for the county and state
6 aforesaid, duly commissioned and qualified, do
7 hereby certify that the foregoing public hearing
8 of the West Virginia Department of Environmental
9 Protection was duly taken by and before me at the
10 time and place specified in the caption hereof.

11 I do further certify that the said hearing
12 was correctly taken by me in stenotype notes,
13 that the same were accurately written out in full
14 and reduced to typewriting; and that said
15 deposition is a true record of the hearing.

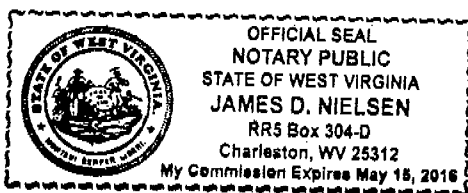
16 I do further certify that I am neither
17 attorney or counsel for, not related to or
18 employed by, any of the parties to the action in
19 which this hearing is taken, and further that I
20 am not a relative or employee of any attorney or
21 counsel employed by the parties hereto or
22 financially interested in this action.

23 My commission expires May 15, 2016.

24 Given under my hand this 13th day of July,
2006.



James D. Nielsen
Court Reporter/Notary Public



Antidegradation Public Hearing
West Virginia Department of Environmental Protection Division of Water and Waste Management
July 10, 2006

Do you wish to speak?

NAME

ADDRESS

PHONE

Check here if you are also commenting at the DAQ rules hearing.

No	Chris Shockey <i>Friend of Alex</i>	2307 Mt. Vernon Circle Parkersburg, WV 26101	422-1375	No
Yes	Jeff Holland	2316 44th Place Parkersburg, WV 26104	485-2385	No
No	Bing Shum	HC 64 Box 109 Parsons WV 26107	478-4411	
yes	Guelian Martin	1525 Hampton Rd. Charleston WV 25314	342-1985	
No	Kathryn A. Stone	26 Birch Tree Ln ^{CITAS} 25314		No
No	Dwight Sieminezu	HC 64 Box 112-A Hansford WV	585-3325	No
YES	Richard Svine	918 Woodland Ave, S. Charleston	744-2403	No
No	Charles Hammons	3 Jensen Dr. Char. W. Va.	984-1995	No
No	Andrew McCallister	PO Box 273 Charleston 25321	340-3858	
No	Buddy Walker	217 Summers Road Parkersburg WV 26101	344-624-7646	
	Michael Foss	2208 Towns Ave, Hgt	(304) 522-8221	
No	Randy Ad	2166 Middle Fork Reedy Wv	(304) 927-5373	
No	Cory Ash	2166 Middle Fork Reedy Wv	(304) 927-5373	
YES	Adam Webster	601 N Randolph Ave Elkins Wv	304 637-7201	No
Yes	Eric Olmstead	780 Millard St. Clarksburg, WV	304-622-2888	
No	Shaq Jit,	385 N Fox Ave Allamore	239-6757	No

X

X *Don't speak*

X

X *WVDE*

X *WVDE*

West Virginia Department of Environmental Protection Division of Water and Waste Management

Check here if
you are also
commenting at
the DAQ rules
hearing.

NAME

ADDRESS

PHONE

	Robert Piffner JR	P.O. Box 7 Hemlock Forest Lane Sugar Grove WI	304 218 5596	
	Robert B. Hine Sr.	14661 Box 13 Sugar Grove WI 26815	304 358 3550	
No	Michael Whitman	used 1804 Buchanan Dr S. Charleston, WV 26303	304 744-0162	No
No	Sandra Spivey	918 Woodland Ave 304 th 25303	340-0436	No
	Ellen Mawer-Holman	104 Mountain Z. Ridge, WV	304-347-1186	
No	Robert Spears	718 Heler Ac Chas WV	304-345-6881	N
No	Jack Ross	2208 Donald Ave ^{Healthy den} WV 26701	304-522-8221	
No	Jeff Skater	536 Melwood Dr. Cross Lanes	304-776-0009	No
No	Aubrey Coleman	1031 Buvarine & Chas WV	304 345-2220	no
No	Lee Deo	123 Sweetmore Ave Chas WV	304 342-6372	No
Yes	Ed Hayne	652 Corda Dr. Chas.	304 345-6960	No
yes	Liz GARCIA	2010 D. Randolph Ave Elkins	603 77201	no
no	Mike Warwick	993 Harmony Lane Sochas	744-3697	No
yes	OC SPRADLIN	88 FOX RUN ^{Chas} Chas WV 25526	757 9322	
yes	GEORGE PHILLIPS	100 POPP LANE ESTATES SCOTT DEPOT WV 25520	304-553-4981	no
yes	Don Ebertman	722 Chappel RD CHAS WV 25304	304/926-8678	-

~~inward~~ detailed pricing log 40 pgs.

X	yes	OC SPRAUDING	88 FOX KENN FUNAICONE WY 25526	757 9322
N ^D X	yes	GEOLOGE PHILLIPS	100 POPULAR ESTATES SCOTT AVE WY 25520	304-553-4981
N ³ X	yes	BOB GARMAN	722 Chappel RD CHAS WY 25304	304/926-8678
X	yes	John David	P.O. Box 127 Knead WY 2715	304/442-3157

Antidegradation Public Hearing
West Virginia Department of Environmental Protection Division of Water and Waste Management
July 10, 2006

Do you wish to speak?

NAME

ADDRESS

PHONE

Check here if you are also commenting at the DAQ rules hearing.

NO	Kacie Warner	381 Elizabeth St. Harrisonburg, VA	(732) 616-5022	NO
Yes	Brook Thompson	140 Marvers Way Project NC 27958	—	
NO	Marley Green	800 S Main St. Harrisonburg	—	NO
NO	TOM COLEMAN	1427 Lonsdale Rd, CHARLESTON CROSS CREEK DRIVE Lanes	(304) 348-4413/342-2401	NO
NO	LARRY BEHLER	5318 HOOVER DRIVE Lanes	304-776-7059	
NO	Steve Joy	408 Dodge Ave. Williamstown, WV	304-375-4908	
NO	Mike Mansfield	127 Shenandoah Ave. Daugherty	304-422-6623	
Yes	Dave Yaussey	P.O. Box 1791 Charleston WV	304 347-8358	
Yes	Leighton Cobb	1912 Box 42 Ravenswood WV	304-273-3347	
Yes	LARRY ORR	104 HILLCREST AVE ELEVATE 25071	304-965-7185	
NO	KANDAL MACGARD	RT 1 Box 155, Durbin WV 25511	304-385-4951	
Yes	Mary Ellen D'Amico	1010 Valley Rd. Charleston WV 25303	304-353-3623	
Yes	Carol Warren	P.O. Box 652, Webster Springs 26288	304-841-5121 (H) 304-343-3360 (W)	
NO	Brendan Skeen	2930 Auburn Rd. Apt 88, Huntington 25704	(304) 744-6125	

11/11/05
11/11/05
11/11/05

11/11/05
11/11/05
11/11/05

11/11/05
11/11/05
11/11/05

11/11/05
11/11/05
11/11/05

Antidegradation Public Hearing
 West Virginia Department of Environmental Protection Division of Water and Waste Management
 July 10, 2006

Do you
wish to
speak?

NAME

ADDRESS

PHONE

Check here if
you are also
commenting at
the DAO rules
hearing.

☒	David Payne	114 Charles St. Parkersburg	488-7061	
No	Jeff Johnson	110 W. Pike Grafton, WV	265-3937	
Maybe	Jason Sanders	2 Woodland Dr Dr Parkersburg WV	304-424-6875	
Maybe	Bob Radspinner	2429 Mountain View Ave, Bluefield, WV	304-320-0988	
YES	Delegated Debbie Stevens	HC 64 Box 102 Parsons WV	304-478-4411	
NO	M. Austen	1410 Satter Circle	722-4449	
No	Mat Robertson	916 Echo Rd, S. Cross, WV ²⁵³⁰³	744-9338	
NO	JOE CROWDER	HC-70, Box 53, EKVILLE, WV. ²⁵⁰⁷¹	965-1338	
NO	REGINA HENDRIX	1637 Quasar Ave #3 ^{Chas 2534}	343-5211	

X40
 X
 X
 X
 X

Dear DEP,

6/8/06

I'm contacting you in concern of removing viable trout streams from the tier 2.5 list. I think this is a bad decision! Brook trout have inhabited these streams long before we were here and they're our state fish. They are declining in populations the way it is and need all of the protection possible.

I'm a diehard fly fisherman and enjoy fishing these great streams and rivers we have in West Virginia. I'm also a outdoor writer for the Hampshire Review and Register-Herald. I plan to get the word out about removing these streams and what a bad decision it is. I'm really concerned about losing any of our trout streams as I would like my children and grandchildren ~~can~~^{to} enjoy these same streams as I have.

We are losing streams and habitat enough the way it is and I urge you to not remove these streams from the 2.5 list. After all this is "Wild and Wonderful". Again, I will fight against this and think it's a horrible idea.

Respectfully,
Clint Fashae



July 10, 2006

West Virginia Department of Environmental Protection
Division of Water and Waste Management
Lisa McClung, Director (antideg@wvdep.org)
Attn: 2.5
601 57th Street, SE
Charleston, West Virginia 25304

Re: Comments of Snowshoe Mountain, Inc. Resources Group on 60 CSR 5:
Tier 2.5 List

Dear Director McClung:

The West Virginia DEP recently proposed to remove some 141 streams from the presumptive list of waters of special concern (Tier 2.5 streams). Some of the streams that DEP has proposed to remove from that list were removed at the request of Snowshoe, and we applaud DEP's proposed decision as appropriate. As you know, all recognized stream uses will still be protected with a Tier 2.0 stream designation. We believe that a Tier 2.5 designation will effectively prevent property development altogether, whereas a Tier 2.0 designation protects sensitive stream uses, such as trout streams, while also allowing landowners the opportunity to develop their property. Accordingly, we applaud DEP's proposed decision and urge it to finalize that decision as proposed.

Sincerely yours,
Snowshoe Mountain, Inc.

J. D. Morgan
Director, Business Development

INTRAWEST



10 Snowshoe Drive • Snowshoe, WV 26209 • Phone: 204 572 1000 • www.snowshoemountain.com



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

Dear Ms. McClung

I am a native West Virginian who enjoys the outdoors, including catch and release fly fishing on the states pristine trout streams. I have taken the time to write this letter to voice a strong protest against DEP's proposed removal of some 141 streams from tier 2.5 protection. I do not in any way feel that DEP is serving the tax paying citizens of the state, ALL OF THEM, not just an influential few, by proposing to remove these 141 streams from tier 2.5 protection. I implore the DEP to act more responsibly on this issue, in a manner more consistent with its mission to preserve and enhance the states watersheds. I want reinstatement of those 141 streams which the DEP is proposing to remove from the tier 2.5 list, and continued tier 2.5 protection for those streams. If this can not be done in time to put the issue before the legislature, then I want additional 90 additional days in which to comment on this important issue. Thank you.



Carla J. Kesling
Rt 2 Box 427
Bridgeport, WV 26330

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

Dear Ms. McClung

I am a native West Virginian who enjoys the outdoors, including catch and release fly fishing on the states pristine trout streams. I have taken the time to write this letter to voice a strong protest against DEP's proposed removal of some 141 streams from tier 2.5 protection. I do not in any way feel that DEP is serving the tax paying citizens of the state, ALL OF THEM, not just an influential few, by proposing to remove these 141 streams from tier 2.5 protection. I implore the DEP to act more responsibly on this issue, in a manner more consistent with its mission to preserve and enhance the states watersheds. I want reinstatement of those 141 streams which the DEP is proposing to remove from the tier 2.5 list, and continued tier 2.5 protection for those streams. If this can not be done in time to put the issue before the legislature, then I want additional 90 additional days in which to comment on this important issue. Thank you.



Randolph L Kesling
Rt 2 Box 427
Bridgeport, WV 26330

July 1, 2006
Lisa McClug, Director
Division of Water & Waste Management
WV Department of Environmental Protection
601 57th St., SE
Charlestown, W.Va. 25304

Don Bearden
108 Tall Pines Lane
Berkeley Springs, W.V. 25411
Ph: 304.258.4262; E-Mail dbbearden@earthlink

Dear Ms. McClug:

The following are comments regarding the rule- 60 CSR 5, Antidegradation Implementation Procedures.

As a SOS certified volunteer Water Monitor and a Board Member of Sleepy Creek Watershed, I was very disappointed to learn of WV DEP's proposed weakening of the protection for pristine Tier 2.5 streams. The proposal unfairly targets and removes 131 streams from Tier 2.5 protection. Instead of removing streams, more should be added such as unimpaired warm water tributaries of the Potomac such as Sleepy Creek.

Businesses and developers may write letters in support for weakening Tier 2.5 stream protection, but we need to do more for our water resources, as we have future generations to be concerned about and not just narrow short-term special interests.

Thank you for your help in this regard.



Don Bearden

Antideg - Antideg comments

From: "Richard Squire" <rhsquire@charter.net>
To: <antideg@wvdep.org>
Date: 7/10/2006 3:49:07 PM
Subject: Antideg comments

Lisa McClung, Director

I am stunned by the announcement of the intent to remove 141 streams from the "tier 2.5 compromise" to a level 2 tier. It seems that the only reason for doing this is to appease developers who say tier 2.5 is too difficult to meet? I worked for the chemical industry in this state for 30 years and when I look back, the pollution controls installed were the right thing to do. At the time some regulations seemed almost impossible, but they were met.

Now we are reversing that standard; first with the 2.5 compromise, and now proposing to move 141 streams to tier 2. As you may know, several of these stream allow native brook, brown and rainbow reproduction. It does not take much of a decrease in water quality for this "outstanding natural resource" (to quote the tier 3 standard) to be forever degraded.

I plead to keep at least Big Spring Fork (20), Hominy Creek (34), Grassy Creek (35), South Fork Cherry River (39), and Yoakum Run (91) pristine by at least keeping them in tier 2.5 if they can't be elevated to tier 3. Yoakum Run feeds Blackwater Falls and goes through the Timberline Housing Development; why build developments if the building itself degrades part of the natural beauty.

Sincerely,

Richard Squire
Professor of Chemistry
WVU-Tech

Karen Light - Big Spring Fork

From: "Kendall Brumbaugh" <kgbrum@verizon.net>
To: <lmcclung@wvdep.org>
Date: 6/5/2006 1:16 PM
Subject: Big Spring Fork

Lisa McClung, Director:

I'm not sure who to send this e-mail to but I need to let someone know how I feel. I find the removal of Big Spring Fork from the tier 2.5 listing appalling. Why bother with the tier listings if streams will be removed when big money comes along? Once again, politics, greed and money rule in West Virginia. I thought this was the Department of Environmental **PROTECTION**, not degradation!

Sincerely,

Kendall Brumbaugh
1445 Washington Ave.
Parkersburg, WV 26101

Renee Morris
1303 Patricia Way
South Charleston, WV 25309

Ms. Lisa McClung
Director
WVDEP Division of Water and Waste Management
601 57th St. SE
Charleston, WV 25304

Re: Removal of 141 streams from the Tier 2.5 list

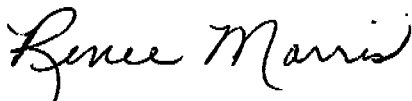
Dear Ms. McClung:

I read with dismay the article in the Gazette, June 26, concerning the trout streams that will lose protection under the current Tier 2.5. I am not a member of any trout organization, but only a citizen who cherishes the waterways of West Virginia, and wants to see them protected to the utmost.

Jobs and development are important components of our state's economic health, as well as tourism. We must find a way to promote economic development while protecting our streams and rivers from over-development and pollution, so that we can build on our tourist industry. It would seem to me that the streams on the targeted list to lose protection would be even more at risk. Mr. Orr agrees, and stated in the article that, "It seems as though many of the streams are being removed from the list for the very reason they should be on it."

Thank you for your time in reviewing my concerns about this issue. I can only hope that with public comment and more input from scientific studies, this issue will be resolved in favor of more responsible management of these 141 streams.

Sincerely,

A handwritten signature in cursive script that reads "Renee Morris".

Renee Morris

George W. Beatty

3438-34th Place, NW Washington, DC 20016

Fax: (202) 537-1609

e-mail: gw-nb-beatty@msn.com

Tel: (202) 537-0855

July 5, 2006

Dear Ms. McClung,

My family and I have owned a house and 2.5 acres in Hardy County adjoining the Washington National Forest for over 25 years. One of the great appeals of WV has been the trout fishing, particularly on Shavers Fork which ranks high on my list of blue ribbon fisheries east of the Mississippi.

I understand that legislation is pending that would jeopardize, or possibly terminate outright, the present Tier 2.5 status of Shavers Fork. Doing so would be on a par with strip mining the Dolly Sods. I hope WV DEP will do everything in its power to prevent such a result.

Sincerely,
Geor Beatty

West Virginia Forestry Association



"Growing for West Virginia"

P.O. Box 718

Ripley, WV 25271

Phone: (304) 372-1955

(304) 372-1956

FAX: (304) 372-1957

Dick Waybright, Executive Director

July 7, 2006

WV Department of Environmental Protection

Attn: Tier 2.5 Hearing

601 57th St. S. E.

Charleston, WV 25304

Dear Sirs:

The West Virginia Forestry Association is a member of the Antidegradation Coalition and support the comments which are being submitted for the coalition.

Our association agrees that the DEP has failed to follow procedures in the listing of streams and believe the DEP should withdraw Appendix A and propose a new rule.

Sincerely,


Dick Waybright
Executive Director

From: <Atkinson.Cheryl@epamail.epa.gov>
To: Patrick Campbell <PCAMPBELL@wvdep.org>
Date: 7/10/2006 2:53:39 PM
Subject: Comment on the proposed revision to West Virginia Antidegradation Implementation Procedures

EPA has the following comment regarding your proposed change to Section 2.6, which deletes the reference to the May 17, 2001 effective date of the definitions incorporated therein.

In our March 29, 2004 letter to West Virginia, approving West Virginia's Antidegradation Implementation Procedures we stated:

"For purposes of this rule [West Virginia's Antidegradation Implementation Procedures] the definitions contained in 46 CSR 1-2 are hereby incorporated herein. EPA understands these definitions are contained in the 46 CSR 1-2 that was effective May 17, 2001. Specifically the following terms are related to Antidegradation Implementation Procedure: 2.1 Ambient Concentrations, 2.2 Ambient Water Quality Conditions, 2.3 Baseline Water Quality, 2.18 Parameter of Concern, 2.21 Reasonable less-degrading or non-degrading alternative, 2.22 Regulated Activity, 2.26 Trading, 2.27 Trading Assessment Procedures."

Because these definitions are not included in the latest version of the Water Quality Standard Rule, 47 CSR 2-2, we recommend that West Virginia keep the May 17, 2001 reference date or incorporate into your Antidegradation Implementation Procedures the above mentioned definitions.

Also, EPA notes that in addition to the Antidegradation Implementation Procedures, Appendix A listing Tier 2.5 waters, 47 CSR 2-4 Section 4.1.c.1 lists Watkins Run (Preston County) as a Tier 2.5 water. For clarity, EPA recommends that West Virginia list all of the Tier 2.5 waters in Antidegradation Implementation Procedures Appendix A.

--

Cheryl Atkinson, U.S. EPA Region III
Phone: (215) 814 3392

--

CC: <Rivera.Nina@epamail.epa.gov>, <Koroncai.Robert@epamail.epa.gov>

Bob Allen

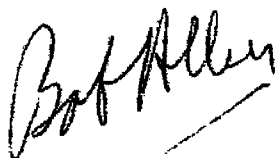
From: "Bob Allen" <muddler6162@atlanticbb.net>
To: <harkowski.denise@epa.gov>
Cc: <antideg@wvdep.org>
Sent: Saturday, July 01, 2006 12:16 AM
Subject: Public Hearing: July 10, '06

I am a concerned trout fisherman and fly tyer and am very interested in West Virginia's trout waters. Too many of our fresh/clean streams have been destroyed in the past few decades. It just seems a shame to continue to destroy these waters. Why don't we shift gears to an effort that embraces "keeping our cake and eating it also". Can't we, with some effort have both ie., get on with industrial promotion in a very careful and clean way, while at the same time save our streams? If not, some hard decisions will have to be made to the disappointment of industry. Maintaining the trout waters has to be the top priority.

We should be placing streams back on the list to be protected rather than removing more streams from the list. It is my understanding that the WV Dept., of Environmental Protection has the responsibility of PROTECTING our water resources rather than destroying them. Please do some soul searching and do the right and proper thing.

Attn: Denise Harkowski, please see that this email is read at the July 10 meeting (in it's entirety) at the WV DEP headquarters in Kanawha City scheduled for 6:00-8:00 p.m. Your consideration will be greatly appreciated. Just as a reminder, the South Branch of the Potomac River, our once premiere Smallmouth Bass fishing stream has been reduced to a "nothing" stream in the past decade because of lack of concerns by the "powers at be". We have had many major fish kills in that river in the past few years and it's just such a pity, a crime perhaps? It was such a great recreational river and fish producer for years. Don't let this happen to our trout waters.

Respectfully,
Bob Allen
170 N. Marsham St.
Romney, WV 26757



RECEIVED
WVDEP

JUL 05 2006

Bob Allen, HHF (you Heard it Here First)

PUBLIC INFORMATION OFFICE

7/1/2006

From: "VERNON HALTOM" <vhaltom@hotmail.com>
To: <antideg@wvdep.org>
Date: Mon, Jul 10, 2006 3:14 PM
Subject: Anti-degradation comments

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

Dear Ms. McClung,

Thank you for this opportunity to comment on streams proposed for tier 2.5 protection.

I support the inclusion of the listed 303 proposed for tier 2.5 protection.

This provides reasonably clean water for a variety of citizen uses, including tourism, West Virginia's fastest growing industry. Protecting these waters now will allow their continued viability for generations to come, provided protections remain in place and are actively enforced. However, I oppose the removal of 131 streams from the list. These streams need protection for the same reasons given above. Removing them from the list condemns them to pollution for what will likely be generations to come, if not forever. Tier 2.5 protection is a compromise that does not preclude development. It does require landowners, coal companies, etc. to maintain water quality at a reasonable level. Removing streams from the list ignores the needs, opportunities, and rights of everyone downstream, upstream, and adjacent to these streams.

Coal companies and land companies have for too long considered West Virginia's streams a dumping ground, a cesspool, for the rest of the country's addiction to energy gluttony. Reinstating the entire tier 2.5 list, with the capability of adding streams to the list, would be a good step to protect West Virginia's future for all. This must be considered above the short-term profits of a few special interests.

Sincerely,

Vernon Haltom
P.O. Box 232
Naoma, WV 25140
(304) 854-2182

Antideg - Antidegradation Rule

From: Tim Tucker <tim.tucker@talic.com>
To: <antideg@wvdep.org>
Date: 7/5/2006 5:37 PM
Subject: Antidegradation Rule

Dear Lisa McClung,

I have been notified by my friends at the West Virginia Rivers Coalition that The West Virginia Department of Environmental Protection proposes removing future protections from more than 100 of West Virginia's most pristine streams including popular native trout waters such as Shavers Fork of the Cheat River and Big Spring Fork of the Elk River!

I oppose such an act. Because my company is in the paddlesport industry, our livelihoods depend on clean water where people and wildlife are safe. Many of our customers live in and around the West Virginia area. These individuals have a significant impact on our company.

Others are effected too. The U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually.

Please take this into consideration as you cast your vote on this ruling.

Best Regards,

Tim Tucker Designer / Production

Talic, Inc.
316 N Goodman St
Rochester, NY 14607

ph 800.843.3307

fx 585.241.9535

"Be Good to Your Toys"

<http://www.talic.com>

storage ■ display ■ kayak ■ canoe ■ rowing

Antideg - Proposed Antidegradation Rule

From: "Hammond, James" <james.hammond@lmco.com>
To: <antideg@wvdep.org>
Date: 7/5/2006 3:15 PM
Subject: Proposed Antidegradation Rule

To whom it may concern,

I am deeply concerned about the proposed antidegradation ruling that will be voted upon by the state legislature. Although I am not a West Virginia resident, I do spend anywhere from 10 days to 2 weeks a year in your wonderful state to enjoy skiing, kayaking, golf and other recreational activities. The wonderful rivers and streams that are resident in your state are a primary draw for me. And, there is no doubt that they are also a reason for many other folks to visit your state. I am concerned that you will reduce the protection that many of the waterways in your state enjoy just on the request of special interests. The fact that WVDEP has failed to respond to the 2003 antidegradation ruling that the West Virginia Rivers Coalition won is another concern. I request that the comment period for this proposed change be extended 45 days or more in order for the rationale behind this change to be explained to the public.

Thank you for your time,

Jim Hammond

From: "Paul Kelly" <Paul.Kelly@mail.wvu.edu>
To: <harkowski.denise@epa.gov>, <antideg@wvdep.org>
Date: Wed, Jul 5, 2006 2:25 PM
Subject: Stream removed from Tier 2.5 Protection

I am writing in response to the removal of 141 stream from the Tier 2.5 Protection for brook trout. I do not want to see the lost of any trout streams and ask that you in your job capacity see that this does not happen.

West Virginia needs all the trout producing stream kept alive and flowing and not closed because "We are open for Business".

Thank you for you attention and hope you will find a way to keep these stream in the Tier 2.5 Protection plan.

Paul Kelly

Paul Kelly
Facility Management
Assistant Director Mountainlair/Student Rec Center
and Central Operation
PO Box 6018
Telephone 293-5086
PWKelly@Mail.WVU.edu

Minds are like parachutes ~ They only function when open

Antideg - Tier 2.5

From: <steinmand@aol.com>
To: <antideg@wvdep.org>
Date: 7/4/2006 12:00 PM
Subject: Tier 2.5

Ms. McClung,

I am writing to voice my support of retaining the Tier 2.5 list as it currently stands. I do not believe that we can trust private entities to protect the water which belongs to each of us. As an owner of land with streams I would welcome any guidance that I could obtain to protect the water.

Dean Steinman
P.O. Box 72
Shirley, WV 26434

Check out AOL.com today. Breaking news, video search, pictures, email and IM. All on demand. Always Free.

Antideg - No degradation.

From: "Sandy Fisher" <andasay@gmail.com>
To: <antideg@wvdep.org>
Date: 7/1/2006 8:35 AM
Subject: No degradation.

I have fished on the Shavers Fork and do not want it degraded. Sandy Fisher, #12 Arlington Court, Charleston WV, 25301.

--

new email address:
andasay@gmail.com

Antideg - Public Hearing:July 10,'06

From: "Bob Allen" <muddler6162@atlanticbb.net>
To: <harkowski.denise@epa.gov>
Date: 7/1/2006 12:16 AM
Subject: Public Hearing:July 10,'06
CC: <antideg@wvdep.org>

I am a concerned trout fisherman and fly tyer and am very interested in West Virginia's trout waters. Too many of our fresh/clean streams have been destroyed in the past few decades. It just seems a shame to continue to destroy these waters. Why don't we shift gears to an effort that embraces "keeping our cake and eating it also". Can't we, with some effort have both ie., get on with industrial promotion in a very careful and clean way, while at the same time save our streams? If not, some hard decisions will have to be made to the disappointment of industry. Maintaining the trout waters has to be the top priority.

We should be placing streams back on the list to be protected rather than removing more streams from the list. It is my understanding that the WV Dept., of Environmental Protection has the responsibility of PROTECTING our water resources rather than destroying them. Please do some soul searching and do the right and proper thing.

Attn: Denise Harkowski, please see that this email is read at the July 10 meeting (in it's entirety) at the WV DEP headquarters in Kanawha City scheduled for 6:00-8:00 p.m. Your consideration will be greatly appreciated. Just as a reminder, the South Branch of the Potomac River, our once premiere Smallmouth Bass fishing stream has been reduced to a "nothing" stream in the past decade because of lack of concerns by the "powers at be". We have had many major fish kills in that river in the past few years and it's just such a pity, a crime perhaps? It was such a great recreational river and fish producer for years. Don't let this happen to our trout waters.

Respectfully,
Bob Allen
170 N. Marsham St.
Romney, WV 26757

Bob Allen, HHF (you Heard it Here First)

Antideg - Uphold the Clean Water Act

From: "Peter Bross" <pfbross@comcast.net>
To: <antideg@wvdep.org>
Date: 7/10/2006 11:33 PM
Subject: Uphold the Clean Water Act
CC: "Joe Peabody WV Rivers" <jpeabody@wvrivers.org>

Lisa McClung, Director
Division of Water and Waste Management
WV Department of Environmental Protection

I understand that WVDEP is currently proposing changes to the state's antidegradation implementation procedures and that you are currently accepting comments regarding a proposed antidegradation rule which proposes removing future protections from more than 100 of West Virginia's most pristine streams— including popular native trout waters such as Shavers Fork of the Cheat River and Big Spring Fork of the Elk River.

As a West Virginia property owner and tax payer, I respectfully suggest that you not recommend removal of 131 streams from Tier 2.5 protection without sufficient reason—these streams must be reinstated onto the list! I also REQUEST that WVDEP extend the comment period by at least 45 days in order for the agency to provide the public with more detailed information and to provide adequate time for response.

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Antidegradation policy is designed to achieve the maintenance part of that goal: to keep clean waters clean and prevent further pollution of others.

Sincerely yours,
Peter F. Bross
Bruceton Mills

Antideg - comment on Tier 2.5

From: "Dave Payne Sr." <payneoutdoors@yahoo.com>
To: <antideg@wvdep.org>
Date: 7/10/2006 12:25 PM
Subject: comment on Tier 2.5

I have to strongly disagree with the DEP decision to remove so many streams from 2.5. In some cases with these streams, it appears they are protected from major development, only as long as noone is planning any major development.

Dave Payne Sr.
Journalist and writer
4502 9th Ave.
Vienna, WV 26105

Sneak preview the all-new Yahoo.com. It's not radically different. Just radically better.

Karen Light - Fwd: tier 2.5 protection

From: Patrick Campbell
To: Karen Light
Date: 7/7/2006 9:10 AM
Subject: Fwd: tier 2.5 protection

>>> Lalena Price 7/7/2006 9:09 AM >>>
Forwarding to you.

Lalena Price
Department of Environmental Protection
Public Information Office
601 57th Street, SE, Rm. 1059
Charleston, WV 25304
office: 304.926.0440
mobile: 304.550.3552
fax: 304.926.0473
lprice@wvdep.org

Promoting a healthy environment.

>>> "Carmen Borsa" <carmenborsa@gmail.com> 7/5/2006 10:43 AM >>>
To Whom It May Concern

I am writing to urge you to protect West Virginia's streams and waterways. Delisting our state's most productive trout streams will be extremely detrimental not only to the quality and beauty of the environment but also to the tourism that is generated by anglers. Tier 2.5 protection is vital to the state of West Virginia as we look forward to increasing revenue from tourism and keeping our state as wild and wonderful as it can be. Development of these areas would impair the waterways to a high degree. Please help to protect the future of West Virginia.

Carmen Borsa
236 S High
Morgantown, WV 26501

Antideg - Tier 2.4 Comments

From: "Don Beyer" <DBeyer@wsgarch.com>
To: <antideg@wvdep.org>
Date: 7/10/2006 1:16 PM
Subject: Tier 2.4 Comments

I am opposed to any relaxing of environmental protections on our state waterways. Too much damage has already been done to them by industrial interests in the name of "helping our economy". I want my grandchildren's children to enjoy them at least as much as I have.

Donald W. Beyer, P.E.
Williamson Shriver Architects
717 Bigley Avenue
Charleston, WV 25302
Phone 304-345-1060
Fax 304-345-3693

Antideg - Streams/2.5

From: "Jennifer Honeycutt" <jjhd@setel.com>
To: <antideg@wvdep.org>
Date: 7/10/2006 12:41 PM
Subject: Streams/2.5

To Whom It May Concern,

I am writing in regard to the proposal to remove Tier 2.5 protection from some of the most outstanding waters in West Virginia.

I live in southeast Kentucky. Every year I travel to West Virginia for outdoor recreation. I love the Monongahela and enjoy camping/hiking in the Dolly Sods/ Seneca /Spruce Knob area, and also in the Cranberry Wilderness/Williams river area. I have also gone rafting on the Gauley River. I love remote forests and clean waters, which is something we don't have in southeast Kentucky due to excessive logging and mountaintop removal.

I object to the proposal to remove 131 streams from Tier 2.5 protection. Bowing to logging, mining, and development interests, without sufficient reason for removal of these streams, is unfair to the businesses that rely on forests and streams for tourism dollars and unfair to the public, especially since many of these streams are on public land. Too much consideration has been given to planned or speculative coal reserve and other development instead of following criteria in Section 8.1 a. 2 of the rule for removing streams from the Tier 2.5 list. There has been an unfair weighing of industry's opposition in the decision to remove specific streams.

Clean Water Act requirements should be followed, which are to protect existing water quality and prevent further pollution from these waters.

The public has a right to demand protection for the few remaining clean streams we have, for the tourism dollars they generate, the clean drinking water they provide, the ecological diversity they support, and the recreational opportunities they create. We should be adding to the list of protected streams, not removing them. Streams that should be added to the Tier 2.5 list include the Cranberry, Elk, the West Fork of the Greenbrier, Gandy Creek, and the section of Seneca Creek in Pendleton county.

Thank you for taking my comment,

Jennifer Honeycutt
PO Box 326
Mayking, Ky 41837
606 632-9498

From: <thoffman1@adelphia.net>
To: <pwebb@wvdep.org>
Date: 7/10/2006 9:41:25 AM
Subject: Rule 60 CSR 5, removal of 141 streams from tier 2.5 protection

Dear Ms. McClung:

My name is Travis Hoffman. I am a life long resident of West Virginia, an avid outdoorsman, and a member of trout unlimited. I am writing you today as a concerned angler. I have recently learned that the WV EPA has intentions of removing 141 of West Virginia's beautiful streams from Tier 2.5 protection. This concerns me greatly. I understand that the EPA originally assigned these streams Tier 2.5 protection as a concession or compromise to allow the streams to be listed at a lower than 3.0 status. However, now you propose completely removing these protections. I ask that you not remove the streams from Tier 2.5 protection.

I recently graduated from West Virginia University College of Law. Upon graduation, many of my friends and classmates moved out of West Virginia. They chose to live and work in Pittsburgh, Charlotte, Washington D.C., and other cities up and down the east coast. I, however, chose to stay in West Virginia. I chose to stay in my home state partly because of the mountains and streams I enjoyed as a child and continue to enjoy today. My father and I have gone trout fishing in Pocahontas County every spring since I was five years old. I am now twenty-eight years old and recently learned that my wife and I are expecting twins. I too would enjoy the opportunity to take my children to clean streams to fish for West Virginia trout. Thus, I ask you, please maintain the Tier 2.5 protection for these streams. Allow me the opportunity to teach my children to fish on the same streams on which I was taught some twenty-three years ago.

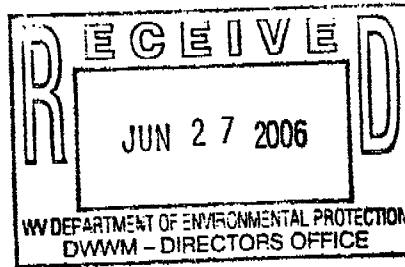
Thank you for your time and concern.

Very truly yours,

Travis W. Hoffman
Rt. 1 Box 119-4
Red House, WV 25168
(304) 767-4880

✓cc: Pat Campbell

Jeff Nelsen
1403 Princess Dr
South Charleston, WV 25309
June 22, 2006



Ms Lisa McClung
Director
WVDEP Division of Water and Waste Management
601 57th St. SE
Charleston, WV 25304

Re: Removal of 141 streams from the Tier 2.5 list

Dear Ms McClung:

How many more streams and rivers in our state have to be the sacrificial lambs for industrial and developers' interests? We have as a state many examples of acid impaired and sediment choked streams of past economic ventures that have left ghost towns and destruction to our water resources. I would hope we could be better stewards going forward.

There are numerous reasons which I know your own staff as well as WVDNR's has identified for not reducing the protection offered to the 2.5 listed streams. I thought the 2.5 classification was already a concession to those opposed to the 3.0 designation.

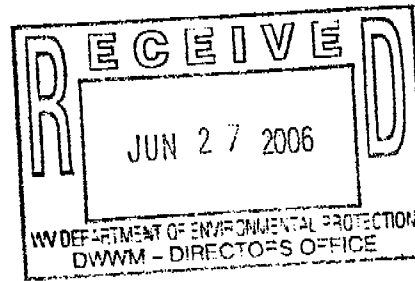
I am not opposed to economic growth and jobs in our state. I know how critical it is to create those opportunities. Maintain reasonable and sound environmental standards for long term economic development so that people come here not just for a job but more for the quality of life that we all know is here.

Thank you for your attention to this issue and hope public comment, scientific review and political debate will prevail to better manage these 141 streams.

Sincerely,

Jeff Nelsen

✓ cc: Pat Campbell



Lisa McClung, Director
Division of Water
W.V. D.E.P.
601 57th St., S.E.
Charleston, WV 25304

June 24, 2006

Dear Ms. McClung:

Brook trout are today restricted to small headwater streams that are little disturbed watersheds. They require the highest quality water. We have a clear history of degradation and the decline of our brook trout heritage. As clear, is the intent of the Clean Water Act to reverse this decline - by the T.M.D.L.s and the antidegradation status.

Under Tier 2.5 some deterioration of water quality is permitted if there is "good" reason. This is not Tier 3.0 - as it should be. The original list was not all inclusive. To remove 140 some from 2.5 status is far too many. We have a great opportunity to expand brook trout presence as our watersheds heal themselves - if we can preserve the very high water quality brook trout require.

I was a fish biologist, a trout biologist, for almost 40 years working mostly with our trout program.

Donald C. Gasper
Fish Biologist
WV DNR - Retired
4 Ritchie Street
Buckhannon, WV 26201

Antideg - I urge you to say NO! to lessening our WVDEP stream antidegradation policies.

From: "Andy Ragland" <maragland@citynet.net>
To: <antideg@wvdep.org>
Date: 7/5/2006 9:15 PM
Subject: I urge you to say NO! to lessening our WVDEP stream antidegradation policies.

Please consider this comment from an *intentional* West Virginian. I live here in Charlewest by choice - born and raised in the DC area - because the people, climate, and scenic beauty all combine to create almost heaven from my perspective. I turn fifty this year and have been paddling WV streams since 1972. I have watched with glee as the WVDEP has successfully managed the water quality and taken it from the horrible mess it was in the 70's to the much better conditions the streams are in today. I beg you to continue to *improve* the water quality - *not* relaxing the standards to allow it to degrade. Our future here is not in coal - it is in tourism/recreation/retirement/travel.

Please visit the WV Rivers Coalition website and get in touch with these folks - the really understand what is at stake and can give you excellent talking points for convincing the legislative and executive branches of our state to be frugal with our most precious of resources - clean streams. The website and contact info is:

<http://www.wvrivers.org>

West Virginia Rivers Coalition
801 North Randolph Ave. Elkins, WV 26241
Office: (304) 637-7201
Fax: (304) 637-4084

Respectfully,

Andy Ragland,
Charleston resident, raft guide, electrical engineer, *intentional* West Virginian

GREGORY K. NORRIS

June 26, 2006

West Virginia Department of Environmental Protection
Division of Water and Waste Management,
Lisa McClung, director
Attn: Tier 2.5
601 57th Street S.E.
Charleston, WV 25304

Dear Ms. McClung:

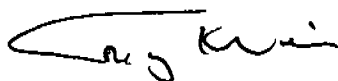
I am writing today to voice my objection to the removal of protections from trout streams in West Virginia. At a time when we should be increasing protections, it seems the DEP is being swayed by the lure of development.

Developers have a number of staff members to plead their case. Most have a battery of lawyers, lobbyists, and project specialists. However, the citizens of West Virginia rely on you and your department to be our "staff members" and protect our interests.

I urge you to reconsider the your recommendation and restore these 141 streams to the list of streams receiving the additional protections of "Tier 2.5" status.

Thank you for your consideration.

Yours truly,

A handwritten signature in dark ink, appearing to read 'Greg K. Norris', with a stylized, flowing script.

Gregory K. Norris

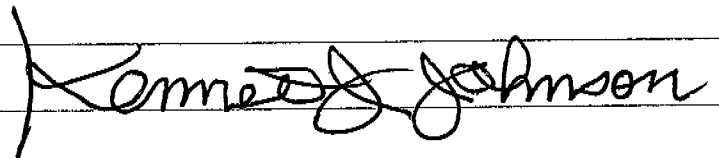
DEP Headquarters
601 5th Street SE.
Charleston WV 25304

Kenneth J. Johnson
13117 MacCorkle Avenue
Chesapeake, WV 25315-1417

27 JUN 2006

I hereby protest the removal of
any protected trout stream for the
purpose of COAL production. This list
is known as the Tier 2.5 list.

Sincerely,

Handwritten signature of Kenneth J. Johnson in cursive script.

Antideg - Anti-Degradation Rules Comment - ATTN Lisa McClung

From: "William Turner" <wturner@phtslaw.com>
To: <antideg@wvdep.org>
Date: 7/8/2006 6:14 PM
Subject: Anti-Degradation Rules Comment - ATTN Lisa McClung

Dear Ms. McClung:

While there are some positive points in DEP's anti-degradation proposed rules, I am dismayed that DEP's proposed rules plan to remove Tier 2.5 protections for more than 100 of West Virginia's most pristine streams—including popular trout waters such as Shavers Fork of the Cheat River and Big Spring Fork of the Elk River, and Second Creek, one of West Virginia's blue ribbon trout streams, which I fished only last Thursday. I also fish Hominy Creek and Glade Creek regularly. As an avid trout fisherman, I am very disappointed with DEP's proposed rules.

As you know, the objective of the Clean Water Act is ""to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."" Antidegradation policy is designed to achieve the maintenance part of that goal: to keep clean waters clean and prevent further pollution of others. If anything, the 131 streams removed should be restored to Tier 2.5 and even more streams are added to the Tier 2.5 list for protection from future pollution. Supporting Tier 2.5 protection is essential to counter claims by industry and special interest groups opposed to protecting higher quality waters throughout the state.

As a lawyer, I also am very concerned that DEP's proposed rules give overriding weight to planned or speculative coal and other development, instead of following criteria outlined in Section 8.1.a.2 of the rule for removing streams from the Tier 2.5 list. DEP's rules unfairly weigh industry's opposition in the decisions to remove specific streams from the Tier 2.5 list. Many streams apparently are proposed to be delisted simply because coal mining companies, logging companies, and developers wrote letters of opposition. The letters did not provide necessary details about how Tier 2.5 protection might actually hurt their businesses. In fact, drastically reducing the Tier 2.5 list as proposed by DEP has a negative economic impact by adversely affecting one of the few industries that actually is growing in WV—outdoor recreation and tourism. In fact, the U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually.

I also am disappointed that DEP has failed to respond to the 2003 antidegradation legal ruling by U.S. District Court. Citizens are in the dark about DEP's failure to respond since DEP has not prepared a briefing document related to the issue. I hereby request that DEP extend the comment period by 45 days in order for the agency to provide the public with a briefing document, to provide interested parties with more detailed information and to provide adequate time for response.

Thank you for considering these comments.

William D. Turner, Esq.

Pyles Haviland Turner & Smith, LLP

206 W. Randolph St.

Lewisburg, WV 24901

(304) 645 6400

Karen Light - Big Spring Fork

From: "Kendall Brumbaugh" <kgbrum@verizon.net>
To: <lmcclung@wvdep.org>
Date: 6/5/2006 1:16 PM
Subject: Big Spring Fork

Lisa McClung, Director:

I'm not sure who to send this e-mail to but I need to let someone know how I feel. I find the removal of Big Spring Fork from the tier 2.5 listing appalling. Why bother with the tier listings if streams will be removed when big money comes along? Once again, politics, greed and money rule in West Virginia. I thought this was the Department of Environmental **PROTECTION**, not degradation!

Sincerely,

Kendall Brumbaugh
1445 Washington Ave.
Parkersburg, WV 26101

Karen Light - Fwd: tier 2.5 protection

From: Patrick Campbell
To: Karen Light
Date: 7/7/2006 9:10 AM
Subject: Fwd: tier 2.5 protection

>>> Lalena Price 7/7/2006 9:09 AM >>>
Forwarding to you.

Lalena Price
Department of Environmental Protection
Public Information Office
601 57th Street, SE, Rm. 1059
Charleston, WV 25304
office: 304.926.0440
mobile: 304.550.3552
fax: 304.926.0473
lprice@wvdep.org

Promoting a healthy environment.

>>> "Carmen Borsa" <carmenborsa@gmail.com> 7/5/2006 10:43 AM >>>
To Whom It May Concern

I am writing to urge you to protect West Virginia's streams and waterways. Delisting our state's most productive trout streams will be extremely detrimental not only to the quality and beauty of the environment but also to the tourism that is generated by anglers. Tier 2.5 protection is vital to the state of West Virginia as we look forward to increasing revenue from tourism and keeping our state as wild and wonderful as it can be. Development of these areas would impair the waterways to a high degree. Please help to protect the future of West Virginia.

Carmen Borsa
236 S High
Morgantown, WV 26501

From: JohnColeman <john@hilerun.org>
To: <antideg@wvdep.org>
Date: Sat, Jul 8, 2006 6:15 PM
Subject: keep Tier 2.5 for Hyle Run (Hile Run)

Please give our streams and rivers the best protection possible. Our water is our greatest resource. At our farm the best water we have comes from our streams and springs. Please don't let it be degraded.

Most importantly, give Hyle Run (Hile Run) tier 2.5 protection. As the owners of the farm on Hile Run in Tucker County my family wants the best protection for our stream. Hile Run is very important to us and we don't want it to be degraded. The biggest threats are logging by the forest service and gas wells. We made the mistake of getting involved with a gas company several years ago and regret it ever since. We need all the protection we can get from the gas companies promising pie-in-the-sky and then polluting our waters. Thank you,
John Coleman

John Coleman
Rt. 2 Box 142
Leadmine, WV 26287
(304) 478-2869
john@HileRun.org

Antideg - Antidegradation/Tier 2.5 Update

From: "Kathleen M. Moore" <ba1040@frontiernet.net>
To: <antideg@wvdep.org>
Date: 6/7/2006 4:36 PM
Subject: Antidegradation/Tier 2.5 Update
CC: "Jason L. Myers" <jlmyers@frontiernet.net>, "Ron Marker" <marker@frontiernet.net>, "Chris Michael" <jchrismichael@msn.com>

I received a card in the mail, addressed to my husband Ralph Moore, thanking him for his comments/objections to the subject. He has been dead for three years and would not have objected or commented in any case. I am concerned that certain people in this county are submitting false correspondence in order to further their unreasonable objections. These people have been known to be dishonest and manipulative in other situations which do not directly involve me. However, this response has made my very angry. I suppose there is no way to determine how this happened, but did feel compelled to report the issue.

Antideg - Shavers Fork

From: "john mathwin" <jmathwin@hotmail.com>
To: <antideg@wvdep.org>
Date: 7/8/2006 8:31 PM
Subject: Shavers Fork

Dear Director Lisa McClung,

I understand that many fine trout waters in West Virginia will not be given tier 2 protection under rules you are considering enacting. I recently retired and one of my ambitions is to fish for trout in West Virginia, especially Shavers Fork. How could this fine stream and others like it not receive the best possible protection? I hope you will consider me and my young grandchildren who I hope to introduce to trout fishing someday when you make your decision.

Thank you,

John Mathwin
13515 Crispin Way
Rockville, MD 20853
301-871-7658

From: "Steve L." <leperas@gmail.com>
To: <antideg@wvdep.org>, <harkowski.denise@epa.gov>
Date: Fri, Jul 7, 2006 3:39 PM
Subject: WVDEP change in Tier 2.5 designations

Hello,

I heard from a friend that the WVDEP is planning to remove 141 streams & rivers from the Tier 2.5 designation, which as I understand things would mean those streams and rivers would no longer be as protected from pollution or degradation due to development and mining.

I can't think of any reason, in this day and age, we should be removing valuable and sensitive natural resources from regulatory protection. If anything, more places in our country should be protected. I visit West Virginia almost every month BECAUSE it is such a beautiful place. Don't ruin it for us and our future generations just to pad the short-term pockets of the local coal or development company.

Please reconsider this change in designation, for the good of your state and our country.

Thanks,
Steve LePera
Blacksburg, VA 24060

From: Brian Perkins <brian.perkins@yahoo.com>
To: <antideg@wvdep.org>, <harkowski.denise@epa.gov>
Date: Fri, Jul 7, 2006 3:20 PM
Subject: Tier 2.5 streams

Please don't remove these 141 streams from the Tier 2.5 designation. We need to add streams to this designation not remove them.

Brian Perkins
WV native, trout fisherman, & caver.

Do You Yahoo!?

Tired of spam? Yahoo! Mail has the best spam protection around
<http://mail.yahoo.com>

Antideg - Tier 2.5

From: Greg Norris <wvframer@ntelos.net>
To: <antideg@wvdep.org>
Date: 6/26/2006 11:28 AM
Subject: Tier 2.5

I am writing today to voice my objection to the removal of protections from trout streams in West Virginia. At a time when we should be increasing protections, it seems the DEP is being swayed by the lure of development.

Developers have a number of staff members to plead their case. Most have a battery of lawyers, lobbyists, and project specialists. However, the citizens of West Virginia rely on you and your department to be our "staff members" and protect our interests.

I urge you to reconsider your recommendation and restore these 141 streams to the list of streams receiving the additional protections of "Tier 2.5" status.

Thank you for your consideration.

Gregory K. Norris
Huntington Hall of Frames
450 Fifth Avenue
Huntington, WV 25701
304-523-3682
wvframer@ntelos.net

Hours: Monday - Thursday 11-6pm
Friday 11-5pm
Saturday 11-2pm

We custom engrave plaques and trophies

From: Lee Orr <orrwhat4@yahoo.com>
To: <antideg@wvdep.org>
Date: Sun, Jun 25, 2006 7:13 PM
Subject: Tier 2.5 concerns

Director McClung,
I am concerned about the DEP's decision to remove numerous reproducing trout streams from tier 2.5 protection. The list of streams slated for removal from 2.5 protection contains documented reproducing trout streams. Under WV rules these streams would require 2.5 protection.

It is difficult to understand the logic behind the decision to remove these streams from 2.5 protection and in fact it appears to be a move to satisfy industry's wishes.

Lee Orr

Do You Yahoo!?
Tired of spam? Yahoo! Mail has the best spam protection around
<http://mail.yahoo.com>

Antideg - Tier 2.5 streams

From: "William Mohler" <b.mohler@charter.net>
To: <antideg@wvdep.org>
Date: 7/6/2006 12:31 PM
Subject: Tier 2.5 streams

I disagree with DEP's removal of 141 streams from the list of waters of special concern (Tier 2.5 Streams). The criteria for removal is arbitrary , unreasonable and without support . There is no basis for determining that " planned or ongoing development " is a valid reason for removal . Rather , any development should be performed under the Tier 2.5 review process . Specifically , Glady Fork (MC-60-K) meets all of the criteria for making the list - high quality on public land - , yet is being removed . Parts of this stream abutt Wilderness Areas and should be designated as a Tier 3 stream , if anything . Similarly , Big Spring Fork (KE-138) and Glade Creek (KN-29) should receive more protection , not less . Streams removed for technical reasons prior to 9/05 because they did not meet all of the high quality on public land is also invalid . Red Creek (MC-60-O) is a fly fishing only stream . This stream obviously has " exceptional aesthetic , ecological or recreational value " . Laurel Fork/ Dry Fork (MC-60-N) is removed even though upstream is a Tier 3 designation . These streams and the others on the list of 141 should be preserved to the greatest extent possible . In short , DEP is moving in the wrong direction by removing 141 steams and changing (decreasing) stream segments which will negatively impact the quality of these streams . I urge DEP to take stronger , not weaker , steps in " promoting a healthy environment " by preserving the streams of West Virginia , its greatest resource . William E Mohler III , 971 Ridgemont Rd , Chas , WV 25314

Protected by a Spam Blocker Utility.

[Click here to protect your inbox from Spam.](#)

Antideg - Opposition

From: "Jim Brannon" <jbrannon@adelphia.net>
To: <antideg@wvdep.org>
Date: 6/26/2006 8:44 PM
Subject: Opposition

To Whom It May Concern:

I want to go on record as opposing the removal of 141 West Virginia streams from the tier 2.5 protection list. Please do not eliminate streams from this list. If anything you should be adding to the list or making it possible for streams to be added to the list through active pro-conservation measures. I thought that was your job. Our most visible and viable asset is our state's wilderness. Are you what your name implies, the Department of Environmental Protection? Our trout are like the canary in the coal mines of old. When they died underground it was a warning for the miners to get out. Where are we supposed to go? I don't understand how you can do this and live with yourself. Please help me understand.

**James P. Brannon
#2 Elizabeth St.
Poca, WV 25159**

Be well.
Do good work &
Keep in touch.
(Garrison Keillor)

Antideg - ANTIDEGRADATION RULE

From: <JCiesla1@aol.com>
To: <antideg@wvdep.org>
Date: 7/7/2006 11:43 PM
Subject: ANTIDEGRADATION RULE

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

Dear Director:

The purpose of this email is to express my strong opposition to the current proposed antidegradation rule whose purpose is to remove future protections from more than 100 of West Virginia's most pristine streams—including popular native trout waters such as Shavers Fork of the Cheat River and Big Spring Fork of the Elk River!

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Antidegradation policy is designed to achieve the maintenance part of that goal: to keep clean waters clean and prevent further pollution of others. The proposed rule flies in the face of logic and common sense.

The Tier 2.5 designation is crucial to protecting state's most ecologically and economically valuable waterways. Clean water is necessary for natural resource tourism, clean drinking water supplies, providing revenue through fishing and other recreational activities, which in turn are essential for economic development. Tier 2.5 also fulfills Clean Water Act requirements intended to protect existing water quality and prevent further pollution of the state's rivers, streams, and lakes.

The proposed rulemaking unfairly targets and removes 131 streams from Tier 2.5 protection without sufficient reason—these streams must be reinstated onto the list! It gives overriding consideration to planned or speculative coal reserve and other development, instead of following criteria outlined in Section 8.1.a.2 of the rule for removing streams from the Tier 2.5 list. Several well-known streams would be removed from the list.

The current Tier 2.5 list is not nearly complete as estimates put trout waters in the state at between 1,000 and 2,000 streams. There are many more waters that need the protection of the Tier 2.5 designation.

I respectfully request that WVDEP extend the comment period by 45 days in order for the agency to provide the public with a briefing document, to provide interested parties with more detailed information and to provide adequate time for response.

Tier 2.5 designation is not designed to prevent development activities in a watershed; rather it helps maintain its most admirable qualities—such as clean water, reproducing trout populations, healthy aquatic ecosystems, and sustainable downstream communities.

Regards,

John Ciesla
313 Maple Avenue
Stonewood, WV 26301
(304) 623-9425

Antideg - Plan to remove protection from streams

From: <SHender470@aol.com>
To: <antideg@wvdep.org>
Date: 6/26/2006 7:56 PM
Subject: Plan to remove protection from streams

To whom it may concern,

The purpose of this E-mail is to protest the plan to remove the 141 trout streams from protection under the Tier 2.5 program. Some of the streams listed for removal are listed for removal because they do not have documented trout reproduction. It seems as if this would be a good reason to keep these streams protected, so that one day these streams will develop to the point where they will be able to sustain trout reproduction. Other streams listed to be removed from protection are already sustainable trout streams, and are also right in the middle of areas of heavy tourist travel, such as the south fork of the Cherry river. It would be shameful to ruin areas such as this with coal mining, timbering, or other development which will hurt the water quality all through and far below the listed areas.

S.E. Henderson
2703 Main Street
Hurricane, WV, 25526
shender470@aol.com

From: Tom Reid <tominthewoodswv@yahoo.com>
To: <antideg@wvdep.org>
Date: Wed, Jun 7, 2006 6:02 PM
Subject: Tier 2.5

I wish to register my strong disapproval on changing the status of Lower Cove in Hardy County. We don't need any more government than we already have. By the time DEP does whatever is you plan to do, the US Federal Government will use eminent domain to take the land and make into a lake. We have too much government here.
Farnum T. Reid

Do You Yahoo!?

Tired of spam? Yahoo! Mail has the best spam protection around
<http://mail.yahoo.com>

Antideg

From: "mary null" <gregnull@charter.net>
To: <antideg@wvdep.org>
Date: 7/8/2006 7:24 AM

As a voter, taxpayer, landowner in this state I wish to express my strong objection to removing streams from the original presumptive list for coal reserve development, planned or ongoing development or unexplained "technical reasons". Once these streams are degraded this can never be reversed and your agency has a moral and ethical duty to protect this resource for future generations. Planned development- be it coal or otherwise- is all the more reason to protect these streams. Citing this as a reason to remove them defies logic. Also doesn't the public deserve more of an explanation than "technical reasons"? Greg Null

Antideg - tier 2.5

From: "Barbara/Scott Weaner" <sweaner@planetwv.com>
To: <antideg@wvdep.org>
Date: 6/5/2006 8:28 AM
Subject: tier 2.5

Dear Tier 2.5 DEP Committee,

We have a small farm along South Haddix Run (Stream 181 MCS 3A on you list of streams to be protected. We regularly see native Brook Trout in the creek, and believe it should remain on your list. We have concerns of activities downstream from us - namely Edward Cross's junkyard, and the Ricotilli Lumber Mill, that are seriously degrading the stream.

We hope that This legislation encourages our neighbors to be more respectful of the wonderful water that flows past their properties. If you cannot get them in compliance, please do not take all of South Haddix Run off your list. The headwaters, all the way past our farm, to the junkyard property remain pristine, and should remain protected.

We were sorry to see 23 Tucker County streams removed from the Tier 2.5 list, and are grateful that 26 remain. We know that many people in our county are against stream protection because they want to be able to run 4 wheelers through the streams, or run cattle in the creeks, or disrespect riparian areas during logging operations.

We are grateful that the EV DEP sees beyond this shortsighted and selfish position, and has the long term health of our water quality and basic environmental health as a priority.

We stand committed to WV waterways, and are willing to pay the price to accomplish this.

Thank you.

Barbara and Scott Weaner
Route 2 Box 96
Montrose, WV 26283
304-478-2123

From: Charles & Nancy Brabec <thebrabecs@earthlink.net>
To: <antideg@wvdep.org>
Date: Wed, Jul 5, 2006 7:05 PM
Subject: Proposed Changes to the Antidegradation Implementation Procedures

I am OPPOSED to the proposed changes in the antidegradation procedures.

These changes unfairly target and remove 131 streams from Tier 2.5 protection without sufficient reason. These streams must be reinstated onto the list!

The changes give overriding consideration to planned or speculative coal reserve and other development, instead of following criteria outlined in Section 8.1.a.2 of the rule for removing streams from the Tier 2.5 list.

Many streams are proposed to be delisted simply because coal mining companies, logging companies, and developers wrote letters of opposition. The letters did not provide necessary details about how Tier 2.5 protection might actually hurt their businesses.

The proposed changes remove protections on numerous well-known streams, including: more than 7 miles of the headwaters of Shavers Fork in Randolph and Pocahontas counties; 31 miles of Gladys Fork in Randolph and Tucker counties; all of Big Spring Fork of Elk River in Pocahontas County; all 20 miles of Loop Creek in Fayette County; most of Elkhorn Creek in McDowell County; an 11-mile stretch of Hominy Creek in Nicholas County; a nine-mile segment of the South Fork of Cherry River east of Richwood; and the six-mile stretch of Glade Creek flowing through the New River National River in Raleigh County.

Aside from proposing changes to the antidegradation implementation procedures, WVDEP has failed to respond to our 2003 antidegradation legal victory. Citizens are in the dark about WVDEP's failure to respond since WVDEP has not prepared a briefing document related to the issue.

The U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually.

Tier 2.5 designation is not designed to prevent development activities in a watershed, rather it helps maintain its most admirable qualities—such as clean water, reproducing trout populations, healthy aquatic ecosystems, and sustainable downstream communities.

Without a strong antidegradation policy, many of West Virginia's most prestigious streams—as well as many lesser known streams—will be exposed to higher amounts of heavy metals and other mining-related pollution!

WVDEP should extend the comment period by 45 days so the agency can provide the public with a briefing document, provide interested parties with more detailed information and provide adequate time for response.

Charles E. Brabec
PO Box 273
Canva, WV 26662-0273

From: "Donna Mitchell" <mitchell_roody@hotmail.com>
To: <antideg@wvdep.org>
Date: Mon, Jul 10, 2006 9:10 AM
Subject: antideg rules

In response to the proposal to remove 131 streams from the antidegradation rule, I feel there has not been enough time to respond to this action. The public should be given the full 45 days.

We have a unique opportunity to be proactive and not have to come back and do remedial work, even if that were possible. This legislation was set up to protect our waters. This does not mean that compatible development cannot occur, it just means that we must use the technology and science that we now have to protect our waters.

The upper Shaver's Fork and Glady Fork are two rivers that should be left on the Tier 2.5 list.

Please consider extending the comment period.

Donna Mitchell
Wildlife Biologist
Rt. 1, Box 164-2
Montrose, WV 26283

Antideg - Stream protedtion

From: "Ron Wilson" <ronwwilson@earthlink.net>
To: <antideg@wvdep.org>
Date: 7/6/2006 12:33 PM
Subject: Stream protedtion

Please protect the 303 streams that have been designated as Tier 2.5 streams. Do not remove streams to benefit the coal and logging industry. Keep West Virginia Wild and Wonderful.

A Weekender for West Virginia - Morgan county along the beautiful Cacapon River
Ron Wilson
8207 Ellingson Dr
Chevy Chase, MD 20815

Ron
ronwwilson@earthlink.net
EarthLink Revolves Around You.

Antideg - Strengthen 2.5 rule

From: <Snidergeo@aol.com>
To: <antideg@wvdep.org>
Date: 7/6/2006 6:45 AM
Subject: Strengthen 2.5 rule

It has come to my attention that DEP is considering changes which would remove a number of WV streams from 2.5 status.

I strongly encourage DEP to not remove or degrade the existing 2.5. The protection afforded by 2.5 keeps these resources as viable and health aquatic ecosystems and insures that these streams remain clean for trout fishing, a valued economic benefit to local communities.

Instead of reducing 2.5, more streams in WV should be added to the list.

Sincerely,

George Snider
Martinsburg, WV

BARBOUR ECONOMIC
West Virginia DEVELOPMENT
COUNTY AUTHORITY

124 N. Main Street
Philippi, West Virginia 26416
Phone: (304) 457-1225
Fax: (304) 457-3887

June 27, 2006

Secretary Stephanie Timmermeyer
West Virginia Department of Environmental Protection
Attn: Tier 2.5
601 Fifty Seventh Street S.E.
Charleston, WV 25304

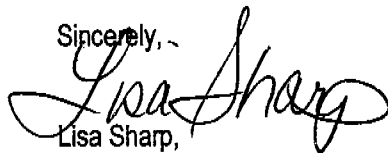
Dear Secretary Timmermeyer:

At its regular meeting on June 27, 2006, the Barbour County Development Authority (BCDA) discussed the West Virginia Department of Environmental Protection (DEP) revisions to the Tier 2.5 list of streams. We were pleased to note that four streams in Barbour County have been removed from the list (Hanging Run MTM-1 and Zebs Creek MT-38 are in the Talbott/Audra State Park area of the county and Mill Run MT-23-F and Mill Run MT-23-H in the Teter Creek Lake/Valley Furnace area.) We appreciate the fact that DEP was responsive to the numerous landowners and organizations in Barbour County, including the BCDA, who wrote letters over the last four to five years objecting to the listing of these four streams as Tier 2.5.

After DEP released the newest list, there have been editorials and press releases in some local newspapers asking citizens, specifically members of Trout Unlimited, to voice their objections to the removal of our streams from the Tier 2.5 list. Yet, to our knowledge, to date there has been no specific support expressed to DEP from Barbour County citizens or organizations for the Tier 2.5 listing of our streams. If, during this final comment period, you receive any objections to the removal of Barbour County streams, we hope the DEP will not let them outweigh all the previous involvement of landowners and organizations such as BCDA who are pleased with the removal of our streams from the list.

BCDA requests that DEP use all the previous comments received from landowners and government organizations in Barbour County along with your own legislative rule to maintain your decision to remove Hanging Run MTM-1, Zebs Creek MT-38, Mill Run MT-23-F and Mill Run MT-23-H from the Tier 2.5 list.

Sincerely, ~



Lisa Sharp,
Executive Director

Rt. 2, Box 504
Philippi, WV 26416

Director Lisa McClung
WVDEP
Division of Water and Water Management
601 57th St. S.E.
Charleston, WV 25304

Director McClung,

I am writing for a third time regarding the listing of Mill Run, MT-23-F in Barbour County as a Tier 2.5 stream.

Upon viewing your website, I understand this stream is on the list to be removed from this designation and I am truly grateful that this action was taken. I feel that finally we have come to a just conclusion to this situation. However, it has come to my attention through the print media that some organizations are protesting this removal causing my concern and this letter.

Once again, I urge you to look at the previous objections and reasons for removal and to remain steadfast in your decision to remove Mill Run from Tier 2.5.

Sincerely,

A handwritten signature in cursive script that reads "John R. Shaffer". The signature is written in dark ink and is positioned above the printed name.

John R. Shaffer

Bob Allen

From: "Bob Allen" <muddler6162@atlanticbb.net>
To: <harkowski.denise@epa.gov>
Cc: <antideg@wvdep.org>
Sent: Saturday, July 01, 2006 12:16 AM
Subject: Public Hearing: July 10, '06

I am a concerned trout fisherman and fly tyer and am very interested in West Virginia's trout waters. Too many of our fresh/clean streams have been destroyed in the past few decades. It just seems a shame to continue to destroy these waters. Why don't we shift gears to an effort that embraces "keeping our cake and eating it also". Can't we, with some effort have both ie., get on with industrial promotion in a very careful and clean way, while at the same time save our streams? If not, some hard decisions will have to be made to the disappointment of industry. Maintaining the trout waters has to be the top priority.

We should be placing streams back on the list to be protected rather than removing more streams from the list. It is my understanding that the WV Dept., of Environmental Protection has the responsibility of PROTECTING our water resources rather than destroying them. Please do some soul searching and do the right and proper thing.

Attn: Denise Harkowski, please see that this email is read at the July 10 meeting (in it's entirety) at the WV DEP headquarters in Kanawha City scheduled for 6:00-8:00 p.m. Your consideration will be greatly appreciated. Just as a reminder, the South Branch of the Potomac River, our once premiere Smallmouth Bass fishing stream has been reduced to a "nothing" stream in the past decade because of lack of concerns by the "powers at be". We have had many major fish kills in that river in the past few years and it's just such a pity, a crime perhaps? It was such a great recreational river and fish producer for years. Don't let this happen to our trout waters.

Respectfully,
Bob Allen
170 N. Marsham St.
Romney, WV 26757



Bob Allen, HHF (you Heard it Here First)

7/1/2006

PO Box 184
Bruceton Mills, WV 26525
July 5, 2006

Lisa McClung, Director
Division of Water and Waste Management
601 57th St SE
Charleston, WV 25304

RE: Comments on 60 CSR 5 "Antidegradation Implementation Procedures"

I believe that non-point source pollution, such as would occur from timbering and farming, are exempt from antidegradation restrictions as long as BMPs are utilized. So the streams that have been removed from the list of 2.5 streams should not have been removed. They are worthy of protection and monitoring to ensure that they remain as suitable habitat for native trout.

For too long WVDEP has bent its policies and enforcement to the will of industry, instead of following the Clean Water Act as it was intended to be implemented. We must value our clean streams and preserve their ecology.

I think all of the streams that were listed by DNR deserve protection from degradation and that the industries that might affect these streams need to use best management practices to protect them, not remove them from listing.

Sally Wilts
Sally Wilts
Phone 304-379-7567

Michael S. Merrifield
127 Shenandoah Dr.
Davisville, WV 26142

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

July 2, 2006

Dear Ms. McClung;

This letter is in response to your organizations' proposed removal of 141 streams from Tier 2.5 designation. This state has a long history of environmental degradation, particularly in relationship to its waterways. How many of our states waterways are currently or have previously flowed red or orange from acid mine drainage. How many of our states trout streams continually have to be given limestone treatment because of acid precipitation. As an avid fisherman I personally am appalled by the proposed removal of these streams from the protection of Tier 2.5. Even more so the reasons given for the removal of these stream such as "coal reserve development" and "planned or ongoing development" is disheartening as these are the very reasons Tier 2.5 was created to protect agains.

It is my understanding that the criterion for inclusion into Tier 2.5 was to be a naturally reproducing trout stream. I have personally fished many of the streams that are to be desisted and can verify the existence of native brook trout in these streams. The Eastern Brook Trout Joint Venture led by Trout Unlimited and WVDNR in WV reports, "The majority of WV's remaining sub watersheds are greatly reduced due to poor water quality associated with a long history of poor land management, forestry and mining. Please do not allow this to continue.

I hope the new WV state motto "Open for Business" does not come at the price of further environmental degradation. I ask that you please re-consider the removal of the 141 streams from the Tier 2.5 listing.

Sincerely;


Michael S. Merrifield
Angler, Concerned citizen

July 5, 2006

Dear Ms. McClung,

I am 55 years old and have been a resident and sportsman of West Virginia all of my life. I am very concerned because of the recent move by the WV DEP to remove 141 streams from the original presumptive list of waters of special concern. I am a resident of Wyoming County and I know what happens to streams (Pinnacle Creek and the Guyandotte River) that are not protected.

Although I am very concerned about all the creeks, some of the ones on the list are of special concern to me and my family. For the last 20 years, I have taken my sons to fish, camp, and enjoy nature to Greenbriar County. We have fished Anthony Creek for many years and I would hate to see the habitat loss in that beautiful stream resulting from its removal from protection.

My youngest son works in Fayette County in the white water rafting industry. I was shocked to see 21 streams being removed that ultimately empty into the Gauley River and 11 streams that empty into the New River. How long will tourism be a viable industry in WV if our streams and rivers are not kept clean?

My understanding is that the Department of Environmental Protection is supposed to protect our natural resources not bow to special interests. I often wonder if Montana would be the beautiful, pristine state that it is if the Montana Department of Environmental Protection allowed the rape of their land as West Virginia does. We have allowed the coal and timber industry free reign over our mountains and streams long enough.

Please do what is right and protect all of our streams so that the residents of and visitors to West Virginia can enjoy the beauty of our state.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wilburn Bolt', with a stylized flourish at the end.

Wilburn Bolt
Box 776 Maple Ave.
Pineville, WV 24874

"The best way out is always through."
Robert Frost



Evan Fedorko
795 Grand Street
Morgantown
West Virginia
26501

5 July 2006

Regarding: Changes to Tier 2.5 List

Ms. McClung –

My name is Evan Fedorko. I am an environmental professional, fly-fisherman, and Trout Unlimited member here in West Virginia. I am writing you today to express my concerns about the Department of Environmental Protection's proposed changes to the Tier 2.5 list of streams.

As an environmental professional interested in water rights, I am very concerned that the Department of Environmental Protection is making a decision that will lead to a degradation of streams, a resource that is of central importance to our state. Emerging economies of water and wilderness are of vital importance to the citizens of the state and should not be devalued in comparison to industry and development. Water, not coal, timber or anything else, is the most important natural resource we have. The decision to remove so many streams from Tier 2.5 protection flies in the face of the very mission of the Department of Environmental Protection.

I am also writing to you as an avid fly fisherman and member of Trout Unlimited. As you are probably aware, one of the major national initiatives that Trout Unlimited is currently undertaking is to restore and conserve eastern brook trout. A far reaching study conducted by TU and several other agencies found that "the majority of West Virginia's remaining brook trout subwatersheds are greatly reduced largely due to poor water quality associated with a long history of poor land management, forestry and mining." While many people, especially those interested in mining coal, may not be interested in the fate of the eastern brook trout, it is my informed opinion that quality environments for eastern brook trout and many other species of wildlife will be of greater service to West Virginia than any new extractive industry.

For the reasons outlined above, I encourage the Department of Environmental Protection to reconsider their decision to remove so many streams from the protections afforded to them by Tier 2.5 designation. The Department of Environmental Protection has a unique opportunity to care for and protect many pristine waterways and I certainly hope that you choose to grasp the chance to positively affect the health of West Virginia's waterways.

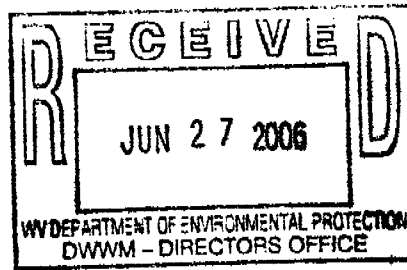
Thank you very much for your time. I look forward to your decision.



Evan Fedorko

cc: Pat Campbell

Jeff Nelsen
1403 Princess Dr
South Charleston, WV 25309
June 22, 2006



Ms Lisa McClung
Director
WVDEP Division of Water and Waste Management
601 57th St. SE
Charleston, WV 25304

Re: Removal of 141 streams from the Tier 2.5 list

Dear Ms McClung:

How many more streams and rivers in our state have to be the sacrificial lambs for industrial and developers' interests? We have as a state many examples of acid impaired and sediment choked streams of past economic ventures that have left ghost towns and destruction to our water resources. I would hope we could be better stewards going forward.

There are numerous reasons which I know your own staff as well as WVDNR's has identified for not reducing the protection offered to the 2.5 listed streams. I thought the 2.5 classification was already a concession to those opposed to the 3.0 designation.

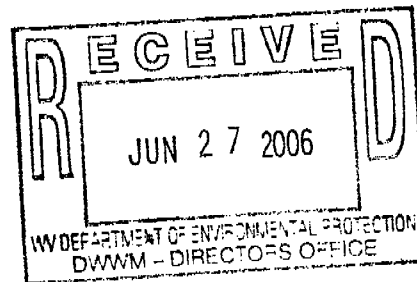
I am not opposed to economic growth and jobs in our state. I know how critical it is to create those opportunities. Maintain reasonable and sound environmental standards for long term economic development so that people come here not just for a job but more for the quality of life that we all know is here.

Thank you for your attention to this issue and hope public comment, scientific review and political debate will prevail to better manage these 141 streams.

Sincerely,

Jeff Nelsen

cc: Pat Campbell



Lisa McClung, Director
Division of Water
W.V. D.E.P.
601 57th St., S.E.
Charleston, WV 25304

June 24, 2006

Dear Ms. McClung:

Brook trout are today restricted to small headwater streams that are little disturbed watersheds. They require the highest quality water. We have a clear history of degradation and the decline of our brook trout heritage. As clear, is the intent of the Clean Water Act to reverse this decline - by the T.M.D.L.s and the antidegradation status.

Under Tier 2.5 some deterioration of water quality is permitted if there is "good" reason. This is not Tier 3.0 - as it should be. The original list was not all inclusive. To remove 140 some from 2.5 status is far too many. We have a great opportunity to expand brook trout presence as our watersheds heal themselves - if we can preserve the very high water quality brook trout require.

I was a fish biologist, a trout biologist, for almost 40 years working mostly with our trout program.

Donald C. Gasper
Fish Biologist
WV DNR - Retired
4 Ritchie Street
Buckhannon, WV 26201



Post Office Box 97 • Slatyfork, WV 26291
www.elkheadwaterswatershedassociation.com

July 8, 2006

To: WV DEP, Division of Water and Waste Management

Lisa McClung, Director

Attn: Tier 2.5 Comment

From: Elk Headwaters Watershed Association

George Bell, President

We request that the Big Springs Fork of the Elk River receive classification of Tier 2.5 a Water of Special Concern. These comments describe our concerns as a group of citizens actively involved in the stewardship of Elk River's headwaters watershed. Our mission includes working to improve the quality of the watershed resources and to help perpetuate the sustainability of these resources.

The Save Our Streams monitoring data that we have collected over the past two years has shown that the Big Springs Fork sustains a biologically diverse community of benthic macro-invertebrates sufficient to sustain a reproducing trout population. The data collected also reveals a level of water quality unique to the mountainous watershed that, if protected from degradation, can sustain its cold water fishery in perpetuity.

In part, our efforts in working with the local timber companies and land developers have resulted in lessening the siltation of the Elk River basin. The Tier 2.5 designation will certainly result in minimizing the erosion and resultant siltation that can occur from land use practices within the watershed. To declassify Big Spring Fork from the presumptive list for the reason of "planned or ongoing development" contradicts the intent of the DEP mission of "promoting a healthy environment."

In recent times, our group participated in the public comment process for the proposed Slatyfork Wastewater Treatment Facility. This controversial project stimulated a high level of concern for the potential water quality impacts that could result from inadequacies in the design and placement of the facility. Thanks, in part, to the public comment, changes to the design have occurred that should promote sustainable health of the river ecology. The discharge will comply with the antidegradation rules of Tier 2.5. The efforts to achieve this standard for the current and future land-use development are commendable and will be defeated by lowering the stream classification.

The resources of this watershed provide the substance of our currently thriving industries of timber and tourism. The socio-economic basis of our community has evolved from the unique collection of natural resources that abound in this part of Pocahontas County. A high level of protection of these waters must occur to assure the productivity of the region as a destination for recreation. Likewise, the timber industry can only benefit from a regime of Best Management Practices that will sustain the conditions in the forests of the watershed where some of the highest quality hardwoods in the world are produced.

We implore the DEP to reconsider the Big Spring Fork of the Elk River for classification as a Tier 2.5 stream.

Sincerely,

George Bell, President

Susan Nelsen
1403 Princess Dr.
So. Charleston, WV 25309
June 28, 2006

Ms. Lisa McClung
Director
WVDEP Division of Water and Waste Management
601 57th St. SE
Charleston, WV 25304

Re: Removal of 141 streams from the Tier 2.5 list

Dear Ms. McClung:

After reading the article in the June 26, 2006 *Charleston Gazette*, regarding the removal of 141 streams to be taken off of the 2.5 Tier list, I became deeply concerned and distressed over the future of our beautiful state. Once again West Virginia is "open for business", but apparently not for the business of saving our state's natural habitats and majestic beauty.

When will our state and federal governments realize we cannot afford to pollute another stream or river in West Virginia or any other state in our country. This list of streams was a compromise to those opposed to the 3.0 list. Now all developers and industrialists have to do is announce another economic venture and our water resources are once again in peril and all in a matter of a few short weeks or months. There are already too many streams that have been destroyed from acid and sediment because of developers' irresponsibility toward our environment.

Please attend to this issue with responsible and sound environmental standards that will protect our natural resources for future generations, and standards that will show others that the quality of life in West Virginia stems from the care we give to all living creatures and their habitats. Do all you can to save our state's water resources.

Sincerely,


Susan D. Nelsen

June 8, 2006

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

Mrs. McClung:

I recently looked over the new antidegradation policy as proposed by the state DEP and the Clean Water Act, and I was honestly shocked and saddened when I saw the list of 141 streams that had been unceremoniously "dumped" from Tier 2.5 protection. The self-stated purpose of the Act is to "mandate that states develop an antidegradation policy to further protect waters." I find myself mystified as how the DEP would be "further protecting waters" by opening up pristine mountain streams to exploitation by coal and lumber industries. These streams are the home to unique flora and fauna that many West Virginians deeply cherish.

I am a sportsman and a voter, and I have spent much of my life roaming the beautiful environs of the Allegheny Highlands. I am a trout fisherman who has spent many happy hours on the streams of Randolph, Pendleton, and Tucker Counties chasing the native brook trout that exist in few places due to past environmental destruction, including many of those that the DEP proposes to dump from the Tier 2.5 protection, especially the headwaters of the Shaver's Fork of the Cheat. I am sure that other sportsmen feel the same outrage that I feel. The future of the state lies in its natural beauty and pristine environment, and I'm sure that many at the Department of Environment Protection and the Department of Natural Resources agree. It is something we have that most other states do not. By loosening environmental regulations, we trade the birthright of our natural landscape for fleeting economic gain from timber and coal industries. Rich, out-of-state business men make money while the typical West Virginian receives little in return but a blighted, ruined landscape.

I urge the DEP to reconsider the proposed changes to the Tier 2.5 policy. A stream destroyed is gone forever. Thank you for your time.

Sincerely,



Matthew Null

919 Westfield Terrace
New Martinsville, WV 26155

phone: (304) 455-1001, email: nullm@wlu.edu

June 26, 2006

Lisa McClung, Director
Division of Water & Waste Mgmt.
WV Dept. of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung:

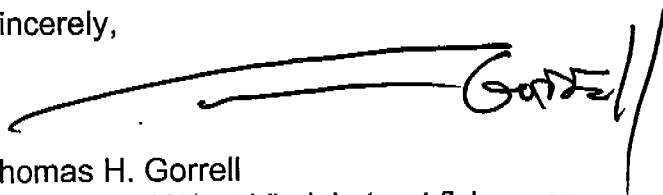
I have not sent a letter like this before, but as a concerned trout fisherman, I thought the time was right.

It is my understanding that we are taking about 141 streams off of a list which protected them from development and coal mining in the area. As a trout fisherman, I think it is very important to protect the streams that we have as fishing brings a lot of people into the area. I spend a lot of time fishing in West Virginia and spend a lot of money here as well as going to Montana. If we had the streams here that we have in Montana, I feel we would have a much better chance of bringing people in from the West to the East to fish. It doesn't make sense to me to have possibly some of the few remaining trout streams left, developed around.

My reason for writing is to let you know that I would like to see these 141 streams that were being protected to continue to be protected. It is very important, I think, to do so.

If you have any questions please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Gorrell", with a long horizontal line extending to the left.

Thomas H. Gorrell
A concerned West Virginia trout fisherman



HOUSE OF DELEGATES WEST VIRGINIA LEGISLATURE

BUILDING 1, ROOM 218-E
1900 KANAWHA BLVD., EAST
CHARLESTON, WV 25305-0470
PHONE (304) 340-3170

MARY M. POLING, Vice-Chair
COMMITTEE ON INDUSTRY & LABOR
ROUTE 1, BOX 331
MOATSVILLE, WV 26405
PHONE: (304) 457-2206

June 28, 2006

Committees:
Education
Agriculture & Natural Resources
Industry & Labor,
Economic Development & Small Business
Roads & Transportation
Veterans' Affairs & Homeland Security

Lisa McClung, Director
Division of Water and Wastewater Management
West Virginia Department of Environmental Protection
Att: Tier 2.5
601 57th St. SE
Charleston, WV 25304

Dear Director McClung:

I am writing to thank you and the West Virginia DEP for removing four Barbour County streams, Hanging Run MTM-1, Zebs Creek MT-38, Mill Run MT-23-F, and Mill Run MT-23-H from the Tier 2.5 list. Doing so is an indication that DEP has been responsive to the many landowners and their representatives who formally objected to listing these four streams as Tier 2.5 since 2001 when the antidegradation process began.

Over the last five years, I have been personally contacted by mail and telephone numerous times by my constituents objecting to the Tier 2.5 designation for the streams in Barbour County. When the most recent list showed that the four streams in Barbour County had been removed, I received several calls of appreciation for the Legislature and DEP because of that action. Not one time have I been contacted by anyone in this county requesting support for even one Tier 2.5 stream designation. Just recently, I read two or three news articles indicating that some environmental groups, including Trout Unlimited, will be launching letter writing campaigns to DEP requesting that the streams that were removed be put back on the Tier 2.5 list.

I hope that DEP will use all the previous comments received from landowners and government organizations in Barbour County along with the legislation and companion rules to stand by your decision to remove Hanging Run MTM-1, Zebs Creek MT-38, Mill Run MT-23-F, and Mill Run MT-23-H from the Tier 2.5 list. Thank you for your continued consideration of public comments as you proceed with the antidegradation implementation process.

Sincerely,

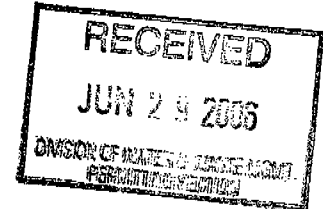
A handwritten signature in cursive script that reads "Mary M. Poling".

Mary M. Poling
Delegate, District 40

Jerry Burke and Janet Burke
9 Point Drive
Petersburg, WV 26847
Home Phone 304-257-4487
Email jabjbb1961@mountain.net

June 27, 2006

Lisa McClung
Division Water and Waste Management
WV Dept. Of Environmental Protection
601 57th St. S.E.
Charleston, WV 35304



Dear Ms. McClung:

I support protection of WV streams and rivers by giving them the highest possible designation under the Clean Water Act.

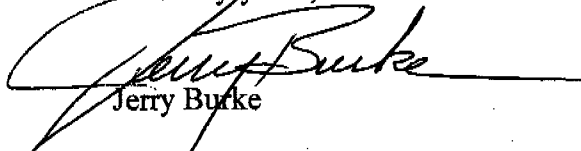
Removal of about one-third of the proposed tier 2.5 streams is not acceptable. Generic reasons given for removal of 141 streams from the list of 444 streams are inadequate

A bright future for WV depends on enlightened stewardship of *our* streams. The old notion of streams and rivers as "trash-movers" must be laid to rest. The myth that protection of streams will hurt timbering, mining, and agricultural industries and is an infringement on "landowner rights" must be laid to rest. I won't go into detail about specific streams, but it defies rationality to believe that all the 141 streams removed from tier 2.5 protection are not reproducing trout streams.

Clean streams with good trout habitat are of enduring and increasing value to WV, to the future economy of the State, to the enjoyment and well-being of its citizens, to land value, and to tourists. WV is situated geographically close to large population areas and has the potential to attract a large number of tourists, *if* we protect the quality of streams and rivers. We must move beyond the myth that protection of streams by tier 2.5 designation will hurt extractive industries and agriculture. WV must have vision.

Ms. McClung, I'm not a latter day "environmentalist". I'm a 68 year old who has witnessed the degradation of WV streams for over half-century, and for what good. As a "conservationist", I believe that agriculture, timbering and mining can function in concert with protection of *our* streams and rivers. I'm also a riparian landowner with a stream designated as tier 2.5. Do I fear this? No. I expect my State Government to have the foresight and courage to protect this stream, and others, for future generations.

Sincerely yours,



Jerry Burke

Cc: Denise Harkowski USEPA

916 Echo Road
South Charleston, WV 25303
June 29, 2006

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

Dear Ms McClung ;

I am writing to voice my disappointment with the Division of Environmental Protection(DEP) position on removing 141 trout streams from the presumptive Tier 2.5 list.

I am an avid trout fisherman and also a retired employee of the DEP. I have documented young of the year catches of brown trout in some of the streams on the list for removal in my fishing log. These include Hominy, Loop, and Rich Creeks. This reproduction has also been documented by the Division of Natural Resources . The criteria for the Tier 2.5 listing is the presence of trout reproduction. Tier 2.5 was a compromise in the first place, and the reasons given to remove the streams are the very reasons that the streams should be on the list!

- Coal reserve development planned or underway
- Planned or undergoing development

Having worked in industry (Union Carbide), I know that industry can find ways to protect the environment without a major hit to their bottom line. Frankly, industry looks bad on this one! Water is a precious commodity in West Virginia, and provides the basis for a great tourism industry.

Please, reconsider a position that makes the DEP look pretty weak in protecting the environment.

Sincerely,

Max Robertson



West Virginia Environmental Council

1324 Virginia Street East ~ Charleston, WV 25301
(304) 346-5905 www.wvecouncil.org

July 9, 2006

(via email)

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

Hello, Lisa:

I am submitting these additional comments on DEP's proposed rule, 60 CSR 5, "Antidegradation Implementation Procedures," on behalf of the West Virginia Environmental Council. I say "additional" because I incorporate here by reference the more detailed comments that will be submitted by the West Virginia Rivers Coalition, et al, to which WVEC is a signatory.

As a member of the WVEC lobby team, I was an active participant in the stakeholder group meetings on the development of this rule facilitated by House Judiciary Committee Chairman Jon Amores in 2001. It was in those meetings that DNR unveiled and further honed the list of Tier 2.5 streams that eventually became the "provisional" list in the rule. It was in those meetings that DNR admitted that the list they submitted was neither exclusive nor exhaustive, and there were as many as 250 additional native brook trout streams not included because of lack of stream survey data.

I was there. So perhaps only DEP staffers like Pat Campbell and Bill Brannon, who were also there, can imagine my dismay as I look now at a proposed list of Tier 2.5 streams that is a mere shadow of the provisional list.

I am dismayed to see that 7.3 miles of the very headwaters of Shavers Fork – a section that has actually been considered for Wilderness designation and in almost all regards would qualify as a Tier 3 water – has been removed from the Tier 2.5 list.

I am dismayed to see that the *entire length* of Glady Fork, all 31.3 miles of it – another stream that in almost all regards would qualify as a Tier 3 water – has also been removed from the Tier 2.5 list.

I am dismayed to see that vital native brook trout nursery streams – streams containing some of West Virginia's most pristine waters – streams like Bearcamp Run and Beech Run on the Left Fork of the Buckhannon and Marsh Fork on the Right Fork of the Buckhannon – have also been removed from the Tier 2.5 list.

These streams, along with numerous others on the provisional list, have been removed from Tier 2.5 designation ostensibly due to "planned or ongoing development." Still other exceptional streams were removed due to "coal reserve development planned or underway." Such reasoning flies in the face of the intent of the antideg provisions of the federal Clean Water Act.

Antidegradation policy and implementation in West Virginia has been highly political by its very nature from its inception. DEP's actions from the beginning have only served to more highly politicize the issue: from removing EQB as the implementing agency, to removing EQB from water quality rulemaking, to two-year comment periods for those objecting to Tier 2.5 stream designations, you can now add the removal of streams from the list for the most political of reasons.

If this proposed rule and the provisional Tier 2.5 list has *any* chance of approval by the West Virginia Legislature, it will be because the agency stands strongly behind its insistence that economic development and the protection of the state's highest quality rivers and streams are not mutually exclusive.

It is time for DEP to plant itself firmly on the side of non-degradation of this state's valuable natural resources. For its own credibility, as well as the eventual passage of this rule, DEP must restore the 141 stream segments removed from the provisional Tier 2.5 list.

Respectfully,

Donald S. Garvin, Jr.
WVEC Legislative Coordinator

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

Lisa McClung

Please find the following letter voicing my concern for the streams being removed from the presumptive list of waters of special concern, Tier 2.5.

Lets pick the easy fruit first.

Reference Streams. If the WVDEP has identified only 79 streams that are relatively undisturbed to use as a benchmark for all other streams in West Virginia then why would we not want to give all these streams Tier2.5 protection? The list of streams that are cut from the presumptive Tier2.5 protection list includes 30 reference streams. That equates to 38% of the reference streams identified by the DEP.

Fernow Experimental Forest. This is a forest where scientists are developing information and techniques for sustainably managing hardwood forest in the central Appalachians. The "Selected Results" on their own web page highlights the fact that well designed and carefully maintained forest roads can prevent most erosion and sedimentation that often accompany logging, and I might add kill streams. They also claim to show that stream flow can be increased and that high flood hazards are not increased when the forest floor is protected from erosion. This is a model for forest management everywhere! Three streams on the removal list are in Fernow Experimental Forest. Ellick Run and Stonelick Run are listed as having reproducing trout populations. If any stream in the state is safe it should be these.

Privately limed streams. The headwaters of the South Fork of the Cherry River are alive with native brook trout. Is that because the streams are limed? Yes I believe liming has a positive impact. The state has proven that liming headwaters greatly improves water quality; they have also recently proven that it is fairly inexpensive. No more does the state have to invest in the building and maintenance of liming stations, simply placing limestone of the correct size in the streams drainage produces positive results. Three streams, South Fork of the Cherry, Rocky Run and Cold Knob were removed from the presumptive list because they are being privately limed! I believe those native trout are worthy of Tier2.5 protection regardless of who is paying the bill for the limestone.

Not so easy to reach fruit.

Planned or ongoing development removed 20 streams from the presumptive Tier2.5 list. It would seem to me that this subset of streams is at the heart of Tier2.5 designation. Many of these streams are in urban or tourism development areas and doing pretty well. A prime example of such a stream is Loop Creek in Fayette County. This jewel of a trout stream runs through urban West Virginia and is cherished by many sportsmen. It would seem reasonable to ask that continued development not negatively impact streams like this.

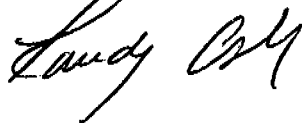
Coal reserve development planned or underway removed 35 streams from the presumptive Tier2.5 list. West Virginia needs coal, no question, but it also needs clean water. Antidegradation does not mean you cannot mine coal it simply means that you

mine coal without adversely affecting the high quality waters around you. Maintaining the existing uses of that high quality water is not too much to ask of big business. *West Virginia is open for business*, but it shouldn't be at the cost of our waters of special concern. When I see streams like Elkhorn Creek in McDowell County and it's reproducing browntrout or Bergoo Creek in Webster/Randolph Counties with it's wild brook trout population loosing Tier2.5 protection for this reason I must admit my faith in this program is somewhat shaken. We can mine the coal without killing streams like these and we should.

The category of steams removed for "technical reasons" perplexes me most of all. Removing streams like Second Creek in Greenbrier/Monroe Counties a DNR designated fly fishing only catch and release stream for many years or Piney Creek in Raleigh County with its tugboat size rainbows and wild browntrout or worse yet Laurel Creek in Fayette County that has held wild trout for 30 years, is well, simply unbelievable. It would seem to me that streams like these deserve Tier2.5 protection until such time as "Technical Reasons" can be corrected. Trust me I have been on these streams and the state of West Virginia can not afford to loose such resources.

The streams that I have referenced above do not represent all of my concerns. They are just obvious examples that hundreds of sportsmen in West Virginia can attest to. Recently the EBTJV or Eastern Brook Trout Joint Venture completed an assessment of brook trout populations across the Appalachian range, the results were not pretty. Among the Mid-Atlantic States West Virginia's brook trout population/habitat did not fair well. It was discovered that we had the highest number of subwatersheds with brook trout classified as severely reduced (249) as well as a large percentage of watersheds with insufficient data to determine if brook trout were extirpated or never existed. I would suggest that a much closer look needs to be taken at this list of waters of special concern before it is too late. Lets do what the federal Clean Water Act intended us to do, learn to live and grow while preserving the existing quality of the State's waters and to prevent future degradation.

Sincerely
Randy Ash

A handwritten signature in cursive script, appearing to read "Randy Ash", written in dark ink.



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Blackwater River, MC-60-D-LOWER

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along the Blackwater River, MC-6-D-LOWER in Tucker County that your organization has included on your presumptive list of Tier 2.5 waters. Although we filed comments on this stream in 2002 and received a letter dated May 27, 2003 from DEP stating that our comments were received, we were not been notified by DEP during the September, 2005 letters that this stream is still being considered a Tier 2.5 stream even though the listing on your website clearly states that it will remain on the listing. This, obviously, is against the criteria set forth by the Legislature and as an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

We have no idea if samples were even taken along this stream and, if so, how long ago they were taken. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit recent data to the private landowner showing the recent baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

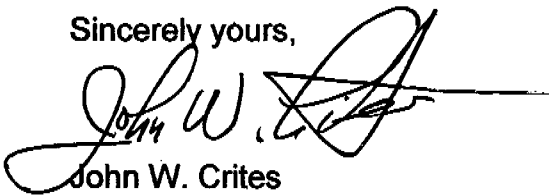
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove the Blackwater River from the Tier 2.5 list.

Sincerely yours,



John W. Crites
Chairman

JWC/dhr



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Flag Run, MC-33-A

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Flag Run, MC-33-A in Preston County that your organization has included on your presumptive list of Tier 2.5 waters. Although we filed comments on this stream in 2002 and received a letter dated May 27, 2003 from DEP stating that our comments were received, we were not been notified by DEP during the September, 2005 letters that this stream is still being considered a Tier 2.5 stream even though the listing on your website clearly states that it will remain on the listing. This, obviously, is against the criteria set forth by the Legislature and as an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

We have no idea if samples were even taken along this stream and, if so, how long ago they were taken. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit recent data to the private landowner showing the recent baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

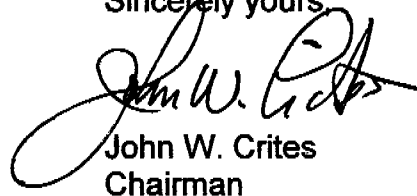
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Flag Run from the Tier 2.5 list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites", with a large, stylized flourish extending from the bottom left.

John W. Crites
Chairman

JWC/dhr

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of West Fork Greenbrier River, KNG-79

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along West Fork Greenbrier River, KNG-79 that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

As private landowners, we are extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

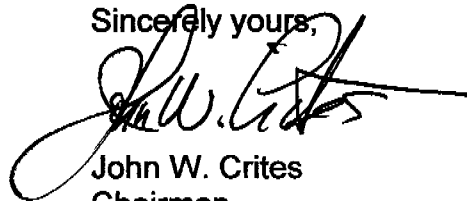
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove West Fork Greenbrier River from the Tier 2.5 list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites", with a long horizontal flourish extending to the right.

John W. Crites
Chairman

JWC/dhr



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Roaring Creek, MC-18

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Roaring Creek, MC-18 that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments from landowners, and is overstepping their authority.

Samples taken along this stream are over four years old. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit recent data to the private landowner showing the recent baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

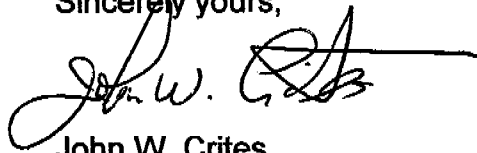
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Roaring Creek from the Tier 2.5 list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites", with a long horizontal flourish extending to the right.

John W. Crites
Chairman

JWC/dhr



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Thorn Creek, PSB-47

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Thorn Creek, PSC-47 in Pendleton County that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners, and is overstepping their authority.

Samples taken along this stream are over four years old. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit recent data to the private landowner showing the recent baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

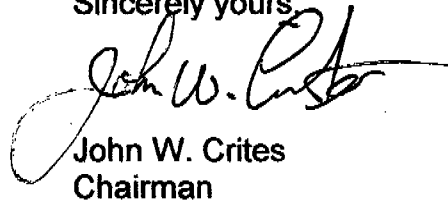
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Thorn Creek from the Tier 2.5 list.

Sincerely yours

A handwritten signature in black ink, appearing to read "John W. Crites", with a long horizontal flourish extending to the right.

John W. Crites
Chairman

JWC/dhr



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Clover Run, the Right (MC-51-A) and Left Forks (MC-51-B)

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Clover Run, the Right and Left Forks in Tucker County that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

Samples taken along this stream are over four years old. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit recent data to the private landowner showing the recent baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

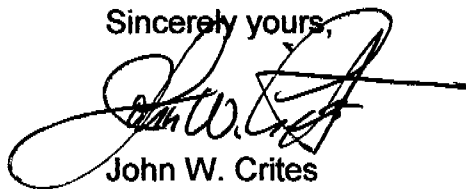
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Clover Run from the Tier 2.5 list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites", with a long horizontal flourish extending to the right.

John W. Crites
Chairman

JWC/dhr

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Frog Run, MT-18-E-4-B

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Frog Run, MT-18-E-4-B that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

NO samples have even been taken along this stream! DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit data to the private landowner showing the recent baseline data instead of just stating that since this stream is reproducing trout so therefore it will be on the Tier 2.5 list? Once again, this action shows that DEP did not adhere to the criteria set forth by the Legislature for streams to be on the Tier 2.5 list.

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing

Sawmills
Dry Kilns

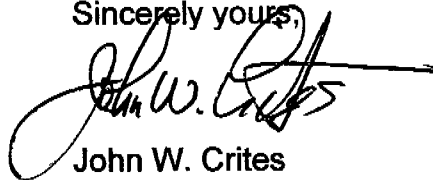
Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Dimension
Panels

discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Frog Run from the Tier 2.5 list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites", with a long horizontal flourish extending to the right.

John W. Crites
Chairman

JWC/dhr



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Wolf Run, MC-57

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Wolf Run, MC-57 that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

Samples taken along this stream are over four years old. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit data to the private landowner showing the **recent** baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

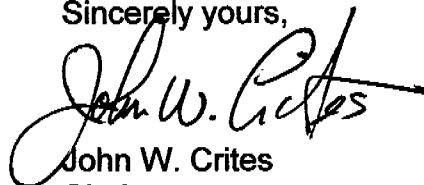
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Wolf Run from the Tier 2.5 list.

Sincerely yours,



John W. Crites
Chairman

JWC/dhr

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Little River/East Fork Greenbrier,
KNG-78-C

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns land along Little River/East Fork Greenbrier, KNG-78-C that your organization has included on your presumptive list of Tier 2.5 waters. As an affected party, I strongly object to the classification of this stream as a Tier 2.5 stream. I have commented several times now on this particular stream and still feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

As private landowners, we are extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we decide to timber or develop our land. The DEP has refused repeated requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

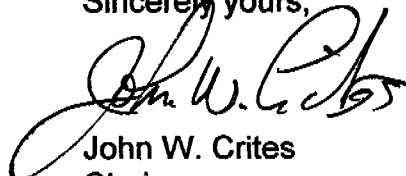
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

requests from our company to address whether BMP's might be revised as a result of a stream being designated as Tier 2.5. During the public hearings held in 2002, we were assured by DEP personnel that Tier 2.5 designation would have no effect on existing discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation. Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove the Blackwater River from the Tier 2.5 list.

Sincerely yours,



John W. Crites
Chairman

JWC/dhr



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

June 22, 2006

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

RE: Objection to proposed Tier 2.5 listing of Blizzard Run, PSB-28-R

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc., owns a sawmill along Blizzard Run, PSB-28-R in Pendleton County that your organization has included on your presumptive list of Tier 2.5 waters. During the 2002 public hearings, our company was specifically informed by then-Director Allyn Turner that this stream **WOULD** be removed from the Tier 2.5 presumptive list as soon as we submitted comments saying there currently is a business located on this stream. Many eye witnesses were present to confirm this statement. This sawmill was built in 1944 and still employs 60 people. As an affected party, I **strongly** object to the classification of this stream as a Tier 2.5 stream. I am extremely upset that this stream has not been removed from the list, feel that DEP has not addressed concerns of the landowner, has ignored comments submitted by landowners multiple times, and is overstepping their authority.

Samples taken along this stream are over nine years old. DEP requires a permittee to perform an extensive assessment of the **existing** water quality at 12 data points over a minimum of a **6-month** period. Why then should DEP not submit recent data to the private landowner showing the recent baseline data instead of relying on old data?

As private landowners, we are also extremely concerned about additional costs, requirements, and time constraints that may be placed on our company in the future when we apply for continuation of our NPDES permit if this stream remains on the Tier 2.5 list. During the public hearings held in 2002, we were assured by DEP personnel

Sawmills
Dry Kilns

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Dimension
Panels

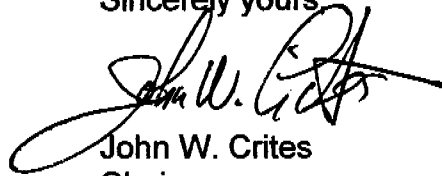
QUALITY APPALACHIAN HARDWOOD LUMBER

that Tier 2.5 designation would have no effect on existing discharges. However, Sec. 6.3.f. of the AIP clearly states that DEP has the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation.

Also, even agriculturally-related construction activities which disturb greater than one acre are now required to register and obtain coverage under the NPDES process even if the landowner is upstream of a Tier 2.5 segment. We were clearly misled during the 2002 public hearings.

Please remove Blizzard Run from the Tier 2.5 list immediately!

Sincerely yours

A handwritten signature in black ink, appearing to read "John W. Crites", with a large, stylized flourish extending from the end of the signature.

John W. Crites
Chairman

JWC/dhr

Parsons W, va

June 5, 2006

Dear Sir,

I say no to the Tier 2.5 list
How can you say you want
to clean up the streams, you
talk thru side of your mouth

Read in paper wanting to
bring sewer from up in at the
end of the County and put
it in our sewerage in Hendrick
and it comes in to our plant
that is a no, no. let you the
State and people take care of
their own sewerage, we have
no right to pay for your
sewerage.

Also read in paper also attend
a Council meeting at City Hall in
Parsons where you are wanting
to dump sewerage from List
hacking above us into stream

Fork river That is a no no.
We sure need some new
Zacs at Charleston, my advise
is get these roads blocks out
of the way before election time
this fall. some Zacs will
not be there come Jan. 1-200^r

Hazel Phillips
177 Spruce St
Parsons,
W.VA. 26281

Telephone - 304, 478-3647

O.S. I am no alone. Let
State take care of their own
problems

C/30/06

P.S. we four children all object to the
tier 2.5 waters.

Dear Sir

we have some objections to the tier
2.5 water concerns. my brother
william E. Hogan and I are owners of
coal which may be stripped and or deep
mined water shed to valley fork run.

my father & mother passed away
now we four children are equal owners
of the Parker Hogan farm. Erma park, Sarah
Conrad, william E. Hogan + I. This farm
may have livestock in the future also
timber may be harvested at various times
and the water shed to valley fork run.

my wife and I have an active ~~farm~~
farm on both sides of the Holly hush road
where livestock resides and we will have
timber to be harvested at various times and
part of the water flows to valley fork run.
we previously wrote objections list some
years ago. Thank for working with our
concerns and objections Sincerely yours
winton D. Hogan

Kerens W. Va

7/7/06

Lesia A McChung,

I object to 2.5 Stream for Stonedick because it will not support fish the year around.

It should not be called a trout stream. I have lived here for 60 years, and several years I have saved dozens of fish. Very few trout a day before they dried up, a lot of years I don't make it in time. It took 40 years of hard work to pay for my place. Then you & other interest groups tell me what I can do on my place that's not right.

I fought the (Nazi) in 1944 & 45
You tell me what for not for freedom
How would you like it if I told
you not to mow the lawn because it
kills worms & insects.

I object because 5 other joining
5 streams are not classified, as 2.5, 1st stream
is improved trout stream with farmland
at the mouth same as Stonedick
(over)

2nd, 3rd, & 4th with more water
Shed then Stone Lick with a hole
of water at the mouth that might
support ~~trout~~ may dry up - 5th is a
Trout Stream like No 1, 4th + 5th
has farm land at the mouth of
the Stream like Stone Lick

I think I have a strong case
of Favoritism.

Elmer J. Carr

Ry-1 Box 36

Kerens W. Va. 26276

P.S. I would like to have an
answer to this letter

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 60 CSR 5, Antidegradation Implementation Procedures, including the Tier 2.5 list

West Virginia Rivers Coalition submits these comments on behalf of, and in collaboration with, the organizations and individuals 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.

In brief, our comments are as follows:

- We support WVDEP's inclusion of 303 streams on the Tier 2.5 list.
- We urge WVDEP to restore 141 streams onto the Tier 2.5 list that were recently removed.
- We request WVDEP make changes to the proposed rule reflecting the judge's decision in the 2004 lawsuit.

1. Background

WVDEP is mandated to protect high quality streams. The Tier 2.5 list is one of the agency's most powerful tools to reach this goal.

Prior to 1972, rivers, streams, and lakes throughout the Nation were badly polluted. In West Virginia, extractive industries, chemical facilities, and development took a toll on many of the state's 32,000 miles of rivers and streams. Many streams throughout coal country became acid-stained, trashed, and lifeless during this period. The Ohio River and its tributaries were pushed to their limits from steel mill toxins, factory discharges, mine pollution, and sewage.

The 1972 Clean Water Act was designed to counter these trends. The keystone of the Act—the National Pollutant Discharge Elimination System, or NPDES—now requires polluters to meet discharge limitations, with the eventual goal of zero discharge. Protecting unpolluted streams, however, remains a challenge; antidegradation provisions are required to meet this challenge.

Antidegradation policy is designed to achieve the maintenance part of the Clean Water Act's objective—“to restore and maintain the chemical, physical, and biological integrity of the Nation's waters”¹—by keeping clean waters clean and preventing further pollution of others.

Antidegradation is also the capstone of state water quality standards. While the state designates uses of waters and implements water quality criteria to protect those uses, antidegradation protects existing uses and ensures that waters are not unnecessarily degraded. The policy places rivers and streams throughout the state into different categories, or tiers. Higher quality streams are placed into higher tiers that require increased protections. Four levels of protection in West Virginia include Tier 3, Tier 2.5, Tier 2, and Tier 1.

Through antidegradation, private gains are balanced with the public good.

This comment letter mainly addresses the listing and delisting of streams proposed for Tier 2.5 protection, the second-highest level of protection. Tier 2.5 waters include, but are not limited to:

“...naturally reproducing trout streams, federally designated rivers under “Wild and Scenic Rivers Act,” ..., waters in state parks and forests, waters in National parks and forests, waters designated under the “National Parks and Recreation Act of 1978,” and waters with unique or exceptional aesthetic, ecological, or recreational value.”²

WVDEP has implemented this language by using three categories for determining Tier 2.5 waters:

- Naturally-reproducing trout streams,
- High quality waters on public lands, and
- WVDEP-determined reference streams.

¹ Clean Water Act Section 101(a).

² 47 CSR 2, “Requirements Governing Water Quality Standards,” Section 4.1.c.

It is important to recognize that West Virginia's antidegradation implementation procedures allow some amount of new pollution to be discharged into streams in all tiers except Tier 3. Higher tiers, however, can receive less new pollution. The debate over the Tier 2.5 list is not about whether *any* pollution will be allowed; it is about which streams will only be able to receive a small amount of extra pollution from point sources. Nonpoint sources such as agriculture and logging are exempt from antidegradation if they are complying with best management practices.

Antidegradation is not just an empty regulatory process of categorizing streams. Instead, it is a vital tool to use to protect all streams, especially those that are relatively clean. The value of clean streams tomorrow can be illustrated by the costs we are facing due to streams that were polluted in the past. Today many West Virginia communities are still coping with the legacy problems from nearly a century of pollution and neglect. For example:

- WVDEP's 2002 statewide assessment found that abandoned mine lands pollute at least 488 streams totaling over 2,800 miles.³
- There are fish consumption advisories for mercury and PCBs for every stream in the state.
- In the southern counties, over 1,000 miles of mountain streams have been filled, buried, and transformed forever by mountaintop removal. These are streams that will never again exhibit nor sustain the diverse natural characteristics that made them unique.

If an antidegradation policy had been in effect decades earlier, these and other threats to human and ecosystem health could have been avoided. Despite the effects of nearly a century of industrial development, West Virginia's mountains and rural communities still provide refuge for hundreds of exceptional quality streams that deserve and require increased protections under the Clean Water Act. Antidegradation requires protecting the biological, chemical, and physical characteristics that define and make each of these streams unique.

A strong and consistently implemented antidegradation policy—including a comprehensive Tier 2.5 list—provides many benefits, including:

- **Protection of headwaters streams.** West Virginia is a headwaters state; its rivers and streams provide drinking water not only for West Virginians, but also for major cities and millions of people throughout the nation. Protecting these waters at the source reduces local drinking water-related treatment costs and ensures safe water for downstream neighbors. Water supply managers are increasingly aware that watershed protection may be the best and cheapest way to guarantee both the quality and quantity of drinking water for the future.⁴

³ West Virginia Department of Environmental Protection. West Virginia Water Quality Assessment, 305(b) Report: 2002.

⁴ Trust for Public Land. "Protecting the Source: How Lands Conservation Safeguards Drinking Water": 1997. http://www.tpl.org/tier3_cd.cfm?content_item_id=1337&folder_id=195.

- **Securing tourism as a major industry.** Tourism is one of the fastest growing industries in West Virginia.⁵ Protecting the state's exceptional water resources attracts thousands of visitors annually—many seeking fishing, hiking, and other outdoor opportunities that generate significant income for the State and local economies.
- **Protecting reproducing trout populations.** Tier 2.5 listing for reproducing trout populations will protect these ecosystems that are so unique and important to West Virginia.
- **Protecting healthy warmwater fisheries.** Pristine warmwater fisheries also fit within Tier 2.5 and deserve similar protections.
- **Maintaining and improving property values.** Antidegradation protections are likely to maintain or even increase property values for riparian landowners, because a "guarantee" is in place that the stream will remain unpolluted into the future.
- **Protecting unpolluted streams for future generations.** Unpolluted streams provide future generations with the benefits and opportunities derived from clean water: safe water to drink and, recreational and economic opportunities.

⁵ Charleston Gazette Article: "West Virginia a Leader in Regional Tourism Growth" (Online: <http://wvgazettemail.com/outlook2006/travelandtourism/J2.pdf>).

2. We support WVDEP's inclusion of 303 streams on the Tier 2.5 list

WVDEP has proposed including 303 streams for Tier 2.5 protection. We commend this decision.

This decision was made in close consultation with West Virginia Division of Natural Resources (WVDNR) biologists. WVDNR is *the* expert agency with regards to the assessment of trout populations and trout streams across the state. WVDEP and WVDNR relied on decades of monitoring data at hundreds of sites to make these decisions. The agencies were conservative: Listings were only made if data or professional judgment was incontrovertible.

Part of the strength of these decisions is based on the long history of monitoring. While a single monitoring event might show a small number or even an absence of trout, data collected over decades provides a more accurate picture of the true status of a stream. ***We therefore urge WVDEP to carefully assess any one-time data submitted during this comment period that might purport to prove an absence of particular trout species.***

Protecting these streams in Tier 2.5 will maintain these streams for the public benefit while still providing for a variety of future activities, including those classified as point or nonpoint source discharges. Protecting these streams fulfills the goals of the West Virginia Water Pollution Control Act policy:

“(a) It is declared to be the public policy of the state of West Virginia to maintain reasonable standards of purity and quality of the water of the state consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.

b) It is also the public policy of the state of West Virginia that the water resources of this state with respect to the quantity thereof be available for reasonable use by all of the citizens of this state.”⁶

⁶ West Virginia Code §22-11-2.

3. We urge WVDEP to restore the 141 streams onto the Tier 2.5 list that were recently removed

WVDEP is proposing to remove 141 streams from the original Presumptive Tier 2.5 list. *We oppose this wholesale delisting and urge WVDEP to restore these streams to the Tier 2.5 list.*

Although the word is not used in the rules, WVDEP uses the word “exemption” when justifying these removals. This choice of term is important and discussed below.

Eight factors must be considered when justifying streams for the Tier 2.5 list.⁷ This process is recognized by the agency itself. For example, in response to letters opposing Tier 2.5 listings of South Fork of the Cherry River (KG-34-G) and Hominy Creek (KG-24), WVDEP wrote:

“... The factors the DEP **must** consider in deciding whether to grant exemptions are set forth in section 8.1.a.2 of the rule, and generally include:

- Impact on private property owners
- Whether interests of all affected parties have been adequately represented
- Location of the water
- Any previous special designations
- Existing water quality
- Unique or exceptional ecological, recreational, or aesthetic resource value
- Impact on economic development in the area, including development of demonstrated natural resources
- Other factors determined by the Environmental Quality Board”⁸ (Emphasis added)

WVDEP is therefore on record regarding the necessity of considering all eight factors in its decision to remove streams from the presumptive list. WVDEP must weigh each criterion—not just impacts on resource-related economics.

The following paragraphs more specifically address our objections to how the eight factors were not appropriately used to justify removing 141 streams from the presumptive list:

⁷ 60 CSR 5, Section 6.2.(before changes now open for public comment) states: “Following the initial listing for 2.5 waters, as described in subdivisions 6.2.a and b... subsequent additions or deletions from Appendix A shall be in accordance with section 8.1, herein.” Section 8.1.a.2 contains the eight factors.

⁸ Letter to Plum Creek Timberlands, LP (James Fatony, Mining Manager) from West Virginia Department of Environmental Protection (Allyn Turner, Director) regarding objection to South Fork Cherry River: Dated June 11, 2003. Letter to Green Valley Coal Company from West Virginia Department of Environmental Protection (Allyn Turner, Director) regarding objection to Hominy Creek (KG-24): May 27, 2003.

3.1 WVDEP provided an extended opportunity to strengthen objections, and little opportunity to register support for listings

In early 2002, WVDEP initiated the process to register concerns provided by landowners affected by presumptive Tier 2.5 list.⁹ WVDEP then extended the comment period until July 31, 2003. During this extension, WVDEP solicited its first extended request to landowners to provide additional information in support of their objections to listed streams.

Another comment period opened in fall 2005. WVDEP further encouraged objectors to provide them with even more detailed information in support of their objection at this time. WVDEP even solicited specific information relating to Section 8.1.a.2.A, "Impact on private property owners," and Section 8.1.a.2.G, "Impact on economic development, including demonstrated natural resources".¹⁰ *By actively seeking only this information, WVDEP created an official record weighted with claims supporting removal of streams from the presumptive list.*

Due to this process, WVDEP unfairly generated a collection of biased comments that deal with specific private property and economic-related concerns conveyed by extractive industries, land developers, or other parties that would directly benefit from discharging into Tier 2.5 streams. Many commenters—such as those from logging industries—are not even affected by the Tier 2.5 listing because they are nonpoint sources.

WVDEP has allowed a strong industry bias to infiltrate the Tier 2.5 listing process by focusing only on two of the eight factors from Section 8.1.a.2—those that favor the removal of streams from the presumptive list.

Lastly, it is absolutely ridiculous, let alone catering to industry and those with purely development interests, that the comment period for objections lasted nearly two years and focused specifically on criteria that potentially justify delisting, while those supporting Tier 2.5 designations are expected to provide factual and substantiated comments about why a stream should remain listed within 30 days!

We therefore object to the removal of 141 streams from the Tier 2.5 list because of this unfair and biased process.

⁹ This process was required by 60 CSR 5 Section 6.1.a.2.

¹⁰ See the following examples: Letter to Green Valley Coal Company from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Hominy Creek (KG-24): September 26, 2005; Letter to Pardee Resources Group (Walter Stroud) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Gauley River (KG): September 26, 2005; Letter to Western Pocahontas Properties (Nick Carter) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Wycroff Run (PNB-16-B-1): September 26, 2005; Letter to Western Pocahontas Properties (Nick Carter) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Johnnycake Run (PNB-16-B): September 26, 2005; Letter to Glade Springs Resort LLC (Stephen Keen) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Glade Creek (KN-29): September 26, 2005; and more.

3.2 WVDEP granted "exemptions" from Tier 2.5 listing, even though the rules provide for no such action

As noted earlier, WVDEP is on record that the agency **must** consider all eight factors in their Tier 2.5 listing decision. However, WVDEP states that these factors relate to "exemptions." In fact, Section 8.1.a.2 has nothing to do with granting exemptions. Even an affected landowner objecting to a stream listing noted this fact, stating:

"Perhaps the phrase 'to grant exemptions' is a simple and meaningless misstatement, but the process required by the rules is not an 'exemption' process. The rules at Section 6.2.b require the Secretary of the DEP 'to provide written justification for the inclusion of the stream as a Tier 2.5 stream with reference to the criteria set out in paragraph 8.1.a.2'. Neither of the applicable sections of the rule treats this process as some sort of exemption; it is instead a prerequisite to a determination by DEP to seek official Tier 2.5 status for a stream."¹¹

WVDEP's use of the word "exemption" is not consistent with 60 CSR 5. Exempting streams does not support the purpose of antidegradation policies, and even hints that WVDEP predetermined that certain activities would override a stream listing as long as the affected party provided a certain amount of information. By specifically seeking out information to justify "exemptions," WVDEP has not appropriately weighed the eight factors that must be used to determine eligibility of a stream for Tier 2.5 level protection.

3.3 WVDEP removed streams from the Tier 2.5 list based on incomplete information provided in initial objection letters

In numerous cases, WVDEP removed streams from the presumptive list based on information received in objection letters alone. For streams that received objection letters, WVDEP responded with the agency's justification for continued inclusion. WVDEP also solicited additional data from affected parties for the purpose of strengthening their objections. In some instances, however, streams have now been dropped from the presumptive list, even when WVDEP files do not show that additional data have been provided by objectors.¹²

Streams that WVDEP previously justified for inclusion on the list in response to landowner objections must remain on the Tier 2.5 list unless there is a clear explanation of new information that has been made available to the agency, and the agency makes a transparent decision to reverse its previous determination.

We therefore recommend that WVDEP review its record of objection letters and confirm that streams were only removed after WVDEP's request for additional supporting data if such data

¹¹ Letter to West Virginia Department of Environmental Protection (Allyn Turner, Director) from Glade Springs Resort (Stephen C. Keen, Bright Enterprises) regarding objection to Glade Creek (KN-29): June 31, 2003.

¹² See records for Elkhorn Creek (BST-99) and Loop Creek (K-76).

were actually provided, and if the new information, after balancing the eight factors, is persuasive enough for a delisting.

3.4 WVDEP did not accurately consider all eight factors in its decision to remove 141 streams from the presumptive list

As mentioned above, WVDEP actions have resulted in an unbalanced showing of opposition to Tier 2.5 stream listings from extractive industries and those with land development interests. WVDEP has given heavy credence to information provided by these parties in relation to Sections 8.1.a.2.A and G. The other six factors have been essentially ignored. The following sections examine each of the 8.1.a.2 criteria that WVDEP should have used to make balanced decisions about inclusion on the Tier 2.5 list.

8.1.a.2.A Impact on Private Property Owners

While WVDEP heavily solicited detailed information about impacts on private property owners objecting to Tier 2.5 listings,¹³ the agency did not actively seek similar information from those private owners that support Tier 2.5 listings. As a result, the record is heavily weighted in favor of objecting parties and there is no accurate measure of how Tier 2.5 protections may positively impact private landowners. WVDEP must consider broader impacts on private property owners.

Extractive industries and land developers have largely expressed the opinion that Tier 2.5 protections will decrease land values, and WVDEP has apparently used these comments as sole justifications for its delisting decisions. Missing from WVDEP's calculations, however, is an equivalent evaluation concerning how Tier 2.5 protections may **increase** property values or otherwise benefit private landowners as a result of increased water quality, flood control, and other potential benefits. Even if WVDEP were to ignore the other seven factors discussed below, a balanced evaluation of this single factor that includes positive impacts to private property owner would have resulted in many fewer, or no, delistings.

In numerous letters of justification for continued inclusion of streams on the Tier 2.5 list, WVDEP itself noted:

¹³ See the following examples: Letter to Green Valley Coal Company from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Hominy Creek (KG-24): September 26, 2005; Letter to Pardee Resources Group (Walter Stroud) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Gauley River (KG): September 26, 2005; Letter to Western Pocahontas Properties (Nick Carter) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Wycroff Run (PNB-16-B-1): September 26, 2005; Letter to Western Pocahontas Properties (Nick Carter) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Johnnycake Run (PNB-16-B): September 26, 2005; Letter to Glade Springs Resort LLC (Stephen Keen) from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Glade Creek (KN-29): September 26, 2005; Letter to Thomas Liberatore from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Elkhorn Creek (BST-99): September 26, 2005; and more.

“The designation of a stream for Tier 2.5 protection is to prevent significant degradation of water quality, and is not designed to prevent economic development or the development of natural resources.”¹⁴

WVDEP is on record as believing that Tier 2.5 designation is consistent with economic development and the development of natural resources. To then turn 180 degrees and agree with landowners that Tier 2.5 designation will mean only negative impacts, and to do so without any written explanation, is arbitrary and unsupported by the facts.

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

According to WVDEP, notification has been provided in legal advertisements, press releases, public meetings, and by attending county commission and other local government meetings. Throughout the objection period, anyone interested in reviewing the entire Tier 2.5 list or the antidegradation legislation could receive copies from WVDEP.

Although we commend WVDEP for its effort to communicate with and educate the public concerning these issues, WVDEP only made special efforts to receive objections. The same issues raised in the previous section on “Impact on Private Property Owners” apply here.

8.1.a.2.C The location of the water

In its numerous justification documents for continued stream inclusions, WVDEP provided very general information regarding the location of streams. In many circumstances, there is no substantive information that can be used by the agency to aid in its decision whether to list a stream for Tier 2.5 protection. We highly recommend that WVDEP add information to this category that will allow a more accurate consideration of how the location of a stream may affect its listing.

The location of a stream is important because it may maintain a reproducing trout population, or may be one of many linked streams that together provide an integrated trout habitat. Trout populations depend upon adequate stream lengths to reproduce. In particular, because of their tendency to migrate from downstream reaches into the headwaters during the spawning season, it is crucial that continuous lengths are protected in order to maintain the reproducing population. By delisting headwaters streams such as Big Spring Fork of the Elk (KE-138), Shavers Fork (MCS), Gladys Fork (MC-60-K), Cold Knob Fork (KG-34-G10), South Fork of Cherry (KG-34-G), Cup Run (KE-138-B), and numerous other headwaters stretches, WVDEP is threatening both the water quality and trout populations in these streams and others nearby. ***We therefore recommend that WVDEP relist all headwaters streams in order to protect vital spawning grounds that maintain reproducing trout populations in these and nearby streams.***

Alarming, numerous streams in McDowell, Logan, and Boone counties are slated for removal. Rivers and streams in these counties are heavily impacted by surrounding mining-related land uses and protecting these exceptional waters is of the utmost importance. Only one stream

¹⁴ Letter to Thomas Liberatore from West Virginia Department of Environmental Protection (Lisa A. McClung, Director) regarding objection to Elkhorn Creek (BST-99): September 26, 2005.

remains listed for each of these three counties—totaling just over 3 miles. In nearby Wyoming County, only two streams are proposed for listing. These streams are of exceptional value in an area where hundreds of miles of headwaters streams have already been filled and buried by mountaintop removal. *It is essential that WVDEP reinstate waters in the southern coalfields to the Tier 2.5 list.*

8.1.a.2.D Any previous special designations

We provide no specific comment on this factor.

8.1.a.2.E Existing Water Quality

Existing water quality is perhaps the most fundamental and important of the eight factors that must be evaluated. If a water is clean enough to support a Tier 2.5 listing because of being a naturally-reproducing trout stream, high quality water, or reference stream, this factor should be given significant weight against the other factors. *We recommend that WVDEP reconsider its delisting decisions and weight existing water quality very highly when considering the eight factors.*

8.1.a.2.F Factors that indicate unique or exceptional ecological, recreational, or aesthetic resource value.

Beyond trout streams, WVDEP has not fully considered the criteria provided in this section for numerous streams. *Once again, we recommend WVDEP consider all the factors, including surrounding land uses that indicate unique values for southern coalfield streams slated for removal from the Tier 2.5 list. Likewise, we recommend that WVDEP reconsider factors related to trout reproduction, such as the significance of headwaters as spawning grounds, in its decision to delist numerous headwater streams throughout the state.*

We also recommend that WVDEP reconsider its rationale for delisting reference streams on private lands. WVDEP has not provided a justification for why important reference streams should not receive protection, just because they are located on private lands. Reference streams have unique and exceptional ecological value. *Thus, we request that WVDEP relist reference streams dropped simply because they flow through private lands.*

8.1.a.2.G Impact on economic development in the area, including development of demonstrated natural resources

As stated above, WVDEP weighted information in this category heavily in its decision to remove 141 streams from the Tier 2.5 list. WVDEP has apparently used a narrow definition of what constitutes a “demonstrated natural resource.” We respectfully request that WVDEP expand its definition beyond the bounds of mineral, timber, oil, and natural gas activities. Demonstrated natural resources should also include the ecosystem characteristics that benefit West Virginia and its communities. For example, each day riparian zones prevent erosion, control flooding, filter sediment, produce oxygen, and provide habitat and corridors for multiple species. Clean water flows downstream constantly providing communities with drinking water and recreational opportunities. WVDEP has not considered any of these impacts on economic development in its decision to delist streams from the Tier 2.5 list.

Other demonstrated natural resources that WVDEP has not considered are healthy fisheries. The U.S. Fish and Wildlife Service estimates that one mile of trout stream in West Virginia has an estimated economic impact of \$40,000 annually.¹⁵ The estimate includes revenues generated from lodging, food, transportation, equipment, and other impacts.

The potential impact of the original presumptive Tier 2.5 list of 444 streams (2008 miles) is more than \$80 million. Removing 141 streams (850 miles) would potentially cost the state almost \$34 million. Other figures provided by the American Sports Fishing Association estimate that sport fishing in West Virginia has an overall economic impact of more than \$179 million.¹⁶

Keeping in mind that West Virginia is within 500 miles of 60 percent of the U.S. population, fishing and tourism-related dollars represent in many cases **the most important** demonstrated natural resource upon which Tier 2.5 protection depends. *We strongly urge WVDEP to consider this vitally important of natural resource protection into their decisions regarding the Tier 2.5 list.*

8.1.a.2.H Other factors determined by the Secretary, when applicable.
This factor is very broad and must not be used liberally.

3.5 WVDEP's reasons for removal are unsupported

WVDEP distributed a document titled, "Streams Removed from the Original Presumptive List of Waters of Special Concern (Tier 2.5 Streams)." This document does not satisfy the public's need to understand how and why WVDEP is proposing to remove streams from the Tier 2.5 list in relation to the eight factors described above.

Reference Only

WVDEP is proposing to drop approximately 30 streams based on the fact that the stream is listed as "Reference Only."

Although not stated in WVDEP's "Reasons for Removal" document, these delistings were apparently made because the reference streams run through private land. Reference streams are extremely important for the future management of West Virginia's streams, whether they flow across public or private land. They provide places for scientific study, modeling, and other activities that are central to WVDEP's mission. For example, reference streams are essential to the development of some total maximum daily loads, and are essential for developing useful metrics to evaluate the health of streams across the state. Both coldwater and warmwater reference streams are equally important. *WVDEP must retain all reference streams on the presumptive list—including those running through private lands—unless a substantiated objection and subsequent removal is deemed appropriate in accordance with criteria in Section 8.1.a.2.*

¹⁵ http://www.envirovaluation.org/index.php?title=wtrf_www_wtrf_com_channel_7_cbs_wheeling&more=1&c=1&t=1&pb=1 Accessed: July 5, 2006.

¹⁶ http://www.asafishing.org/asa/statistics/saleco_trends/state_allfish_2001.html Accessed: July 5, 2006.

Removed for Technical Reasons Prior to 9/05

We encourage WVDEP and WVDNR to continue their sampling efforts so that streams removed for technical reasons, as well as others satisfying the appropriate criteria, may be considered for Tier 2.5 protections in the future.

Coal reserve development planned or underway

WVDEP has assigned this reason for removal to approximately 35 streams. As mentioned in earlier sections, WVDEP has given credence—purposefully or not—to coal-related interests throughout the delisting process. The agency has removed streams based on information received in special interest objection letters alone.

In the case of the Gauley River from its North Fork headwaters to Big Run near Jerryville, the agency has essentially ignored all other factors. This section of the Gauley River is known for its unique and exceptional characteristics, such as providing a summer haven for reproducing trout populations. The economic value of this segment is significant because of its contribution toward sustaining the river's downstream reaches that flow through a National Recreation Area. This segment is also encapsulated by the Monongahela Forest in an area known to attract hundreds of fishermen each year.

We recommend that WVDEP relist the Gauley River for Tier 2.5 protection and further consider the Gauley and New rivers for Tier 2.5 protection based on not only their nationally-recognized designations, but also their unique and exceptional ecological, recreational, and aesthetic characteristics. These resources provide millions of dollars of revenue for local economies each year.

Planned or ongoing development

Approximately 20 streams are being removed from the Tier 2.5 list based on this reason. Once again, WVDEP has allowed a few private interests that are suspicious of Tier 2.5 designation to outweigh the potential benefits of Tier 2.5 protections. WVDEP proposes to delist numerous headwaters streams because of planned or ongoing development, including Shavers Fork (MCS), Gladys Fork (MC-60-K), Big Spring Fork (KE-138), and Cup Run (KE-138-B). Each of these streams is a known reproducing trout fishery, or trout spawning ground.

WVDEP has weighted its decision largely on vague development plans outlined in letters of objection, even in the face of contradictory information presented in the objection letters themselves. For example, in an objection letter regarding Big Spring Fork (KE-138), Snowshoe Mountain, Inc. states:

“With all of the development that has occurred in recent years, Big Spring remains a high quality stream and we intend to preserve that quality. We believe that we can continue to develop without affecting the ability of the stream to support existing uses and habitat.”¹⁷

¹⁷ Letter to West Virginia Department of Environmental Protection from Snowshoe Mountain, Inc. (Jim Haas) regarding objection to Big Spring Fork (KE-138): Undated, but stamped as received by WVDEP June 3, 2002.

This sentiment is consistent with our arguments that developments, even those with point source discharges, can continue in Tier 2.5 watersheds.

We object to the removal streams from the Tier 2.5 list based solely on planned or ongoing development, and we recommend that WVDEP relist the streams due to their unique and exceptional qualities, as well as other factors.

Privately Limed

This reason for removal is seemingly arbitrary and is not consistent with the criteria for removal outlined in Section 8.1.a.2. There are three streams within the South Fork of the Cherry watershed proposed for removal from the presumptive list based on this reason. After reviewing objection letters and other records relating to these streams, we have found no evidence explaining the private entity actually liming these streams.

Although the alleged liming may be "improving" stream pH in these streams, WVDEP is setting a precedent that suggests that if a company performs an environmentally friendly action, it can gain an exemption from a federally mandated regulation. Once again, however, we remind WVDEP that this is not an exemption process; rather it is a process for determining the appropriate level of protection for an exceptional quality stream.

Objection letters received about these streams were sent from timber companies. Tier 2.5 designation, and the entire antidegradation process, does not apply to nonpoint sources like timber companies. Therefore, we object to the delisting of South Fork of Cherry River (KG-34-G), Cold Knob Fork (KG-34-G-10), and Rocky Run (KG-34-G-6).

South Fork of Cherry is a known reproducing trout fishery. It is important to protect both the South Fork and its tributaries in order to sustain the water quality needed in order for these trout to survive. These streams should be relisted for Tier 2.5 protections.

Fernow Experimental Forest

Once again, WVDEP is providing a seemingly arbitrary reason for removal. WVDEP must be consistent with using the factors in Section 8.1.a.2. Objection letters relating to the removal of three streams within the boundaries of the Fernow Experimental Forest were sent to WVDEP by the U.S. Forest Service. Letters from private landowners were also received; however, farming is exempt from Tier 2.5 level restrictions and these letters should not be given heavy weight. While we respect the Forest Service's position, we also recognize that Elklick Run (MC-60-C), John B. Hollow (MC-60-C-3), and Stonelick Run (MCS-7) qualify above and beyond the criteria that must be met in order to qualify for Tier 2.5 level protection. ***Therefore, we recommend WVDEP relist these streams for Tier 2.5 level protection.***

4. We request that WVDEP make changes to the proposed rule as required by the judge's decision in the 2004 lawsuit

Environmental organizations and the thousands of citizens they represent have worked in West Virginia toward full implementation of the federally mandated antidegradation provisions of the Clean Water Act (the Act) for over 25 years. As early as 1980 Friends of the Little Kanawha sought to protect streams from further degradation by advocating for full compliance with the antidegradation provisions of the Act. The West Virginia Highlands Conservancy continued that call through extensive administrative comments and testimony. Then in May of 1999, the West Virginia Rivers Coalition, West Virginia Highlands Conservancy, West Virginia Citizens Action Group, West Virginia Council of Trout Unlimited and a number of individuals filed notice of intent to sue EPA over its failure to require antidegradation implementation in West Virginia. In response the Environmental Quality Board established an antidegradation stakeholder group that eventually gave rise to a draft implementation rule. After tremendous politicizing of the issues and closed-door dealings, the legislature eventually passed and EPA approved the antidegradation implementation rule, §60-5.

While the rule in many ways was a victory for those of us who had long sought its passage, it failed to comply with minimum federal requirements because it illegally exempted many activities from antidegradation review. Because of these exemptions, over twenty local, state, regional and national environmental groups challenged EPA's approval of the rule in federal court. In 2003, after a long legal battle, Judge Joseph R. Goodwin of the United States District Court, Southern District of West Virginia, issued a favorable opinion on seven specific exemptions listed in our complaint and remanded the entire rule back to EPA for further consideration.

In March of 2004, EPA issued a response to Judge Goodwin's ruling approving major portions of the rule but disapproving three of the overturned issues and recommending WVDEP delete the disapproved language from the rule. EPA also deferred a decision on the four remaining issues in order to reevaluate the record related to their previous decision. EPA's disapprovals and deferrals prevent the use of those provisions for CWA purposes by the state.¹⁸ EPA has indicated they will be addressing the remaining issues before the end of 2006.¹⁹

We comment on WVDEP's proposed revisions to the antidegradation rule in light of Judge Goodwin's ruling and based on our strong belief that to "maintain the chemical, physical, and biological integrity,"²⁰ of the waters of West Virginia is in the best interest of the citizens and economy of the State.

¹⁸ Note: The Alaska Rule states that state and authorized tribal standards adopted on or after the effective date of the rule on or after May 30, 2000 do not become the "applicable" standards for CWA purposes until they are approved by EPA.

¹⁹ Personal communication between Cheryl Atkinson of USEPA and Margaret Janes of the Appalachian Center.

²⁰ Section 101(a) of the Federal Water Pollution Control Act.

4.1 Proposed Changes to the body of the rule

We include by reference plaintiffs arguments and briefs in *Ohio Valley Environmental Coalition v. Horinko*.

WVDEP has failed to modify §60-5 in response to the 2003 Goodwin ruling or the subsequent EPA 2004 antidegradation decision document. For example, the Agency has failed to comply with EPA's recommendation to delete language at Sections 5.2 and 5.6.c. Accordingly, we strongly recommend that WVDEP delete the disapproved language.

In addition, the WVDEP has also failed to publicly address the remaining four issues favorable to the plaintiffs in Judge Goodwin's ruling. Those issues are:

1. The Judge found EPA's approval of Section 4.3, which classifies large segments of the Kanawha and Monongahela Rivers as Tier 1 waters, was not based on adequate evidence in the record regarding the quality of waters in those rivers. Accordingly, this approval was arbitrary and capricious. EPA deferred action on this issue and WVDEP agreed to submit to EPA evidence about the quality of water in these river segments supporting that designation.
2. The Judge found EPA's approval of Section 3.7, which requires Tier 2 antidegradation review for discharges under a general Section 402 or Section 404 permit only at the time the general permit is issued, and not for individual discharges under such permits, was arbitrary and capricious. EPA deferred action on this issue and is evaluating options.
3. The Judge found EPA's approval of Section 5.6.a.1, insofar as that provision allows for a twenty percent cumulative reduction from all discharges before Tier 2 review is required, was not supported by any evidence in the record and therefore was arbitrary and capricious. EPA deferred action and is working with WVDEP on this issue.
4. The Judge found EPA's approval of Section 6.3.a.1-4, which set numerical criteria for four individual pollutant parameters, was not supported by any evidence in the record and was therefore arbitrary and capricious. EPA deferred action on this issue and is working with West Virginia to further explore and develop a record basis of such a threshold.²¹

In its briefing document on the proposed antidegradation rule, WVDEP is silent on its decision to retain the language related to overturned points above.²² On the WVDEP website in response to comments on Tier 2.5 issues, however, WVDEP states they have, "provided EPA with supplemental supporting documentation," related to the challenged provisions.²³ Neither that documentation nor a summary has been provided to the general public. Thus, WVDEP has

²¹ See *OVEC v Horinko* and EPA's 2004 Letter to Allyn Turner, WVDEP, and attached decision documents.

²² http://www.wvdep.org/Docs/10646_BRIEFING_DOCUMENT_Antidegradation.pdf

²³ http://www.wvdep.org/Docs/10649_Responsive_Summary_6106.pdf

deprived the public of an adequate opportunity to comment on the agency's basis for the retaining overturned provisions of the rule. We submitted a Freedom of Information Act request for the communications between EPA and WVDEP on June 19, 2006. The response was received on June 29, 2006 giving us insufficient time to adequately respond. The information still has not been disclosed to the general public. Thus, we request that the comment period for the rule be extended for 45 days beyond the time a briefing document is provided to the public and the full rationale is made available. There is very little to comment on based on the present record. In the absence of strong and scientifically defensible justification for retaining the language, we recommend that WVDEP delete language and Sections that were overturned by Judge Goodwin.

In addition, WVDEP actually adds language at 5.6.d that is identical to the overturned language at 6.3.a. There are only two sentences in the briefing document supporting the change. The briefing document states, "[o]ne additional change was made to incorporate the same approach for determining significant degradation in Tier 2 waters as is currently established for Tier 2.5 waters. This change relates only to pH, fecal coliform, temperature and dissolved oxygen and reflects the fact that due to their nature, application of a percentage change in assimilative capacity is not an appropriate measure of degradation for these pollutants." The implication that these thresholds are currently established for Tier 2.5 waters is blatantly false. As stated above, these thresholds were overturned in court then deferred by EPA. Further, the WVDEP provides no additional information as to 1) why a 10% assimilative capacity could not be used to calculate the de minimis on a stream-by-stream basis, or 2) why these levels of degradation are, in fact, insignificant. Merely restating WVDEP's intent or conclusions does not constitute a reasonable justification for the action.

4.2 Specific Comments Related to the Issues Covered by Deferred EPA Decisions

1) Section.3, which classifies large segments of the Kanawha and Monongahela Rivers as Tier 1 waters.

The WVDEP has not publicly provided justification for classifying the Kanawha and Monongahela Rivers as Tier 1 waters.

In WVDEP's November 5, 2004 letter to EPA²⁴ received through FOIA, however, WVDEP states reasons for permanently designating the Lower Kanawha and Monongahela Rivers as Tier 1. The Agency argues that because the rivers are large, it is unlikely that a permitted discharge will cause significant degradation. The Agency does not state that such a discharge will never occur only that it is unlikely. In other words, in some instances these rivers could be impermissibly degraded without the required Tier 2 antidegradation review. WVDEP also suggests that the rivers are so large that they can effectively dilute and withstand even high volume polluting discharges. That is flatly inconsistent with the antidegradation concept, which

²⁴ Letter from Allyn G. Turner, Director, DWW, WVDEP to Donald S. Welsh, Regional Administrator, EPA Region III, November, 5, 2004. Note: this letter is in response to the March 29, 2004 EPA response letter to the Goodwin decision.

does not offer exemptions based on the flow of a water body. In addition, the Agency states that this approach may not be appropriate in boundary waters where a more conservative approach would be appropriate. This means that permanently designating the Kanawha and Mon Rivers as Tier 1 is not conservative or as protective as it should be. There is also no justification for treating instate waters differently from boundary waters.

Further, the agency argues that the number of historic discharges to these rivers is pertinent to Tier designation. This argument merely suggests that DEP is trying to deregulate these rivers as a matter of administrative convenience or to mollify the powerful corporations whose facilities discharge into it. If anything, the permitting of these discharges prior to the implementation of the state's antidegradation policy explains why the rivers are impaired for one or two parameters, underlining the need and value of Tier 2 protections in these waters.

Finally, WVDEP argues that the listing of these streams on the 303(d) list justifies permanent designation as Tier 1 waters. WVDEP provides no evidence that either river is so impaired that it does not qualify for Tier 2 protection. WVDEP may not remove Tier 2 protections from waters that support aquatic life and recreation if only one or two parameters are impaired and the water quality exceeds the standards for all other parameters.

While the Monongahela River is on the 303(d) list, the main stem of the Monongahela (Mon) River supports a thriving fishery. The WVDNR reports that the fishery on the Mon is good to excellent. The river supports all the large river species including walleye, sauger, white bass, largemouth bass, smallmouth bass, spotted bass, channel catfish, flathead catfish, drum and carp. In addition there are numerous fishing tournaments every year.²⁵ The Mon River is also used extensively for other recreational activities. For example, the Second Annual MedExpress Mountaineer Triathlon on the Mon was held on June 25, 2006²⁶ and attracted hundreds of people for a Mon River swim.

Portions of the lower Kanawha River have also been on the 303(d) list. The Kanawha River, however, also has an excellent warmwater fishery especially in the tailwaters downstream of Marmet and Winfield locks that attract large number of warmwater species. There are two fishing piers in this section of the Kanawha and much fishing activity from small boats. The WVDNR also hosts two bass tournaments every year.²⁷ Further, the website of the city of Charleston promotes the Kanawha River as a "water playground" and "the foundation for the city's annual Sternwheel Regatta celebration."²⁸ Numerous water skiers and swimmers are frequently seen recreating in the Kanawha River near Charleston.

The federal antidegradation policy requires states to afford Tier 2 protection to waters whose quality exceeds "levels necessary to support propagation of fish, shellfish, and wildlife and

²⁵ Personal communication between Frank Jernejcic, WVDNR and Margaret Janes, Appalachian Center. 6/26/06.

²⁶ <http://www.mountaineertri.com/index.php>

²⁷ Personal communication between Zac Brown, WVDNR and Margaret Janes, Appalachian Center. 6/26/06.

²⁸ <http://www.cityofcharleston.org/>

recreation in and on the water” 40 CFR 131.12(a)(2). Thus, waters that support propagation of aquatic life and that have excess assimilative capacity (i.e. in waters whose water quality “exceeds levels necessary” to support aquatic life and recreation), must receive Tier 2 protection. In other words, when there is “excess assimilative capacity” available, and the water at issue actually supports aquatic life and recreation, the water quality by definition exceeds the levels necessary to support those uses.

There are hundreds of streams on West Virginia’s 303(d) list. The WVDEP is not suggesting that all of those waters be permanently denied Tier 2 protections, implausibly just these two rivers - among the largest in the state. The 303(d) listings do not even support the geographic scope of the claimed exemptions. The antidegradation procedures state, “[w]ater segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection.” §60-5-5.2. Note: the word generally was overturned in the Goodwin decision and disapproved by EPA and is not applicable. Further, EPA admitted in its brief in OVEC v. Horinko, a waterbody cannot automatically be designated as Tier 1 merely because one parameter exceeds water quality standards, or because it is listed on the State’s list of impaired waters. EPA Br. 35, n.37. Thus, WVDEP’s own regulations and EPA’s stated position require that the Kanawha and the Monongahela Rivers be designated Tier 2 waters. Thus, the last portion of Section 4.3 classifying large segments of the Kanawha and Monongahela Rivers as Tier 1 waters must be deleted.

2) Section 3.7, which requires Tier 2 antidegradation review for discharges under a general Section 402 or Section 404 permit only at the time the general permit is issued

West Virginia’s exemption of activities covered by general permits under Sections 402 and 404 of the CWA from Tier 2 review does not comply with federal requirements because, although the general permits themselves are subject to antidegradation review, the specific activities later seeking coverage under those general permits are never subjected to antidegradation review. EPA has previously required those activities to be included in antidegradation review because they could degrade water quality, and because the Tier 2 determination that such degradation is “necessary to accommodate important economic or social development in the area in which the waters are located” under § 131.12(a)(2) can only be made on a site-specific basis.

In EPA’s September 2000 issuance of a multi-sector NPDES storm water general permit for industrial facilities, EPA stated that “EPA would have to modify the permit for each discharge in question in order to comply with 40 CFR Section 131.12(a)(2). Individual considerations such as [those required by a Tier 2 antidegradation review] are contrary to the concept of a general permit.” 65 Fed.Reg. 64746, 64794 (Oct. 30, 2000) (emphasis added). Thus WVDEP’s action to retain the language exempting authorizations under 402 and 404 general permits is inappropriate not only because of Judge Goodwin’s decision overturning EPA’s flawed approval of their original action but because of EPA’s own past policies.

Neither WVDEP nor EPA has explained how site-specific antidegradation factors can be analyzed on a statewide basis before individual dischargers have even *applied* for coverage under the general permits, or how antidegradation review can be applied to the state as a whole

without examining impacts on individual receiving waters. DEP's reliance on 401 certifications is misplaced since those certifications are not conducted on a site-specific basis for nationwide permits like NWP 21. Instead, they are only conducted on a state-wide basis when the NWP is first issued. DEP has also made no effort to demonstrate, as a factual matter, that any activity under a statewide or nationwide permit is de minimis. Instead, DEP merely cites procedures which, in theory, require de minimis impacts. DEP's reliance on those procedures is entirely circular. DEP assumes that the impacts will be de minimis because it has procedures which require the impacts to be de minimis. Those procedures are no substitute for site-specific factual analysis. Thus, the language at Section 3.7, which requires Tier 2 antidegradation review for discharges under a general Section 402 or Section 404 permit only at the time the general permit is issued, and not for individual discharges under such permits must be deleted.

3) Section 5.6.a.1, insofar as that provision allows for a twenty percent cumulative reduction from all discharges before Tier 2 review is required

It is nonsensical for WVDEP to state in one section of the rule that for a single discharge the de minimis is 10% but for cumulative impacts from multiple discharges the de minimis is 20%. In addition, the WVDEP established, EPA twice approved, and Judge Goodwin upheld a 10% de minimis as a reasonable gauge of significance. The target for assessment for stream degradation is the impact on the receiving stream and is immaterial to the source of the impact. Further, WVDEP cites no factual or scientific evidence of any kind that a 20% cumulative reduction in assimilative capacity is insignificant. WVDEP merely asserts that the 20% figure was a "product" of stakeholder discussions. The rest of WVDEP's analysis is entirely hypothetical and theoretical. WVDEP assumes that the 20% reduction is insignificant, and then merely provides hypothetical examples of how it would operate. Thus, WVDEP must change the 20% cumulative impact de minimis to 10%.

4) Section 6.3.a.1-4, which set numerical criteria for four individual pollutant parameters

Sections § 60-5-6.3.a and added Sections §60-5-5.6.d automatically deem the discharges of four specific pollutants – dissolved oxygen, pH, temperature, and fecal coliform – to be insignificant if they do not exceed listed numerical values or ranges. The use of such automatic, state-wide values for individual pollutants is illegal because antidegradation review applies to all discharges that have the potential to degrade water quality, and WVDEP does not support their assumption that discharging the specified amounts of these pollutants are harmless. It is immaterial that these changes would not be allowed to cause a violation of numeric water quality criteria, as that is already required in the rule and by other parts of the Act. The issue is whether these changes are in any instance significant.

Instead, WVDEP merely argues that analyzing the impacts of these pollutants is more complex and difficult than pollutants which are subject to a "mass balance" analysis. In WVDEP's words, "it is a challenge to determine the appropriate assessment of assimilative capacity." However, this argues in favor of a site-specific analysis, not for a general rule exempting discharges from analysis for these pollutants.

The entire premise that the significance of discharges with predetermined amounts of heat or pollutants to different streams can be determined without site specific information is false. The impact of discharges at predefined levels can only be determined on a case-by-case basis relative to the baseline water quality and relative flow of the receiving stream. Obviously, the closer the ambient conditions of the receiving stream are to water quality standards, the greater the significance of these discharges will be. In addition, multiple new discharges of these parameters to a given receiving stream could take up all of the remaining assimilative capacity in a stream and still be deemed insignificant.

Below are specific comments on each of the four parameters specified in § 60-5-6.3.a and §60-5-5.6.d.

Dissolved oxygen (DO) –DO sags of .4 mg/l will have significant impacts on bodies of water with daytime DO's near the criterion. [Note: in WVDEP rationale to EPA they use .3 mg/l DO as a de minimis level not .4 mg/l] Diurnal variation in DO's, with DO's dipping to 24 hour lows in early morning hours are well documented. These dips however, are rarely recognized for regulatory purposes or used for NPDES permitting – quite simply no one is there sampling. For example, Charles Fork Lake on 11/23/04 had a maximum DO of 6.01 and minimum DO of 4.71 mg/l (below the applicable criterion of 5 mg/l) and on 11/26/04 had a maximum DO of 5.49 but a minimum DO of 4.97.²⁹ Clearly, if a daytime sag of .4 mg/l were allowed in Charles Fork Lake while the daytime DO would comply with water quality criterion even more harmful nighttime and early morning DO's would occur. While 5.6.d.1 and 6.3.a.1 allow a dissolved oxygen sag of .4mg/l only when conditions would assure compliance with water quality standards, in all practicality the working of WVDEP do not routinely recognize diurnal variations in DO – making that assurance a hollow one. Thus, diurnal variations in DO, in addition to the other general reasons stated above, mean that a blanket .4 mg/l DO sag de minimis could cause very important water quality impacts – beyond even significant.

In addition, WVDEP states, “[o]ne of the aspects of antidegradation that is challenging with dissolved oxygen is the location of the maximum DO sag. Antidegradation assumes that water quality is uniform within a given stream segment and essentially protects the location where BWQ was established.” It is important to note that the location of baseline water quality assessments and the assumptions about uniformity have been set by WVDEP through guidance issued on November 30, 2001, Baseline Water Quality (BWQ) Assessment Procedures. Those procedures do not comply with §60-5 because they require that antidegradation review be carried out at a single spot in the receiving stream a significant distance downstream from the discharge and not at sites along the river where impacts may be most important. Environmental interests have legally challenged this flawed interpretation in state court where the case is pending. In any event, the Agency is using its own flawed guidance which could easily be changed to justify corrupting another aspect of Tier 2 and Tier 2.5 review. Thus we strongly recommend that the .4 mg/l DO de minimis be removed and that DO be reviewed in a way consistent with standard protocol.

²⁹ Data obtained from John Wirts of WVDEP during Nutrient Technical Committee meetings.

Temperature - The de minimis for thermal discharges in § 60-5-6.3.a and §60-5-5.6.d of the proposed rule restricts temperature increases to no more than two degrees. For warmwater rivers the water quality criterion prohibits an increase in temperature of no more than 5 degrees.³⁰ Thus, the temperature de minimis of 2 degrees allows a 40% increase in temperature with no antidegradation review and is inconsistent with the 10% significance de minimis of the overall policy. In the epilimnion of lakes, only a 3-degree temperature rise is allowed by the criterion.³¹ The 2-degree change allowed without antidegradation review thus consists of a 66% allowable change in ambient temperature -- also inconsistent with the 10% de minimis of the overall policy.

There are also problems in cold-water fisheries with the 2-degree de minimis. In the lower reaches of reproducing brook trout streams an increase in temperature of two-degrees is significant. The increase would cause a shift in population bringing in creek chubs and warmwater minnows and decreasing the number of brook trout in that reach essentially reducing the size/extent of brook trout habitat.³²

For warmwater fisheries stocked with trout a two-degree increase in temperature is also significant. Stocked trout quickly move to microhabitats of cooler water and must do so within hours or a day or two of stocking to survive. Water warmed by 2 degrees increases the stress on stocked trout and decreases survivability. Allowing a two-degree temperature increase can thus significantly harm the success of the stocked fishery and this could occur with no Tier 2 antidegradation review.³³

In addition, in cooler waters an increase in temperature by 2 degrees would cause a DO sag of greater than .4 mg/l, the specific DO de minimis stated in the rule. This puts the DO and temperature de minimis in direct conflict. The following chart shows the change in DO expected with an increase in temperature of 2 degrees C.

³⁰ §47-2-8.28

³¹ Id.

³² Personal communication between Fish Biologist, Don Gasper and Margaret Janes of the Appalachian Center, 6/9/06.

³³ Id.

Decrease in dissolved oxygen (DO) due to a 2°C increase in water temperature for water in equilibrium with the atmosphere at a pressure of 760 mmHg.³⁴

Original temperature		Raised temperature		Original DO concentration	DO after warming	Decrease in DO
°C	°F	°C	°F	mg/L	mg/L	mg/L
0	32.0	2	35.6	14.59	13.80	0.79
1	33.8	3	37.4	14.18	13.43	0.75
2	35.6	4	39.2	13.80	13.08	0.72
3	37.4	5	41.0	13.43	12.74	0.69
4	39.2	6	42.8	13.08	12.42	0.66
5	41.0	7	44.6	12.74	12.12	0.63
6	42.8	8	46.4	12.42	11.82	0.60
7	44.6	9	48.2	12.12	11.54	0.58
8	46.4	10	50.0	11.82	11.27	0.55
9	48.2	11	51.8	11.54	11.01	0.53
10	50.0	12	53.6	11.27	10.76	0.51
11	51.8	13	55.4	11.01	10.51	0.49
12	53.6	14	57.2	10.76	10.28	0.47
13	55.4	15	59.0	10.51	10.06	0.45
14	57.2	16	60.8	10.28	9.85	0.44
15	59.0	17	62.6	10.06	9.64	0.42
16	60.8	18	64.4	9.85	9.44	0.40
17	62.6	19	66.2	9.64	9.25	0.39
18	64.4	20	68.0	9.44	9.07	0.38
19	66.2	21	69.8	9.25	8.89	0.36
20	68.0	22	71.6	9.07	8.72	0.35
21	69.8	23	73.4	8.89	8.55	0.34
22	71.6	24	75.2	8.72	8.39	0.33
23	73.4	25	77.0	8.55	8.24	0.32
24	75.2	26	78.8	8.39	8.09	0.31
25	77.0	27	80.6	8.24	7.94	0.30
26	78.8	28	82.4	8.09	7.80	0.29
27	80.6	29	84.2	7.94	7.66	0.28
28	82.4	30	86.0	7.80	7.53	0.27
29	84.2	31	87.8	7.66	7.40	0.26
30	86.0	32	89.6	7.53	7.28	0.25
31	87.8	33	91.4	7.40	7.16	0.24
32	89.6	34	93.2	7.28	7.04	0.24
33	91.4	35	95.0	7.16	6.93	0.23
34	93.2	36	96.8	7.04	6.82	0.22
35	95.0	37	98.6	6.93	6.71	0.22
36	96.8	38	100.4	6.82	6.60	0.21
37	98.6	39	102.2	6.71	6.50	0.21
38	100.4	40	104.0	6.60	6.40	0.20
39	102.2	41	105.8	6.50	6.31	0.20
40	104.0	42	107.6	6.40	6.21	0.19

DO concentrations calculated according to an equation by Weiss, as described at:
<http://water.usgs.gov/admin/memo/QW/qw81.11.html>³⁵

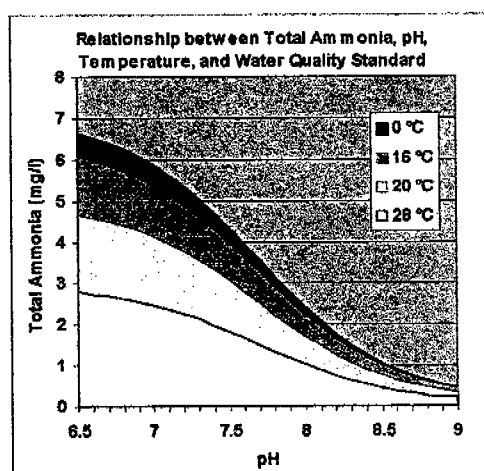
³⁴ Table compiled by Martin Christ, Environment and Natural Resource Dialogs, 219 Wall St., Morgantown, WV 26505. 6/23/06.

Thus we strongly recommend that the 2-degree temperature de minimis be removed and that temperature be reviewed consistent with standard protocol.

Fecal Coliform – Fecal coliform is an important pollutant of concern as it indicates the likelihood of harmful bacteria and other organisms being present in the water. WVDEP has set de minimis levels for fecal coliform at 200/100 ml monthly average and 400/100 ml daily maximum. The assumption is that these levels do not in any instance cause significant harm. As noted previously, WVDEP has not provided any justification for this assumption in their briefing document.

Further, effluent discharged with fecal coliform levels of 200/100 ml monthly average and 400/100 ml daily maximum may contain harmful organisms resistant to treatment at the plant, for example *Giardia* and *Cryptosporidium*. Small number of resistant organisms could readily cause significant public health issues. Thus, the inclusion of this de minimis levels is inappropriate and should be deleted.

PH – As shown by the diagram³⁶ below, changes in pH maintained within 6 – 9 can cause significant changes in the total ammonia criterion. This change can be significant in and of itself.



Relationship between Total Ammonia, pH, Temperature, and the Chronic Ammonia Water Quality Standard.

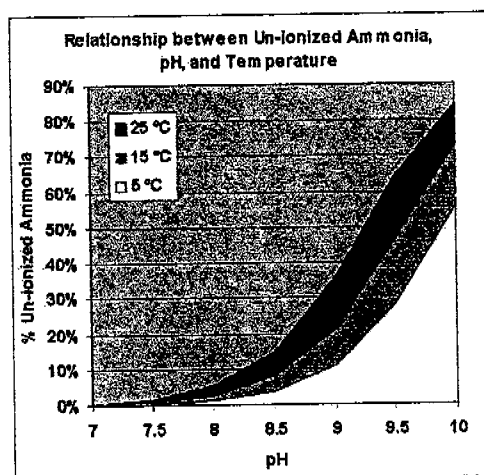
For example, increasing the instream pH from 6.5 to 8 can decrease the total ammonia criterion from approximately 2.5 mg/l to 1 mg/l (at 28 degree C.) – meaning a significant increase in the

³⁵ Note the chart applies to any water non saline waters at equilibrium with the atmosphere. It is more easily applied to streams, where tumbling over rocks exposes more of the water to the air. The numbers indicate where the water conditions before life impacts are present. Life can cause the water to be unequilibrated. In the case of fish and decomposition, life will consume DO faster than it will diffuse back in from the atmosphere, and the DO concentrations will be lower than these equilibrated numbers. Where photosynthesis is occurring, life will raise add DO faster than it will escape to the atmosphere, and the DO concentrations will be greater than the equilibrium concentrations.

³⁶ Charts provided by Neil Gillies of the Cacapon Institute.

toxicity of ammonia already present in the stream. The decrease in the criterion to 40% of what it was is obviously a significant change.

In addition, as pH increases the percent of unionized harmful ammonia increases even within a pH of 6-9 as shown by the chart below.³⁷



Relationship between un-ionized Ammonia, pH, and temperature.

Another example is related to aluminum. Aluminum is relatively insoluble at pH 6 to 8 but the solubility of Al increases under somewhat more alkaline or acidic conditions. If a tributary of low pH and relatively high Al flows into a stream with neutral to elevated pH a mixing zone of increased toxicity can occur – where during equilibration aluminum precipitates on gills and is toxic to fish. The toxicity of these mixing zones is greater than that in the original acidic water before mixing.³⁸ (Poleo, 1994).

Another study focused on mixing zones of Al laden water. Mixing of acid river water containing pH 5.1, total acid reactive aluminum 345 ug/l with neutral water of a lake (pH 7.0, total acid reactive aluminum 73 ug/l) resulted in water with pH of 6.4 and Al of 245 ug/l. The resultant water was expected to be of relatively low toxicity based on current toxicity models. However, under semi-field conditions the freshly mixed water in minutes proved to be highly acutely toxic to brown trout. This phenomenon will be detrimental to migrating trout in natural conditions. While this example covered pH's somewhat below the water quality criterion, it is also true for situations within the pH of 6 – 9 and demonstrates impacts of discharges whose pH differs dramatically from the receiving stream.³⁹ Those discharges could cause toxic mixing zones of disparate pH's that would seriously harm fish.

³⁷ Id.

³⁸ Poleo, A.B.S., Lydersen, E., Rosseland, B.O., Kroglund, F., Salbu, B., Vogt, R.D., and Kvellestad, A. 1994. Increased Mortality of Fish due to Changing Al-Chemistry of Mixing Zones Between Lined Streams and Acidic Tributaries. *Water, Air and Soil Pollution*. 75:339-351.

³⁹ Verboost, P.M., Berntssen, M.H.G., Kroglund, F., Lydersen, E., Witters, H.E., Rosseland, B.O., Salbu, B., Wendelaar Bonga, S.E. 1995. The Toxic Mixing Zone of Neutral and Acidic River Water: Acute Aluminum Toxicity in Brown Trout. *Water, Air, and Soil Pollution*. 85:341-346.

The above are only two examples of the importance of pH changes within the 6 – 9 range. Thus, we strongly recommend that WVDEP delete the language referable to pH and treat pH in a way similar to other parameters.

5. Conclusion

In summary, we strongly support WVDEP's inclusion of 303 streams on the Tier 2.5 list. This is a major step forward in the implementation of antidegradation, and we commend WVDEP for finally taking this action.

At the same time, we urge WVDEP to restore the 141 streams onto the Tier 2.5 list that were recently removed, and we request that WVDEP make changes to the proposed rule as required by the judge's decision in the 2004 lawsuit.

Sincerely,

Liz Garland
Executive Director
West Virginia Rivers Coalition

Margaret Janes
Senior Policy Analyst
Appalachian Center for the Economy and
the Environment

Cindy Rank
Mining Chair
West Virginia Highlands Conservancy

Don Garvin
Legislative Coordinator
West Virginia Environmental Council

Paul Burke
Stewards of the Potomac Highlands

Kevin Colburn
National Stewardship Director
American Whitewater

Gary P. Cooper
President
Greenbrier River Watershed Association

Mark Ehrnschwender
Chair
Plateau Action Network

Winnie Fox

Helen Gibbins
League of Women's Voters—WV

Larry Gibson
Stanley Heirs Foundation and
Keepers of the Mountain

Vernon Haltom
Executive Assistant
Coal River Mountain Watch

Regina Hendrix

Keith Pitzer
Executive Director
Friends of the Cheat

Deana Smith
President
Friends of the Little Kanawha

Norm Steenstra
Executive Director
West Virginia Citizens Action Group

Vivian Stockman
Project Coordinator
Ohio Valley Environmental Coalition

Ron Wilson
President
Friends of the Cacapon River

Paul Wilson
Chapter Chair
West Virginia Sierra Club



July 10, 2006

VIA HAND DELIVERY

Ms. Lisa McClung, Director
Division of Water and Waste Management
Department of Environmental Protection
Division of Water Waste Management
601 57th Street
Charleston, WV 25301
Attn: Tier 2.5

Re: **Tier 2.5 – Antidegradation Implementation**

Dear Director McClung:

On behalf of the Independent Oil and Gas Association of West Virginia ("IOGA"), I am submitting comments regarding the final list of Tier 2.5 streams proposed by the West Virginia Department of Environmental Protection ("DEP"). By letter dated December 30, 2005, IOGA provided its initial comments and objections to the DEP's list of Tier 2.5 streams and the procedures the agency employed to create it.

IOGA was pleased to see that the DEP had removed certain streams from the original presumptive list of 444 streams for the reason that the streams were adjacent to areas with demonstrated natural resources. The procedures for designating a stream as a Tier 2.5 water contained in Sec. 8.1.a.2.E of the Antidegradation Implementation Procedures states that the DEP must consider the impact on economic development in the area along the streams, including any impact on the development of demonstrated natural resources. It was clear that this impact had not been evaluated in the creation of the "Presumptive List" of Tier 2.5 waters. In applying this broader view in making the Tier 2.5 determinations, we believe the DEP has included a balancing of interests not incorporated in the development of the initial Presumptive List. We applaud the agency for this action.

In the Antidegradation/Tier 2.5 background document that the DEP produced with this final list of Tier 2.5 streams, the Agency responded to the comments of IOGA and others that the DEP had shifted the burden of proof in contravention of the clear intent of the Antidegradation rule. The DEP's response, however, does not adequately address IOGA's December 30, 2005 comments about the burden shifting. Instead, the DEP merely stated that many commenters did not provide specific information about why the stream should be removed. This response does not acknowledge the crux of

INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA

405 Capitol Street, Suite 507 Charleston, WV 25301 Phone (304) 344-9867 Fax (304) 344-5836

IOGA's earlier comment: that under the Antidegradation rule, the DEP was clearly identified as the entity that bore the burden to justify a stream's inclusion. Our position on this very important issue has not changed. Furthermore, it appears from the DEP's response, commenters who argued that certain mineral development information was confidential business information were penalized for failing to reveal what they considered proprietary information. For these reasons, IOGA renews its objections to the DEP's burden shifting.

In addition to the foregoing comments, IOGA has participated with the interested parties known as the Antidegradation Coalition in the review of DEP's proposed action in this rule-making. IOGA joins in that group's comments filed by letters dated December 30, 2005 and July 10, 2006 and incorporates those comments by reference into this letter.

IOGA appreciates the opportunity to provide these comments on the final list of Tier 2.5 streams and looks forward to the DEP's response to our concerns.

Very truly yours,

Robert Radabaugh / by ABM

Robert Radabaugh
Chairman, IOGA Environmental Committee

Barbara Ann Wilson Zizzi
P.O. Box 1277
Elkins, WV 26241

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of the West Fork of the Greenbrier River (KNG-79) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the West Fork of the Greenbrier River (KNG-79).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the West Fork of the Greenbrier River (KNG-79). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove the West Fork of the Greenbrier River (KNG-79)** from the 2.5 stream classification.

Sincerely,

Barbara Ann Wilson Zizzi /amp

Barbara Ann Wilson Zizzi
Property Owner

Barbara Ann Wilson Zizzi

P.O. Box 1277

Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
West Fork of the Greenbrier River (KNG-79)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the West Fork of the Greenbrier River on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider qualification criteria and may designate nominated waters as Tier 2.5, but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. Please direct your attention to the justification for listing the West Fork of the Greenbrier River on the Tier 2.5 list provided with your September 26, 2005 letter to me, which states that the listing is based on a survey confirming the presence of a reproducing trout population which was conducted by the West Virginia Division of Natural Resources in 1978 in which native brook trout were found. Neither the text, nor the attachments provide information on the 25+ year old survey that could support or refute the presence of a reproducing trout population. Data which I reviewed resulting from a Freedom of Information Act request to your agency were incomplete and inadequate to determine the presence of a reproducing trout population. Further, the West Fork of the Greenbrier River is stocked with trout in the stream reach which is listed on the Tier 2.5 list. There is evidence that stocking trout into a naturally reproducing stream harms the native or wild trout population due to several factors including competition for resources, the introduction of disease, and the incorporation of weaker hatchery reared individuals into the population. Either the stocking program has inadvertently been continuing a practice which is detrimental to this naturally reproducing population and may have, over the last 25 years damaged or eliminated the population, or the reach is simply a stocked stream and not the habitat of a naturally reproducing population. In either case, the information presented to support the listing is not sufficient to establish the presence of a reproducing population. I request that the Agency reject the nomination of the stream for the Tier 2.5 stream list as the burden of the demonstration falls on the nominating party.

The statement in your Justification for Continued Inclusion of the West Fork of the Greenbrier River on the Tier 2.5 List regarding the location of public lands is incorrect. Page 3 of that document states: "The stream scored well on the WV Stream Condition Index and is located entirely on public

Ms. Lisa McClung
December 16, 2005
Page 2

land." That statement is incorrect. As you can see from the attached map (Attachment I) roughly indicating my property boundaries, there is private property adjacent to the stream. Please reconsider your statement and my objections in light of this oversight.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the West Fork of the Greenbrier River watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of the West Fork of the Greenbrier River on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the West Fork of the Greenbrier River from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

Barbara Ann Wilson Zizzi

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

**John T. Wilson
P.O. Box 1277
Elkins, WV 26241**

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

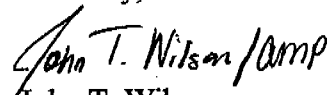
On December 16, 2005 we properly and timely forwarded our protest of the West Fork of the Greenbrier River (KNG-79) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the West Fork of the Greenbrier River (KNG-79).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the West Fork of the Greenbrier River (KNG-79). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove the West Fork of the Greenbrier River (KNG-79)** from the 2.5 stream classification.

Sincerely,


John T. Wilson
Property Owner

**John T. Wilson
P.O. Box 1277
Elkins, WV 26241**

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
West Fork of the Greenbrier River (KNG-79)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the West Fork of the Greenbrier River on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider qualification criteria and may designate nominated waters as Tier 2.5, but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. Please direct your attention to the justification for listing the West Fork of the Greenbrier River on the Tier 2.5 list provided with your September 26, 2005 letter to me, which states that the listing is based on a survey confirming the presence of a reproducing trout population which was conducted by the West Virginia Division of Natural Resources in 1978 in which native brook trout were found. Neither the text, nor the attachments provide information on the 25+ year old survey that could support or refute the presence of a reproducing trout population. Data which I reviewed resulting from a Freedom of Information Act request to your agency were incomplete and inadequate to determine the presence of a reproducing trout population. Further, the West Fork of the Greenbrier River is stocked with trout in the stream reach which is listed on the Tier 2.5 list. There is evidence that stocking trout into a naturally reproducing stream harms the native or wild trout population due to several factors including competition for resources, the introduction of disease, and the incorporation of weaker hatchery reared individuals into the population. Either the stocking program has inadvertently been continuing a practice which is detrimental to this naturally reproducing population and may have, over the last 25 years damaged or eliminated the population, or the reach is simply a stocked stream and not the habitat of a naturally reproducing population. In either case, the information presented to support the listing is not sufficient to establish the presence of a reproducing population. I request that the Agency reject the nomination of the stream for the Tier 2.5 stream list as the burden of the demonstration falls on the nominating party.

The statement in your Justification for Continued Inclusion of the West Fork of the Greenbrier River on the Tier 2.5 List regarding the location of public lands is incorrect. Page 3 of that document states: "The stream scored well on the WV Stream Condition Index and is located entirely on public

Ms. Lisa McClung
December 16, 2005
Page 2

land." That statement is incorrect. As you can see from the attached map (Attachment I) roughly indicating my property boundaries, there is private property adjacent to the stream. Please reconsider your statement and my objections in light of this oversight.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the West Fork of the Greenbrier River watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of the West Fork of the Greenbrier River on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the West Fork of the Greenbrier River from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

John T. Wilson

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

**James F. Wilson
P.O. Box 1277
Elkins, WV 26241**

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

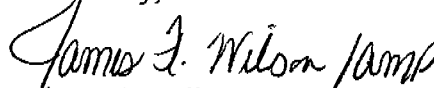
On December 16, 2005 we properly and timely forwarded our protest of the Left Fork of Files Creek (MT-50-B) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the Left Fork of Files Creek (MT-50-B).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the Left Fork of Files Creek (MT-50-B). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove the Left Fork of Files Creek (MT-50-B)** from the 2.5 stream classification.

Sincerely,

A handwritten signature in dark ink, appearing to read "James F. Wilson /amp". The signature is fluid and cursive, with a large initial "J" and a stylized "W".

James F. Wilson
Property Owner

James F. Wilson
P.O. Box 1277
Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.,
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Left Fork of Files Creek (MT-50-B)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the Left Fork of Files Creek (MT-50-A) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this segment of stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider the qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. As indicated in my previous correspondence dated July 31, 2005, the data relied upon for classifying this stream as a reproducing trout stream are insufficient to support the designation. Please refer to your justification for listing the Right Fork of Files Creek on the Tier 2.5 list provided with your September 26, 2005 letter which states that trout streams must have documented reproducing trout populations. Your letter further states that a survey confirming this reproduction was conducted by the West Virginia Division of Natural Resources in 1984 when native brook trout were found. The presence of native brook trout does not indicate that a reproducing population of trout exists as they are widely stocked in Randolph County. That survey did not document, or appear to attempt to document, reproduction in the population. Nine brook trout were found representing two size classes. The documentation from that survey does not indicate gravid females (despite the impending breeding season), young of the year, the presence of redds, or any other supporting information indicating reproduction was ongoing in the Left Fork of Files Creek.

Additionally, recent habitat evaluations provide with your September 26, 2005 letter indicate habitat problems in the Right Fork of Files Creek such that conditions may not be similar to those found over 20 years ago when trout were present. The habitat evaluation conducted in 2002 indicated reduced bank cover and riparian vegetation which are necessary to provide temperatures regimes suitable for trout survival. Even if a reproducing trout population had existed there 20 years ago (a point which has not been established), there is certainly no evidence that a population exists there currently.

As the 1984 survey failed to establish a reproducing population and there are no available recent fish surveys, there appears to be no information on which to base a Tier 2.5 listing for this stream. With no supporting documentation for the listing, I request that the nomination of the stream be

Ms. Lisa McClung
December 16, 2005
Page 2

immediately returned to the nominating party as insufficient and that the Left Fork of Files Creek be removed from the Tier 2.5 stream list.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the Left Fork of Files Creek watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of the Left Fork of Files Creek on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the Left Fork of Files Creek from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

**James F. Wilson
P.O. Box 1277
Elkins, WV 26241**

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of the Right Fork of Files Creek (MT-50-A) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the Right Fork of Files Creek (MT-50-A).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the Right Fork of Files Creek (MT-50-A). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove the Right Fork of Files Creek (MT-50-A)** from the 2.5 stream classification.

Sincerely,

A handwritten signature in cursive script that reads "James F. Wilson / amo".

James F. Wilson
Property Owner

**James F. Wilson
P.O. Box 1277
Elkins, WV 26241**

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S.E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Right Fork of Files Creek (MT-50-A)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the Right Fork of Files Creek (MT-50-A) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this segment of stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider the qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. As indicated in my previous correspondence dated July 31, 2005, the data relied upon for classifying this stream as a reproducing trout stream are insufficient to support the designation. Please refer to your justification for listing the Right Fork of Files Creek on the Tier 2.5 list provided with your September 26, 2005 letter which states that trout streams must have documented reproducing trout populations. Your letter further states that a survey confirming this stream's station was conducted by the West Virginia Division of Natural Resources in 1984 when native brook trout were found. The presence of native brook trout does not indicate that a reproducing population of trout exists as they are widely stocked in Randolph County. That survey did not document, or appear to attempt to document, reproduction. The eight brook trout which were found were all of similar length which would leave to believe that they were possibly stocked fish. The documentation from that survey does not indicate multiple size classes, gravid females, young of the year, the presence of redds, or any other supporting information indicating reproduction.

Additionally, recent stream evaluations provide with your September 26, 2005 letter indicate habitat problems in the Right Fork of Files Creek such that conditions may not be similar to those found over 20 years ago when trout were present. The habitat evaluation conducted in 2002 indicated channel alterations and sediment deposition with limitations in bank cover and riparian vegetation which is necessary to provide temperatures suitable for trout survival. In addition to the reduced total habitat scores, the benthic macroinvertebrate community's West Virginia Stream Condition Index Score from the 2002 survey was not indicative of an undisturbed watershed. Even if a reproducing trout population had existed there 20 years ago (a point which was never established), there is certainly no evidence that a population exists there currently.

As the 1984 survey failed to establish a reproducing population and there are no available recent fish surveys, there appears to be no information on which to base a Tier 2.5 listing for this stream. With

Ms. Lisa McClung
December 16, 2005
Page 2

no supporting documentation for the listing, I request that the nomination of the stream be immediately returned to the nominating party as insufficient and that the Right Fork of Files Creek be removed from the Tier 2.5 stream list.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the Right Fork of Files Creek watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of the Right Fork of Files Creek on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the Right Fork of Files Creek from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

**James F. Wilson
P.O. Box 1277
Elkins, WV 26241**

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of the West Fork of the Greenbrier River (KNG-79) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the West Fork of the Greenbrier River (KNG-79).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the West Fork of the Greenbrier River (KNG-79). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to remove the West Fork of the Greenbrier River (KNG-79) from the 2.5 stream classification.

Sincerely,


James F. Wilson
Property Owner

**James F. Wilson
P.O. Box 1277
Elkins, WV 26241**

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
West Fork of the Greenbrier River (KNG-79)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the West Fork of the Greenbrier River on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider qualification criteria and may designate nominated waters as Tier 2.5, but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. Please direct your attention to the justification for listing the West Fork of the Greenbrier River on the Tier 2.5 list provided with your September 26, 2005 letter to me, which states that the listing is based on a survey confirming the presence of a reproducing trout population which was conducted by the West Virginia Division of Natural Resources in 1978 in which native brook trout were found. Neither the text, nor the attachments provide information on the 25+ year old survey that could support or refute the presence of a reproducing trout population. Data which I reviewed resulting from a Freedom of Information Act request to your agency were incomplete and inadequate to determine the presence of a reproducing trout population. Further, the West Fork of the Greenbrier River is stocked with trout in the stream reach which is listed on the Tier 2.5 list. There is evidence that stocking trout into a naturally reproducing stream harms the native or wild trout population due to several factors including competition for resources, the introduction of disease, and the incorporation of weaker hatchery reared individuals into the population. Either the stocking program has inadvertently been continuing a practice which is detrimental to this naturally reproducing population and may have, over the last 25 years damaged or eliminated the population, or the reach is simply a stocked stream and not the habitat of a naturally reproducing population. In either case, the information presented to support the listing is not sufficient to establish the presence of a reproducing population. I request that the Agency reject the nomination of the stream for the Tier 2.5 stream list as the burden of the demonstration falls on the nominating party.

The statement in your Justification for Continued Inclusion of the West Fork of the Greenbrier River on the Tier 2.5 List regarding the location of public lands is incorrect. Page 3 of that document states: "The stream scored well on the WV Stream Condition Index and is located entirely on public

Ms. Lisa McClung
December 16, 2005
Page 2

land." That statement is incorrect. As you can see from the attached map (Attachment I) roughly indicating my property boundaries, there is private property adjacent to the stream. Please reconsider your statement and my objections in light of this oversight.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the West Fork of the Greenbrier River watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of the West Fork of the Greenbrier River on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the West Fork of the Greenbrier River from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

**Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241**

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of the Right Fork of the Buckhannon River (MTB-31) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the Right Fork of the Buckhannon River (MTB-31).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the Right Fork of the Buckhannon River (MTB-31). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove the Right Fork of the Buckhannon River (MTB-31)** from the 2.5 stream classification.

Sincerely,

RUTHBELL LUMBER COMPANY

A handwritten signature in dark ink, appearing to read "James F. Wilson /amp". The signature is fluid and cursive, with a large initial "J" and a stylized "W".

James F. Wilson
President

Ruthbell Lumber Company

P.O. Box 1277

Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Right Fork of the Buckhannon River (MTB-31)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the Right Fork of the Buckhannon River (MTM-31) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider the qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. The justification for listing Buckhannon River on the Tier 2.5 list provided with your September 26, 2005 letter to me indicated that a survey confirming reproduction was conducted by the West Virginia Division of Natural Resources in 2004 and brook trout were found. According to that same document, the presence of trout does not meet the criteria for inclusion on the 2.5 list. To meet a trout stream designation, the stream must have a documented reproducing trout population. As you are undoubtedly aware, the Right Fork of the Buckhannon River is stocked with trout. There are no data included from the 2004 survey to demonstrate that the criteria for listing have been met. In response to a Freedom of Information Act request pertaining to the data used for listing this stream segment, I was not provided with data from a 2004 survey but was given information from surveys conducted in 1982 and 1995. The 1982 survey found only one brown trout which was clearly a stocked individual in 0 – 10 inch size range. The 1995 survey found a single brook trout in the 0-3 inch size range. Neither surveys indicated sufficient numbers of trout to even establish that stocked fish could survive year round. Neither survey indicated multiple size classes, gravid females, the presence of spawning redds, young of the year, or any other supporting information indicating reproduction. Further, both surveys indicated fish communities dominated by warm water species such as blacknose dace and creek chubs which are not commonly found in native brook trout habitat. With two surveys indicating otherwise, it appears unlikely that the 2004 survey referenced in your September 26, 2005 letter would have established a reproducing trout population. Rather it may have documented, as indicated in your letter, that native brook trout were found. However, I formally request to be provided the additional data and given the opportunity to comment on the data which the Agency used for listing the stream reach as is provided to me in 60 CSR 5-8.1.a.1.B.

Unless the Agency provides other supporting information, there appears to be no supporting

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of the Right Fork of Chenoweth Creek (MT-45-C) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing the Right Fork of Chenoweth Creek (MT-45-C).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to the Right Fork of Chenoweth Creek (MT-45-C). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove the Right Fork of Chenoweth Creek (MT-45-C)** from the 2.5 stream classification.

Sincerely,

RUTHBELL LUMBER COMPANY


James F. Wilson
President

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Right Fork of Chenoweth Creek (MT-45-C)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of the Right Fork of Chenoweth Creek (MT-45-C) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider the qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. Please direct your attention to the justification for listing the Right Fork of Chenoweth Creek on the Tier 2.5 list provided with your September 26, 2005 letter to me which states that the listing is based on a survey confirming the presence of reproducing trout populations which was conducted by the West Virginia Division of Natural Resources in 1984 in which native brook trout were found. Neither the text, nor the attachments provide information on the 20+ year old survey that could support or refute the presence of reproducing trout populations. Data which I reviewed based on a Freedom of Information Act request to the West Virginia Department of Natural Resources (WVDNR) were incomplete and inadequate to determine the presence of a reproducing trout population. I again request that the Agency reject the nomination of the stream for the Tier 2.5 stream list as the data provided are insufficient to support the listing as the burden of the demonstration falls on the nominating party.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the Right Fork of Chenoweth Creek watershed, and other watersheds, are investments in my future

Ms. Lisa McClung
December 16, 2005
Page 2

and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of the Right Fork of Chenoweth Creek on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the Right Fork of Chenoweth Creek from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson
President

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of Alec Run (MTB-31-C) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing Alec Run (MTB-31-C).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to Alec Run (MTB-31-C). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove Alec Run (MTB-31-C)** from the 2.5 stream classification.

Sincerely,

RUTHBELL LUMBER COMPANY

A handwritten signature in cursive script that reads "James F. Wilson /amp".

James F. Wilson
President

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S.E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Alec Run (MTB-31-C)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of Alec Run (MTB-31-C) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. The justification for listing Alec Run on the Tier 2.5 list provided with your September 26, 2005 letter to me indicated that a survey confirming a reproducing stream was conducted by the West Virginia Division of Natural Resources in 1982 and brook trout were found. According to that same document, the presence of trout does not meet the criteria for inclusion on the 2.5 list. In fact, the stream reach in question is a tributary to the Right Fork of the Buchkannon River which receives regular stocking. To meet a trout stream designation, the stream must have a documented naturally reproducing trout population. In response to a Freedom of Information Act (FOIA) request pertaining to the data used for listing this stream segment, I was provided information from surveys conducted in 1982. The 1982 survey found 2 brook trout in the 0-4 inch size range and 10 brook trout in the 3-7 inch range. Each of the fish may have been 4 inches long; there is no information to indicate otherwise. The survey did not indicate multiple size classes, gravid females, the presence of spawning redds, young of the year, or any other supporting information indicating the presence of a reproducing population. The survey was conducted in early October and some evidence of spawning should have been noticeable if it were occurring. I must also object to the quality of data used for this listing. Upon response to my FOIA, I received information from this 25-year old survey on Agency forms which appear to have been revised in 1997. This would indicate to me that I did not receive the original data and I formally request, again, to be provided with all of information the Agency has pertaining to this stream reach.

A 25-year old survey indicating a single size class of brook trout in a tributary of a stocked stream does not appear to meet the criteria for listing on the Tier 2.5 list. I request that either sufficient information be provided to warrant the listing of Alec Run on the Tier 2.5 list or that the nomination

Ms. Lisa McClung
December 16, 2005
Page 2

of the stream be immediately returned to the nominating party as insufficient and the stream be removed from the Tier 2.5 stream list.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the Alec Run watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of Alec Run on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove the Alec Run from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson
President

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of Laurel Run (MTM-22) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing Laurel Run (MTM-22).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to Laurel Run (MTM-22). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to remove Laurel Run (MTM-22) from the 2.5 stream classification.

Sincerely,

RUTHBELL LUMBER COMPANY

A handwritten signature in dark ink, appearing to read "James F. Wilson / amp".

James F. Wilson
President

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Laurel Run (MTM-22)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of Laurel Run (MTM-22) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider the qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. The justification for listing Laurel Run on the Tier 2.5 list provided with your September 26, 2005 letter to me indicated that a survey confirming reproduction was conducted by the West Virginia Division of Natural Resources in 1995 and brook trout were found. According to that same document, the presence of trout does not meet the criteria for inclusion on the 2.5 list. To meet a trout stream designation, the stream must have documented reproducing trout populations. Laurel Run is a tributary of Middle Fork which is stocked with trout in the area of the confluence of the streams. The presence of trout in the tributary would not be unexpected. The data provided to me via Freedom of Information Act request included information from the 1995 survey, however inconsistencies in the information make interpretation of the data impossible. The stream survey data form indicates that the survey was conducted August 4, 1995 while the form completed was revised in January 1997; so the actual date of the survey is questionable. Further, while the form indicates that 21 brook trout were found, it states that their sizes ranged from 60 to 184 inches. Clearly this information is incorrect and has not been subjected to appropriate quality assurance procedures which are required for data to be considered valid. The survey did not indicate multiple size classes, gravid females, the presence of spawning redds, young of the year, or any other supporting information indicating reproduction. Further, the survey did indicate that the presence of warm water species such as blacknose dace and creek chubs.

The information provided by the Agency does not support the presence of a reproducing trout population. As the burden of meeting this demonstration falls to the nominating party, I request that the nomination of the stream be immediately returned to the nominating party as insufficient and that Laurel Run be removed from the Tier 2.5 stream list.

Ms. Lisa McClung
December 16, 2005
Page 2

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the Laurel Run watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of Laurel Run on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove Laurel Run from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson
President

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

July 7, 2006

Attn: Lisa A. McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
6011 57th Street, S.E.
Charleston, WV 25304

Dear Ms. McClung,

On December 16, 2005 we properly and timely forwarded our protest of Getout Run (LK-131) being included on the listing of 2.5 streams. It was our understanding that your department would respond to our specific objections stating the reason(s) our objections were denied.

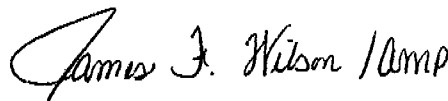
We have received no acknowledgment to our letter (other than the return postal receipt of certified mail delivery), yet we find that the above listed stream continues to be listed on those streams now being considered for the 2.5 classification. Further, your responsiveness summary does not adequately speak to our objections for listing Getout Run (LK-131).

It is our belief that our protest has not received your consideration and that your department has not performed its assigned duty to respond specifically to each protest submitted by affected property owners. We did receive a notice that additional comments/protests may be submitted by July 10th before the finalization of the listing of 2.5 streams for legislative review. We therefore send another timely letter of our protest to the assignment of a 2.5 Stream status assignment to Getout Run (LK-131). A copy of our original protest letter is attached hereto to allow your specific comment response.

We urge you to **remove Getout Run (LK-131)** from the 2.5 stream classification.

Sincerely,

RUTHBELL LUMBER COMPANY

A handwritten signature in cursive script that reads "James F. Wilson /amp".

James F. Wilson
President

Ruthbell Lumber Company
P.O. Box 1277
Elkins, WV 26241

COPY

December 16, 2005

Ms. Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street. S. E.
Charleston, West Virginia 25304

RE: Tier 2.5 Objection
Getout Run (LK-131)

I have received your letter dated September 26, 2005 in response to my objections to the inclusion of Getout Run (LK-131) on the final Tier 2.5 list. Upon review of the response you provided it remains apparent that the West Virginia Department of Environmental Protection (WVDEP) (now referred to as the Agency, formally the Board as referenced in 60CSR5) has not met the requirements for listing this segment of stream on the Tier 2.5 stream list and I again formally object to the stream's inclusion on the list.

According to §60-5-8.1a the Agency shall consider the qualification criteria and may designate nominated waters as Tier 2.5 but the burden for establishing the basis for listing is placed on the nominating party. Insufficient nominations are to be returned to the nominating party by the Agency. As indicated in my previous correspondence dated July 31, 2005, the data relied upon for classifying this stream as a reproducing trout stream are insufficient to support the designation. Please refer to your justification for listing Getout Run on the Tier 2.5 list provided with your September 26, 2005 letter to me which states: "Trout Stream. To meet this designation, the stream must have a documented reproducing trout population. The survey confirming this reproduction was conducted by the West Virginia Division of Natural Resources in 1982 and native brook trout were found." While it may be true (and is it indicated in the documentation from the 1982 survey) that seven brook trout from a single size class were found; that survey was 23 years ago and did not document, or appear to attempt to document, reproduction. The documentation from that survey does not indicate multiple size classes, gravid females, young of the year, or any other supporting information indicating reproduction. There are no available recent fish surveys or any information presented on disturbances in the watershed in the last 20 years. More recent data with surveys including stream temperatures and specific age class information are necessary to establish the status of the stream.

With no supporting documentation for the listing, I request that the nomination of the stream be immediately returned to the nominating party as insufficient and that Getout Run be removed from the Tier 2.5 stream list.

Regarding your response to the concerns I raised that inclusion of the stream referenced above will severely limit my ability to develop my property and will result in future economic loss. Your September 26, 2005 letter discounted my concerns as too general and without sufficient evidence to provide a response, I strongly disagree and request that you reevaluate your position on this and all

Ms. Lisa McClung
December 16, 2005
Page 2

listed stream segments. The term "significant degradation" is arbitrarily defined as background concentration plus 10% of the remaining assimilative capacity. For any particular parameter, there is no scientific justification that this value is relevant. Yet, as indicated in §60-5-6.3.1, if any activity performed on my property would result in "significant degradation" to the stream channel, that activity "shall not be allowed." One can't get much more specific than that. The properties I own in the Getout Run watershed, and other watersheds, are investments in my future and those of my children and their children. It is not reasonable to expect that we would know today the potential land uses or development opportunities that may be considered in the future. Imposition of the Tier 2.5 designation on this stream reach limits those possibilities in a tangible way. From the day the stream is placed on the list there are innumerable development alternatives which are no longer possible due to the inability to gain necessary permits. Even under Tier 2.0 protection, mechanisms exist to allow property owners to use their property while demonstrating that every effort is undertaken to minimize degradation. This is not available to property owners on streams listed on the Tier 2.5 stream list.

Clearly, the data presented supporting the inclusion of Getout Run on the Tier 2.5 stream list are inadequate. Further, your consideration of the effect this listing will have on me, as the property owner, and future generations of my family are simplistic and trivialize the importance of the designation. I respectfully request that you reevaluate the Agency position on the listing and remove Getout Run from the Tier 2.5 stream list.

I want to thank you for giving me the opportunity to comment on this action.

Sincerely,

James F. Wilson
President

c: Governor Manchin
Secretary Timmermeyer
Senator Walt Helmick
Delegate Bill Proudfoot
Delegate Bill Hartman

From: Elizabeth Byers <ebyers@mountain.org>
To: <antideg@wvdep.org>
Date: Sun, Jul 9, 2006 6:15 PM
Subject: Comment on Antidegradation Rule

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

I would like to voice my strong support for protecting the state's most pristine streams from pollution through inclusion in the rule 60 CSR 5, Antidegradation Implementation Procedures.

This rule is proposed to protect 303 of the state's most ecologically and economically valuable waterways (totaling 1,158 stream miles in 30 counties) as Tier 2.5 a designation that includes reproducing trout streams, waters flowing through public lands, and other waters with exceptional qualities. It includes our most pristine coldwater rivers and streams, and some of our most dynamic warmwater streams which also provide revenue through fishing and other recreational activities.

I disagree with the current proposal to remove 131 streams from the Tier 2.5 stream list previously approved by the Legislature. These are high quality streams -- including popular native trout waters such as Shavers Fork of the Cheat River and Big Spring Fork of the Elk River -- that should be reinstated to Tier 2.5 protection.

As a professional ecologist, I have personally visited many of the stream reaches in question. In particular, I would like to stress the values of four stream segments with which I have personal experience. They are:

90 MC-60-D-10 Sand Run
91 MC-60-D-11 Yoakum Run
94 MC-60-K Gladly Fork
102 MCS Shavers Fork

All of these streams have been removed due to "planned or ongoing development". In fact, the rule should protect these waters from inappropriate development, since they are clearly high quality waters. Sand Run and Yoakum Run are in the very sensitive headwaters of the Blackwater River, a statewide "hotspot" of for rare plants, animals and natural communities. Allowing these streams to become degraded would threaten the entire sensitive wetland ecosystem of Canaan Valley.

Gladly Fork contains high quality wetlands along the length of the river, in addition to excellent reproducing fish populations. Many of the wetlands are maintained by natural overflow, and would be adversely affected by degradation in either water quality or flood regime.

The Shavers Fork headwaters are one of the ecological jewels of

the state of West Virginia, and should be protected at all cost. Many rare species and sensitive natural communities occur in the headwater reach. Just downstream of the reach in question, there is globally rare riverscours vegetation which occurs in the Shavers Fork and nowhere else on earth. This riverscours vegetation is dominated by several beautiful and globally rare wildflowers, including Barbara's buttons, sticky bog-asphodel lily, and burnet. Our only opportunity to preserve this community for future generations is in the Shavers Fork, since it exists nowhere else in the world. It is solely West Virginia's responsibility to be a good steward for these lovely and rare botanical treasures. Any change to flood regime or water quality could result in the loss of this precious natural community. The upper Shavers Fork should be reinstated to the list of Tier 2.5 streams.

I urge you to reinstate all of the 131 streams that qualify on technical grounds. The antidegradation rule allows compatible development, and is no great restriction for responsible developers. Tier 2.5 designation is not designed to prevent development activities in a watershed, rather it helps maintain its most admirable qualities such as clean water, reproducing trout populations, healthy aquatic ecosystems, and sustainable downstream communities. We should value the commonly held heritage and recreation of all West Virginians above corporate interests, especially if corporate interests are unwilling to follow best practices to keep our waters clean.

In the future, the clean water resources of West Virginia are likely to become our most valuable renewable resource. The U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually. Please don't compromise our state's economic and ecological future by "giving away" our clean water to irresponsible extractive industries.

Please extend the comment period by 45 days in order for the WVDEP to provide the public with a briefing document, to provide interested parties with more detailed information and to provide adequate time for response.

Sincerely,
Elizabeth Byers
Ecologist
Appalachian Ecology, Inc.

Antideg - Proposed antidegradation rule

From: "Robert E. Rutkowski" <rutkowski@terraworld.net>
To: <antideg@wvdep.org>
Date: 7/5/2006 9:06 PM
Subject: Proposed antidegradation rule

Lisa McClung, Director
 Division of Water and Waste Management
 WV Department of Environmental Protection
 601 57th Street SE
 Charleston, WV 25304
antideg@wvdep.org

Dear Director:

I understand the West Virginia Department of Environmental Protection (WVDEP) is currently accepting comments about a proposed antidegradation rule that will be voted upon by the Legislature.

The rule proposes removing future protections from more than 100 of West Virginia's most pristine streams—including popular native trout waters such as Shavers Fork of the Cheat River and Big Spring Fork of the Elk River.

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Antidegradation policy is designed to achieve the maintenance part of that goal: to keep clean waters clean and prevent further pollution of others.

WVDEP is currently proposing changes to the state's antidegradation implementation procedures. One of the rule's steps requires WVDEP to identify and protect higher quality waters throughout the state. Waterways designated to the list, known as Tier 2.5, receive protections adequate to maintain the integrity of their quality. Many Tier 2.5 streams include waters that are located on public lands, support reproducing trout populations, or maintain other exceptional characteristics. The future of these rivers and streams is at stake!

I SUPPORT the current strengths of the proposed rule that protect more than 300 streams as Tier 2.5. I also request that even more streams are added to the Tier 2.5 list for protection from future pollution. Supporting Tier 2.5 protection is essential to counter claims by industry and special interest groups opposed to protecting higher quality waters throughout the state.

WVDEP's proposed antidegradation implementation procedures:

Protect 303 of the state's most ecologically and economically valuable waterways (totaling 1,158 stream miles in 30 counties) as Tier 2.5— a designation that includes reproducing trout streams, waters flowing through public lands, and other waters with exceptional qualities.

Are a crucial component of the rule that will protect the state's water resources and related economics throughout future development in the state.

Protect the ecological and economical benefits of having clean water in the future—such as natural resource tourism, clean drinking water supplies, and responsible waterfront development.

Protect some of the state's most pristine coldwater rivers and streams—many of which sustain reproducing trout populations and are located on public lands.

Protect some of the state's most dynamic warmwater streams— which also provide revenue through fishing and other recreational activities.

Fulfill Clean Water Act requirements intended to protect existing water quality and prevent further pollution of the state's rivers, streams, and lakes.

Protect the "Wild and Wonderful" legacy of West Virginia by providing clean water and outstanding opportunities for future generations.

Include many popular streams such as: segments of Cranberry, Elk, and Williams rivers; the entire length of the West Fork of Greenbrier River; all of Gandy Creek in Randolph County; and the length of Seneca Creek in Pendleton County.

I REQUEST STRENGTHENING OF THE RULE

WVDEP's proposed antidegradation implementation procedures:

Unfairly targets and removes 131 streams from Tier 2.5 protection without sufficient reason—these streams must be reinstated onto the list!

Gives overriding consideration to planned or speculative coal reserve and other development, instead of following criteria outlined in Section 8.1.a.2 of the rule for removing streams from the Tier 2.5 list.

Unfairly weighs industry's opposition in the decisions to remove specific streams from the Tier 2.5 list. Many streams are delisted simply because coal mining companies, logging companies, and developers wrote letters of opposition. The letters did not provide necessary details about how Tier 2.5 protection might actually hurt their businesses.

Remove protections on numerous well-known streams, including: more than 7 miles of the headwaters of Shavers Fork in Randolph and Pocahontas counties; 31 miles of Glady Fork in Randolph and Tucker counties; all of Big Spring Fork of Elk River in Pocahontas County; all 20 miles of Loop Creek in Fayette County; most of Elkhorn Creek in McDowell County; an 11-mile stretch of Hominy Creek in Nicholas County; a nine-mile segment of the South Fork of Cherry River east of Richwood; and the six-mile stretch of Glade Creek flowing through the New River National River in Raleigh County.

Aside from proposing changes to the antidegradation implementation procedures, WVDEP has failed to respond to our 2003 antidegradation legal victory. Citizens are in the dark about WVDEP's failure to respond since WVDEP has not prepared a briefing document related to the issue. Citizens SHOULD REQUEST that WVDEP extend the comment period by 45 days in order for the agency to provide the public with a briefing document, to provide interested parties with more detailed information and to provide adequate time for response.

The U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually.

Tier 2.5 designation is not designed to prevent development activities in a watershed, rather it helps maintain its most admirable qualities—such as clean water, reproducing trout populations, healthy aquatic ecosystems, and sustainable downstream communities.

The U.S. energy policy has shifted once again toward coal reserves. Without a strong antidegradation policy, many of West Virginia's most prestigious streams—as well as many lesser known streams—will be exposed to higher amounts of heavy metals and other mining-related pollution!

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

2527 Faxon Court
Topeka, Kansas 66605-208627
P/F: 1 785 379-9671
E-mail: r_e_rutkowski@myrealbox.com



West Virginia Coal Association

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

July 10, 2006

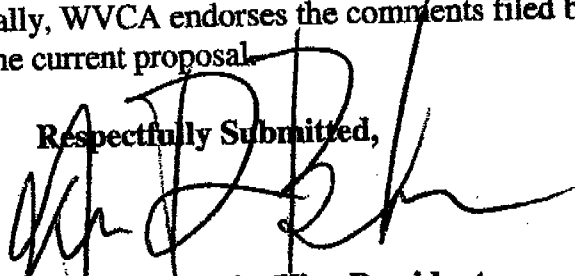
Ms. Lisa McClung, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304
Via electronic mail: pwebb@wvdep.org

Dear Director McClung:

Pursuant to the notice filed with the West Virginia Secretary of State's office on May 31, 2006, the West Virginia Coal Association (WVCA) submits the following comments and observations regarding the agency's proposed revisions to 60 CSR 5, the Anti-degradation Implementation Procedures rule.

WVCA (in concert with other industry organizations) has commented extensively on previous rulemaking efforts related specifically to the anti-deg rule and Tier 2.5 stream listings. While we appreciate the efforts of the agency to address these collective concerns, WVCA continues to believe that the deficiencies previously identified in these earlier comments have compromised the validity of the Tier 2.5 list. WVCA has attached a copy of these original comments and we request that the agency consider them as part of the current rulemaking initiative. Additionally, WVCA endorses the comments filed by the Anti-degradation Coalition on the current proposal.

Respectfully Submitted,



Jason D. Bostic, Vice-President
Regulatory & Technical Affairs

ANTIDEGRADATION COALITION

MEMBERS

Contractors
Association of
WV

WV Farm
Bureau

WV Forestry
Association

WV Coal
Association

WV
Manufacturers
Association

WV Hospitality
and Tourism
Association

WV Chamber
of Commerce

WV Business
and Industry
Council

Independent
Oil and Gas
Association of
WV

WV Oil and
Natural Gas
Association

WV Petroleum
Council

WV Municipal
League

December 30, 2005

Ms. Lisa McClung

Director

Division of Water and Waste Management

Department of Environmental Protection

601 57th Street

Charleston, West Virginia 25304

Attention: Antidegradation Tier 2.5

Dear Director McClung:

This letter is filed on behalf of the undersigned organizations who have joined together to express their concerns regarding the Department of Environmental Protection's (DEP's) proposed action with regard to the listing of Tier 2.5 waters of special concern as a part of the agency's Antidegradation Implementation Procedures ("AIP"), 60 CSR 5. The organizations that are joining in these comments, collectively referred to as the "Antidegradation Coalition" (or the "Coalition"), are the following:

Contractors Association of West Virginia
West Virginia Farm Bureau
West Virginia Forestry Association
West Virginia Coal Association
West Virginia Manufacturers Association
West Virginia Hospitality and Tourism Association
West Virginia Chamber of Commerce
West Virginia Business and Industry Council
Independent Oil and Gas Association of West Virginia
West Virginia Oil and Natural Gas Association
West Virginia Petroleum Council
West Virginia Municipal League

The organizations in the Coalition represent thousands of businesses and individuals throughout the State and are vitally concerned with its future.

Members of the Antidegradation Coalition have participated actively in stakeholders groups which preceded the adoption of the AIP, in legislative hearings and meetings which led to the passage of the AIP by the Legislature in 2001, and in the subsequent rulemaking hearings and comment periods that have been provided by the DEP in its implementation of the AIP. The extensive participation of Coalition members in these activities has been compelled because of the potentially profound implications of the AIP for both private and public development in the future in West Virginia.

Coalition groups and their members in turn strongly support protection of water quality throughout West Virginia, and join you in the belief that a healthy natural environment is one of the factors needed to assure a healthy business environment. We seek a logical, fair and effective program which protects our streams and their uses. We accept our responsibility to participate in protecting the streams and environment of our state, and we support the reasonable and necessary limitations on our activities and projects that come with that responsibility.

However, when a regulatory program goes far beyond the level needed to assure adequate environmental protection, and when a program implemented in West Virginia is more stringent than corresponding programs in states we compete with, the result is to harm the economic health and growth of West Virginia. We believe the Tier 2.5 provisions of the AIP as they have been implemented by DEP result in just such an overly restrictive program. More significantly, we believe these provisions, as implemented by the DEP, do not properly reflect the Tier 2.5 provisions of the AIP as approved by the Legislature in 2001.

Our specific objections to the DEP actions to date are many. They are summarized below.

A. PROCEDURAL ERRORS

Although the Coalition recognizes the DEP's significant efforts to fulfill its statutory assignment with regard to the Tier 2.5 list, we believe there are substantial errors to be corrected. It should also be borne in mind that the size of the task that has confronted the agency was of DEP's own making, resulting from the agency's insistence throughout the 2001 legislative process on including 444 streams throughout West Virginia on the poorly justified Initial Presumptive Listing for Tier 2.5 (the "Presumptive List").

The agency initially took the position before the Legislature that the list of 444 streams should be a final list of Tier 2.5 streams. This would have eliminated any input from the public. The public review and comment that has occurred and is occurring was required of an unwilling DEP by the Legislature and appears to have had no impact on the agency's decision-making. Significantly, despite the thousands of objections the DEP received from property owners with regard to the streams on the Tier 2.5 list, not one objection was granted for any substantive reason. The only changes made to the initial list were due to technical defects identified by DEP.

As is discussed further below, in the review and comment process that has occurred to date, it appears that the agency has significantly failed to comply with the Legislature's mandate to inform and involve private property owners in the listing process.

1. Failure to provide adequate public notice

DEP failed to comply with the requirements contained in the AIP and mandated by the Legislature for landowner notice of the presumptive Tier 2.5 stream designations, and of the right to object.

a. The DEP failed to provide any individual notice regarding Tier 2.5 streams

The AIP provide in Sec. 6.1.a.2 that the agency's first obligation is to provide "individual" notice to property owners along proposed Tier 2.5 streams of the possible designation of the stream to a higher level of regulation. Only in instances where individual notice was not "practicable" was the agency authorized to rely upon newspaper notices. The AIP required the newspaper notices to be provided in addition to, not instead of, individual notice to landowners.

Although the agency had over a year to provide the required notices in no instance did the agency conclude that individual notice was practicable. The Coalition believes that this failure to provide any individual notice was incorrect and indefensible. Property ownership maps and records such as would have been needed to prepare individual notices are readily available in each county courthouse and in the Charleston offices of the Department of Tax and Revenue. To verify the availability of this information, one coalition representative secured the names and addresses of more than 190 landowners along streams on the presumptive list in Upshur County in just two hours of research at the County Courthouse. We believe it is clear that obtaining the names and addresses of the majority of landowners along the proposed streams was in fact practicable for WVDEP.

b. The DEP provided inadequate information to property owners during the notice process

In its published legal notices DEP failed to comply with the other requirements of Sec. 6.1.a.2, in that DEP's notices did not provide adequate stream-specific "... Information set forth in subparagraphs 8.1.a.1.A through 8.1.a.1.D of this rule." Specifically, Sec. 8.1.a.1.B requires that the notice include "[t]he procedures and criteria for designation as well as the impact of the designation." The legal notices prepared by DEP contained no description of the criteria that would be applied to qualify the stream for the Tier 2.5 list. As to "the impact of the designation," the notices simply stated: "Inclusion of these water segments may impact adjacent property owner's or legal interest's ability to discharge pollutants into the water segment." No member of the general public would recognize from this description that if they chose to build a road on their property or disturb more than an acre of their land with any sort of construction, let alone do any more significant development of their land, they could be impacted by the listing. The DEP's failure to include details regarding the potential impact of a Tier 2.5 stream designation breached its obligation under the AIP with regard to the notice to be given property owners along these streams.

c. DEP provided erroneous information to property owners during public meetings held to discuss the Tier 2.5 Presumptive List

DEP compounded its public notice deficiencies during a series of public meetings it conducted in 2002 to inform the public regarding the rule and the impact of a Tier 2.5 stream designation. We appreciate that these meetings DEP arranged and conducted were a well-intended and serious effort by the agency to improve the public's knowledge of the Tier 2.5 stream designation process and impacts. We believe, however, that the

information provided at those meetings may have added to, rather than cleared up, misunderstandings.

- **Potential Impact on Existing Discharges**

Specifically, in those meetings as well as in its published information, WVDEP representatives consistently downplayed or rejected the notion that a Tier 2.5 designation would have any effect on landowners' current activities. As one example, representations were made by DEP representatives at certain of the public meetings that a Tier 2.5 designation would have no effect on existing discharges (unless expanded). The black and white provisions of the AIP show these representations to be inaccurate. Sec. 6.3.f. of the AIP clearly sets forth a procedure that allows DEP the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation.

- **Nonpoint Sources**

Many types of land-disturbing activities are generally understood to be nonpoint source in nature. The information about such activities provided by DEP representatives in the Tier 2.5 meetings constitutes an example of information that was either misleading or, it may have been accurate when stated, but due to intervening regulatory changes, is no longer correct. DEP's antidegradation presentations used in its 2002 meetings (and still available on the agency's website) included the following definition in the slide show presentation: "Point source – a discharge coming from a pipe, such as an industrial facility or wastewater treatment plant." The presentations also included a description of nonpoint sources which confirmed the general understanding that oil and gas operations, forestry operations, agriculture, and construction activities are nonpoint sources.

Having presented these point source and nonpoint source definitions to citizens, DEP then repeatedly stated in the meetings that antidegradation procedures and Tier 2.5 streams would not affect those activities it described as nonpoint sources. A review of DEP's permitting activities and the agency's own information related thereto, however, reveals that the information DEP disseminated to the public regarding these types of activities is not accurate.

Land development and construction activities, and even agriculturally-related construction activities which disturb an aggregate of greater than one acre are required to register and obtain coverage under the WV/NPDES General Water Pollution Control Permit for Storm Water Associated with Construction Activities (currently Permit No. WV0115924) ("Construction General Permit"). This permit and its accompanying information make it clear that DEP intends that anyone who proposes an activity requiring a stormwater permit which involves a discharge on a Tier 2.5 stream or anywhere in the watershed upstream of a Tier 2.5 stream segment will in fact be affected, and substantially so, because of the Tier 2.5 designation of the stream. (The additional burdens this specific permit imposes on activities on Tier 2.5 streams are further discussed in the next section below.)

In the context of this Construction General Permit DEP clearly describes and applies a much broader definition of "point source" than was suggested in its Antidegradation slide

presentations and public meetings. Regardless of which of the conflicting agency definitions of point source and nonpoint source is correct, the problem is that DEP clearly gave the public erroneous information during its public notice and public meeting process regarding those activities the agency defined in the meetings as nonpoint sources.

Many potentially affected citizens and landowners received, and likely accepted at face value, this erroneous information from DEP. These people could have made their Tier 2.5 stream-related decisions based on the mistaken belief that any "nonpoint source" activities (as defined by DEP itself in 2002) they plan, would not be affected by a Tier 2.5 designation. DEP must act to assure that these citizens receive accurate information regarding this critical issue.

- *Individual review of general permit registrations*

DEP repeatedly stated in the public meetings that no individual antidegradation review would be required for general permit registrations. These statements have proven to be inaccurate. Sec. 3.7 of the AIP - while providing that antidegradation review will not be required for activities covered by general permits on Tier 2 streams - makes it clear that this exemption does not apply to activities covered by general permits on Tier 2.5 streams. The effect of this provision can be enormous.

For example, DEP's Construction General Permit, referenced above, and its accompanying information make it clear that anyone who proposes an activity which must have a stormwater permit which involves a discharge on a Tier 2.5 stream or anywhere in the watershed upstream of a Tier 2.5 stream segment will in fact be affected, and substantially so, because of the Tier 2.5 designation of the stream. Activities on Tier 2.5 streams seeking to be covered by the Construction General Permit are required to do much more comprehensive and costly studies, and to undergo a far more extensive permit review process with an outcome that is at best uncertain. This review process entails (directly contrary to DEP's 2002 claims) an individual antidegradation review of the activity, and a ninety day public notice and comment period. In addition, persons seeking coverage under this general permit must implement additional stream protection measures including but not limited to maintaining an undisturbed buffer zone one hundred feet in width on both sides of the stream.

We are not taking the position that these provisions are not appropriate for streams that truly qualify for and in fact merit Tier 2.5 protection. The goal for these streams is, after all, to have no significant degradation. Further, it may be that some development activities can occur on such streams and still meet the stringent requirements that would be applied to them, assuming enough money is spent to meet them. Our objection is that the DEP has not accurately portrayed this impact to property owners. We further believe that the fact that there have been no objections filed with regard to the inclusion of a stream on the Tier 2.5 list does not necessarily mean that landowners along those streams would not have objected to such a listing and attempted to provide information relevant to this rulemaking process had they been provided adequate accurate information concerning the likely impact of such a listing on the future development of their property.

2. DEP Failed to Make the Findings with Regard to Private Property Takings Required by Statute

In carrying out its mandatory process for the presumptive Tier 2.5 list, the DEP also failed to adequately address its obligations under the West Virginia Private Real Property Protection Act ("PRPA"), 22-1A-1 *et. seq.* PRPA imposes requirements upon the DEP to ensure the protection of private property rights as afforded by the State and United States Constitutions. With regard to Tier 2.5 specifically, the DEP was required to "[a]ssure compliance with all provisions of article one-a of chapter 22," (see 60 CSR 5-6.1.a.1). To date, however, there is scant evidence of the DEP's effort to comply with this requirement. Instead, in listing streams for Tier 2.5 protections, with a high likelihood of impacts that could deprive at least some property owners of all productive uses of his or her property, the DEP has simply failed to address the matter. It is not enough in such a circumstance for the DEP to rely on general positions that non-point sources will not be affected as long as BMPs are used, or that "some" development will be allowed in most instances. A taking of all productive uses of even one owner's property not only requires compensation, but requires action by the DEP under the PRPA. The DEP must correct this error by demonstrating full compliance with PRPA before any final decision to include a stream on the Tier 2.5 list.

B. DEP HAS IMPROPERLY APPLIED THE BURDEN OF PROOF FOR INCLUSION OF A STREAM ON THE FINAL TIER 2.5 LIST

1. DEP has accorded the Presumptive List greater stature than was intended by the Legislature.

DEP has indicated that when it created the Presumptive List it conferred with certain individuals at DNR to come up with streams believed to be reproducing trout streams. Next, DEP used some internal data to identify what it has characterized as "reference streams." Finally, the agency used data apparently also gathered within DEP to pull together a list of streams that were deemed to be of high quality and located on public lands. This, then, is the process DEP used to cobble together the Presumptive List. Two points are critical to observe in the history of this process:

- No public input was involved in determining the Presumptive List; and
- The Presumptive List was not developed with reference to the criteria that the Legislature required to be evaluated for the inclusion of streams on the final Tier 2.5 list.

Although the Legislature allowed the DEP to include the Presumptive List in the final AIP, it did so with recognition of the two critical points mentioned above. Accordingly, the Legislature required these deficiencies to be addressed as follows: First, with regard to the absence of public input on the Presumptive List, the Legislature imposed a specific process for obtaining public input. DEP's failure to follow that required process has been discussed above.

Second, the Legislature addressed the fact that all of the criteria for the designation of Tier 2.5 streams had not been addressed in the initial development of the Presumptive List. On this issue the Legislature provided that in the event an objection was made to a stream on the Presumptive List by an adjacent property owner or the holder of a legal

interest, it was then the DEP's obligation "to provide written justification for the inclusion of the stream as a Tier 2.5 stream with reference to the criteria set out in paragraph 8.1.a.2 [Qualification Criteria for Tier 2.5 Stream Designation] of this rule." Sec. 6.2.b (Bold typeface added). What has transpired in relation to this second point is exactly the opposite of what the Legislature ordered.

In the face of an objection to any stream on the Presumptive List, DEP was to carry the burden of evaluating each stream in light of all of the criteria set forth in Sec. 8.1.a.2., in order to fully justify why the stream should remain on the list for designation as Tier 2.5. Instead, and contrary to the agency's duties under the AIP, the DEP has required the property owner to provide the justification for removing a stream from the Tier 2.5 list, as if the streams had already been fully and publicly studied and as if the justifications for their presence on the list had already been well-established.

To the extent the DEP provided any "justification" in its responses to objections filed, it simply repeated its original contention that the specific stream is a trout water, a reference stream or a high quality water on public land. In no instance where an objection has been filed has the DEP met its obligation under Sec. 6.2.b of the AIP.

2. Even if DEP had been correct in placing the burden of proof on objectors, the agency has set the standard so high for demonstrating the impact of a Tier 2.5 listing on private property owners and economic development that no objector has been able to meet it

Following its three year plus review of the 4,000 + objections to the proposed Tier 2.5 streams, DEP refused to remove a single stream from the Tier 2.5 list based on objectors' private property and economic development concerns. The DEP's responses regarding impact on private property owners (Sec. 8.1.a.2.A) were generally: (i) to argue again that nonpoint source activities complying with BMP's would not be affected, and to refuse to address whether BMP's might themselves be revised as a result of a stream receiving a Tier 2.5 designation; (ii) to refuse to address concerns about the property owner's ability to develop his property in the future, and concerns about activities that may be point sources rather than nonpoint sources, unless the owner provided a case-specific analysis of actual development plans and how Tier 2.5 designation would affect those plans, including numerical projections.

Even where economic development project details were supplied by objectors, DEP still rejected their concerns and announced its intention to retain the stream on the Tier 2.5 list (other than the fifty streams where DEP had discovered errors or inadequacies in its own data).

The DEP's similar response to Sec. 8.1.a.2.G regarding impacts on economic development in the area was to reject all objections on the basis that the objector did not produce specific details and timetables of economic development plans, disclose confidential business information such as financing details, or provide mathematical calculations quantifying the degree of economic impact of the inclusion of a stream on Tier 2.5.

The agency arguably might find it difficult to provide specific data or numerical calculations regarding economic impacts, although the agency did not hesitate to suggest that each objector had the burden of producing such detailed data and calculations. However, as primary sponsor of the rule which was passed in 2001, DEP surely has some idea of its intentions regarding real-world implementation of the Tier 2.5 standards.

It seems that DEP's experts could have provided at least narrative descriptions and discussions of the nature and extent of potential impacts of Tier 2.5 stream designations on private property uses and on economic development. Further, DEP could have easily provided examples using hypothetical plans for property development projects, and could have described in considerable detail how the permitting and regulatory process might play out for such a project on a Tier 2.5 stream in comparison to what the same project would encounter on a Tier 1 or Tier 2 stream.

Such projections and hypothetical applications of Tier 2.5 would have been of great value to the public's understanding of what Tier 2.5 would mean to landowners and to economic development.

3. DEP has required objectors to explain how the AIP will affect their ability to develop their property despite the fact that the Tier 2.5 provisions of the AIP have been legally challenged and are not yet finalized

As stated above, the Coalition believes that the DEP has improperly placed the burden on property owners to justify the non-inclusion of a stream on the Tier 2.5 list and, in doing so, has required property owners to explain how the Tier 2.5 provisions will be implemented in a way that impacts their ability to develop their property. Notwithstanding the legal points that have been raised in opposition to the DEP's action on this issue, there is an additional practical problem with the DEP's approach. Many aspects of the AIP have been the subject of a legal challenge in the case of *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp. 732 (2003). As a result of that challenge a number of the provisions of the AIP including several provisions relating to Tier 2.5 designations have not been approved by EPA and are not currently effective in West Virginia. For DEP to suggest that property owners should be able to project now how their future development plans will be affected without knowing the specific regulatory provisions that will apply in the future is unreasonable.

C. **FACTUAL AND DATA DEFICIENCIES HAVE BEEN IDENTIFIED FOR STREAMS ON THE PRESUMPTIVE LIST**

Not surprisingly, given the manner in which it was hastily pulled together, a number of errors have been identified with the factual and technical support that was purported to exist for streams on the Presumptive List. As stated above, the DEP's only justification for inclusion of a stream on the Presumptive List was that 1) the stream was a reproducing trout stream; 2) a reference stream; or 3) a high quality water on public land. In letters responding to objections made to the inclusion of certain streams as Tier 2.5 waters, the DEP has stated as follows:

... [T]he DEP has reviewed each objection and the information supporting the stream's initial placement on the presumptive list. Fifty streams did not meet the technical criteria and are no longer being considered for Tier 2.5 protection.

Recalling that DEP's original version of the AIP did not provide for any public review of the 444 streams to be placed on the Tier 2.5 list, now, as to those streams to which objections were filed, the agency finds that over 12% of those streams do not fall into one of the 3 categories the agency had originally assigned. Does not this also suggest that as to the 38 streams for which DEP states no objections were received it is likely that upon closer review at least 4 or 5 of those streams (the same percentage range) would fail DEP's limited justification for inclusion on the Presumptive List?

1. In many instances there is very limited data to support a "reference stream" classification

Other evidence of weaknesses in the factual/technical bases supporting the Presumptive List is apparent in the limited justification the DEP has provided for reference streams. In some instances DEP has supported the inclusion of a stream as a reference stream, i.e., a stream with exceptional water quality, by relying on only one or two data points. This is particularly ironic because, under the same antidegradation program, the DEP will not accept a determination of background water quality from a permittee unless the permittee has performed an extensive assessment of the existing water quality in a stream, which requires at least 12 data points taken over a minimum 6 month period. If DEP deems such a data set is necessary to determine background water quality for one purpose in the antidegradation program, it should not apply some different, lesser standard for the Tier 2.5 designation.

2. DEP has used the category of "reference stream" as though it has binding legal significance when it is simply an unpublished internal list of streams created by the agency without public notice or input

A particularly frustrating aspect of the DEP's reliance on a stream's classification as a "reference stream" as its sole justification for the Tier 2.5 designation is the fact that this classification was made without any public notice or input. The DEP's reliance upon such informal determinations and elevating them as having some legally binding status is clearly a violation of the West Virginia Administrative Procedures Act and violates the procedural due process rights of property owners along those streams.

3. In some instances DEP's only justification for inclusion of a stream is a decades-old Trout Waters study that has never been reviewed or updated

A third factual/technical deficiency that has been identified with the initial Presumptive List relates to the DEP's conclusion that a particular stream is a "reproducing trout stream." Where the DEP has used this category as its limited justification, we have found among the responses the DEP has provided to objectors the following statement:

Trout Stream. To meet this designation, the stream must have documented reproducing trout populations. The survey confirming

this reproduction was conducted by the West Virginia Division of Natural Resources in 1984 and native brook trout were found (Bold typeface added).

We believe that the DEP is erroneously applying Sec. 3.3 of the AIP in reaching the conclusion that it may rely on such outdated information in making a Tier 2.5 designation. Sec. 3.3 reads, in pertinent part, as follows:

... The Secretary shall determine the existing uses of the water body by identifying the uses set forth in 46 CSR 1 Section 6 that the water body currently supports or has supported since November 28, 1975.

The DEP's error is in equating a "Category B2 - Trout Waters" use designation under Section 6 of the water quality standards with a Tier 2.5 designation under the AIP. First of all, a Tier 2.5 designation is not a use "set forth in ... Section 6" of the water quality standards, therefore the reference to uses existing since November 28, 1975, on its face does not apply to a Tier 2.5 designation. Secondly, the types of waters covered under each provision are defined differently. Category B2 is defined to apply to waters "which sustain year-round trout populations," whereas Sec. 4.1.c of the water quality standards mentions "naturally reproducing trout streams" as one of the types of waters that "may" be considered for inclusion as Tier 2.5 waters. Had it been the intention of the Legislature to make these classifications equivalent, they would have defined them accordingly.

As an additional point we cannot determine that DEP has ever critically evaluated any of the findings of the 1980s-vintage DNR studies. Similarly, we have not found any occasion in the two-decades that these reports have existed when have they ever been exposed to public review or scrutiny. Surely, given the critical nature of the Tier 2.5 designation the DEP must do something more than put forth an uncritiqued study that is over 20 years old and conclude that the justification has been made. Does anyone

D. DEP SHOULD TAKE AN ALTERNATIVE APPROACH WITH THE PRESUMPTIVE LIST THAT MORE PROPERLY IMPLEMENTS THE REQUIREMENTS OF THE AIP

The current opportunity for comment on the Tier 2.5 Presumptive List, provided under Sec. 6.2.b of the AIP, will allow further comments from those who previously filed objections that DEP has rejected. Given the agency's failure to follow the procedural and substantive mandates in the AIP to date, it is justifiably feared that a new round of

delegated responsibilities with regard to the Tier 2.5 list and which should properly implement the AIP. This path should, we suggest, involve a new and adequate review by DEP of each of the streams which received objections in the first round, or which receive objections now. New objections to even the 38 streams which

received no initial objections should be accepted by DEP due to the notice deficiencies in the first round.

In preparation for this new review of each stream on the presumptive Tier 2.5 list, DEP should first officially rescind its preliminary determinations and decisions to include streams on the Tier 2.5 list that the agency announced in its letters of late September and early October, 2005.

Next, we suggest that DEP should prepare, and then widely publicize and disseminate revised, thorough and accurate statements and information describing the nature and degree of impact that Tier 2.5 stream designations would or could have on private property owners and on economic development. We would of course expect this new information from DEP to correct the lack of information and inaccuracies that existed in the first round in 2002.

After providing this new and adequate information to the public, DEP should allow for a new public comment opportunity, including the opportunity for objection letters. Each of the new comment letters should be reviewed by DEP and given proper credence, remembering that the burden the AIP places on the objector is minimal – to our understanding there was no intent when the rule was passed that objectors would have to numerically or otherwise prove why a stream should be delisted. Instead, in these reviews DEP should properly carry its burden to address all of the criteria set forth in Sec. 8.1.a.2 of the AIP, and to fully justify why the stream should remain on the list in the face of opposition.

Only subsequent to this new and corrected round of information dissemination, comment opportunity, and thorough and proper review of objections should DEP make its decisions regarding each stream on the Presumptive List. If DEP cannot justify the inclusion of a stream on the Tier 2.5 list, in consideration of all of the criteria of Sec. 8.1.a.2, such stream should not be advanced to the final Tier 2.5 list.

We realize that our suggestions that DEP in effect do the Tier 2.5 notice and comment process over, at least in part, will take time and resources. However, we believe that if DEP persists in its current course of action, far more resources and time will be expended in debates that will be first and foremost about the Tier 2.5 listing process as implemented by DEP, rather than about the merits of and proper category for any given stream.

As members of the Coalition have learned from past experience with the water quality standards, once a criteria or provision is included in the standards it is practically impossible to remove it, regardless of the scientific basis in support of such a change. We believe the same would be true for the inclusion of any stream on the Tier 2.5 list. For this reason it is all the more critical that it be done right the first time.

1. **Streams That Are Not Currently Designated As Tier 2.5 Streams Will Retain the Protections Provided for Tier 2 Streams**

Should the DEP choose to recommence the review process for streams to be included in the Tier 2.5 list, there are sufficient safeguards in place to assure that water quality in any of the candidate streams is properly safeguarded in the meantime. All streams on the presumptive Tier 2.5 list currently qualify as Tier 2 waters. This means that no new

activity may take place on any of these streams that may result in significant degradation of their water quality without (1) a review of less-degrading or non-degrading alternatives; and (2) full opportunity for public review and comment. See Sec. 9, 60 CSR 5. In addition a regulated entity that seeks authorization for a new or expanded discharge into a Tier 2 stream must perform a baseline water quality assessment which should determine the existing water quality in the stream. No permit may be issued for such an activity unless it assures that all existing uses of the stream are fully protected. If during the process of evaluating a new discharge to a Tier 2 stream the DEP determines that the stream should be classified as a Tier 2.5 water and that the proposed discharge would significantly degrade the water quality of that stream, the agency is free at that point, on its own initiative to nominate the stream for inclusion as a Tier 2.5 water. Presumably, the agency would have sufficient data about the stream and information about potentially affected property owners to proceed expeditiously on the Tier 2.5 nomination. For these reasons we see no risk in DEP pursuing a full review of all streams on the Presumptive List in accordance with these comments.

E. THE ROLE OF THE ENVIRONMENTAL QUALITY BOARD

The purpose of the AIP is to establish the procedures for implementing the antidegradation policy as adopted by the Environmental Quality Board ("EQB") in the state water quality standards, 46 CSR 1. The AIP, as written, recognizes the role of the EQB and assigns certain responsibilities to it. These include reviewing nominations for the designation of streams as Tier 2.5 or Tier 3 streams. With regard to the Presumptive

stream as Tier 2.5 made following the procedure set forth in the paragraph, may be appealed to the EQB. [Sec. 6.2.b.2.]

During the 2005 Regular Session the Legislature passed and Governor Manchin signed SB 287 which transferred all authority for promulgating water quality standards from the EQB to the Secretary of DEP. As a result of that legislation *W. Va. Code* § 22-11-7b now reads, in pertinent part, as follows:

All authority to promulgate rules and implement water quality standards vested in the Environmental Quality Board is hereby transferred from the Environmental Quality Board to the Secretary of the Department of Environmental Protection ...

It may be argued that the designation of a particular stream as a Tier 2.5 water is a part of the rule-making function with regard to water quality standards. As such, regardless of the current language in the AIP assigning a role in the Tier 2.5 designation process to the EQB, it may be further argued that SB 287 has stripped the EQB of any role in this rulemaking process. At the same time SB 287 has substituted the DEP Secretary for any rule-making function previously performed by the EQB. How does this legislative enactment affect Sec. 6.2.b.2, regarding appeals from final decisions by the Secretary regarding the Presumptive List? The Coalition urges the DEP to provide guidance to regulated entities regarding the effect of SB 287 on the right to appeal a final decision of the Secretary with regard to the inclusion of a stream on the Tier 2.5 list.

F. CONCLUSION

The members of the Coalition hope that you will carefully consider the deficiencies we have described with the implementation of the AIP and the suggestions for rectifying this situation that we have offered. As noted at the outset of these comments, our concerns arise because we believe the proper and adequate implementation of the AIP is a critical issue for the economic health and growth of our state.

Very truly yours,

Karen S. Price, On Behalf of
ANTIDEGRADATION COALITION

Antideg - Removal of streams from preliminary Tier 2.5 list

From: Charlie Nichols <wvtroutbum@cebridge.net>
To: <antideg@wvdep.org>
Date: 7/9/2006 5:25 PM
Subject: Removal of streams from preliminary Tier 2.5 list

Lisa McClung, Director

West Virginia Division of Environmental Protection Waste and Water Division

Ms. McClung:

I am writing to protest the removal of 141 cold water trout streams from the preliminary Tier 2.5 list compiled by the West Virginia Division of Environmental Protection. WVDEP is charged by the West Virginia legislative statute to protect the environment, not the economy of the extractive industries in the state. The reasons given by the WVDEP for removal of the 141 streams are:

Reference only

Coal reserve development planned or underway

Removed for technical reasons prior to 9/05

Planned or ongoing development

Privately limed

It appears to many of us that fish and hunt in the state of West Virginia that the streams have been removed for the very reasons they should be on the list, hence there may be development that could, if not done properly, effect the cold waters of the state. However, WVDEP seems to care more about the economic development of the extractive industries, rather than the environmental protection that our state waters need. Why? They appear to be doing extremely well as far as the economic indicators show.

Ms. McClung, I am a private landowner in the state of West Virginia. As an American I understand the sanctity of private land ownership. However, I must point out that my rights to develop my property end at my property line. Anything that I do that effects my neighbors land rights should be regulated. I do not burn refuse on my property during fire season because the state regulates the where and when I can burn on my property. This is to protect my neighbors property. I should not be able to pollute the water to the detriment of my neighbors either. That is why I do not understand the WVDEP's reasoning behind the decision to drop 141 streams because they are being developed. This attempt to remove streams blatantly infringes on water rights of owners downstream who demand clean water for recreation or tourism usage.

The WV Division of Natural Resources provided WVDEP compelling evidence for the issuance of the other 141 streams but it appears that the extractive industries are attempting to have the streams deleted

from the list because they do not wish to comply with environmental regulations that would cost them a pittance. Please remedy this situation by putting the streams back on the Tier 2.5 list.

West Virginia has fresh water that is the envy of most states in the union. For that reason the West Virginia Legislature declared that the state owns the water for the use of its citizens. Speaker of the House, Bob Kiss was told by a New Mexico representative that the state of New Mexico doesn't need our coal or natural gas, but they covet our fresh water. We need to protect this most valuable resource now. The Clean Water Act requires it. The state's brook trout demand it.

I am requesting that you put the 141 dropped streams back on the Tier 2.5 list. Please listen to the conservation organizations like Trout Unlimited that recognize that we all live downstream and cold, fresh water is the mainstay for a healthy environment.

Respectfully,

Charlie Nichols <*{}{}{}{}<<

304-776-4403; 4706 West Washington Street, Cross Lanes, WV 25313

Antideg - Tier 2.5 List

From: "Ernie Nester" <eenester@charter.net>
To: "Lisa McClung" <antideg@wvdep.org>
Date: 6/13/2006 12:26 PM
Subject: Tier 2.5 List

Ms McClung,

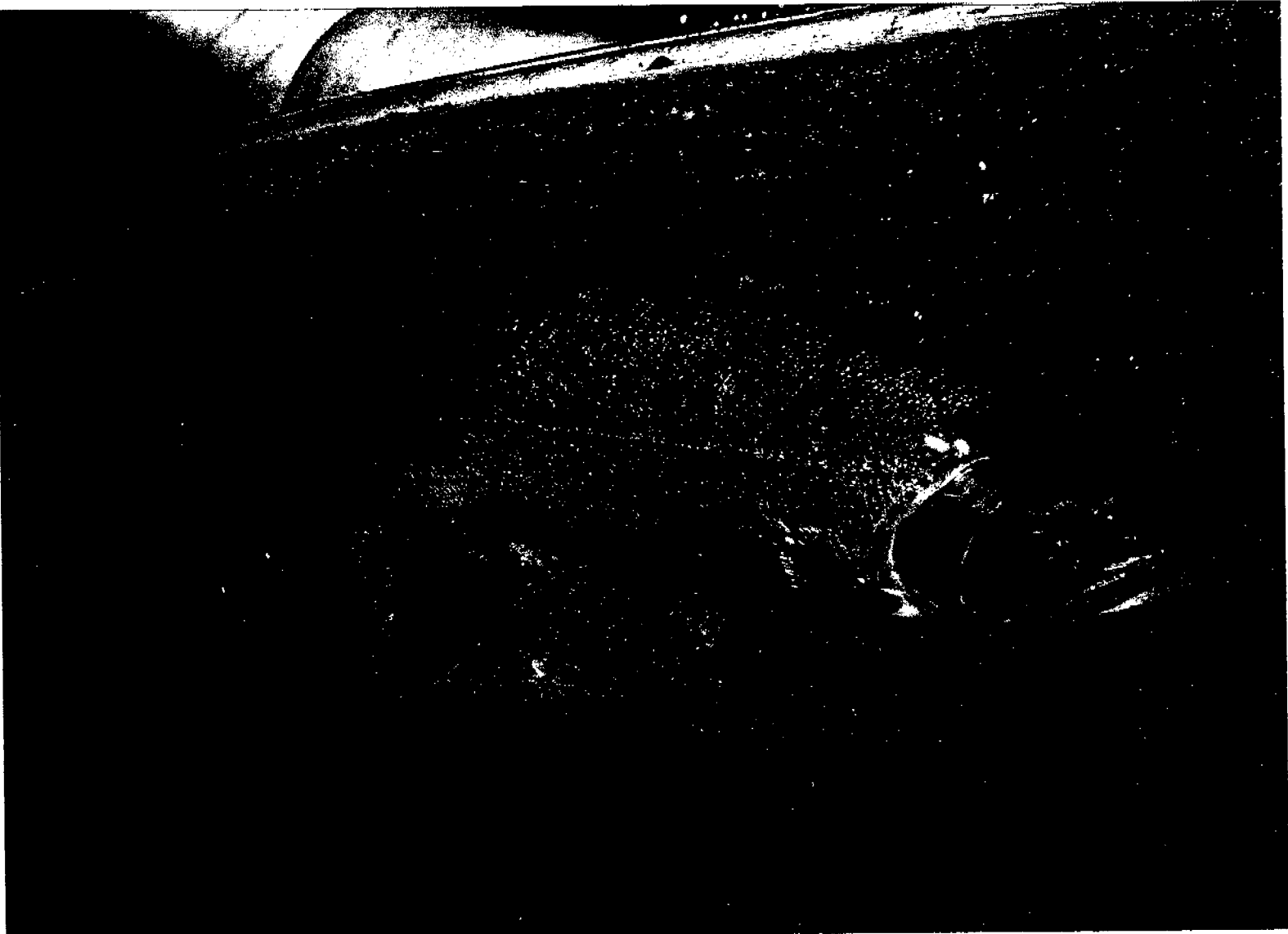
I was dismayed when I reviewed the list of 141 streams that were removed from the Tier 2.5 list of streams. I am a trout fisherman who is very concerned about the reproducing trout streams in WV, and I noticed that many reproducing trout streams were removed from the Tier 2.5 List. Here is a sample of 5 streams that have self sustaining reproducing populations of trout that were removed:

<u>DNR Code</u>	<u>Stream</u>	<u>County</u>	<u>Trout</u>	<u>Reason For Removal</u>
BST-99	Elkhorn	McDowell	Reproducing Rainbows and browns	Coal Reserve Development Planned
or Underway				
KNB-30	Crane	Mercer	Reproducing Rainbows	Coal Reserve Development Planned or
Underway				
KN-26-B	Fat Creek	Raleigh	Reproducing Browns	Planned or Ongoing Development
KG-34-G-8	Rocky Run	Greenbrier	Native Brook Trout	Privately Lined
KE-76-L-5	Tug Fork	Nicholas	Native Brook Trout	Coal Reserve Development Planned
or Underway				

The reasons listed for removing the streams from the Tier 2.5 List do not make any sense to me. It appears that WVDEP is saying that reproducing trout streams are not going to be protected if there are active coal mines or potential coal mining activity on the watershed. Also, it appeared that any kind of development knocked the reproducing trout streams off the list.

I suggest that all of the reproducing trout streams be reinstated on the Tier 2.5 List.

Ernest Nester
P.O. Box 235
Alloy, WV 25002
304-779-2706



1967 Grapevine Road
Sissonville, WV 25320

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

Dear Lisa McClung, Director,

Subject: Removal of 141 Streams from Tier 2.5 Protection

I am an avid trout angler, father of two, member of Trout Unlimited and proud West Virginian. Furthermore, I am the sole proprietor of Vandalia Rodworks, a company specializing in the production of fine split bamboo fly fishing rods. West Virginia has been very blessed with wild rivers, spectacular mountains and a unique people. We have also been very blessed with natural resources. Coal and timber are such strong industries in our state that often the other natural resources are overlooked. There is a substantial tourism industry that relies upon a natural, beautiful landscape and clean water. I am a part of that industry as I sell very expensive fishing rods to native West Virginians as well as those from outside of West Virginia for the purpose of pursuing wild trout.

The recent move by the WV DEP to remove 141 streams from Tier 2.5 protection astonishes me. Obviously, I'm appalled that your office would consider allowing more extensive degradation of trout waters, but the sheer fact that every trout stream on the B2 list is not under Tier 2.5 or higher protection is an unacceptable practice for the governmental agency responsible for the protection of our most valuable resources. The Tier 2.5 level was a concession to industry to begin with. How far do you intend to erode regulations so that industry can have free reign over our wild habitats to make money at any cost. We have been proclaimed "Open For Business", but the selectivity of which businesses we are open to is disturbing.

I have personally fished for wild trout in many of the streams being delisted (73 different streams in WV since 2004). I can verify that many on that list are reproducing trout streams and many are home to our state fish, the native brook trout. You see, those who visit WV to trout fish and those dedicated trout anglers from WV generally do not care to fish for stocked trout in sub-marginal habitat. Many states bring in millions of tourism dollars due to wild trout fishing alone. West Virginia has a low population, a favorable climate and great elevations, which lends to an opportunity to further promote our fishing tourism and wild trout fisheries. However, moves such as that by the WVDEP to remove these wild trout streams fly in the face of that industry and those who care about it.

The Eastern Brook Trout Joint Venture which is comprising of fish and wildlife agencies from 17 states, conservation organizations, academic institutions and federal agencies reports "The majority of West Virginia's remaining brook trout subwatersheds are greatly

reduced largely due to poor water quality associated with a long history of poor land management, forestry and mining." The findings of the assessment phase of that venture in part was that acid deposition and abandoned mine drainage each impair approximately 25% of available brook trout habitat. Only 1% of West Virginia's brook trout subwatersheds were found to have a historically intact population. The majority of our brook trout subwatersheds are greatly reduced (30%). We are not talking about an insignificant insect species, this is our state fish. Apparently, our state fish is a viable sacrifice for the interest of irresponsible industrial practices. Will the black bear, cardinal and rhododendron be the next species to cash in on?

I've personally seen streams once teeming with trout, severely damaged through lack of protection due to irresponsible land use. Hominy Creek and its tributaries are a prime example of that. My children are very young and it is my desire to teach them to fish for wild trout on all these streams that I have enjoyed. Damage to these streams can destroy unique genetic populations of fish that have acclimated to their niche since the ice age. It has been shown that the genotype of brook trout vary significantly within each watershed. You cannot replace that.

I'm asking you to stop this practice of selling our wild trout for temporary business gain. Furthermore, I'm asking you as my environmental protection service as a voting, taxpaying citizen of West Virginia, to increase the protection of all B2 trout waters to a Tier 2.5 minimum level of protection.

Respectfully,



Philip D. Smith
Vandalia Rodworks

Cc: Denise Harkowski – US Environmental Protection Agency



PARDEE & CURTIN LUMBER COMPANY

A Member of the Pardee Resources Group

1 Curtin Road
Webster Springs, WV 26288

Telephone: 304-847-2107
Fax: 304-847-7552

George D. Curtin III
President

July 6, 2006

West Virginia Department of Environmental Protection
Division of Water and Waste Management
Lisa McClung, Director (antideg@wvdep.org)
Attn: Tier 2.5
601 57th Street, SE
Charleston, West Virginia 25304

Re: Comments of Pardee Resources Company on 60 CSR 5: Tier 2.5 List

Dear Director McClung:

Pardee Resources applauds and supports WVDEP's proposed decision to remove some 141 streams from the presumptive Tier 2.5 list. Absent such action, substantial amounts of Pardee's mineral reserves would effectively have been rendered unmineable because dischargers could never have utilized more than 10 percent of the remaining assimilative capacity of the streams flowing through Pardee's property. WVDEP responded appropriately to the extensive data Pardee submitted in support of requests that certain streams retain a Tier 2.0, rather than Tier 2.5, classification.

By retaining a Tier 2.0 rating, stream uses—such as maintenance of trout—will still be fully protected. Dischargers will be allowed to utilize more than 10 percent of the stream's remaining assimilative capacity only upon a showing that there are important social or economic reasons for doing so, and in no event will be allowed to raise the concentrations of substances in the stream above the levels established by state law for protecting designated uses. Recently, however, misguided media coverage and an e-mail campaign by Trout Unlimited members have sought to pressure WVDEP to reverse its course. These efforts tend to confuse the Tier 2.5 list with the trout stream list, and suggest that if a stream is removed from the Tier 2.5 list, then its status as a "trout stream" will be jeopardized. This is flatly untrue. Regardless of whether a stream is granted Tier 2.0 or 2.5 status, if it qualifies as a "trout stream" under existing water quality standards, then any future discharger will be held to effluent limits that protect trout.

Pardee Resources has a long history of working with Trout Unlimited members and other conservation groups to grant access to its land for fishing and hunting. However, if their efforts to reverse WVDEP's proposed course are successful, then they may ultimately work against their own interests because Pardee is fully prepared to post any of its property that adjoins a Tier 2.5 stream so that no one interferes with stream uses and water quality. We hope, however, that this will not be necessary and believe that the interests of Pardee and of sportsmen can both be accommodated with the Tier 2.0 classifications proposed by WVDEP.

Sincerely yours,

A handwritten signature in black ink, reading "George D. Curtin III". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

George D. Curtin III
Senior Vice President
Pardee Resources Company

"To restore, preserve, and promote the outstanding natural qualities of the Cheat River Watershed."



July 6, 2006

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

Director McClung:

The following comments pertain to the proposed anti-degradation rule to go before the Legislature. This issue has persisted and divided stakeholder interests in the mountain state for several years now. Never has there been clarity of the information and background provided to the public and this has added to the misinformation and divisive views.

Friends of the Cheat opposes the removal of streams from the Tier 2.5 category for any reason other than scientific field study by professional agency personnel. The process of determining what streams will have Tier 2.5 protection should be based on science. The WVDNR historically has monitored and evaluated the state's streams and this information logically provided the basis of qualifying stream classification. (It should be noted that Tier 2.5 is a uniquely West Virginia level between the Clean Water Act defined Tier 2 and Tier 3. West Virginia legislature chose to designate this tier years before implementation of anti-degradation rules became an issue.)

This proposal to remove 131 streams from the previously approved list seems to be based more often on development or resource extraction plans than on science. Coal reserve development is the listed reason from many of the proposed lower level of protection. This rationale shows a higher value for exploitation of resources than protection of resources.

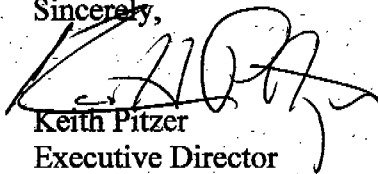
Additionally, the interests that promote the removal of these streams from Tier 2.5 would seem to expect some level of degradation from their planned activities. Rather than operating in a manner that maintains water quality, certain business interests seem to be willing to trade off quality for economic gain.

It should also be noted that previous comments were generated from many private landowners whose comments were provided by one source. This source is politically connected to development interests and so should be viewed as biased for development favored outcomes.

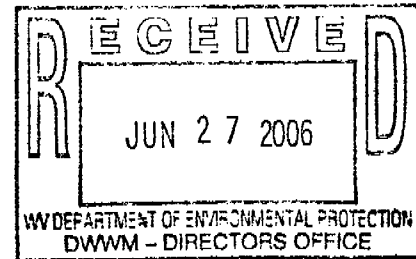
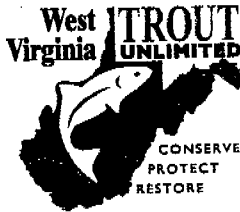
Friends of the Cheat exists primarily to bring resources to the lower Cheat watershed to address the devastating impairment of streams caused by acid mine

drainage. Millions of dollars of public investment in acid mine drainage treatment have addressed this impairment in recent years. Millions more are needed. This impairment exists because adequate protection was not in place or enforced at the time of mining activity. The legacy of acid mine drainage is a classic example of misplaced values within a society. Regrettably, I view the course of the anti-degradation debate as another example of the same.

Sincerely,

A handwritten signature in black ink, appearing to read 'Keith Pitzer', is written over the typed name and title.

Keith Pitzer
Executive Director



June 22, 2006
104 Hillcrest Ave.
Elkview, WV 25071 - 9514

West Virginia Department of Environmental Protection
Division of Water and Waste Management
Attention: Lisa A. McClung, Director
601 57th Street, S. E.
Charleston, WV 25304

Dear Ms. McClung:

I am writing on behalf of the 1600 dues paying members of the West Virginia Council of Trout Unlimited (WVCTU) to express our extreme concern over the removal of 141 streams from the Antidegradation Tier 2.5 List of "waters of special concern." The logic of the removal of these streams is very puzzling to our members.

I fished two of these streams on Saturday and Sunday of this past week. I fished Camp Creek (DNR Code KE-102-A) in Braxton and Webster Counties on Saturday, June 17 and caught and released 20 brown trout, including at least 3 age classes. I fished Loop Creek (DNR Code K-76) in Fayette County on Sunday, June 18 and caught and released 16 brown trout, including 4 age classes. This is evidence that these are truly high-quality trout streams, appropriately included in the B2 List and they should not be removed from the Tier 2.5 List. The reason given for the removal of Camp Creek is "Removed for technical reasons prior to 9/05" and the reason given for the removal of Loop Creek is "Planned or ongoing development."

Both of the above streams have already been impacted by sedimentation and siltation, which adversely affects the reproduction capability of trout. If these streams had been afforded the additional protection of "waters of special concern" they would right now be of even higher quality.

The reasons given by the WV DEP for removal of the 141 streams are:

- Reference only
- Coal reserve development planned or underway
- Removed for technical reasons prior to 9/05
- Planned or ongoing development
- Privately limed

Many of the streams have been removed for the very reasons they should be on the list. Have coal companies submitted plans for mining? Have the various landowners submitted NPDES applications (the only action that triggers an antidegradation review) for mining operations or development? Or, are streams being removed because someone says they might or their children might want to develop the home place in the future?

The Eastern Brook Trout Joint Venture (comprised of fish and wildlife agencies from 17 states, conservation organizations, academic institutions and federal agencies) recently released its report of the status of the eastern brook trout, our state fish and only native trout. Their findings for West Virginia were that the majority of our brook trout subwatersheds are greatly reduced, largely due to poor water quality associated with a long history of poor land management, forestry and mining. In addition, acid deposition and abandoned mine drainage each impair approximately 25% of available brook trout habitat. Only 1% of West Virginia's brook trout subwatersheds were found to have a historically intact population. The majority of our brook trout subwatersheds are greatly reduced (30%).

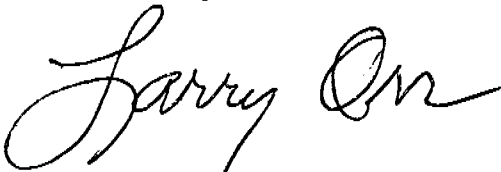
The most important natural resource in West Virginia is water – not coal, gas, timber or any extractive industry product. West Virginia is "open for business" in selected industries/businesses, but apparently not in businesses that rely upon clean water, such as recreation or tourism.

Economic interests have had the ability to remove streams from the list with no opposing comments. It is relatively easy to remove a stream and very hard to add one. The 2.5 List was a concession to allow streams to be listed at a lower level than 3.0 protection which applies to wilderness and other protected areas. This removal of 141 of the streams from the original "presumptive list" of 444 represents one third of the list and is very alarming to our members. WVCTU members were concerned that the original "presumptive list" did not contain hundreds of streams that we know to be high quality trout streams, but felt that the 2.5 List might be a good start.

WVCTU members strongly object to the removal of these 141 streams from the "presumptive list" and our position is still as stated in my Dec.8, 2005 letter to the WVDEP – the original "presumptive list" should remain intact.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, reading "Larry Orr".

Larry Orr
Chairman, WVCTU
304 965 7185
edhorse@aol.com

cc: Denise Harkowski
US EPA Region 3
1650 Arch Street (3PM52)
Philadelphia, PA 19103-2029

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

From: Carl Bolyard
222 Elm Street
Elkins, WV. 26241

July 5, 2006

Thank you for the opportunity to comment on WVDEP's proposed antidegradation rule that will be voted upon by the Legislature. Please make my comments a part of the public record. I wish to also be kept informed of all matters pertaining to this vital issue as it develops.

As I understand it the proposed antidegradation rule removes future protections from more than 100 of West Virginia's most pristine streams— including popular native trout waters such as Shavers Fork of the Cheat River which is on my backdoor. My family owns a home beside this river, the heart of the Cheat watershed.

West Virginia is at the heart of the Appalachian Mountains and serves as water towers for the eastern United States and the Chesapeake Bay. The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The Antidegradation policy of the federal Clean Water Act is designed to achieve the maintenance part of that goal: to keep clean waters clean and prevent further pollution of others. This allows our state to continue to serve its vital role as "water towers" for our nation effectively. I feel that your proposed rule change would move our country backwards, not forwards in water quality protections.

WVDEP's proposed changes seek to destroy the Tier 2.5 protections in a manner that suggests catering to industry. Most Tier 2.5 streams are waters that are located on public lands, support reproducing trout populations, and have exceptional recreational characteristics. This water was originally protected as "trout water" by the legislature but has come to be a vital part of the health of the forest and the engine that drives the tourist based economy in my county. There are over 100 good paying jobs in the Bowden area of Shavers Fork alone – all due to good water quality and the protections of Tier 2.5 for the upper reaches of our river. It is often cited, yet bears repeating, that the U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually.

Our state has more than 300 streams protected as Tier 2.5. I would support more streams being added to the Tier 2.5 list for protection from future pollution – rather than seeking to weaken the rule. This will protect the state's water resources and related economics throughout any future development. Saving the best stream attributes for Americans and West Virginians the way the Clean Water Act intended over 30 years ago! I believe that the Tier 2.5 designation is not designed to prevent development activities in a watershed, but it helps maintain the watershed's most desirable qualities: available supply of clean water, reproducing trout populations, healthy aquatic ecosystems, lowered drinking water treatment costs, reduced flooding and sustainable downstream communities. This makes good sense and economic sense for our state.

Rule changes and weakening of the 2.5 rule would jeopardize other streams I frequent as a paddler and fisherman. Reaches such as the Cranberry, Elk, Williams, the West Fork of Greenbrier River, Gandy Creek, Glade Creek, Hominy Creek and Seneca Creek are part of West Virginia's treasure and are not for sale to industry. Nor should 131 streams be allowed to be preemptively de-listed by commercial interests for insufficient reason. They should be protected with high water quality standards and kept wild and wonderful for citizens of our state and our

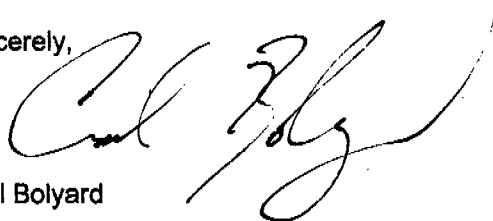
country as a natural resource. Proper protocol for de-listing as outlined in Section 8.1.a.2 of the rule for removing streams from the Tier 2.5 list has not been followed and I feel that NONE of these streams should be removed from the Tier 2.5 list.

Further – your agency has never clarified the 2003 legal ruling that supported antidegradation implementation procedures that enforce the federal Clean Water Act. As I understand it no briefing document related to this issue has ever been prepared. West Virginia Rivers Coalition sued you and won this case yet there has never been a formal policy revision to my knowledge. How can we ask the legislature to vote on removing 2.5 protections for these river treasures when it has never been made clear how your agency is to uphold federal law in regards to antidegradation policy? If nothing else I ask that a briefing document related to the antidegradation issue be prepared by your office and that WVDEP extend the comment period by 45 days in order for the agency to provide interested parties with more detailed information and adequate time for response.

I think with America's energy needs continuing unchecked that I understand where the political pressure to de-list waterway protections might come from. However as an agency charged with the public good in mind and many of these waters located on federal lands, I find your rule changes intolerable. The states antidegradation policy is unclear at best and you are responsible for that error. Please prepare a briefing document resolving the antidegradation issue from your office and extend the comment period by 45 days in order for the agency to provide interested parties with more detailed information and adequate time for response. Remove the proposed rule change that will de-list over 130 streams that are vital to forest health and tourism in our state's green economy. Please take the advice of someone "on the ground" not at a desk in Charleston, that Randolph County, the downstream neighbors, and my children's health all depend upon high standards of water quality protections. Your office is the gatekeeper of the public good for our environment and I only insist that you not be shortsighted in your intentions for our many great streams which will be worth far more than any other resource twenty years from now.

Thank you for the opportunity to comment. Please keep me informed of all news pertaining to this matter. I appreciate a swift response to my letter and look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carl Bolyard', with a large, sweeping flourish extending from the end of the signature.

Carl Bolyard

CC: Clark Barnes, Walt Helmick,



west virginia department of environmental protection

Date: 7/3/06

TO: Lisa McClung

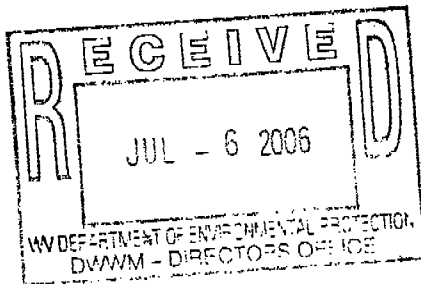
FROM: Dennis O. Stottlemeyer

- ☒ For your information.
- ☐ For your review and approval.
- ☐ To be signed.
- ☐ Please draft a response for review.
- ☐ Please provide comments.
- ☐ Please note and file.
- ☐ Answer, send me copy of letter.
- ☐ Prepare reply for my signature.
- ☐ Please see me.
- ☐ Urgent!

Remarks:

Written comments on

Tier 2.5





west virginia department of environmental protection

Executive Office
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0440 Fax: (304) 926-0447

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

July 3, 2006

Clint Ferguson
HC Box 1302
Romney, West Virginia 26757-9306

RE: Tier 2.5 List

Dear Mr. Ferguson:

I am writing in regards to your recent letter to Governor Joe Manchin, III concerning the West Virginia Department of Environmental Protection's (DEP) Antidegradation Implementation Procedures Rule, or Tier 2.5 Stream List.

Your comments are appreciated and will be recorded. Furthermore the DEP is holding a public hearing on July 10, 2006, at 6:00 p.m. at its Charleston office, Cooper's Rock Training Room, 601 57th Street, S.E., Charleston, West Virginia. The agency will also accept any written comments received by the close of business on July 10, 2006. Written comments should be mailed to the following address:

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

Sincerely,

Dennis O. Stottlemyer
Executive Assistant

Krista Cox-Milsap, Office of the Governor

Promoting a healthy environment.

1800 Kanawha Blvd. East
Charleston, WV 26301
Phone: (304) 558-2000 ext 3802
Fax: (304) 558-2722

Governors Office**Fax**

DOS

To: Stephanie Timmermeyer**From: Krista Cox-Milsap****Department of****Constituent Services****Environmental Protection****Fax: (304) 926-0446****Date: June 12, 2006****Phone: (304) 926-0499****Pages: 2****Re: Clint Ferguson****CC:**

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments:

The following information is being forwarded for your review and consideration. Please reply to the constituent as soon as possible. A copy of your reply is requested for the Governors Office files.

Thank you for your time in this matter.

Krista Cox-Milsap

Governors Office of Constituent Services**(304) 558-2000**

File 1000

707234

Log 2137709

DELETED NO. 117
JUN 12 2006
By 6/8/06

Dear Governor Manchin,

Hello again, it's me Clint Ferguson. The reason I'm contacting you this time is that I'm very concerned about removing viable trout streams from the DEP's tier 2.5 list. By now you know that I'm a die hard fly fisherman and care deeply about this state. I feel we are losing enough the way it is and protection of the streams is essential. Brook trout are our state fish and their populations are declining. By removing these trout streams from the list I'm afraid that my children and grandchildren won't be able to enjoy these special places as much as I have.

Since I'm a outdoor writer, I'm going to get the word out about this. I totally disagree removing these streams from the tier 2.5 list and think it's a horrible idea. After all, this is "Wild and Wonderful" West Virginia and I personally would like to see it remain as such. As you can tell I'm extremely passionate about the outdoors we have in this great state especially when it comes to trout. Please take in consideration the negative impact removing these streams will have on them. Thank you for your time.

HC65 Box 1302
Dammer WV

Respectfully,

Clint Ferguson

26757-9306



west virginia department of environmental protection

Executive Office
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0440 Fax: (304) 926-0447

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

July 3, 2006

Ronald and Rosemary Swecker
HC 67 Box 17
Valley Head, West Virginia 26294

RE: Tier 2.5 List

Dear Mr. and Mrs. Swecker:

I am writing in regards to your recent letter to Senator John D. Rockefeller IV concerning the West Virginia Department of Environmental Protection's (DEP) Antidegradation Implementation Procedures Rule, or Tier 2.5 Stream List.

Your comments are appreciated and will be recorded. Furthermore the DEP is holding a public hearing on July 10, 2006, at 6:00 p.m. at its Charleston office, Cooper's Rock Training Room, 601 57th Street, S.E., Charleston, West Virginia. The agency will also accept any additional written comments received by the close of business on July 10, 2006. Written comments should be mailed to the following address:

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

Sincerely,

Dennis O. Stottlemeyer
Executive Assistant

Senator John D. Rockefeller IV

Promoting a healthy environment.

JOHN D. ROCKEFELLER IV
WEST VIRGINIA

United States Senate
WASHINGTON, DC 20510-4802

June 27, 2006

Ms. Stephanie Timmermeyer, Secretary
West Virginia Department of
Environmental Protection
601 57th Street, Southeast
Charleston, West Virginia 25304

Re: Mr. and Mrs. Ronald L. Swecker
Case #: 197866
Case Code: WWH

Dear Stephanie,

I have been contacted by Mr. and Mrs. Ronald L. Swecker, of Valleyhead, regarding their objection to the proposed 2.4 listing of Conley Run.

I have enclosed a copy of Mr. and Mrs. Swecker's correspondence for your review. If you would look into this matter and provide me with a report, I would appreciate it.

Please refer to the above Case Number and Case Code when responding. Send your findings to my State Office at 405 Capitol Street, Suite 508, Charleston, West Virginia 25301. Thank you, in advance, for checking into this matter for me.

Sincerely,



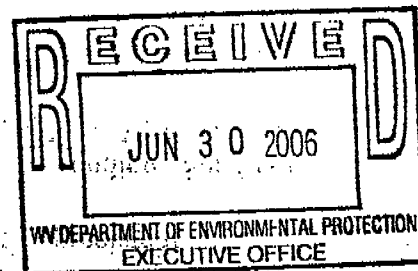
John D. Rockefeller IV

STATE OFFICE:
405 CAPITOL STREET, SUITE 508
CHARLESTON, WV 25301
(304) 347-5372
FAX: (304) 347-5371

NORTHERN SATELLITE OFFICE:
118 ADAMS STREET, SUITE 301
FAIRMONT, WV 26554
(304) 367-0122
FAX: (304) 367-0822

SOUTHERN SATELLITE OFFICE:
207 WEST PRINCE STREET
BECKLEY, WV 25801
(304) 253-9704
FAX: (304) 253-2578

EASTERN REGIONAL OFFICE:
217 WEST KING STREET, SUITE 307
MARTINSBURG, WV 25401
(304) 262-9285
FAX: (304) 262-9288



SCAILED

2006 MAY 30 PM 2:47

MAY 15, 2006

A FRIEND OF OURS TOLD US WE NEEDED TO SEND A COPY OF THIS LETTER
OF (OBJECTION TO PROPOSED TIER 2.4 LISTING OF STREAM, SPECIFICALLY
CONLEY RUN, A TRIBUTARY OF THE TYGART VALLEY RIVER, RANDOLPH
COUNTY, DNR STREAM NUMBER MT-77) TO GOVERNOR JOE MANCHIN III,
SENATOR ROBERT BYRD, SENATOR JOHN D. ROCKEFELLER IV, AND
SHELLY M CAPITO. PLEASE HELP US WITH THIS CONCERN.

THANK YOU,

RANDALL D. & ROSEMARY L. SWECKER
HC 67 BOX 17
VALLEY HEAD, WV 26294
EMAIL - rwoodswecker@yahoo.com

December 30, 2005

Department of Environmental Protection
Water and Waste Management, Tier 2.5
601 57th Street SE
Charleston, WV 25304

Re: Objection to proposed Tier 2.4 listing of stream, specifically **Conley Run**, a tributary of the Tygart Valley River, Randolph County, DNR stream number **MT-77**.

To Whom It May Concern:

I am requesting that you do not place **Conley Run Stream MT-77** in any designation higher than Tier 2.0.

You designated this stream on June 16 2002, as high quality by classifying it as a 2.0. This rating indicates that this stream does not need any further regulations or protection. You have determined that it is already well protected. So why fix something that is not broken!

Approximately a 0.5 mile section, more or less, of Conley Run Stream is situated on the Swecker family property. Approximately 90% of Conley Run Stream is on private land, not public land.

I feel that upgrading the tier designation to 2.5 will cause significant hardships to the families along Conley Run. Your plans to raise the tier designation will seriously impact development, timber harvesting, road building, cattle and sheep production or fertilizing our land and make farming more costly and difficult. It will devalue private property, and eventually cause higher tax rates.

I wish to note that the lower segment of Conley Run, adjoining my property, frequently dries up during dry weather cycles. Please find the enclosed photos of the stream during these times that show the stream with very little water.

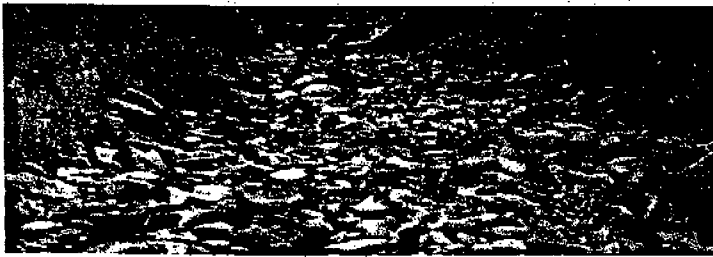
Some of my other concerns are, how can this stream be classified as a naturally reproducing trout stream? If there are trout in this stream, why do we not see anglers fishing this stream?

Please forward the appropriate documentation that indicates you obtained permission to trespass on private property in order to conduct the test on Conley Run Stream MT-77.

Your response and cooperation is appreciated and expected.

Randall D Swecker, Landowner
Rosemary L Swecker, Landowner
HC 67 Box 17
Valley Head, WV 26294
304-339-6847 email- rwoodswecker@yahoo.com
Tax Map/Parcel Number-116003000000000

Different areas of Conley Run Stream





July 9, 2006

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

(via email)

Ms. McClung:

Thank you for the opportunity to comment on DEP's proposed rule, 60 CSR 5, "Antidegradation Implementation Procedures," and specifically on the Tier 2.5 stream list.

I am a retired WV DNR fisheries biologist who has worked in this state since 1957. During that time I was primarily involved with West Virginia's wonderful trout fisheries. In that regard I have been a serious student myself of the water quality necessary for coldwater fisheries, including the severe impacts from pollution, such as acid rain, that can impair trout populations.

I appreciate your challenging work, given that we often begin with limited data and concepts. I find two such problems with this Tier 2.5 effort.

First, is the difficulty in describing the exact nature of a trout stream. A "trout stream" is more than just the specific stream a trout may be located in at any given time. A "trout stream" is actually a complex system of headwaters, tributaries and main stems. The location of a stream is important because it may maintain a reproducing trout population, or may be one of many linked streams that together provide an integrated trout habitat. Trout populations depend upon adequate stream lengths to reproduce, and because of their tendency to migrate from downstream reaches into the headwaters during the spawning season, it is crucial that continuous lengths are protected in order to maintain the reproducing population. In addition, trout move in reaction to environmental circumstances, such as warm summer temperatures and springtime acid flows.

Second, the definition of a "reproducing" trout stream has been altered over time. For example, repeated brown trout stocking, such as in Camp Creek and Hominy Creek and many streams further south, has resulted in some natural reproduction. Would the capture of one 4-inch "Fourth of July" brown trout with red spots and prior to additional fingerling stockings qualify a stream for Tier 2.5 designation? The words "naturally reproducing" seem inadequate if you are attempting to describe a self-sustaining trout population.

With these limitations in mind, I respectfully submit the following suggestions concerning the proposed Tier 2.5 list.

A. Red Creek of Dry Fork of Cheat River

Red Creek has two seeps with a pH of 6.0 and about 200 little brook trout in each. Each is about 100 yards long, and is located opposite Little Stonecoal Run. Larger brook trout enter Red Creek in May, grow 1" per month, and populate to the falls 1.5 miles upstream. There are no other fish in this reach of Red Creek, and these tributaries are too acid and infertile for fish. Above the falls in richer water, with no acid problem, beaver activity has eliminated all trout.

Greenbrier Springs in Red Creek below South Prong adds brook trout reproduction, as does Gandy Run. Therefore Red Creek for five miles starting just below Flat Rock Run, another brook trout stream, upstream to the falls, qualifies for Tier 2.5 protection.

B. Blackwater River

One would be hard pressed to find brook trout in or near Sand Run, with its beaver. Brown trout are sustained by stocking throughout Blackwater. Yokum Run is a heritage brook trout stream, as are the other isolated populations in Flat Run and Freeland Run. Beaver Creek has some brook trout above Gatsmer and in its Hawkins Run and possibly other streams from that side. Pendleton Run has brook trout in its headwaters.

Yokum Run should be restored to the Tier 2.5 list. Yokum, Flat, Freeland, Upper Beaver, Hawkins and Pendleton headwaters should be added to the Tier 2.5 list. Sand Run should be removed.

C. Cranberry River

The tributaries above Aldrich Branch are too acidic, so Lick, Hanging Rock and Birchlog runs have no trout today. These tributaries should be removed from the list. Dogway above the limer one mile up has no fish, so it should not be on the list as well. North Fork has brook trout in its right fork, not in its left, feeding the entire North Fork in summer, so the Tier 2.5 list should be changed to reflect this.

The headwater of South Fork of Cranberry above the Glades has brook trout. There are a few in the Glades, but many are in Yew Creek at the boardwalk. Some penetrate Charles Creek. The entire South Fork should be in Tier 2.5. Red Run, half way up the South Fork, also has brook trout and is an important feeder stream, and should be included in the Tier 2.5 list.

D. South Fork of Cherry

Tier 2.5 protection should begin at Rocky Run, which while it is too acid for trout reproduction, contributes necessary cool water to the South Fork. Ellick Run and Becky Run are feeders. Cold Knob Fork and all tributaries should be Tier 2.5, as native brook trout are present.

E. Gauley Headwaters

All "three forks" of Gauley headwaters have brook trout, except that Panther Run is too infertile due to its geology and acid rain. Gauley itself and Big Run have brook trout. Straight Creek is also a brook trout feeder. These should all be on the Tier 2.5 list.

Williams and Hughes have brook trout and should be listed under Tier 2.5. Turkey Creek is too infertile and acidic today. Only a few brook trout are in its right fork.

Gauley River headwaters and all its tributaries should be given Tier 2.5 status above the reach just below Miller Mill Run.

F. Shavers Fork (headwater to falls 2 miles above Bemis)

Wild rainbow trout persist just below Snowshoe and brook trout are present throughout. Black Run is on the Tier 2.5 list, but all the tributaries and the mainstem should be so listed. Lambert Run is limed. Add Greathouse Run of First Fork to list. First Fork, Second Fork, Blister Run and Red Run are listed (the Right Fork of Red Run is too acid today for brook trout reproduction). Whitmeadow, Crouch and McGee Runs are limed and contain brook trout populations, and should be included as Tier 2.5. Glade Run on the opposite side of Shavers Fork has been an important brook trout feeder stream for these tributaries and the main stem. All Shavers Fork down to the falls above Bemis, where the presence of smallmouth bass eliminates native brook trout, should be included in the Tier 2.5 list.

In addition to the streams listed above, I offer the following comments regarding other streams in specific drainages:

Cheat River Drainage

Wolf Creek -- extend Tier 2.5 to mouth (native brook trout throughout)

Clover Run -- extend Tier 2.5 to mouth and include all tributaries (native brook trout throughout)

Minear Mill Run -- extend Tier 2.5 to headwaters and all tributaries (native brook trout throughout)

Horseshoe Run -- extend Tier 2.5 to mouth and all tributaries (native brook trout throughout)

Gandy Creek -- extend Tier 2.5 above Whitmer and include all tributaries (native brook trout throughout)

Big Run of Gandy above Sinks -- add to Tier 2.5 list because of strong presence of native brook trout in the Sinks indicates spawning upstream will be successful

Big Run (lower) -- add both forks to Tier 2.5 list (native brook trout throughout)

Beaver Dam Run of Laurel Fork of Dry Fork -- has no brook trout and should be removed from Tier 2.5 list

Upper Pond Lick of Shavers -- should be retained on Tier 2.5 list due to reproducing rainbow trout population

Taylor Run of Shavers -- add entire length to Tier 2.5 list (native brook trout throughout)

Greenbrier River Drainage

North Fork of Anthony Creek -- add entire length to Tier 2.5 list (native brook trout throughout)

Meadow Creek above Sherwood Lake -- add entire length to Tier 2.5 list (native brook trout throughout)

Hills Creek down to Lobelia -- add to Tier 2.5 list (native brook trout throughout)

Beaver Creek of Greenbrier -- add entire length to Tier 2.5 list (native brook trout throughout)

Laurel Run of Greenbrier below Watoga State Park -- add entire length to Tier 2.5 list (native brook trout throughout)

West Fork of Greenbrier -- add all tributaries to Tier 2.5 list (native brook trout throughout)

East Fork of Greenbrier -- extend Tier 2.5 to Thornwood (native brook trout throughout)

East Fork tributaries (Abes Run, Burning Run, Simmons Run, and Bennett Run) -- add to Tier 2.5 list (native brook trout throughout)

East Fork tributaries (Waldeman Run, Lick Run, and Grassy Run) -- add to Tier 2.5 list (native brook trout throughout)

Little River -- extend Tier 2.5 to East Fork (native brook trout throughout)

Oldhouse Run -- add to Tier 2.5 list (native brook trout throughout)

Big Run and Buffalo Fork above Buffalo Lake -- add to Tier 2.5 list (native brook trout throughout)

Swago Creek of Greenbrier -- add to Tier 2.5 list (native brook trout and wild rainbow trout throughout)

Gauley River Drainage

Brushy Fork of Muddlety Creek -- add to Tier 2.5 list (native brook trout throughout)

Anglins Creek and all tributaries -- add to Tier 2.5 list (native brook trout throughout)

Panther Creek of Gauley -- add entire length including all headwaters (Cranes Nest Run is on the list) to Tier 2.5 list (native brook trout throughout)

Laurel Creek of Cherry River -- add section downstream from Jettsville to the mouth to Tier 2.5 list (native brook trout throughout)

North Fork of Cherry tributaries above Hunter Run up to Left Branch (except for Bear Run) -- have had no brook trout since the first logging and should be removed from Tier 2.5 list

North Fork of Cherry headwaters -- has brook trout and should be on the Tier 2.5 list

Potomac River Drainage

North Fork of the South Branch Potomac, from Virginia to Riverton -- add to Tier 2.5 list (native brook trout throughout)

Laurel Fork of North Fork of the South Branch Potomac -- add to Tier 2.5 list (native brook trout throughout)

Gulf Run of Seneca Creek -- add to Tier 2.5 list (native brook trout throughout)

Jordan Run of North Fork and tributaries -- add to Tier 2.5 list (native brook trout throughout)

Shackleford Run, Moyer Run, Sawmill Run and Shaver Run -- add to Tier 2.5 list (native brook trout throughout)

Williams River Drainage

Lick Branch and Upper Bannock Shoals Run have no brook trout and should be removed from Tier 2.5 list

Left Fork of Tea Creek is listed as having native brook trout populations, but this is an error. The Right Fork does contain brook trout and should be listed, and the Left Fork removed from the list.

Tygart River Drainage

Tygart River headwaters above Big Run -- add to Tier 2.5 list (native brook trout throughout)

Elkwater Fork -- extend Tier 2.5 to Tygart River (native brook trout throughout)

Snake Run of Elkwater -- add to Tier 2.5 list (native brook trout throughout)

Becky Creek -- extend Tier 2.5 to Tygart River (native brook trout throughout)

Mill Creek -- extend Tier 2.5 to Tygart River (native brook trout throughout)

Riffle Creek -- extend Tier 2.5 to Tygart River (native brook trout throughout)

Files Creek -- extend Tier 2.5 to Tygart River (native brook trout throughout)

Middle Fork River headwater tributaries -- add to Tier 2.5 list (native brook trout throughout)

Long Run of Middle Fork -- add to Tier 2.5 list (native brook trout throughout)

Right Fork of Middle Fork above Queens and all tributaries -- add to Tier 2.5 list (native brook trout throughout)

Hell Run, Devil Run, and Hanging Run of Middle Fork -- add to Tier 2.5 list (native brook trout throughout)

Mill Run near Teter Creek Lake -- add to Tier 2.5 list (native brook trout throughout)

Grand Camp Run of French Creek -- add to Tier 2.5 list (wild brook trout throughout)

Right Fork of Tenmile Creek headwaters -- add to Tier 2.5 list (native brook trout throughout)

Panther Fork of Buckhannon -- add to Tier 2.5 list (native brook trout throughout)

Left Fork of Buckhannon -- add entire length and all tributaries to Tier 2.5 list (native brook trout throughout)

Bearcamp Run of Left Fork of Buckhannon -- return to Tier 2.5 list (native brook trout throughout)

Beech Run of Left Fork of Buckhannon -- return to Tier 2.5 list (native brook trout throughout)

Right Fork of Buckhannon -- extend Tier 2.5 to mouth (native brook trout throughout)

Marsh Fork of Right Fork Buckhannon -- add to Tier 2.5 list (native brook trout throughout)

Left Fork of Right Fork and all tributaries, including Trout Run -- add to Tier 2.5 list (native brook trout throughout)

Little Kanawha Drainage

Unnamed Tributary of Left Fork of Right Fork of Little Kanawha (second tributary below Eden) -- add to Tier 2.5 list (self-sustaining wild brook trout population present since the 1980's)

Big Run of Left Fork of Holly above Fall Run -- return to Tier 2.5 list (native brook trout throughout)

Elk River Drainage

Poplar Creek of Birch River-- has no brook trout and should be removed from Tier 2.5 list

Powell Creek of Birch River -- add entire length to Tier 2.5 list, including Tug Fork which is listed (native brook trout throughout)

Back Fork of Elk upstream of Skelt, including all tributaries -- add to Tier 2.5 list (native brook trout throughout)

Leatherwood Creek and Left Fork of Leatherwood Creek of Elk -- add to Tier 2.5 list (native brook trout throughout)

Big Run of Elk River -- add to Tier 2.5 list (native brook trout throughout)

Big Spring Fork of Slaty, and all tributaries -- restore to Tier 2.5 list (native brook trout throughout)

Respectfully submitted,

Donald C. Gasper
WV DNR Retired
4 Ritchie Street
Buckhannon, WV 26201

**Robert Earl Maxwell
Post Office Box 1818
Elkins, WV 26241**

July 10, 2006

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

Attn: Tier 2.5

Re: Proposed Tier 2.5 Listing
West Fork of Glady Fork, Randolph County

Dear Ms. McClung:

In December 2005, I submitted comments regarding the proposed listing of the West Fork of Glady Fork in Randolph County, West Virginia (the "West Fork of Glady Fork") by the West Virginia Department of Environmental Protection ("DEP") as a Tier 2.5 Water of Special Concern under 60 CSR 5, the Antidegradation Implementation Procedures. A segment of the West Fork of Glady Fork flows through property which I own, and a small portion of the segment of the West Fork of Glady Fork proposed for Tier 2.5 listing appears to be located on my property.

Specifically, clarification was requested from DEP as to whether the segment of the West Fork Glady Fork proposed for Tier 2.5 listing is intended or not intended to be located on my property. Maps have been provided to DEP indicating my property boundaries as well as a map obtained from DEP showing the location of the segment of the West Fork of Glady Fork proposed for listing. Because no rationale for the boundary of the listed segment was offered, it appeared that the portion located on my property was a mapping error.

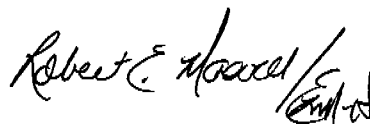
To date, I have received no response to my inquiry. Instead, DEP offered a very general response to comments document on its website and has moved forward with a proposed rule based on the list on which I made my comments in December.

My letter also posed questions to DEP regarding the effect of the proposed listing on the future use of my property. DEP submitted only a very general answer to these questions in the general response to comments document. I focused my questions on the fact that some or all of my property (depending on the response to my unanswered question above) is located upstream of a Tier 2.5 stream segment. I find no response to these questions in DEP's general response to comments document. I request again that DEP provide a response to my inquiries.

Finally, DEP's response to comments contains only general information regarding how the proposed listing could affect the future use of my property. For example, the response states that NPDES permit applications would require more detailed information to be submitted, and perhaps a more extensive review. What does that mean, in practical terms? Can DEP preclude certain activities on a Tier 2.5 stream that would be permissible on a Tier 2 stream? If so, time delays and additional permitting cost are only the beginning of the process issues created by the Tier 2.5 listing. As stated in my previous letter, DEP has a duty to provide information in sufficient detail for me to determine whether these restrictions are acceptable or warrant further comment to DEP. To date, DEP has not provided sufficient information to the public for me (and no doubt others) to make that determination.

I urge you to reconsider moving forward with the proposed Tier 2.5 listings until the public is offered better information to understand the proposed rule and better answers – or any answers for that matter – to the public's questions are provided. I may not be opposed to the proposed listing if I fully understand whether the listed segment is located on my property or whether being located upstream of the listed segment will have an impact on my property. Thank you for the opportunity to comment on the proposed Tier 2.5 listing.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Maxwell" with a stylized flourish at the end.

Robert E. Maxwell

BERWIND LAND COMPANY

 A SUBSIDIARY OF
BERWIND CORPORATION

300 SUMMERS STREET, SUITE 1050
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: 304-346-0569
FAX: 304-346-6516

July 10, 2006

Ms. Lisa McClung, Director
Division of Water and Waste Management
Department of Environmental Protection
Division of Water Waste Management
601 57th Street
Charleston, WV 25301
Attn: Tier 2.5

Re: **Tier 2.5 - Deletion of Jacobs Fork (BST-70-W)**

Dear Director McClung:

By letters dated July 31, 2003 and December 30, 2005 to the West Virginia Department of Environmental Protection ("DEP"), Berwind Land Company ("BLC") provided its comments and objections to the inclusion of Jacobs Fork in McDowell County on the list of Tier 2.5 "waters of special concern." BLC was pleased to see that the DEP has removed Jacobs Fork (BST-70-W) from the proposed list of Tier 2.5 waters. BLC offers these comments in support of the DEP's action and incorporates by reference the letters dated July 31, 2003 and December 30, 2005 which also provide support for the DEP's decision.

As BLC stated in its earlier letters commenting and objecting to the inclusion of Jacobs Fork on the Tier 2.5 list, this stream should never have been designated a potential "water of special concern." In the document entitled "Streams Removed from the Original Presumptive List of Waters of Special Concern (Tier 2.5 Streams)" the DEP listed "coal reserve development planned or underway" as the reason for removing Jacobs Fork. BLC had provided information regarding existing and potential mineral development to the DEP in its earlier comments about Jacobs Fork. As noted in these earlier comments, BLC has entered into leases and agreements with several companies to develop mineral reserves on lands adjacent to Jacobs Fork. BLC consistently has stated its view that under the provisions of the Antidegradation Implementation Rule, 60 CSR 5, related to the "Presumptive List" of Tier 2.5 waters the presence of proven, developable mineral reserves alone made Jacobs Fork an inappropriate stream to be considered a "water of special concern" and applauds the DEP for considering these comments and removing this stream from the Tier 2.5 list.

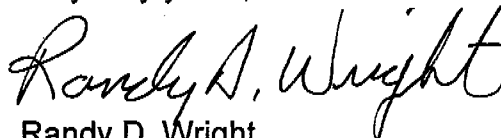
While the DEP gave "coal reserve development" as the reason for removing Jacobs Fork, each of the following reasons also supports the removal of Jacobs Fork from the Tier 2.5 list. First, the sole basis¹ for including Jacobs Fork on the initial proposed Tier 2.5 list was a claim that it qualified as a naturally reproducing trout stream. BLC has challenged the information relied upon by the DEP in support of this claim as being wholly out of date with no way to test the reliability of the information gathered. See BLC comment letter of December 30, 2005.

In addition to the age of the original data, the only water quality samples for Jacobs Fork that BLC could access on the DEP's website casts doubt on Jacobs Forks qualification as a trout stream. One sample, taken at mile point 0.8 on June 30, 1998, showed the stream had a temperature of 70.88 degrees Fahrenheit. The DEP's own guidelines for trout streams state that the water temperature in these streams should never exceed 70 degrees Fahrenheit. The DEP could not justify a Tier 2.5 classification for Jacobs Fork based upon such evidence and DEP was correct to remove the stream after the problems with the existing data were brought to the agency's attention.

Another point that the DEP could have relied upon to justify its removal of Jacobs Fork was the overall water quality of this stream. The DEP's website includes the results of a total of three water samples taken since 1998 and two of these samples were taken on the same date. However, this limited data set suggests that Jacobs Fork is not a high quality stream. Two of the three samples taken show that this stream exceeded the state water quality standards for fecal coliform. Beyond the results of the water quality samples suggesting poor water quality, the small number of samples also casts doubt on the DEP's ability to rely upon them to justify a Tier 2.5 listing. Under the Antidegradation program, the DEP requires a permittee to establish baseline water quality for a stream by taking a minimum of twelve samples over a six-month period. Surely three samples over seven years cannot be sufficient to justify including Jacobs Fork on the Tier 2.5 list. As such, Jacobs Fork does not require the additional protections mandated for Tier 2.5 waters and the DEP's decision to remove the stream is correct.

In light of both the reason given by the DEP and the other reasons listed in this letter and our previous comments, BLC believes that the DEP has made the correct decision to not include Jacobs Fork as a Tier 2.5 stream. We appreciate the agency's review and consideration of these comments.

Very truly yours,



Randy D. Wright
Berwind Land Company

¹ The DEP never responded to BLC's July 31, 2003 comments and objections regarding Jacobs Fork. As such, BLC has had to speculate on the exact reason that Jacobs Fork was included on the original presumptive list.

BERWIND LAND COMPANY

 A SUBSIDIARY OF
BERWIND CORPORATION

300 SUMMERS STREET, SUITE 1050
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: 304-346-0569
FAX: 304-346-6516

July 10, 2006

Ms. Lisa McClung, Director
Division of Water and Waste Management
Department of Environmental Protection
Division of Water Waste Management
601 57th Street
Charleston, WV 25301
Attn: Tier 2.5

Re: **Tier 2.5 – Deletion of Vall Creek (BST-70-Z)**

Dear Director McClung:

By letters dated July 31, 2003 and December 30, 2005 to the West Virginia Department of Environmental Protection ("DEP"), Berwind Land Company ("BLC") provided its comments and objections to the inclusion of Vall Creek in McDowell County on the list of Tier 2.5 "waters of special concern." BLC was pleased to see that the DEP has removed Vall Creek (BST-70-Z) from final Tier 2.5 list it published in June 2006. BLC offers these comments in support of the DEP's action and incorporates by reference the letters dated July 31, 2003 and December 30, 2005 which also provide support for the DEP's decision.

As BLC stated in its earlier letters commenting and objecting to the inclusion of Vall Creek on the Tier 2.5 list, Vall Creek should not be considered a "water of special concern." In the document entitled "Streams Removed from the Original Presumptive List of Waters of Special Concern (Tier 2.5 Streams)" the DEP gave "coal reserve development planned or underway" as the reason for removing Vall Creek. BLC provided information regarding the mineral resources adjacent to Vall Creek to the DEP in its earlier comments. As noted in the 2003 and 2005 comments, BLC has entered into leases and agreements with several companies to develop mineral reserves on lands adjacent to Vall Creek. Indeed, Consol Energy, Inc. is already developing coalbed methane wells on the property. BLC argued in earlier comments that mineral development alone made Vall Creek an inappropriate stream to be considered a "water of special concern" through its inclusion on the "Presumptive List" and applauds the DEP for considering those comments and removing this stream from the Tier 2.5 list.

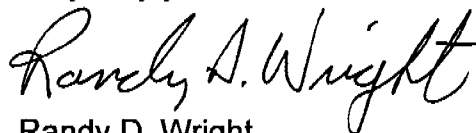
While the DEP gave "coal reserve development" as the reason for removing Vall Creek, BLC would like to reiterate the other reasons that the DEP could have relied

upon in its decision not to retain it as a Tier 2.5 stream. The DEP originally included Vall Creek on the Presumptive List of Tier 2.5 streams because the agency classified it as a reference stream. BLC's earlier comments showed that Vall Creek was not an untouched stream and was not properly classified as a reference stream for that reason. As such, Vall Creek should never have been included on the presumptive list and it was entirely proper for the DEP to remove it from the final proposed list of Tier 2.5 streams.

The only two water samples that the DEP relied upon in originally classifying Vall Creek as a reference stream revealed a fecal coliform level that exceeded state water quality samples. Clearly, Vall Creek's water quality samples show that it is not an appropriate candidate to be considered a "reference" stream. Beyond the results of the water quality samples, the small number of data points available also casts doubt of the DEP's ability to rely upon them to justify a Tier 2.5 listing. Under the Antidegradation program, the DEP requires a permittee to establish baseline water quality for a stream by taking a minimum of twelve samples over a six-month period. Presumably, the agency would never accept a data set containing only two data points as being sufficient to draw conclusions regarding the baseline water quality. Correspondingly, a total of two samples should not be sufficient to justify including Vall Creek on the Tier 2.5 list. Neither the number of samples taken, nor the results of the samples that were taken, supports classifying Vall Creek as a reference stream. As this was the DEP's only justification for including Vall Creek on the Tier 2.5 list, the agency was correct to remove it.

In light of all the evidence, BLC believes that the DEP has made the correct decision in removing Vall Creek from the list of Tier 2.5 streams. We appreciate the agency's review and consideration of these comments.

Very truly yours,

A handwritten signature in cursive script that reads "Randy D. Wright".

Randy D. Wright
Berwind Land Company

July 6, 2006

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

RE: ANTIDEGRADATION IMPLEMENTATION PROCEDURES RULE

Dear Ms. McClung:

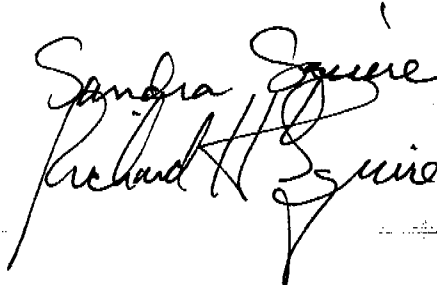
We strongly object to the reclassification by DEP for 141 streams located throughout the State of West Virginia. The reasons stated for the reclassification change appears deliberately deceptive and vague. We request that during the July 10, 2006, hearing, DEP present **credible** evidence concerning the environmental impact on aquatic and other wildlife this reclassification will inflict.

Further, that at said hearing, DEP provide copies of documents proving that it has addressed or investigated **all** issues to present reliable, conclusive and **unbiased** data to support the reclassification of these streams. This evidence must undeniably show how doing so will serve the interests of the public in West Virginia. Stream reclassification will undoubtedly have a detrimental economic impact on the State's tourism industry, and local and state economy.

Reclassification seriously threatens the State's most scenic streams and poses a serious threat to the economics of communities that rely heavily on pristine trout streams to attract tourists and second home property owners. The burden of controlling and maintaining water quality able to support trout reproduction should certainly fall to those industries profiting from planned or ongoing development. We implore you to continue to protect these streams under the state legislation passed in 2001.

Sincerely,

Dr. Richard and Mrs. Sandra Squire
918 Woodland Avenue
South Charleston, WV 25303
(304) 744-2903

Handwritten signatures of Sandra Squire and Richard H. Squire. The signatures are written in dark ink and are somewhat stylized. Sandra's signature is on top, and Richard's is below it.

Attached is a petition in support of the above comments

36

Name	Address	Zip
Sandra J. J. J.	918 Woodland Ave S Chas	25303
Richard H. J. J.	918 Woodland Ave S Chas	25303
Connie Shaley	555 Buckeye Fork, Sd	25564
Michael Shaley	555 Buckeye Fork, Sd	25564
Kathy Calvert	1200A Alexander St., Charleston	25302
Huston Woods	260 Frame Rd, Elkview	25071
Donna Woods	260 Frame Rd Elkview	25071
Daniel J. J.	2 Cherokee Trail, Elkview	25071
Off. J. J. Hair	858 Chester Rd, Charleston WV 25302	25302
Kathy Cottrell	1490 Otto Rd. Spencer, WV	25276
John J. J.	364 Left Fork Twistabout Precious WV	25164
Sally Mageran	1325 Mt. Vernon Place Charleston	25314
Janet J. J.	4009 Cottage Ave., Charleston	25304
John W. J. J.	114 Belle Acres, Scott Depot, WV	25560
Gill M. Harlan	931 Montrose Dr., South Charleston WV	25303
Joe Walker	284 Roxana Hills Dr. Dunbar, WV	25064
Ed J. J.	P.O. Box 540 Ripley WV	
William M. Smith	P.O. Box 540, Ripley, WV	25271
Shad Smith	P.O. Box 783 Ripley WV 25271	25271
Paul J. J.	506 17th St., Dunbar, WV	25064
Richard E. J. J.	1031 Greenland Circle ^{Sp. Charleston, WV}	25309
Joe Marakovits	106 Countryside Est. Scott Depot, WV	25560
John Curvill	2714 Glenfield Terrace S. Charleston, WV	25303
William C. Adams	5630 STANTON AVENUE CHAS WV	25304
Shirley Hoden	109 East Ridge Charleston, WV	25314

[illegible]

Attn List M&C Long

As an interested
citizen of WV
and an avid
outdoorsman. I am
opposed to any
reduction to the
Tier 2.5 List of
Streams.

We have little left
in WV, but clean water
is one of them!! Think
you will agree.
Halt R. Shy

①

While I am concerned about all 141 streams removed from the Tier 2.5 list, the removal of 35 for "coal reserve development" is very disturbing.

Tier 2.5 allows for some stream degradation, but any is too much. To allow streams to be damaged and polluted to satisfy the interests of a few people and their money is unfair and deeply wrong.

He won't be able to drink the money that the coal companies are making. It won't help us survive in any way when the coal is gone and the companies leave with it. In fact, no one but those high in the coal companies benefit from the removal of these streams.

(2)

from the list.

People have depended on these streams for food and clean water for generations. It is our responsibility as citizens and the job of the DEP to leave these streams healthy and intact for future generations.

To think only of ourselves and lining our pockets, and not of the future and of all the people, animals and fish is immoral.

I ask that ~~to~~ the DEP not allow the interests of coal companies hold more weight than the interests of people who, like the employees of the DEP, need clean water to survive. The bottom line is that we need water. We don't need coal.

Sarah Jonkin

[MSN Home](#) | [My MSN](#) | [Hotmail](#) | [Shopping](#) | [Money](#) | [People & Chat](#)Web Search: 

veric



Hotmail

[Today](#)[Mail](#)[Calendar](#)[Contacts](#)

phillipsg63@hotmail.com

[Reply](#) | [Reply All](#) | [Forward](#) | [Delete](#) | [Junk](#) | [Put in Folder](#) | [Print View](#) | [Save Address](#)

The sender of this message, sharpscountrystore@frontiernet.net, could not be verified by Sender ID. Learn more about Sender ID.

From : Tom <sharpscountrystore@frontiernet.net>
Sent : Sunday, July 9, 2006 9:44 PM
To : Phillips George <phillipsg63@hotmail.com>
Subject : Fwd: Tier 2.5 / Big Spring Fork in Slatyfork, West Virginia

[▲](#) | [▼](#) | [X](#) | [Inbox](#)

Begin forwarded message:

From: tom <dsharp001@cinci.rr.com>
Date: July 9, 2006 4:39:01 PM EDT
To: hakowski.denise@epa.gov
Subject: Tier 2.5 / Big Spring Fork in Slatyfork, West Virginia

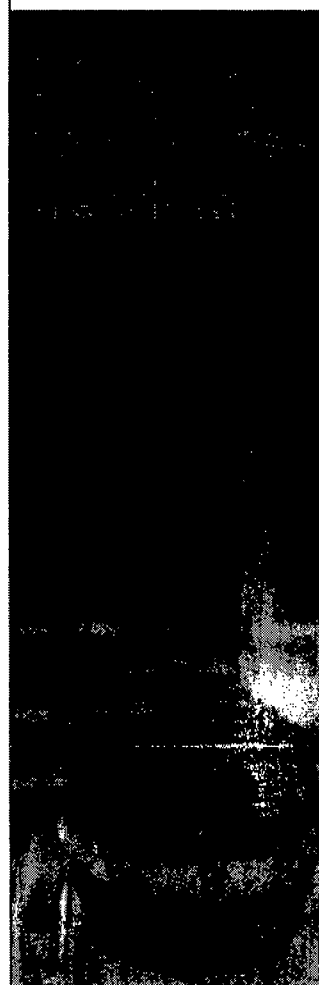
Dear Ms. Hakowski,

I am the eighth generation to look after a proud Pocahontas County, West Virginia heritage. The Big Spring Fork River flows through our cherished land and is as pristine today as it was when William Sharp III built his first log house here in the early 1800's. Native Brook trout, our state fish, and the Cambarus Elkinsi (one of only two endemic crayfish / imperiled G2) thrive in its cold spring waters.

The 'valley' between Cheat, Middle and Elk Mountains has remained essentially undisturbed for centuries. The top of Cheat mountain now hosts the Snowshoe Ski Resort owned by Intrawest of Canada. While they are to be applauded for their success it seems Intrawest nor the WVDEP cared to be responsible for their sewage and Infrastructure. Building continued at a fast pace while violations and fines piled up. Intrawest holds two NPDES permits covering four 'developments'. The Pocahontas County Commission claims the WVDEP thinks of Snowshoe as a separate 'city', citing this as the reason the county commission did not get 'involved'. The building continues.

As Intrawest began to develop their Hawthorne community at the base of Cheat Mountain, instead of a major overhaul of their entire sewer system, they chose to apply for a meager 90,000 gallon per day plant just for Hawthorne at the bottom of Cheat. Though owned privately (Snowshoe Water & Sewer, INC), any state authorized utility is required to make service available to the surrounding community. Some complaints were lodged by neighbors who believed Intrawest was polluting their properties and that they should have been offered access to the new treatment plant. The WVDEP then sent letters to Intrawest offering up to one million gpd for their plant to serve the needs of all at the base of the mountain and for their Inn at Snowshoe and Snowshoe

**Weight
Watchers®
TurnAround™**



Village at the top of Cheat. Instead of taking on the financial responsibility of building a new, comprehensive treatment plant which would allow them to live up to their NPDES permit requirements for their entire development and duty of their utility charter, Intrawest chose to withdraw its request for a certificate of need for the tiny Hawthorne plant with the WV Public Service Commission. No new plant of any kind would be built by Intrawest.

The bucolic valley still remains, but rapidly rising property values have created quite a conundrum for us. The county commission claims to want to develop the narrow valley farmland nestled between magnificent, steep mountainsides. They believed a 'regional' sewer project was the answer because local 'planners' told them the 'valley' had too few customers to obtain funding from the state. They 'needed' Snowshoe's customer base. Sadly, years later, it has been realized this is simply not true, as Milton, WV was just granted \$5 million for a plant to serve fewer than 50 people by the WV Infrastructure Jobs and Development Council. More distressing is the fact that when the county went to Intrawest to ask for their customer base, they stipulated not having to 'acquire' their liability. 'Negotiations went on for months but ended with the county having to take on all of Snowshoe Water & Sewer's liability plus the liability of their 'newly acquired Silvercreek Water & Sewer utility to be 'granted' Intrawest's customer base.

One of the many complications of this project is that the people do not want it. The county commission and project officials say publicly that they are saving the river from the septic systems of the farmers along route 219. WVDEP representatives say the Big Spring Fork shows no sign of damage from pollution from any source, despite Snowshoe's repeated violations. The project planners have chosen the Sharp farm right beside Scenic Highway 55/219, 14 miles from Snowshoe Village, as the location for the 2.25 million gpd treatment plant. The Big Spring Fork would be the receiving body of water for the sewer discharge. 95% of the development is occurring at Snowshoe and at the base of its mountain. From the entrance to Snowshoe down to the Sharp farm, miles and miles away at the cost of millions per mile, they are picking up fewer than 20 new sewer customers. There are only two developments along route 219 and they will not be hooking up to the sewer. So the project continues without any regard to cost, additional customers served or need. The project, disguised as a 'regional' sewer, has always been and continues to be a device to serve the needs of Intrawest. As proposed, the taxpayers will foot the \$17 million bill. Even the homeowners who bought property from Intrawest at Snowshoe have expressed their concern about the treatment plant with hundreds of letters petitioning the commission to move the plant.

Situating the sewer plant on the Big Spring Fork has caused alarm in our community. The Sharp farm is on karst (fractured limestone with underground water channels, caves and sinkholes) with recent major sinkhole activity. The Big Spring Fork runs dry most of the year due to the karst. Even the spring which supplies most of the surface water runs dry. So sewer discharge will be excreted into a dry riverbed. The Native Brook trout (and other aquatic life) which seek sanctuary in the cool, deep pockets of water, sometimes hidden from view, will be inundated with nothing but effluent during dry periods.

The WVDEP is proposing a 2.25 mgpd plant to discharge into the Big Spring Fork with a wasteload allocation of only 1.5 mgpd? Sworn testimony from WVDEP officials indicate that 1.5 is the maximum allocation available at this location. To 'obey' a state law requiring any new sewer plant built with state monies to accommodate growth for 20 years, they propose the 2.25 mgpd plant without the wasteload capacity to discharge into the river! The WVDEP State Revolving Fund is seeded with federal dollars, therefore the NEPA process is required. NEPA requires that the WVDEP hold public hearings where alternate sites or no site are options. This was not done. Also, an Environmental Assessment (EA) is required to evaluate the impact on the community. The WVDEP issued a FONSI (Finding of No Significant Impact) based on a supposed EA, which was listed as a 'reference' document in the FONSI. When the WVDEP received a FOIA (Freedom of Information Act request) for the EA, the response from the WVDEP was that "no such document exists". Ms. Hakowski, if an EA was performed it would absolutely

require a further Environmental Impact Study (EIS). The WVDNR and Fish & Wildlife cautioned the officials that "no environmental study has ever been performed in this region" and that it includes "conditions in which rare and endangered species are known to live". Fish and Wildlife sent letters of caution to the project officials about the *Cambarus Elkinsi*. Tom Chapman said his agency does not have enforcement powers, but alerted officials about this endemic crayfish so they could see their 'error' and move the plant. They did not, claiming they have no legal requirement to do so as the *Cambarus Elkinsi* is not on the Endangered Species list.

Whitney Stocker, of Denison University, discovered this species in the Big Spring Fork in the late 1980's and wrote letters to officials warning that the population at the Sharp farm site was the wheelhouse for the other two known populations, found only in West Virginia. He said merely building the plant on the Sharp farm location would deprive this creature of its breeding habitat and the population could be wiped out completely. The *Cambarus Elkinsi* is not a burrower, depending on spaces between river rock for survival. Stocker told of a recent annihilation of a non-burrowing species in West Virginia from just such loss of habitat.

The Sharp farm site is riddled with sinkholes. Water rises up from the earth below when water pressure from Cheat Mountain becomes too great. Scores of sinkholes become boilholes with water gushing out and millions of tiny holes exude so much water it creates a miniature Everglades. The 9 1/2 acre field is more than half in the 100 year flood zone. The officials had to scrunch the buildings and 2.25 million gallon open vats of human waste up against Scenic Highway 55/219 in a 3 acre area to 'avoid' the official flood plain. They have ignored photographs and testimony from life long residents that the Big Spring Fork jumps its banks at the very eastern edge of the meadow and floods right across the field, not just 'around' it. The field, itself, was created by the Middle Mountain Stream flooding into the path of the Big Spring Fork and depositing earth and debris for eons. This is why the Big Spring Fork, otherwise flowing in a beeline for the soon to be formed Elk River, is forced to go around the meadow. The entire site is composed of alluvium. Core samples done after the WV Public Service Commission hearing indicate a wide underground water channel beneath the site. Nationally known karst experts have warned officials of the danger of locating the plant on the Sharp farm. One spill, one mistake, one overflow will be immediately sucked into the earth and will ruin the underground water supply. There is no public water supply, we all depend on springs and wells. In fact, WVDEP Cabinet Secretary Timmermeyer has ignored a 21-page 'trip study' by her own WVDEP geologist, George Dasher, (featured keynote speaker at last year's Karst Symposium). He warned the engineering department that they were making a grave mistake placing the treatment plant and the discharge on the Sharp farm. Jeff Bray, owner of Maxwellton Solutions, performed micro-gravity tests for the project planners. In his report he said the Sharp farm site was the most precarious due to the karst and the possibility that 'material' would be "immediately spirited away" into the underground water supply.

The county commission is comprised of three members with ties to Snowshoe and development. They have received thousands of signed petitions from all four corners of the county asking them to move the proposed treatment plant location off the Sharp farm and away from the Big Spring Fork. Trout Unlimited, The National Speleological Society, The Friends of Elk, The West Virginia Outdoor Sportsmen Association, The Isaak Walton League, The Mid-Atlantic Fly-Fishermen Association, The Elk Headwaters Watershed Association and many more have expressed their grave concerns about the proposed treatment plant location. Curiously, the WVDEP, as of June 1, 2006, has lifted the Tier 2.5 protection off of the entire Big Spring Fork River siting 'development or planned development' as the reason.

During the re-opened Tier 2.5 'comment period' I wrote to the WVDEP stating my support for the Tier 2.5 protection of the Big Spring Fork, as a property owner for some distance on both sides of the river about 1/2 mile before it meets the Old Field Fork to form the Elk River. I believe other family members owning more property along the river did likewise. It is my understanding that

the WVDEP received many letters from property owners several years ago when the 'idea' of Tier 2.5 was a new one and may well have been 'misunderstood'. The majority of landowners were timber, gas and coal companies. Their complaint was that the Tier 2.5 designation would not allow them to develop their land. At some point, a small sacrifice has to be made in order to protect our God given river. Is it not the mandate of the EPA via the WVDEP to protect pristine rivers as required by the National Clean Water Act? Is the reason, "development or planned development" reason enough to take away the protection afforded the Big Spring Fork river? Was a 'review' of this classification brought on, as well, from the pressure by officials to be able to discharge effluent into the Big Spring Fork? After all, now they can do it without any legal recourse because, wink wink, it is not a reproducing trout stream anymore.

I invite you or any EPA official to walk our farm and fish this river. You will have tears in your eyes from the sheer beauty of it all, as I did when I recently gave up my business and home to move back to my native West Virginia to look after this long, proud heritage. Please encourage the WVDEP to reinstate the Tier 2.5 protection for the Big Spring Fork as West Virginia (and the United States...as fishermen from around the world come to fish the Upper Elk) will lose a precious resource.

Additionally, I hope that your agency can step in and offer guidance to the WVDEP to avoid a future embarrassing situation when something goes wrong and take action to move the treatment plant and stop a catastrophe before it happens.

Sincerely,

Tom Shipley
HC 69 Box 1a
Slatyfork, West Virginia 26291
304 572 3547
sharpscountrystore@frontiernet.net



Get the latest updates from MSN

[MSN Home](#) | [My MSN](#) | [Hotmail](#) | [Search](#) | [Shopping](#) | [Money](#) | [People & Chat](#)

© 2006 Microsoft [TERMS OF USE](#) [Advertise](#) [TRUSTe Approved](#) [Privacy Statement](#) [GetNetWise](#) [Anti-Spam Policy](#)

Antideg - Please Maintain 2.5 tier Stream Designations

From: <CCWALBRIDGE@cs.com>
To: <antideg@wvdep.org>
Date: 7/5/2006 4:56 PM
Subject: Please Maintain 2.5 tier Stream Designations

Charlie & Sandy Walbridge
Route 1, Box A43B
Bruceton Mills, WV 26525
304-379-9002; ccwalbridge@cs.com

July 6, 2006

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

Dear Ms. McClung,

I am extremely concerned about proposals to reduce protection of Tier 2.5 streams in West Virginia. These 300+ streams total over 1100 smiles in 30 West Virginia counties. They are our state's most ecologically and economically valuable waterways, supporting cold and warm water fisheries, clean drinking water supplies, and responsible waterfront development.

Your proposed antidegradation implementation procedures:

Unfairly remove 131 streams from Tier 2.5 protection without sufficient reason

Unfairly weigh industry opposition in the decisions to remove specific streams from the Tier 2.5 list. Many streams are scheduled for delisting simply because miners, loggers, and developers wrote letters of opposition without explaining about how Tier 2.5 protection might actually hurt their businesses.

Unwisely removes protection on many well-known streams, including: more than 7 miles of Shavers Fork in Randolph and Pocahontas counties; 31 miles of Gladly Fork in Randolph and Tucker counties; all of Big Spring Fork of Elk River in Pocahontas County; all 20 miles of Loop Creek in Fayette County; most of Elkhorn Creek in McDowell County; an 11-mile stretch of Hominy Creek in Nicholas County; a nine-mile segment of the South Fork of Cherry River east of Richwood; and the six-mile stretch of Glade Creek flowing through the New River National River in Raleigh County.

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It was intended to protect existing water quality and prevent further deterioration of rivers, streams, and lakes. Tier 2.5 designation is not designed to prevent development activities in a watershed; rather it helps maintain its most admirable qualities such as clean water, active fisheries, and sustainable downstream communities.

I have seen significant positive changes from the Clean water Act in my lifetime, and I don't want to see these gains lost. The antidegradation policy keeps clean waters clean and prevent further pollution of others. Indeed, I would like to see more streams should added to the Tier 2.5 list for increased protection from pollution.

Please protect the "Wild and Wonderful" legacy of West Virginia by continuing to fully protect Tier 2.5 streams.

Sincerely,

Charlie & Sandy Walbridge

Antideg - Written comments for the rule -- 60 CSR 5, "Antidegradation Implementation Procedures"

From: "Robert A. Mertz" <ramertz@mountain.net>
To: <antideg@wvdep.org>
Date: 7/3/2006 8:29 AM
Subject: Written comments for the rule -- 60 CSR 5, "Antidegradation Implementation Procedures"

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

Lisa McClung,

As a Biology, Wildlife Management and Environmental Earth Science teacher working in the public school systems of several states, for over twenty years I have been teaching students the importance of a sustainable life style. I want them to learn to live within the ecological budget of Earth. The quality of life for the present and future generations depends on keeping the life sustaining diversity of our complex life systems healthy. Although there are some impressive self-maintaining dynamics at work to stabilize these systems, there are limits to their ability to correct for continued stress. The geological record is full of evidence showing sudden drastic upheavals and ecological disasters. We have no valid reason to believe that we humans with our huge powers to alter the climate and ecosystems will not trigger another watershed shift in the world's balance that will result in condition that renders the Earth unsuitable for human life, or that degrades the quality of our existence to a much lower level. It is our duty as the most powerful species to exist on this planet to use our might to protect the integrity of our life support systems for the benefit of all living things, to do anything is the extreme in narrow minded, short sighted self indulgent stupidity.

For 30 years I have been teaching students about the importance and value of clean water. Our streams are the life blood of the terrestrial part of the planet and as terrestrial creatures our welfare is very much tied to the health of our streams. My students have studied the streams as each year as they complete an extensive Stream Study Project that collects and identifies the aquatic life in the stream and measures many physical and chemical features. We study ecological concerns such as bioaccumulation, BOD, and sedimentation. My students are well aware of the ecological and economic values of protecting the quality of our streams, surely the experts at WVDEP are as aware of the concerns. My wish is that the WVDEP will have the fortitude to stand up to the industries that want to place their short term economic interests ahead of the long term interests of everyone else. Here are some of the good and bad features of the 60 CSR 5, "Antidegradation Implementation Procedures". Please accept these comments and ideas to improve these procedures.

Current strengths of WVDEP's proposed antidegradation implementation procedures:

- Protect 303 of the state's most ecologically and economically valuable waterways (totaling 1,158 stream miles in 30 counties) as Tier 2.5— a designation that includes reproducing trout streams, waters flowing through public lands, and other waters with exceptional qualities.
- Are a crucial component of the rule that will protect the state's water resources and related economics throughout future development in the state.

- Protect the ecological and economical benefits of having clean water in the future—such as natural resource tourism, clean drinking water supplies, and responsible waterfront development.
- Protect some of the state's most pristine coldwater rivers and streams—many of which sustain reproducing trout populations and are located on public lands.
- Protect some of the state's most dynamic warm water streams— which also provide revenue through fishing and other recreational activities.
- Fulfill Clean Water Act requirements intended to protect existing water quality and prevent further pollution of the state's rivers, streams, and lakes.
- Protect the "Wild and Wonderful" legacy of West Virginia by providing clean water and outstanding opportunities for future generations.
- Include many popular streams such as: segments of Cranberry, Elk, and Williams rivers; the entire length of the West Fork of Greenbrier River; all of Gandy Creek in Randolph County; and the length of Seneca Creek in Pendleton County.

Problems with WVDEP's proposed antidegradation implementation procedures:

- Unfairly targets and removes 131 streams from Tier 2.5 protection without sufficient reason—these streams must be reinstated onto the list!
- Gives overriding consideration to planned or speculative coal reserve and other development, instead of following criteria outlined in Section 8.1.a.2 of the rule for removing streams from the Tier 2.5 list.
- Unfairly weighs industry's opposition in the decisions to remove specific streams from the Tier 2.5 list. Many streams are delisted simply because coal mining companies, logging companies, and developers wrote letters of opposition. The letters did not provide necessary details about how Tier 2.5 protection might actually hurt their businesses.
- Remove protections on numerous well-known streams, including: more than 7 miles of the headwaters of Shavers Fork in Randolph and Pocahontas counties; 31 miles of Glady Fork in Randolph and Tucker counties; all of Big Spring Fork of Elk River in Pocahontas County; all 20 miles of Loop Creek in Fayette County; most of Elkhorn Creek in McDowell County; an 11-mile stretch of Hominy Creek in Nicholas County; a nine-mile segment of the South Fork of Cherry River east of Richwood; and the six-mile stretch of Glade Creek flowing through the New River National River in Raleigh County.

Aside from proposing changes to the antidegradation implementation procedures, WVDEP has failed to respond to our 2003 antidegradation legal victory. Citizens are in the dark about WVDEP's failure to respond since WVDEP has not prepared a briefing document related to the issue. WVDEP should extend the comment period by 45 days in order for the agency to provide the public with a briefing document, to provide interested parties with more detailed information and to provide adequate time for response.

OTHER POINTS:

- The U.S. Fish and Wildlife Service estimates that each mile of trout stream provides more than \$40,000 in economic benefit to the State of West Virginia annually.
- Tier 2.5 designation is not designed to prevent development activities in a watershed, rather it helps maintain its most admirable qualities—such as clean water, reproducing trout populations, healthy aquatic ecosystems, and sustainable downstream communities.
- The U.S. energy policy has shifted once again toward coal reserves. Without a strong antidegradation policy, many of West Virginia's most prestigious streams—as well as many lesser known streams—will be exposed to higher amounts of heavy metals and other mining-related

pollution!

The two sons my wife and I have produced are the most important things in my world. We have done everything to raise them to be strong and healthy. We have tried to equip them to enjoy their lives to the fullest extent while making a substantial contribution to the quality of life of others. They are sons to make us proud. Now it is my job to do my part to see that they, and their future children, and all their children's children have a quality existence as well. The love I feel for my sons demands that I do nothing less than give this effort my full persistent attention. I am asking you to consider, do you have people in your life that mean this much to you? Will you do your part to make sure that all our children will have a future full of interesting creatures, clean water and pure air? Please help me for the sake of all of our children.

from Doug Wood

**TITLE 60
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE
SERIES 5
ANTIDEGRADATION IMPLEMENTATION PROCEDURES...**

§60-5-2. Definitions...

2.6. For purposes of this rule the definitions contained in ~~46-CSR-1-2~~ 47 CSR 2-2 effective ~~May 17, 2001~~ June 1, 2006 are hereby incorporated herein.

**TITLE 47
LEGISLATIVE RULES
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SERIES 2
REQUIREMENTS GOVERNING WATER QUALITY STANDARDS...**

§47-2-2. Definitions...

~~2.7.~~ 2.8. "High quality waters" are those waters whose quality is equal to or better than the minimum levels necessary to achieve the national water quality goal uses.

~~2.9.~~ 2.10. "Outstanding national resource waters" are those waters whose unique character, ecological or recreational value or pristine nature constitutes a valuable national or State resource.

~~2.19.~~ 2.20. "Water Waters of special concern" are those waters occurring in the categories outlined in section 4.1.c. of the antidegradation policy. This designation provides an intermediate level of antidegradation protection between high quality waters and outstanding national resource waters.

§47-2-4. Antidegradation Policy...

4.1.c. Tier 2.5 Protection. Waters of special concern include all of those waters listed in 60 C.S.R. 5, Appendix A. Waters of special concern may include, but are not limited to naturally reproducing trout streams, federally designated rivers under the "Wild and Scenic Rivers Act," 16 U. S.C. §§ 1271 et seq., waters in state parks and forests, waters in National

parks and forests, waters designated under the "National Parks and Recreation Act of 1978," and waters with unique or exceptional aesthetic, ecological, or recreational value. Waters may be nominated for inclusion in this category by any interested party or by the Board Secretary on his or her own initiative.

COMMENTS

Several streams were recently removed from the Presumptive List of Special Waters of Concern (Tier 2.5 Protection Status) by the West Virginia Department of Environmental Protection (WVDEP). With these comments, I am making interested parties within the agency aware that seventeen of these streams should be reinstated to the list based upon their meeting more than one criterion for inclusion, and other reasons herein described. In addition, I am also making interested parties within the WVDEP aware of the potential status of four of the seventeen streams for Tier 3 protection as Outstanding National Resource Waters. If the time allotted for consideration of reinstatement to the list has passed, then as per 47CSR2-4.1.c. (see above), I am nominating seventeen waters for inclusion in the category of Special Waters of Concern for Tier 2.5 Protection.

Data from randomly selected sites were gathered in the period 1997-2004. Of West Virginia's 32 major watersheds, 25 were sampled at more than 30 sites. Of those 25 with a sample population of more than 30 sites, six have been extensively mined, beginning around the turn of the 19th and 20th centuries (See the map that highlights seven extensively mined watersheds. Only 18 random sites were sampled in the Upper Kanawha watershed, so it is not included in the following discussion.). Of those six extensively mined watersheds, only West Fork and Tug Fork watersheds produced randomly selected sites that met the criteria for inclusion in the WVDEP reference stream list. This stream list is extremely important to the WVDEP, for it allows the agency to generate ranges of biometrics within which the biological integrity of all streams can be compared. Without these reference streams, the agency could not judge the relative biological conditions of any of the state's streams. The data from these reference streams has allowed the agency to develop its West Virginia Stream Condition Index scoring procedure, a method of comparison that is being mimicked across the nation with the endorsement and encouragement of federal oversight agencies like the U. S. Environmental Protection Agency, the Office of Surface Mining, and the U. S. Geological Survey.

Of the 19 remaining less extensively mined watersheds (some watersheds were completely un-mined within the study period) with at least 30 randomly selected sample sites, only one produced no sites that met all reference criteria. Within those 19 less extensively mined watersheds, the average percentage per watershed of randomly selected sites that met reference criteria was 4.5%. Within the six extensively mined watersheds, the average percentage of similar sites was only 1.0%. In other words,

streams that met reference criteria were more rare in extensively mined watersheds than in less extensively mined and un-mined watersheds.

Watershed name	Total Random sites	Reference sites	% Ref sites
Upper Guyandotte	52	0	0
Coal	49	0	0
West Fork	48	1	2.0
Monongahela	35	0	0
Dunkard	34	0	0
Tug	43	2	4.0
Upper Kanawha	18	0	0
Avg. extensively-mined % ref sites			1.0%
Upper Ohio South	56	3	5.3
Upper Ohio North	3	0	0
Upper New	35	1	2.8
Tygart	47	3	6.3
South Branch Potomac	51	4	7.8
Potomac Direct Drains	51	1	1.8
Shenandoah Jefferson	1	1	1
Shenandoah Hardy	1	0	0
North Branch Potomac	49	3	6.1
Mid Ohio North	59	1	1.6
Lower Ohio	37	1	2.7
Lower New	44	3	6.8
Lower Kanawha	45	3	6.6
Lower Guyandotte	46	1	2.1
Little Kanawha	39	3	7.6
James	3	1	33
Greenbrier	51	3	5.8
Gauley	42	1	2.3
Elk	49	5	10.2
Cheat	54	3	5.5
Cacapon	48	2	4.1
Mid Ohio South	42	0	0
Big Sandy	10	0	0
Twelvepole	45	0	0
Youghiogheny	1	0	0
Avg. less-mined % ref sites			4.5%

The coal fields of West Virginia are often divided into two distinct districts based upon the amount of iron disulfide in the coal seams and their associated rock strata. The northern coal field is made up primarily of strata with high iron disulfide content, making it more difficult to mine without producing acidic byproducts. The southern coal field consists largely of low sulfur coals and associated strata. Consequently, reference

streams from each of the coal fields are of great ecological and regulatory significance. When they are gone, the WVDEP will lose some of its ability to compare and contrast the aquatic integrity of streams within each coal field in an unbiased and statistically valid manner. By failing to grant protection to coal field reference streams under the Tier 2.5 listing procedure, the agency is limiting its ability to develop better tools for judging the relative health of streams within the coal fields.

Four stream segments located within Panther State Forest were inappropriately removed from the Presumptive List of Waters of Special Concern (Tier 2.5). George Branch (BST-60-E), Crane Creek (BST-60-F), Hurricane Branch (BST-60-G), and White Oak Branch (BST-60-H-2) meet the requirements for inclusion on the presumptive list. The definition of waters of special concern is given in 47CSR2-4 Antidegradation Policy as follows:

"4.1.c. Tier 2.5 Protection. Waters of special concern include all of those waters listed in 60 C.S.R. 5, Appendix A. Waters of special concern may include, but are not limited to naturally reproducing trout streams, federally designated rivers under the "Wild and Scenic Rivers Act," 16 U. S.C. §§ 1271 et seq., waters in state parks and forests, waters in National parks and forests, waters designated under the "National Parks and Recreation Act of 1978," and waters with unique or exceptional aesthetic, ecological, or recreational value. Waters may be nominated for inclusion in this category by any interested party or by the Board Secretary on-its-his or her own initiative."

These streams are unique not only by virtue of being coal field streams that meet reference criteria (a rare combination as highlighted in the previous discussion), but also because they lie partly within the boundary of Panther State Forest. By virtue of this location, these streams meet another criterion for inclusion in the list of Waters of Special Concern (Tier 2.5) as identified in the statute quoted above. Therefore, because these four streams have reaches within Panther State Forest, because they have unique and exceptional aesthetic and ecological value, and because they are extremely important to the decision-making processes of the WVDEP, they should be reinstated to the list of Waters of Special Concern (Tier 2.5 Protection). Indeed, because of the rapidly decreasing numbers of relatively pristine streams within the coal fields of the Appalachian Mountains, these streams should be considered for inclusion under Tier 3 protection status as Outstanding National Resource Waters. They meet three of the four possible criteria for nomination as Outstanding National Resource Waters (i.e., their unique character, ecological value, and pristine nature constitute a valuable national or state resource). Hurricane Branch was removed from the Presumptive List because coal companies have applied for mine permits to allow them to mine coal within that stream's watershed boundary.

In addition to these four streams, two others within the Tug Fork watershed should be reinstated to the list of Special Waters of Concern. Vall Creek (BST-70-Z) and Daycamp Branch (BST-76-E), like the other four streams previously discussed, are unique by virtue of being coal field streams that meet reference criteria. Therefore, because these two streams have unique and exceptional aesthetic and ecological value, and because they are extremely important to the decision-making processes of the WVDEP, they should be reinstated to the list of Waters of Special Concern (Tier 2.5 Protection). Vall Ck lies within the bounds of Berwind Lake Wildlife Management Area.

Both of these streams were removed from the list because coal companies have applied to mine coal within their watershed boundaries.

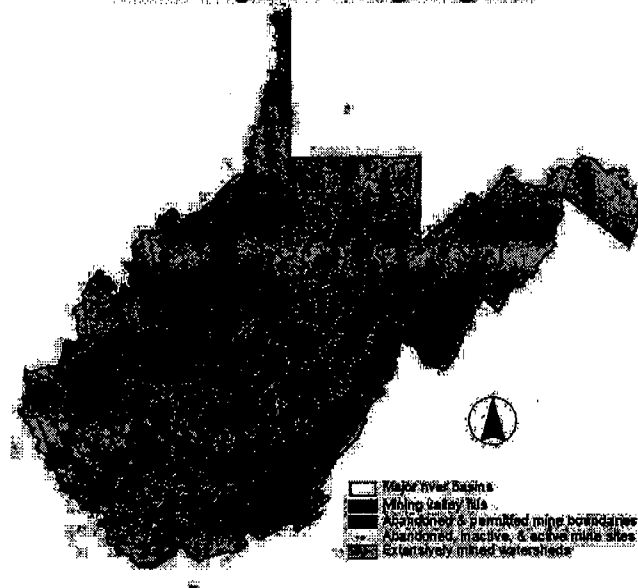
Fourteen reference streams located within the coal fields were removed from the list because companies plan on mining the coal within their watersheds. Based upon the evidence gathered by the Watershed Assessment Program of the WVDEP, in the portions of those eleven streams that are not completely buried under fill it is very likely that their water quality and habitat will be degraded enough to significantly reduce their biological integrity (lower their WVSCI scores), and to cause them to be removed from the reference stream list (See the publications noted in the References section of these comments.). Even if all regulated/permited water quality constituents in the mine discharges meet the permit limitations, ionic stress due to elevated total dissolved solids, conductivity, sulfates, and salinity, as well as loss of suitable habitat due to sedimentation and channel alterations, are very likely to negatively impact the biological integrity of the fourteen streams: Hurricane Branch (BST-60-G), Vall Creek (BST-70-Z), Daycamp Branch (BST-76-E), White Oak Br (KC-10-T-22), Bergoo Ck (KE-118), Ike Fk (KE-50-B-10), Johnson Br (KE-76-U), Ash Fk (KG-5-H), Neil Br (KG-5-J), Right Fk/Middle Fork River (MTM-11), Jenks Fk (MTM-11-E), Little Laurel Ck (O-2-Q-18-A), Nelson Fk (OG-34-E-1), and Big Ugly Ck (OG-38). Because these streams have unique and exceptional aesthetic and ecological value, because they are extremely important to the decision-making processes of the WVDEP (by virtue of being rare reference streams in the coal field region), and because they are very likely to be severely degraded due to planned mining activities, they should be reinstated to the list of Waters of Special Concern (Tier 2.5 Protection). In addition to these reasons, at least one of these streams (Big Ugly Ck) lies within the boundary of a Wildlife Management Area. Portions of Bergoo Ck lie within Monongahela National Forest and it is also a stream that supports a naturally-reproducing trout fishery; two other criteria for classifying the stream as a Water of Special Concern. Right Fk/Middle Fk River and Jenks Fk also support naturally-reproducing trout fisheries.

The WVDEP and its predecessor agencies have already permitted the filling of nearly 600 miles of streams for mining purposes (Shank 2004). These streams are permanently gone with no hope of restoration. Discharges from abandoned, inactive, and active mines continue to degrade the waters of the state. We now know that high total dissolved solids, including sulfates and other charged water quality constituents that are currently not regulated by the State's Water Quality Standards, have a deleterious effect on numerous aquatic species. We also know that permitted habitat alterations due to mining activities negatively impact the biological integrity of many of our State's streams. We have already lost several of our first-round reference streams to permitted mining. Current agency policies and actions are inadequate to protect the remainder of this unique resource. The imminent demise of the few remaining reference-quality streams in the coal fields of West Virginia has been ensured by the recent removal of most of those streams from the Tier 2.5 Protection category. By reinstating these streams to the List of Waters of Special Concern via the criteria laid out in Titles 47 and 60 of the State Legislative Rules, the WVDEP can fulfill its mission and preserve the agency's ability to judge the aquatic integrity of its waters in the future.

REFERENCES

- Chambers, Douglas B. and Terence Messinger. 2001. *Benthic Invertebrate Communities and Their Responses to Selected Environmental Factors in the Kanawha River Basin, West Virginia, Virginia, and North Carolina*. Water Resources Investigations Report 01-4021. U. S. Department of the Interior U. S. Geological Survey. Denver, Colorado.
- Green, Jim, Maggie Passmore, and Hope Childers. 2000. *A Survey of the Condition of Streams in the Primary Region of Mountaintop Mining/Valley Fill Coal Mining*. U.S. Environmental Protection Agency, Region III, Aquatic Biology Group. Wheeling, West Virginia.
- Pond, Gregory J. 2004. *Effects of Surface Mining and Residential Land Use on Headwater Stream Biotic Integrity in the Eastern Kentucky Coalfield Region*. Kentucky Department of Environmental Protection, Frankfort, Kentucky.
- Shank, Michael. 2004. *Development of a Mining Fill Inventory from Multi-date Elevation Data*. A paper presented at the 2004 Advanced Integration of Geospatial Technologies in Mining and Reclamation, Dec. 7-9, 2004, Atlanta, Georgia.
- U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Department of the Interior's Office of Surface Mining and Fish & Wildlife Service, and the West Virginia Department of Environmental Protection. 2003. *Mountain-top Mining/Valley Fill Draft Environmental Impact Study*.

West Virginia Mining Regions



P.O. Box 1109
876 North Jefferson Street
Lewisburg, West Virginia 24901
304-645-1542

July 7, 2005



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

Re: Tier 2.5 List

Dear Director McClung:

Plum Creek Timber Company ("Plum Creek") has reviewed your revised list of streams on the Department of Environmental Protection's (DEP's) Tier 2.5 list of waters of special concern.

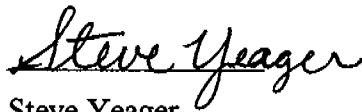
In reviewing the DEP's remaining stream list, we find inconsistencies at least as far as those streams to which Plum Creek objected.

Plum Creek has been partnering with the DNR since 1999 to correct stream chemistry with limestone sand to stop the decline in native fish populations. Research from the West Virginia DNR indicates that brook trout spawning is not successful in highly acidic streams (Clayton et al, 1998). We contend that those streams still listed by the DEP that are part of our limestone treatment project should be removed from tier 2.5. They are Turkey Creek, KG-60, and Middle Fork, KG-72.

We also noted inconsistency that some streams listed on the 303(d) list of impaired streams were removed while other remained. It does not make sense that a stream can be impaired yet identified as tier 2.5. This creates a quandary for the landowner where one classification requires corrective action and the other maintaining status quo.

Those streams remaining as Tier 2.5 that are on the DEP's 303(d) list of impaired streams should be removed from the list. Those on Plum Creek property include Turkey Creek, KG-60, and Brushy Meadow Creek KG-24-E-2, and Big Run KG-20.

Sincerely yours,

A handwritten signature in cursive script that reads "Steve Yeager". The signature is written in dark ink and is positioned above the printed name.

Steve Yeager

Resource Supervisor

Reference cited: Application of Limestone to Restore Fish Communities in Acidified Streams, Clayton, Dannaway, Menendez, Rauch, Renton, Sherlock, and Zurbuch, from the *North American Journal of Fisheries Management* 18:347-360, 1998.

West Virginia Farm Bureau

Member of American Farm Bureau Federation

1 Red Rock Road, Buckhannon, WV 26201
(304) 472-2080 • 1-800-398-4630
FAX (304) 472-6554



July 7, 2006

West Virginia Department of Environmental Protection
Attn: Tier 2.5
601 57th St. S.E.
Charleston, WV 25304

Dear Sir or Madam:

The West Virginia Farm Bureau strongly opposes the process used in the development of the Tier 2.5 list of streams. The implementation of the antidegradation rule has been anything but just or in compliance with the rule approved by the West Virginia Legislature.

It is laughable that WVDEP explains the need for deleting Section 6.2 in proposed amended antidegradation rules because it related to the procedures the Department was required to follow in reviewing the list of 444 streams that had initially been placed on the presumptive list for Tier 2.5 waters and making a final decision prior to legislative review. These procedures have recently been completed and thus the rule language is no longer necessary.

From the beginning, WVDEP has not followed the implementation procedures requirements and consequently not legally completed the process; therefore, we contest this section of the rule being removed.

When this rule was drafted by the state lawmakers, careful and thoughtful consideration was given to the potential impact on landowners, future growth and above all, fairness. With this in mind, provisions and specific criteria were put in place to protect the rights of private property owners, to ensure that accurate scientific data was used to support Tier 2.5 classification and that economic development not be hindered. This process has been flawed from the beginning because many of the criteria outlined by the legislature in 60CSR5 have been circumvented by the WVDEP, including most of aforementioned protections.

During the initial objection period, only affected landowners were permitted to file objections. While the WVDEP failed to notify each of these landowners individually, as required by the rule, more than 4,000 objections were received. Objections were filed for more than 90 percent of the 444 streams on the presumptive Tier 2.5 list at the conclusion of this comment period.

In line with the discussion about the initial objection period, we would like to address a reply that you included in your Responsiveness Summary regarding the procedure.

"The DEP complied with the notification procedures during the spring/summer of 2002. In fact, the DEP went further than the rule required by holding a series of 13 public meetings around the state to inform landowners of the process. After initially visiting courthouses in several counties, the DEP quickly determined that the process of simply identifying individual landowners adjacent to the streams in the 35 counties where the streams were located would be impractical, let alone attempting to identify persons with legal interests or just the mineral rights in those properties. Therefore, DEP chose to exercise the opportunity provided by the rule in the phrase "where practicable" and notify property owners through other mechanisms. Notice by publication in local and statewide newspapers, news releases, and the above-mentioned public meetings apparently provided adequate notification to the affected landowners as evidenced by the over 4,000 objection letters received during the process."

Once again, we contend that the WVDEP did not comply with notification procedures. Sending WVDEP employees to do title searches at courthouses instead of using professionals trained in the procedure or asking county courthouse staff for assistance is inexcusable and is not satisfactory justification for usurping the rule requirement of individual landowner notification. The "where practicable" clause was not intended by the legislature for this purpose and should have never been interpreted as such. While we recognize the fact that you did hold public hearings, it had nothing to do with fulfilling the requirement of individual notice. Your news release and legal ads did little to invoke responses from the public. Had it not been for our organization raising the issue to our members and the public, this matter would have largely gone unnoticed and you would have probably received 400 objections, not 4,000; an outcome we believe WVDEP desired.

Also, we take issue with your claim that you were not knowledgeable about the change in Construction NPDES Permits from three acres to one acre at the time initial Tier 2.5 hearings were conducted. In fact, in the meeting held at Canaan Valley Resort, this issue was raised by one of the participants and addressed by the WVDEP employees overseeing the meeting. These public hearings, in general, ended up being more antagonistic than educational to landowners. Concerns by participants were often unanswered, answered incorrectly and in some instances, deceitfully.

WVDEP has also issued stream segmentation corrections recently. On twenty-three streams, additional mileage was added. Has the WVDEP notified affected individuals who perhaps thought they were exempt from Tier 2.5 and did not comment because of the technical error on your part?

Once the initial 4,000 objections were received, WVDEP was required to address other criteria as set forth in 8.1.a, to determine whether to keep the stream on the list or remove it and to provide information supporting the listing to qualified objectors. Yet another requirement the WVDEP chose to ignore.

After taking several years to consider these objections, the WVDEP has **failed** to meet the requirements and continues its pursuit to list these streams as Tier 2.5 while giving no further consideration of the criteria as listed in the rule.

WVDEP not only did not provide adequate data to these objectors, but also switched the burden of proof to the affected landowners. This action altered the implementation of the rule from requiring WVDEP to provide proof that the stream should be on the list to requiring the landowner to provide proof why the stream should not be labeled as Tier 2.5. While this method of enforcement may have been more to the agency's convenience, **no government entity has the authority to alter rules set forth by the legislature, without the legislature's review.**

In many cases, existing water quality data or proof of naturally reproducing trout for streams targeted for Tier 2.5 classification is either non-existent, extremely outdated and/or meager. Where the WVDEP does provide data, some measurements date back more than ten years and some streams have only one sampling. If little or no information exists, how can it be scientifically feasible to justify the listing of a stream as Tier 2.5? DEP did remove a few streams due to lack of data but hundreds remain on the list with old, outdated data still being used to support their listing.

With so little data on many of the streams, it will be impossible for WVDEP to establish baseline water quality. While your agency is permitted to obtain data from a number of sources that data is still required to be "recent" and "reliable". Consequently, this will transfer the burden to the landowner desiring to undertake some type of development activity on his property since your agency seems unwilling and unable to produce any type of scientifically justified data to support the listing of the streams as Tier 2.5 at the outset. Since no discharge is allowable without the establishment of baseline water quality, landowners on Tier 2.5 streams may be forced to produce this data on their own or face shutdown of a pending project or major delays. This is an obstruction to economic development and a deprivation of use of private property.

We also believe that the WVDEP failed to comply with 6.1.a.1 of the rule that requires that the Secretary "assure compliance with all provisions of article one-a of chapter twenty-two". In the most recent briefing document regarding this rule, Part E states "In accordance with §22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America." If this determination has been made, we would like to see documentation that supports this statement. There should be assessments for every individual property owner affected by Tier 2.5 that address the following:

- (a) Whenever the division of environmental protection considers any action within its statutory authority that is reasonably likely to deprive a private real property owner of his or her property in fee simple or to deprive an owner of all productive use of his or her private real property, it shall prepare an assessment that includes, but need not be limited to, the following:
- (1) An identification of the risk created by the private real property use, and a description of the environmental, health, safety, or other benefit to be achieved by the proposed action;
 - (2) The anticipated effects, if any, on other real property owners or on the environment if the division does not take the proposed action;
 - (3) An explanation of how the division believes its action advances the purpose of protecting against the risk;
 - (4) The reasons that the division believes that its action is likely to result in requiring the state, under applicable constitutional principles and case law, to compensate the owner of private real property, including a description of how the action affects the use or value of private real property;
 - (5) Alternatives, if any, to the proposed action that the division believes will fulfill the legal obligations of the division, reduce the impact on the private real property owner and reduce the likelihood of requiring compensation; and
 - (6) An estimate of the cost to the state for compensation in the event such compensation is required.

Landowners who had development plans that were in the preinvestment stage were ignored by WVDEP when they requested that the agency remove their stream from the Tier 2.5 while those that have plans already drafted requests for removal were considered and often times eliminated from Tier 2.5 designation.

For WVDEP to tell objectors that they must provide plans for immediate development for their streams to be considered for removal from consideration as Tier 2.5 ignores any prospective development and could potentially strip the hopes and dreams of many landowners, not to mention their use of private property; an action that we believe comes dangerously close to abuse of eminent domain or at the very least a takings.

While the WVDEP continually claims that listing a stream as Tier 2.5 would not deprive any property owner of productive use, WVDEP also stated in their Responsiveness Summary that they decided against listing some streams as Tier 2.5 due to potential limitations on some use of the property. Recent articles in the *Charleston Gazette* point to plans by certain groups to use Tier 2.5 designations to stifle development resulting in loss of productive use. A Tier 2.5 designation has already been used in Preston County to halt development.

To say that property development interference will not happen because of a Tier 2.5 designation is false, because it has already happened and will continue to occur if this highly flawed implementation process is allowed to proceed.

WVDEP's failure to consider the economic impact of the listing these streams as Tier 2.5 is implausible. With communities continually seeking ways to survive and grow, the potential for economic development is hopeful, but very much unpredictable. Land having a minimal value 30 years ago, today is used for housing developments, factories, highways, mineral extraction, energy creation, commerce and recreation.

It is the responsibility of the WVDEP to evaluate what impact the Tier 2.5 list has on future development. Looking back is a good measure of what may happen in the future, and evidence from past economic growth experiences proves that the manner in which WVDEP has chosen to implement this rule will have significant economic impact on many regions of the State.

More than 4000 families in West Virginia have recognized the potential impact of this rule should it be implemented and fear its consequences. They have spoken, and they have been ignored.

The outcry of these affected citizens should be evidence enough to abandon the current presumptive Tier 2.5 list. We call upon your agency to remedy the wrongs committed and remove every stream on the presumptive Tier 2.5 list that received an objection.

While irregularities in enforcing this regulation may seem to you an effective means to an end, the long-term consequences will not be favorable to the State of West Virginia, our constitutional rights, the affected landowners or the environmental quality of our streams.

The whole concept of forcing an additional layer of regulation on the very people who have been exceptional caretakers of water quality of the streams in question for generations is preposterous.

In addition to these comments, the West Virginia Farm Bureau fully supports the comments submitted by the West Virginia Antidegradation Coalition, of which we are a member.

Finally, we would like to address in your Responsiveness Summary, a comment from a supporter of the listing of Tier 2.5 implementation that read,

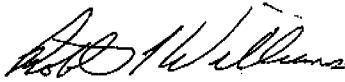
"I cannot understand the strong opposition to Tier 2.5 by certain groups in West Virginia. Especially in light of the antidegradation implementation standards exempting nonpoint source activities from antidegradation review, landowners' current uses of the land are not threatened. Only if a change in land use threatens the water quality of our trout streams would Tier 2.5 come into consideration. So it seems contradictory for opponents of Tier 2.5 stream designation to claim that private ownership of land is threatened. Rather, the stream is protected from degradation. This protects value of that land and land downstream."

WVDEP's response to this individual says a lot about what the agency truly thinks about the opinions of objectors *"While DEP supports this comment, landowners have been afforded the opportunity to object to the designation."*

Are we correct to surmise from your response that you believe objectors are just foolish for being so resistant to having their land subject to yet another layer of government control? Is this response an insight to how the WVDEP really considered landowners objections? -- Landowners have the right to object, but we [the WVDEP] do not have to listen because we [the WVDEP] know better.

The West Virginia Farm Bureau has challenged the validity of this process at each opportunity and has essentially been ignored, as have the comments of individuals and other organizations. It is clear that WVDEP has its own agenda and plans to pursue it regardless of the laws of the State of West Virginia. We will again make our objections known even though we have little doubt that WVDEP will again dismiss them without a fair and meaningful explanation and accurate, up-to-date scientific documentation.

Sincerely,



Robert L. Williams
Executive Secretary

CC: Governor Manchin
Secretary Timmermeyer
WVFB Board of Directors
State Legislators

July 10, 2006

Lisa McClung, Director
West Virginia Department of Environmental Protection
Division of Water and Waste Management
601 57th Street S.E.,
Charleston, WV 25304
Submitted via email to antideg@wvdep.org

RE: Proposed antidegradation implementation rule

Dear Director McClung:

Please accept these comments on behalf of the West Virginia Rivers Coalition, West Virginia Highlands Conservancy, West Virginia Citizens Action Group, Wilderness Society and the Greenbrier River Watershed Association.

Background

Environmental organizations and the thousands of citizens they represent have worked in West Virginia toward full implementation of the federally mandated antidegradation provisions of the Clean Water Act (the Act) for over 25 years. As early as 1980 Friends of the Little Kanawha sought to protect streams from further degradation by advocating for full compliance with the antidegradation provisions of the Act. The West Virginia Highlands Conservancy continued that call through extensive administrative comments and testimony. Then in May of 1999, the West Virginia Rivers Coalition, West Virginia Highlands Conservancy, West Virginia Citizens Action Group, West Virginia Council of Trout Unlimited and a number of individuals filed notice of intent to sue EPA over its failure to require antidegradation implementation in West Virginia. In response the Environmental Quality Board established an antidegradation stakeholder group that eventually gave rise to a draft implementation rule. After tremendous politicizing of the issues and closed-door dealings, the legislature eventually passed and EPA approved the antidegradation implementation rule, §60-5.

While the rule in many ways was a victory for those of us who had long sought its passage, it failed to comply with minimum federal requirements because it illegally exempted many activities from antidegradation review. Because of these exemptions, over twenty local, state, regional and national environmental groups challenged EPA's approval of the rule in federal court. In 2003, after a long legal battle, Judge Joseph R. Goodwin of the United States District Court, Southern District of West Virginia, issued a favorable opinion on seven specific exemptions listed in our complaint and remanded the entire rule back to EPA for further consideration.

In March of 2004, EPA issued a response to Judge Goodwin's ruling approving major portions of the rule but disapproving three of the overturned issues and recommending WVDEP delete the disapproved language from the rule. EPA also deferred a decision on

the four remaining issues in order to reevaluate the record related to their previous decision. EPA's disapprovals and deferrals prevent the use of those provisions for CWA purposes by the state.¹ EPA has indicated they will be addressing the remaining issues before the end of 2006.²

We comment on WVDEP's proposed revisions to the antidegradation rule in light of Judge Goodwin's ruling and based on our strong belief that to "maintain the chemical, physical, and biological integrity,"³ of the waters of West Virginia is in the best interest of the citizens and economy of the State.

Proposed Changes to the body of the rule

We include by reference plaintiffs arguments and briefs in *Ohio Valley Environmental Coalition v. Horinko*.

WVDEP has failed to modify §60-5 in response to the 2003 Goodwin ruling or the subsequent EPA 2004 antidegradation decision document. For example, the Agency has failed to comply with EPA's recommendation to delete language at Sections 5.2 and 5.6.c. Accordingly, we strongly recommend that WVDEP delete the disapproved language.

In addition, the WVDEP has also failed to publicly address the remaining four issues favorable to the plaintiffs in Judge Goodwin's ruling. Those issues are:

1. The Judge found EPA's approval of Section 4.3, which classifies large segments of the Kanawha and Monongahela Rivers as Tier 1 waters, was not based on adequate evidence in the record regarding the quality of waters in those rivers. Accordingly, this approval was arbitrary and capricious. EPA deferred action on this issue and WVDEP agreed to submit to EPA evidence about the quality of water in these river segments supporting that designation.
2. The Judge found EPA's approval of Section 3.7, which requires Tier 2 antidegradation review for discharges under a general Section 402 or Section 404 permit only at the time the general permit is issued, and not for individual discharges under such permits, was arbitrary and capricious. EPA deferred action on this issue and is evaluating options.
3. The Judge found EPA's approval of Section 5.6.a.1, insofar as that provision allows for a twenty percent cumulative reduction from all discharges before Tier 2 review is required, was not supported by any evidence in the record and therefore

¹ Note: The Alaska Rule states that state and authorized tribal standards adopted on or after the effective date of the rule on or after May 30, 2000 do not become the "applicable" standards for CWA purposes until they are approved by EPA.

² Personal communication between Cheryl Atkinson of USEPA and Margaret Janes of the Appalachian Center

³ Section 101(a) of the Federal Water Pollution Control Act.

was arbitrary and capricious. EPA deferred action and is working with WVDEP on this issue.

4. The Judge found EPA's approval of Section 6.3.a.1-4, which set numerical criteria for four individual pollutant parameters, was not supported by any evidence in the record and was therefore arbitrary and capricious. EPA deferred action on this issue and is working with West Virginia to further explore and develop a record basis of such a threshold.⁴

In its briefing document on the proposed antidegradation rule, WVDEP is silent on its decision to retain the language related to overturned points above.⁵ On the WVDEP website in response to comments on Tier 2.5 issues, however, WVDEP states they have, "provided EPA with supplemental supporting documentation," related to the challenged provisions.⁶ Neither that documentation nor a summary has been provided to the general public. Thus, WVDEP has deprived the public of an adequate opportunity to comment on the agency's basis for the retaining overturned provisions of the rule. We submitted a Freedom of Information Act request for the communications between EPA and WVDEP on June 19, 2006. The response was received on June 29, 2006 giving us insufficient time to adequately respond. The information still has not been disclosed to the general public. Thus, we request that the comment period for the rule be extended for 45 days beyond the time a briefing document is provided to the public and the full rationale is made available. There is very little to comment on based on the present record. In the absence of strong and scientifically defensible justification for retaining the language, we recommend that WVDEP delete language and Sections that were overturned by Judge Goodwin.

In addition, WVDEP actually adds language at 5.6.d that is identical to the overturned language at 6.3.a. There are only two sentences in the briefing document supporting the change. The briefing document states, "[o]ne additional change was made to incorporate the same approach for determining significant degradation in Tier 2 waters as is currently established for Tier 2.5 waters. This change relates only to pH, fecal coliform, temperature and dissolved oxygen and reflects the fact that due to their nature, application of a percentage change in assimilative capacity is not an appropriate measure of degradation for these pollutants." The implication that these thresholds are currently established for Tier 2.5 waters is blatantly false. As stated above, these thresholds were overturned in court then deferred by EPA. Further, the WVDEP provides no additional information as to 1) why a 10% assimilative capacity could not be used to calculate the de minimis on a stream-by-stream basis, or 2) why these levels of degradation are, in fact, insignificant. Merely restating WVDEP's intent or conclusions does not constitute a reasonable justification for the action.

⁴ See OVEC v Horinko and EPA's 2004 Letter to Allyn Turner, WVDEP, and attached decision documents.

⁵ http://www.wvdep.org/Docs/10646_BRIEFING_DOCUMENT_Antidegradation.pdf

⁶ http://www.wvdep.org/Docs/10649_Responsive_Summary_6106.pdf

Specific Comments Related to the Issues Covered by Deferred EPA Decisions

1) Section.3, which classifies large segments of the Kanawha and Monongahela Rivers as Tier 1 waters.

The WVDEP has not publicly provided justification for classifying the Kanawha and Monongahela Rivers as Tier 1 waters.

In WVDEP's November 5, 2004 letter to EPA⁷ received through FOIA, however, WVDEP states reasons for permanently designating the Lower Kanawha and Monongahela Rivers as Tier 1. The Agency argues that because the rivers are large, it is unlikely that a permitted discharge will cause significant degradation. The Agency does not state that such a discharge will never occur only that it is unlikely. In other words, in some instances these rivers could be impermissibly degraded without the required Tier 2 antidegradation review. WVDEP also suggests that the rivers are so large that they can effectively dilute and withstand even high volume polluting discharges. That is flatly inconsistent with the antidegradation concept, which does not offer exemptions based on the flow of a water body. In addition, the Agency states that this approach may not be appropriate in boundary waters where a more conservative approach would be appropriate. This means that permanently designating the Kanawha and Mon Rivers as Tier 1 is not conservative or as protective as it should be. There is also no justification for treating instate waters differently from boundary waters.

Further, the agency argues that the number of historic discharges to these rivers is pertinent to Tier designation. This argument merely suggests that DEP is trying to deregulate these rivers as a matter of administrative convenience or to mollify the powerful corporations whose facilities discharge into it. If anything, the permitting of these discharges prior to the implementation of the state's antidegradation policy explains why the rivers are impaired for one or two parameters, underlining the need and value of Tier 2 protections in these waters.

Finally, WVDEP argues that the listing of these streams on the 303(d) list justifies permanent designation as Tier 1 waters. WVDEP provides no evidence that either river is so impaired that it does not qualify for Tier 2 protection. WVDEP may not remove Tier 2 protections from waters that support aquatic life and recreation if only one or two parameters are impaired and the water quality exceeds the standards for all other parameters.

While the Monongahela River is on the 303(d) list, the main stem of the Monongahela (Mon) River supports a thriving fishery. The WVDNR reports that the fishery on the Mon is good to excellent. The river supports all the large river species including walleyes, saugers, white bass, large mouth bass, small mouth bass, spotted bass, channel catfish, flathead catfish, drum and carp. In addition there are numerous fishing

⁷ Letter from Allyn G. Turner, Director, DWWM, WVDEP to Donald S. Welsh, Regional Administrator, EPA Region III, November, 5, 2004. Note: this letter is in response to the March 29, 2004 EPA response letter to the Goodwin decision.

tournaments every year.⁸ The Mon River is also used extensively for other recreational activities. For example, the Second Annual MedExpress Mountaineer Triathlon on the Mon was held on June 25, 2006⁹ and attracted hundreds of people for a Mon River swim.

Portions of the lower Kanawha River have also been on the 303(d) list. The Kanawha River, however, also has an excellent warm water fishery especially in the tailwaters downstream of Marmet and Winfield locks that attract large number of warm water species. There are two fishing piers in this section of the Kanawha and much fishing activity from small boats. The WVDNR also hosts two bass tournaments every year.¹⁰ Further, the website of the city of Charleston promotes the Kanawha River as a "water playground" and "the foundation for the city's annual Sternwheel Regatta celebration."¹¹ Numerous water skiers and swimmers are frequently seen recreating in the Kanawha River near Charleston.

The federal antidegradation policy requires states to afford Tier 2 protection to waters whose quality exceeds "levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 CFR 131.12(a)(2). Thus, waters that support propagation of aquatic life and that have excess assimilative capacity (i.e. in waters whose water quality "exceeds levels necessary" to support aquatic life and recreation), must receive Tier 2 protection. In other words, when there is "excess assimilative capacity" available, and the water at issue actually supports aquatic life and recreation, the water quality by definition exceeds the levels necessary to support those uses.

There are hundreds of streams on West Virginia's 303(d) list. The WVDEP is not suggesting that all of those waters be permanently denied Tier 2 protections, implausibly just these two rivers - among the largest in the state. The 303(d) listings do not even support the geographic scope of the claimed exemptions. The antidegradation procedures state, "[w]ater segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection." §60-5-5.2. Note: the word generally was overturned in the Goodwin decision and disapproved by EPA and is not applicable. Further, EPA admitted in its brief in *OVEC v. Horinko*, a waterbody cannot automatically be designated as Tier 1 merely because one parameter exceeds water quality standards, or because it is listed on the State's list of impaired waters. EPA Br. 35, n.37. Thus, WVDEP's own regulations and EPA's stated position require that the Kanawha and the Monongahela Rivers be designated Tier 2 waters. Thus, the last portion of Section 4.3 classifying large segments of the Kanawha and Monongahela Rivers as Tier 1 waters must be deleted.

⁸ Personal communication between Frank Jernejcic, WVDNR and Margaret Janes, Appalachian Center. 6/26/06.

⁹ <http://www.mountaineertri.com/index.php>

¹⁰ Personal communication between Zac Brown, WVDNR and Margaret Janes, Appalachian Center. 6/26/06.

¹¹ <http://www.cityofcharleston.org/>

2) Section 3.7, which requires Tier 2 antidegradation review for discharges under a general Section 402 or Section 404 permit only at the time the general permit is issued

West Virginia's exemption of activities covered by general permits under Sections 402 and 404 of the CWA from Tier 2 review does not comply with federal requirements because, although the general permits themselves are subject to antidegradation review, the specific activities later seeking coverage under those general permits are never subjected to antidegradation review. EPA has previously required those activities to be included in antidegradation review because they could degrade water quality, and because the Tier 2 determination that such degradation is "necessary to accommodate important economic or social development in the area in which the waters are located" under § 131.12(a)(2) can only be made on a site-specific basis.

In EPA's September 2000 issuance of a multi-sector NPDES storm water general permit for industrial facilities, EPA stated that "EPA would have to modify the permit for each discharge in question in order to comply with 40 CFR Section 131.12(a)(2). Individual considerations such as [those required by a Tier 2 antidegradation review] are contrary to the concept of a general permit." 65 Fed.Reg. 64746, 64794 (Oct. 30, 2000) (emphasis added). Thus WVDEP's action to retain the language exempting authorizations under 402 and 404 general permits is inappropriate not only because of Judge Goodwin's decision overturning EPA's flawed approval of their original action but because of EPA's own past policies.

Neither WVDEP or EPA has explained how site-specific antidegradation factors can be analyzed on a statewide basis before individual dischargers have even *applied* for coverage under the general permits, or how antidegradation review can be applied to the state as a whole without examining impacts on individual receiving waters. DEP's reliance on 401 certifications is misplaced since those certifications are not conducted on a site-specific basis for nationwide permits like NWP 21. Instead, they are only conducted on a statewide basis when the NWP is first issued. DEP has also made no effort to demonstrate, as a factual matter, that any activity under a statewide or nationwide permit is *de minimis*. Instead, DEP merely cites procedures, which, in theory, require *de minimis* impacts. DEP's reliance on those procedures is entirely circular. DEP assumes that the impacts will be *de minimis* because it has procedures which require the impacts to be *de minimis*. Those procedures are no substitute for site-specific factual analysis. Thus, the language at Section 3.7, which requires Tier 2 antidegradation review for discharges under a general Section 402 or Section 404 permit only at the time the general permit is issued, and not for individual discharges under such permits must be deleted.

3) Section 5.6.a.1, insofar as that provision allows for a twenty percent cumulative reduction from all discharges before Tier 2 review is required

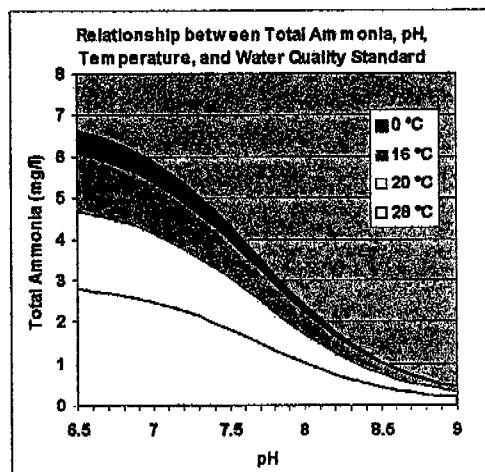
It is nonsensical for WVDEP to state in one section of the rule that for a single discharge the *de minimis* is 10% but for cumulative impacts from multiple discharges the *de minimis* is 20%. In addition, the WVDEP established, EPA twice approved, and Judge

Thus we strongly recommend that the 2-degree temperature de minimis be removed and that temperature be reviewed consistent with standard protocol.

Fecal Coliform – Fecal coliform is an important pollutant of concern as it indicates the likelihood of harmful bacteria and other organisms being present in the water. WVDEP has set de minimis levels for fecal coliform at 200/100 ml monthly average and 400/100 ml daily maximum. The assumption is that these levels do not in any instance cause significant harm. As noted previously, WVDEP has not provided any justification for this assumption in their briefing document.

Further, effluent discharged with fecal coliform levels of 200/100 ml monthly average and 400/100 ml daily maximum may contain harmful organisms resistant to treatment at the plant, for example *Giardia* and *Cryptosporidium*. Small number of resistant organisms could readily cause significant public health issues. Thus, the inclusion of this de minimis levels is inappropriate and should be deleted.

PH – As shown by the diagram¹⁹ below, changes in pH maintained within 6 – 9 can cause significant changes in the total ammonia criterion. This change can be significant in and of itself.



Relationship between Total Ammonia, pH, Temperature, and the Chronic Ammonia Water Quality Standard.

For example, increasing the instream pH from 6.5 to 8 can decrease the total ammonia criterion from approximately 2.5 mg/l to 1 mg/l (at 28 degree C.) – meaning a significant

¹⁸ Note the chart applies to any water non saline waters at equilibrium with the atmosphere. It is more easily applied to streams, where tumbling over rocks exposes more of the water to the air. The numbers indicate where the water conditions before life impacts are present. Life can cause the water to be unequilibrated. In the case of fish and decomposition, life will consume DO faster than it will diffuse back in from the atmosphere, and the DO concentrations will be lower than these equilibrated numbers. Where photosynthesis is occurring, life will raise add DO faster than it will escape to the atmosphere, and the DO concentrations will be greater than the equilibrium concentrations.

¹⁹ Charts provided by Neil Gillies of the Cacapon Institute.

Decrease in dissolved oxygen (DO) due to a 2°C increase in water temperature for water in equilibrium with the atmosphere at a pressure of 760 mmHg.¹⁷

Original temperature		Raised temperature		Original DO concentration	DO after warming	Decrease in DO
°C	°F	°C	°F	mg/L	mg/L	mg/L
0	32.0	2	35.6	14.59	13.80	0.79
1	33.8	3	37.4	14.18	13.43	0.75
2	35.6	4	39.2	13.80	13.08	0.72
3	37.4	5	41.0	13.43	12.74	0.69
4	39.2	6	42.8	13.08	12.42	0.66
5	41.0	7	44.6	12.74	12.12	0.63
6	42.8	8	46.4	12.42	11.82	0.60
7	44.6	9	48.2	12.12	11.54	0.58
8	46.4	10	50.0	11.82	11.27	0.55
9	48.2	11	51.8	11.54	11.01	0.53
10	50.0	12	53.6	11.27	10.76	0.51
11	51.8	13	55.4	11.01	10.51	0.49
12	53.6	14	57.2	10.76	10.28	0.47
13	55.4	15	59.0	10.51	10.06	0.45
14	57.2	16	60.8	10.28	9.85	0.44
15	59.0	17	62.6	10.06	9.64	0.42
16	60.8	18	64.4	9.85	9.44	0.40
17	62.6	19	66.2	9.64	9.25	0.39
18	64.4	20	68.0	9.44	9.07	0.38
19	66.2	21	69.8	9.25	8.89	0.36
20	68.0	22	71.6	9.07	8.72	0.35
21	69.8	23	73.4	8.89	8.55	0.34
22	71.6	24	75.2	8.72	8.39	0.33
23	73.4	25	77.0	8.55	8.24	0.32
24	75.2	26	78.8	8.39	8.09	0.31
25	77.0	27	80.6	8.24	7.94	0.30
26	78.8	28	82.4	8.09	7.80	0.29
27	80.6	29	84.2	7.94	7.66	0.28
28	82.4	30	86.0	7.80	7.53	0.27
29	84.2	31	87.8	7.66	7.40	0.26
30	86.0	32	89.6	7.53	7.28	0.25
31	87.8	33	91.4	7.40	7.16	0.24
32	89.6	34	93.2	7.28	7.04	0.24
33	91.4	35	95.0	7.16	6.93	0.23
34	93.2	36	96.8	7.04	6.82	0.22
35	95.0	37	98.6	6.93	6.71	0.22
36	96.8	38	100.4	6.82	6.60	0.21
37	98.6	39	102.2	6.71	6.50	0.21
38	100.4	40	104.0	6.60	6.40	0.20
39	102.2	41	105.8	6.50	6.31	0.20
40	104.0	42	107.6	6.40	6.21	0.19

DO concentrations calculated according to an equation by Weiss, as described at:
<http://water.usgs.gov/admin/memo/QW/qw81.11.html>¹⁸

¹⁷ Table compiled by Martin Christ, Environment and Natural Resource Dialogs, 219 Wall St., Morgantown, WV 26505. 6/23/06.

Goodwin upheld a 10% de minimis as a reasonable gauge of significance. The target for assessment for stream degradation is the impact on the receiving stream and is immaterial to the source of the impact. Further, WVDEP cites no factual or scientific evidence of any kind that a 20% cumulative reduction in assimilative capacity is insignificant. WVDEP merely asserts that the 20% figure was a "product" of stakeholder discussions. The rest of WVDEP's analysis is entirely hypothetical and theoretical. WVDEP assumes that the 20% reduction is insignificant, and then merely provides hypothetical examples of how it would operate. Thus, WVDEP must change the 20% cumulative impact de minimis to 10%.

4) Section 6.3.a.1-4, which set numerical criteria for four individual pollutant parameters

Sections § 60-5-6.3.a and added Sections §60-5-5.6.d automatically deem the discharges of four specific pollutants – dissolved oxygen, pH, temperature, and fecal coliform – to be insignificant if they do not exceed listed numerical values or ranges. The use of such automatic, state-wide values for individual pollutants is illegal because antidegradation review applies to all discharges that have the potential to degrade water quality, and WVDEP does not support their assumption that discharging the specified amounts of these pollutants are harmless. It is immaterial that these changes would not be allowed to cause a violation of numeric water quality criteria, as that is already required in the rule and by other parts of the Act. The issue is whether these changes are in any instance significant.

Instead, WVDEP merely argues that analyzing the impacts of these pollutants is more complex and difficult than pollutants which are subject to a "mass balance" analysis. In WVDEP's words, "it is a challenge to determine the appropriate assessment of assimilative capacity." However, this argues in favor of a site-specific analysis, not for a general rule exempting discharges from analysis for these pollutants.

The entire premise that the significance of discharges with predetermined amounts of heat or pollutants to different streams can be determined without site specific information is false. The impact of discharges at predefined levels can only be determined on a case-by-case basis relative to the baseline water quality and relative flow of the receiving stream. Obviously, the closer the ambient conditions of the receiving stream are to water quality standards, the greater the significance of these discharges will be. In addition, multiple new discharges of these parameters to a given receiving stream could take up all of the remaining assimilative capacity in a stream and still be deemed insignificant.

Below are specific comments on each of the four parameters specified in § 60-5-6.3.a and §60-5-5.6.d.

Dissolved oxygen (DO) –DO sags of .4 mg/l will have significant impacts on bodies of water with daytime DO's near the criterion. [Note: in WVDEP rationale to EPA they use .3 mg/l DO as a de minimis level not .4 mg/l] Diurnal variation in DO's, with DO's dipping to 24 hour lows in early morning hours are well documented. These dips however, are rarely recognized for regulatory purposes or used for NPDES permitting –

quite simply no one is there sampling. For example, Charles Fork Lake on 11/23/04 had a maximum DO of 6.01 and minimum DO of 4.71 mg/l (below the applicable criterion of 5 mg/l) and on 11/26/04 had a maximum DO of 5.49 but a minimum DO of 4.97.¹² Clearly, if a daytime sag of .4 mg/l were allowed in Charles Fork Lake while the daytime DO would comply with water quality criterion even more harmful nighttime and early morning DO's would occur. While 5.6.d.1 and 6.3.a.1 allow a dissolved oxygen sag of .4mg/l only when conditions would assure compliance with water quality standards, in all practicality the working of WVDEP do not routinely recognize diurnal variations in DO – making that assurance a hollow one. Thus, diurnal variations in DO, in addition to the other general reasons stated above, mean that a blanket .4 mg/l DO sag de minimis could cause very important water quality impacts – beyond even significant.

In addition, WVDEP states, “[o]ne of the aspects of antidegradation that is challenging with dissolved oxygen is the location of the maximum DO sag. Antidegradation assumes that water quality is uniform within a given stream segment and essentially protects the location where BWQ was established.” It is important to note that the location of baseline water quality assessments and the assumptions about uniformity have been set by WVDEP through guidance issued on November 30, 2001, Baseline Water Quality (BWQ) Assessment Procedures. Those procedures do not comply with §60-5 because they require that antidegradation review be carried out at a single spot in the receiving stream a significant distance downstream from the discharge and not at sites along the river where impacts may be most important. Environmental interests have legally challenged this flawed interpretation in state court where the case is pending. In any event, the Agency is using its own flawed guidance which could easily be changed to justify corrupting another aspect of Tier 2 and Tier 2.5 review. Thus we strongly recommend that the .4 mg/l DO de minimis be removed and that DO be reviewed in a way consistent with standard protocol.

Temperature - The de minimis for thermal discharges in § 60-5-6.3.a and §60-5-5.6.d of the proposed rule restricts temperature increases to no more than two degrees. For warm water rivers the water quality criterion prohibits an increase in temperature of no more than 5 degrees.¹³ Thus, the temperature de minimis of 2 degrees allows a 40% increase in temperature with no antidegradation review and is inconsistent with the 10% significance de minimis of the overall policy. In the epilimnion of lakes, only a 3-degree temperature rise is allowed by the criterion.¹⁴ The 2-degree change allowed without antidegradation review thus consists of a 66% allowable change in ambient temperature – also inconsistent with the 10% de minimis of the overall policy.

There are also problems in cold-water fisheries with the 2-degree de minimis. In the lower reaches of reproducing brook trout streams an increase in temperature of two-degrees is significant. The increase would cause a shift in population bringing in creek

¹² Data obtained from John Wirtz of WVDEP during Nutrient Technical Committee meetings.

¹³ §47-2-8.28

¹⁴ Id.

chubs and warm water minnows and decreasing the number of brook trout in that reach essentially reducing the size/extent of brook trout habitat.¹⁵

For warm water fisheries stocked with trout a two-degree increase in temperature is also significant. Stocked trout quickly move to microhabitats of cooler water and must do so within hours or a day or two of stocking to survive. Water warmed by 2 degrees increases the stress on stocked trout and decreases survivability. Allowing a two-degree temperature increase can thus significantly harm the success of the stocked fishery and this could occur with no Tier 2 antidegradation review.¹⁶

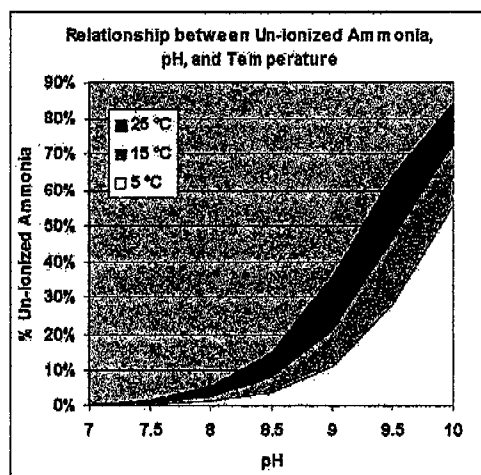
In addition, in cooler waters an increase in temperature by 2 degrees would cause a DO sag of greater than .4 mg/l, the specific DO de minimis stated in the rule. This puts the DO and temperature de minimis in direct conflict. The following chart shows the change in DO expected with an increase in temperature of 2 degrees C.

¹⁵ Personal communication between Fish Biologist, Don Gaspar and Margaret Janes of the Appalachian Center, 6/9/06.

¹⁶ Id.

increase in the toxicity of ammonia already present in the stream. The decrease in the criterion to 40% of what it was is obviously a significant change.

In addition, as pH increases the percent of unionized harmful ammonia increases even within a pH of 6-9 as shown by the chart below.²⁰



Relationship between un-ionized Ammonia, pH, and temperature.

Another example is related to aluminum. Aluminum is relatively insoluble at pH 6 to 8 but the solubility of Al increases under somewhat more alkaline or acidic conditions. If a tributary of low pH and relatively high Al flows into a stream with neutral to elevated pH a mixing zone of increased toxicity can occur – where during equilibration aluminum precipitates on gills and is toxic to fish. The toxicity of these mixing zones is greater than that in the original acidic water before mixing.²¹ (Poleo, 1994).

Another study focused on mixing zones of Al laden water. Mixing of acid river water containing pH 5.1, total acid reactive aluminum 345 ug/l with neutral water of a lake (pH 7.0, total acid reactive aluminum 73 ug/l) resulted in water with pH of 6.4 and Al of 245 ug/l. The resultant water was expected to be of relatively low toxicity based on current toxicity models. However, under semi-field conditions the freshly mixed water in minutes proved to be highly acutely toxic to brown trout. This phenomenon will be detrimental to migrating trout in natural conditions. While this example covered pH's somewhat below the water quality criterion, it is also true for situations within the pH of 6 – 9 and demonstrates impacts of discharges whose pH differs dramatically from the receiving stream.²² Those discharges could cause toxic mixing zones of disparate pH's

²⁰ Id.

²¹ Poleo, A.B.S., Lydersen, E., Rosseland, B.O., Kroglund, F., Salbu, B., Vogt, R.D., and Kvellestad, A. 1994. Increased Mortality of Fish due to Changing Al-Chemistry of Mixing Zones Between Limed Streams and Acidic Tributaries. *Water, Air and Soil Pollution*. 75:339-351.

²² Verboost, P.M., Berntssen, M.H.G., Kroglund, F., Lydersen, E., Witters, H.E., Rosseland, B.O., Salbu, B., Wendelaar Bonga, S.E. 1995. The Toxic Mixing Zone of Neutral and Acidic River Water: Acute Aluminum Toxicity in Brown Trout. *Water, Air, and Soil Pollution*. 85:341-346.

that would seriously harm fish.

The above are only two examples of the importance of pH changes within the 6 – 9 range. Thus, we strongly recommend that WVDEP delete the language referable to pH and treat pH in a way similar to other parameters.

Conclusion

The WVDEP has not only failed to publicly address the issues overturned in *Ohio Valley Environmental Coalition v. Horinko* but has also deprived the public of an adequate opportunity to comment on the agency's basis for the retaining overturned provisions of the rule. The Agency has essentially made these decisions behind closed doors - away from the public eye. We again request that WVDEP extend the comment period for the proposed rule after making public their rationale for retaining the overturned sections.

In addition, during our review of WVDEP's submission to EPA addressing the four remaining issues overturned by Judge Goodwin, we find no credible justification for retaining these exemptions. In fact, in a short amount of time we have already identified a number of scientific and legal reasons for deleting these provisions. Therefore, we strongly recommend that WVDEP delete the pertinent sections prior to finalizing the implementation plan.

Sincerely,

Margaret Janes
Senior Policy Analyst
Appalachian Center for the Economy and the Environment
5640 Howards lick Rd
Mathias, WV 26812
mjanes@hardynet.com

**COMMENTS OF THE
ANTIDEGRADATION COALITION
REGARDING
ANTIDEGRADATION IMPLEMENTATION PROCEDURES
60 C.S.R. 5**

July 10, 2006

RECEIVED

JUL 10 2006

WATER QUALITY STDS

I. INTRODUCTION

The Antidegradation Coalition is a group of businesses, trade associations and interested persons who are concerned about the restrictions that will be placed on private property development under the proposed revisions by the West Virginia Department of Environmental Protection (DEP) to Title 60, Series 5 of the West Virginia Code of State Regulations, *Antidegradation Implementation Procedures*. The Antidegradation Coalition has been involved in the development of the antidegradation implementation procedures from the time the rule was first adopted, through the litigation that followed adoption of the rule, and the ongoing attempt to add a large number of streams to the Waters of Special Concern that are designated Tier 2.5. The Coalition believes that the DEP is making a serious error in the manner in which it is proceeding with its rule and urges the DEP to reconsider its proposal.

II. COMMENTS

A. The DEP has not complied with the procedural requirements for listing the Tier 2.5 streams.

In the comments that were filed by the Antidegradation Coalition in a letter to Director McClung dated December 30, 2005, the Coalition identified several procedural errors committed by the DEP in providing notice to the public and individuals about the stream listings, and erroneous information that was given at public meetings. A copy of

the Coalition's comment letter is attached. The Antidegradation Coalition has reviewed the DEP's responses to comments, and does not find any that contradict its contention that the process was so flawed that the DEP has no choice but to begin the process again, giving proper notice and accurate information.

B. The DEP has failed to perform the individual analysis needed to justify additions to the Tier 2.5 list in the proposed rule.

The DEP has proposed deleting the process for the initial listing of Tier 2.5 waters found at Section 6.2, and has proposed the following language in its place: "Currently listed Tier 2.5 waters are included in Appendix A to this rule. Subsequent additions or deletions from Appendix A shall be in accordance with subsection 8.1." Appendix A contains hundreds of streams that are to be listed as Tier 2.5 waters. The DEP has evidently taken the position that it has complied with its obligations with regard to the presumptive list of Tier 2.5 streams, such that the procedure for approving the presumptive list that was originally found at Section 6.2 is no longer needed, and that there is no further impediment to listing the streams found in proposed Appendix A.

The Antidegradation Coalition fundamentally disagrees with the DEP's belief that it has successfully complied with the requirements for listing the Tier 2.5 streams in Appendix A. We believe that Tier 2.5 Waters of Special Concern should be designated only after careful deliberation and a conclusion that they are particularly deserving of protection against development. Other than Watkins Run, the stream in Preston County that went through the Section 8.1 listing process and was approved by the Legislature as a Water of Special Concern 2006 (*See* 47 C.S.R. 2-4.1.c.1), there is no stream that has been through this type of thoughtful analysis. Nothing that we have seen in the DEP's

Responsiveness Summary, which makes general responses to specific objections, shows that individual attention was given to the listing of those streams for which the DEP received objections.

Tier 2.5 determinations are too important to make without considering each stream individually, and deciding whether its unique attributes qualify it for the additional protections afforded by a Tier 2.5 designation. The state's water quality standards already provide protections in the form of criteria that are protective of the uses that are present in state waters, and the Tier 2 antidegradation requirements already prevent a greater than a 20% change in water quality without review by the DEP. In the case of trout streams, that means that the stringent Category B2 cold water criteria, which are set to be protective of reproducing trout, will always apply regardless of whether there is a Tier 2.5 designation. Given this protection for trout and other cold water species, it is difficult to see why further restrictions on development should be imposed by means of a Tier 2.5 designation.

C. The DEP has not justified the addition of trout streams to the Tier 2.5 list.

The DEP has never fully complied with the requirements of section 8.1 which, among other things, require the DEP to identify: the impact of the Tier 2.5 designation on private property owners (§ 8.1.2.A); the existing water quality (§ 8.1.2.E); or the impact on economic development in the area (§ 8.1.a.2.G). In particular we remain concerned that the justification for adding the naturally-reproducing trout streams has fallen far short of what is required by the rule. In response to a Freedom of Information Act inquiry the DEP provided the documents from the Division of Natural Resources upon which it relied in listing trout streams in this rule and in the water quality standards. See 47

C.S.R. 2, Appendix A. When one looks at the supporting documentation, one finds that it is often very old and provides nothing conclusive with regard to reproductive activity. For example, the Fall Run of Left Fork, Code KE-98-C-14, was surveyed on September 12, 1977 by biologist D. Ramsey. Parallel wire shocking revealed seven brook trout, but there is no indication as to whether they were reproducing in that stream or merely inhabiting it, or how long trout had been there, nor is there any indication as to whether they had been stocked in that location. In other words, unless the DEP has other data it is not providing in its Antidegradation Tier 2.5 position paper, it is relying upon data that, in this case, is almost 30 years old, and that provides no conclusive evidence as to the crucial issue - whether the stream qualifies as a naturally-reproducing trout stream.

To determine whether a trout stream is "naturally-reproducing," some sort of clear protocol needs to be developed by the DEP in conjunction with the DNR. Recent data should be developed that show what time of the year trout are present, at what ages, and under what conditions. A methodology should be applied to interpreting that data so that there are consistent results. For example, one test the DEP should consider is whether young of the year trout are present during low flow periods in unstocked streams. That would be one indication of a naturally-reproducing trout stream.

Furthermore, even assuming that there was sufficient evidence to conclude that Fall Run was a "naturally reproducing trout stream," that fact does not end the analysis for purposes of the Tier 2.5 stream designation process. Section 4.1.c of 47 CSR 2 references streams that "may" be included as waters of special concern, but this language does not mandate their inclusion as Tier 2.5 streams. Only after an evaluation of all of the criteria of Sec. 8.1.a.2, "Qualification Criteria," can the determination be made as to

whether a stream should be included in Appendix A of 60 CSR 5. In the case of Fall Run there is no indication from the evidence provided whether the listing will have an impact on private property owners, whether the interest of all affected parties have been adequately represented, the impact on economic development, or any of the other factors the DEP is required to consider.

D. Reference streams should be removed from the Tier 2.5 list.

The Antidegradation Coalition believes that the DEP acted properly in removing streams included on the presumptive list that were included solely because they were "reference" streams. The DEP stated that it removed any reference stream that was located wholly on private property because a Tier 2.5 designation for these streams "would not necessarily prevent activities on streams that may ultimately affect their status as a 'reference' stream" Following this reasoning, any reference stream that flows through both public and private land should also be removed from the Tier 2.5 list because the designation will not prevent activities on the private portions of the stream in question. If the private portion of the stream is upstream of the public portion, the entire stream length should be removed. If, however, the private portion is downstream, the private stream segment should be removed.

Moreover, the Coalition continues to believe that the DEP's use of the reference stream category is inappropriate because it is ill-defined and has never gone through rulemaking or been put out for public comment. The DEP should not rely upon this definition to impose stringent protections that Tier 2.5 will receive. The serious problems related to the reference stream designations suggest that the DEP should remove all streams that are included solely because of this designation.

III. CONCLUSION

The process followed by the DEP was procedurally flawed and has resulted in listing of streams for which there is limited or no evidence that they qualify as Tier 2.5 waters. Consequently, the Antidegradation Coalition urges the DEP to withdraw Appendix A as proposed and resubmit the rule, after public notice, careful study and fully documenting which streams, if any, truly warrant Tier 2.5 protection.

**Karen S. Price, On Behalf of
ANTIDEGRADATION COALITION**

**Contractors of West Virginia
West Virginia Farm Bureau
West Virginia Forestry Association
West Virginia Coal Association
West Virginia Manufacturers Association
West Virginia Hospitality and Tourism Association
West Virginia Chamber of Commerce
West Virginia Business and Industry Council
Independent Oil and Natural Gas Association
West Virginia Oil and Natural Gas Association
West Virginia Petroleum Council
West Virginia Municipal League**

ANTIDEGRADATION COALITION

MEMBERS

Contractors
Association of
WV

WV Farm
Bureau

WV Forestry
Association

WV Coal
Association

WV
Manufacturers
Association

WV Hospitality
and Tourism
Association

WV Chamber
of Commerce

WV Business
and Industry
Council

Independent
Oil and Gas
Association of
WV

WV Oil and
Natural Gas
Association

WV Petroleum
Council

WV Municipal
League

December 30, 2005

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

Attention: Antidegradation Tier 2.5

Dear Director McClung:

This letter is filed on behalf of the undersigned organizations who have joined together to express their concerns regarding the Department of Environmental Protection's (DEP's) proposed action with regard to the listing of Tier 2.5 waters of special concern as a part of the agency's Antidegradation Implementation Procedures ("AIP"), 60 CSR 5. The organizations that are joining in these comments, collectively referred to as the "Antidegradation Coalition" (or the "Coalition"), are the following:

Contractors Association of West Virginia
West Virginia Farm Bureau
West Virginia Forestry Association
West Virginia Coal Association
West Virginia Manufacturers Association
West Virginia Hospitality and Tourism Association
West Virginia Chamber of Commerce
West Virginia Business and Industry Council
Independent Oil and Gas Association of West Virginia
West Virginia Oil and Natural Gas Association
West Virginia Petroleum Council
West Virginia Municipal League

The organizations in the Coalition represent thousands of businesses and individuals throughout the State and are vitally concerned with its future.

Members of the Antidegradation Coalition have participated actively in stakeholders groups which preceded the adoption of the AIP, in legislative hearings and meetings which led to the passage of the AIP by the Legislature in 2001, and in the subsequent rulemaking hearings and comment periods that have been provided by the DEP in its implementation of the AIP. The extensive participation of Coalition members in these activities has been compelled because of the potentially profound implications of the AIP for both private and public development in the future in West Virginia.

RECEIVED

DEC 30 2005

DEPARTMENT OF ENVIRONMENTAL PROTECTION

December 30, 2005

Page 2 of 13

Coalition groups and their members in turn strongly support protection of water quality throughout West Virginia, and join you in the belief that a healthy natural environment is one of the factors needed to assure a healthy business environment. We seek a logical, fair and effective program which protects our streams and their uses. We accept our responsibility to participate in protecting the streams and environment of our state, and we support the reasonable and necessary limitations on our activities and projects that come with that responsibility.

However, when a regulatory program goes far beyond the level needed to assure adequate environmental protection, and when a program implemented in West Virginia is more stringent than corresponding programs in states we compete with, the result is to harm the economic health and growth of West Virginia. We believe the Tier 2.5 provisions of the AIP as they have been implemented by DEP result in just such an overly restrictive program. More significantly, we believe these provisions, as implemented by the DEP, do not properly reflect the Tier 2.5 provisions of the AIP as approved by the Legislature in 2001.

Our specific objections to the DEP actions to date are many. They are summarized below.

A. PROCEDURAL ERRORS

Although the Coalition recognizes the DEP's significant efforts to fulfill its statutory assignment with regard to the Tier 2.5 list, we believe there are substantial errors to be corrected. It should also be borne in mind that the size of the task that has confronted the agency was of DEP's own making, resulting from the agency's insistence throughout the 2001 legislative process on including 444 streams throughout West Virginia on the poorly justified Initial Presumptive Listing for Tier 2.5 (the "Presumptive List").

The agency initially took the position before the Legislature that the list of 444 streams should be a final list of Tier 2.5 streams. This would have eliminated any input from the public. The public review and comment that has occurred and is occurring was required of an unwilling DEP by the Legislature and appears to have had no impact on the agency's decision-making. Significantly, despite the thousands of objections the DEP received from property owners concerning the streams on the Tier 2.5 list, not one objection was granted for any substantive reason. The only changes made to the initial list were due to technical defects identified by DEP.

As is discussed further below, in the review and comment process that has occurred to date, it appears that the agency has significantly failed to comply with the Legislature's mandate to inform and involve private property owners in the listing process.

1. Failure to provide adequate public notice

DEP failed to comply with the requirements contained in the AIP and mandated by the Legislature for landowner notice of the presumptive Tier 2.5 stream designations, and of the right to object.

a. The DEP failed to provide any individual notice regarding Tier 2.5 streams

The AIP provide in Sec. 6.1.a.2 that the agency's first obligation is to provide "individual" notice to property owners along proposed Tier 2.5 streams of the possible designation of the stream to a higher level of regulation. Only in instances where individual notice was not "practicable" was the agency authorized to rely upon newspaper notices. The AIP required the newspaper notices to be provided in addition to, not instead of, individual notice to landowners.

Although the agency had over a year to provide the required notices in no instance did the agency conclude that individual notice was practicable. The Coalition believes that this failure to provide any individual notice was incorrect and indefensible. Property ownership maps and records such as would have been needed to prepare individual notices are readily available in each county courthouse and in the Charleston offices of the Department of Tax and Revenue. To verify the availability of this information, one coalition representative secured the names and addresses of more than 190 landowners along streams on the presumptive list in Upshur County in just two hours of research at the County Courthouse. We believe it is clear that obtaining the names and addresses of the majority of landowners along the proposed streams was in fact practicable for WVDEP.

b. The DEP provided inadequate information to property owners during the notice process

In its published legal notices DEP failed to comply with the other requirements of Sec. 6.1.a.2, in that DEP's notices did not provide adequate stream-specific "... information set forth in subparagraphs 8.1.a.1.A through 8.1.a.1.D of this rule." Specifically, Sec. 8.1.a.1.B requires that the notice include "[t]he procedures and criteria for designation as well as the impact of the designation." The legal notices prepared by DEP contained no description of the criteria that would be applied to qualify the stream for the Tier 2.5 list. As to "the impact of the designation," the notices simply stated: "Inclusion of these water segments may impact adjacent property owner's or legal interest's ability to discharge pollutants into the water segment." No member of the general public would recognize from this description that if they chose to build a road on their property or disturb more than an acre of their land with any sort of construction, let alone do any more significant development of their land, they could be impacted by the listing. The DEP's failure to include details regarding the potential impact of a Tier 2.5 stream designation breached its obligation under the AIP with regard to the notice to be given property owners along these streams.

c. DEP provided erroneous information to property owners during public meetings held to discuss the Tier 2.5 Presumptive List

DEP compounded its public notice deficiencies during a series of public meetings it conducted in 2002 to inform the public regarding the rule and the impact of a Tier 2.5 stream designation. We appreciate that these meetings DEP arranged and conducted were a well-intended and serious effort by the agency to improve the public's knowledge of the Tier 2.5 stream designation process and impacts. We believe, however, that the

information provided at those meetings may have added to, rather than cleared up, misunderstandings.

- **Potential Impact on Existing Discharges**

Specifically, in those meetings as well as in its published information, WVDEP representatives consistently downplayed or rejected the notion that a Tier 2.5 designation would have any effect on landowners' current activities. As one example, representations were made by DEP representatives at certain of the public meetings that a Tier 2.5 designation would have no effect on existing discharges (unless expanded). The black and white provisions of the AIP show these representations to be inaccurate. Sec. 6.3.f. of the AIP clearly sets forth a procedure that allows DEP the option of requiring existing dischargers on Tier 2.5 streams to change their practices and procedures solely as a result of the stream's Tier 2.5 designation.

- **Nonpoint Sources**

Many types of land-disturbing activities are generally understood to be nonpoint source in nature. The information about such activities provided by DEP representatives in the Tier 2.5 meetings constitutes an example of information that was either misleading or, it may have been accurate when stated, but due to intervening regulatory changes, is no longer correct. DEP's antidegradation presentations used in its 2002 meetings (and still available on the agency's website) included the following definition in the slide show presentation: "Point source – a discharge coming from a pipe, such as an industrial facility or wastewater treatment plant." The presentations also included a description of nonpoint sources which confirmed the general understanding that oil and gas operations, forestry operations, agriculture, and construction activities are nonpoint sources.

Having presented these point source and nonpoint source definitions to citizens, DEP then repeatedly stated in the meetings that antidegradation procedures and Tier 2.5 streams would not affect those activities it described as nonpoint sources. A review of DEP's permitting activities and the agency's own information related thereto, however, reveals that the information DEP disseminated to the public regarding these types of activities is not accurate.

Land development and construction activities, and even agriculturally-related construction activities which disturb an aggregate of greater than one acre are required to register and obtain coverage under the WV/NPDES General Water Pollution Control Permit for Storm Water Associated with Construction Activities (currently Permit No. WV0115924) ("Construction General Permit"). This permit and its accompanying information make it clear that DEP intends that anyone who proposes an activity requiring a stormwater permit which involves a discharge on a Tier 2.5 stream or anywhere in the watershed upstream of a Tier 2.5 stream segment will in fact be affected, and substantially so, because of the Tier 2.5 designation of the stream. (The additional burdens this specific permit imposes on activities on Tier 2.5 streams are further discussed in the next section below.)

In the context of this Construction General Permit DEP clearly describes and applies a much broader definition of "point source" than was suggested in its Antidegradation slide

December 30, 2005

Page 5 of 13

presentations and public meetings. Regardless of which of the conflicting agency definitions of point source and nonpoint source is correct, the problem is that DEP clearly gave the public erroneous information during its public notice and public meeting process regarding those activities the agency defined in the meetings as nonpoint sources.

Many potentially affected citizens and landowners received, and likely accepted at face value, this erroneous information from DEP. These people could have made their Tier 2.5 stream-related decisions based on the mistaken belief that any "nonpoint source" activities (as defined by DEP itself in 2002) they plan, would not be affected by a Tier 2.5 designation. DEP must act to assure that these citizens receive accurate information regarding this critical issue.

- *Individual review of general permit registrations*

DEP repeatedly stated in the public meetings that no individual antidegradation review would be required for general permit registrations. These statements have proven to be inaccurate. Sec. 3.7 of the AIP - while providing that antidegradation review will not be required for activities covered by general permits on Tier 2 streams -- makes it clear that this exemption does not apply to activities covered by general permits on Tier 2.5 streams. The effect of this provision can be enormous.

For example, DEP's Construction General Permit, referenced above, and its accompanying information make it clear that anyone who proposes an activity which must have a stormwater permit which involves a discharge on a Tier 2.5 stream or anywhere in the watershed upstream of a Tier 2.5 stream segment will in fact be affected, and substantially so, because of the Tier 2.5 designation of the stream. Activities on Tier 2.5 streams seeking to be covered by the Construction General Permit are required to do much more comprehensive and costly studies, and to undergo a far more extensive permit review process with an outcome that is at best uncertain. This review process entails (directly contrary to DEP's 2002 claims) an individual antidegradation review of the activity, and a ninety day public notice and comment period. In addition, persons seeking coverage under this general permit must implement additional stream protection measures including but not limited to maintaining an undisturbed buffer zone one hundred feet in width on both sides of the stream.

We are not taking the position that these provisions are not appropriate for streams that truly qualify for and in fact merit Tier 2.5 protection. The goal for these streams is, after all, to have no significant degradation. Further, it may be that some development activities can occur on such streams and still meet the stringent requirements that would be applied to them, assuming enough money is spent to meet them. Our objection is that the DEP has not accurately portrayed this impact to property owners. We further believe that the fact that there have been no objections filed with regard to the inclusion of a stream on the Tier 2.5 list does not necessarily mean that landowners along those streams would not have objected to such a listing and attempted to provide information relevant to this rulemaking process had they been provided adequate accurate information concerning the likely impact of such a listing on the future development of their property.

2. DEP Failed to Make the Findings with Regard to Private Property Takings Required by Statute

In carrying out its mandatory process for the presumptive Tier 2.5 list, the DEP also failed to adequately address its obligations under the West Virginia Private Real Property Protection Act ("PRPA"), 22-1A-1 *et. seq.* PRPA imposes requirements upon the DEP to ensure the protection of private property rights as afforded by the State and United States Constitutions. With regard to Tier 2.5 specifically, the DEP was required to "[a]ssure compliance with all provisions of article one-a of chapter 22," (see 60 CSR 5-6.1.a.1). To date, however, there is scant evidence of the DEP's effort to comply with this requirement. Instead, in listing streams for Tier 2.5 protections, with a high likelihood of impacts that could deprive at least some property owners of all productive uses of his or her property, the DEP has simply failed to address the matter. It is not enough in such a circumstance for the DEP to rely on general positions that non-point sources will not be affected as long as BMPs are used, or that "some" development will be allowed in most instances. A taking of all productive uses of even one owner's property not only requires compensation, but requires action by the DEP under the PRPA. The DEP must correct this error by demonstrating full compliance with PRPA before any final decision to include a stream on the Tier 2.5 list.

B. DEP HAS IMPROPERLY APPLIED THE BURDEN OF PROOF FOR INCLUSION OF A STREAM ON THE FINAL TIER 2.5 LIST

1. DEP has accorded the Presumptive List greater stature than was intended by the Legislature.

DEP has indicated that when it created the Presumptive List it conferred with certain individuals at DNR to come up with streams believed to be reproducing trout streams. Next, DEP used some internal data to identify what it has characterized as "reference streams." Finally, the agency used data apparently also gathered within DEP to pull together a list of streams that were deemed to be of high quality and located on public lands. This, then, is the process DEP used to cobble together the Presumptive List. Two points are critical to observe in the history of this process:

- No public input was involved in determining the Presumptive List; and
- The Presumptive List was not developed with reference to the criteria that the Legislature required to be evaluated for the inclusion of streams on the final Tier 2.5 list.

Although the Legislature allowed the DEP to include the Presumptive List in the final AIP, it did so with recognition of the two critical points mentioned above. Accordingly, the Legislature required these deficiencies to be addressed as follows: First, with regard to the absence of public input on the Presumptive List, the Legislature imposed a specific process for obtaining public input. DEP's failure to follow that required process has been discussed above.

Second, the Legislature addressed the fact that all of the criteria for the designation of Tier 2.5 streams had not been addressed in the initial development of the Presumptive List. On this issue the Legislature provided that in the event an objection was made to a stream on the Presumptive List by an adjacent property owner or the holder of a legal

interest, it was then the DEP's obligation "to provide written justification for the inclusion of the stream as a Tier 2.5 stream with reference to the criteria set out in paragraph 8.1.a.2 [Qualification Criteria for Tier 2.5 Stream Designation] of this rule." Sec. 6.2.b (Bold typeface added). What has transpired in relation to this second point is exactly the opposite of what the Legislature ordered.

In the face of an objection to any stream on the Presumptive List, DEP was to carry the burden of evaluating each stream in light of all of the criteria set forth in Sec. 8.1.a.2., in order to fully justify why the stream should remain on the list for designation as Tier 2.5. Instead, and contrary to the agency's duties under the AIP, the DEP has required the property owner to provide the justification for removing a stream from the Tier 2.5 list, as if the streams had already been fully and publicly studied and as if the justifications for their presence on the list had already been well-established.

To the extent the DEP provided any "justification" in its responses to objections filed, it simply repeated its original contention that the specific stream is a trout water, a reference stream or a high quality water on public land. In no instance where an objection has been filed has the DEP met its obligation under Sec. 6.2.b of the AIP.

2. Even if DEP had been correct in placing the burden of proof on objectors, the agency has set the standard so high for demonstrating the impact of a Tier 2.5 listing on private property owners and economic development that no objector has been able to meet it

Following its three year plus review of the 4,000 + objections to the proposed Tier 2.5 streams, DEP refused to remove a single stream from the Tier 2.5 list based on objectors' private property and economic development concerns. The DEP's responses regarding impact on private property owners (Sec. 8.1.a.2.A) were generally: (i) to argue again that nonpoint source activities complying with BMP's would not be affected, and to refuse to address whether BMP's might themselves be revised as a result of a stream receiving a Tier 2.5 designation; (ii) to refuse to address concerns about the property owner's ability to develop his property in the future, and concerns about activities that may be point sources rather than nonpoint sources, unless the owner provided a case-specific analysis of actual development plans and how Tier 2.5 designation would affect those plans, including numerical projections.

Even where economic development project details were supplied by objectors, DEP still rejected their concerns and announced its intention to retain the stream on the Tier 2.5 list (other than the fifty streams where DEP had discovered errors or inadequacies in its own data).

The DEP's similar response to Sec. 8.1.a.2.G regarding impacts on economic development in the area was to reject all objections on the basis that the objector did not produce specific details and timetables of economic development plans; disclose confidential business information such as financing details, or provide mathematical calculations quantifying the degree of economic impact of the inclusion of a stream on Tier 2.5.

The agency arguably might find it difficult to provide specific data or numerical calculations regarding economic impacts, although the agency did not hesitate to suggest that each objector had the burden of producing such detailed data and calculations. However, as primary sponsor of the rule which was passed in 2001, DEP surely has some idea of its intentions regarding real-world implementation of the Tier 2.5 standards.

It seems that DEP's experts could have provided at least narrative descriptions and discussions of the nature and extent of potential impacts of Tier 2.5 stream designations on private property uses and on economic development. Further, DEP could have easily provided examples using hypothetical plans for property development projects, and could have described in considerable detail how the permitting and regulatory process might play out for such a project on a Tier 2.5 stream in comparison to what the same project would encounter on a Tier 1 or Tier 2 stream.

Such projections and hypothetical applications of Tier 2.5 would have been of great value to the public's understanding of what Tier 2.5 would mean to landowners and to economic development.

3. DEP has required objectors to explain how the AIP will affect their ability to develop their property despite the fact that the Tier 2.5 provisions of the AIP have been legally challenged and are not yet finalized

As stated above, the Coalition believes that the DEP has improperly placed the burden on property owners to justify the non-inclusion of a stream on the Tier 2.5 list and, in doing so, has required property owners to explain how the Tier 2.5 provisions will be implemented in a way that impacts their ability to develop their property. Notwithstanding the legal points that have been raised in opposition to the DEP's action on this issue, there is an additional practical problem with the DEP's approach. Many aspects of the AIP have been the subject of a legal challenge in the case of *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp. 732 (2003). As a result of that challenge a number of the provisions of the AIP including several provisions relating to Tier 2.5 designations have not been approved by EPA and are not currently effective in West Virginia. For DEP to suggest that property owners should be able to project now how their future development plans will be affected without knowing the specific regulatory provisions that will apply in the future is unreasonable.

C. **FACTUAL AND DATA DEFICIENCIES HAVE BEEN IDENTIFIED FOR STREAMS ON THE PRESUMPTIVE LIST**

Not surprisingly, given the manner in which it was hastily pulled together, a number of errors have been identified with the factual and technical support that was purported to exist for streams on the Presumptive List. As stated above, the DEP's only justification for inclusion of a stream on the Presumptive List was that 1) the stream was a reproducing trout stream; 2) a reference stream; or 3) a high quality water on public land. In letters responding to objections made to the inclusion of certain streams as Tier 2.5 waters, the DEP has stated as follows:

...[T]he DEP has reviewed each objection and the information supporting the stream's initial placement on the presumptive list. Fifty streams did not meet the technical criteria and are no longer being considered for Tier 2.5 protection.

Recalling that DEP's original version of the AIP did not provide for any public review of the 444 streams to be placed on the Tier 2.5 list, now, as to those streams to which objections were filed, the agency finds that over 12% of those streams do not fall into one of the 3 categories the agency had originally assigned. Does not this also suggest that as to the 38 streams for which DEP states no objections were received it is likely that upon closer review at least 4 or 5 of those streams (the same percentage range) would fail DEP's limited justification for inclusion on the Presumptive List?

1. In many instances there is very limited data to support a "reference stream" classification

Other evidence of weaknesses in the factual/technical bases supporting the Presumptive List is apparent in the limited justification the DEP has provided for reference streams. In some instances DEP has supported the inclusion of a stream as a reference stream, i.e., a stream with exceptional water quality, by relying on only one or two data points. This is particularly ironic because, under the same antidegradation program, the DEP will not accept a determination of background water quality from a permittee unless the permittee has performed an extensive assessment of the existing water quality in a stream, which requires at least 12 data points taken over a minimum 6 month period. If DEP deems such a data set is necessary to determine background water quality for one purpose in the antidegradation program, it should not apply some different, lesser standard for the Tier 2.5 designation.

2. DEP has used the category of "reference stream" as though it has binding legal significance when it is simply an unpublished Internal list of streams created by the agency without public notice or input

A particularly frustrating aspect of the DEP's reliance on a stream's classification as a "reference stream" as its sole justification for the Tier 2.5 designation is the fact that this classification was made without any public notice or input. The DEP's reliance upon such informal determinations and elevating them as having some legally binding status is clearly a violation of the West Virginia Administrative Procedures Act and violates the procedural due process rights of property owners along those streams.

3. In some instances DEP's only justification for inclusion of a stream is a decades-old Trout Waters study that has never been reviewed or updated

A third factual/technical deficiency that has been identified with the initial Presumptive List relates to the DEP's conclusion that a particular stream is a "reproducing trout stream." Where the DEP has used this category as its limited justification, we have found among the responses the DEP has provided to objectors the following statement:

Trout Stream. To meet this designation, the stream must have documented reproducing trout populations. The survey confirming

this reproduction was conducted by the West Virginia Division of Natural Resources in 1984 and native brook trout were found (Bold typeface added).

We believe that the DEP is erroneously applying Sec. 3.3 of the AIP in reaching the conclusion that it may rely on such outdated information in making a Tier 2.5 designation. Sec. 3.3 reads, in pertinent part, as follows:

... The Secretary shall determine the existing uses of the water body by identifying the uses set forth in 46 CSR 1 Section 6 that the water body currently supports or has supported since November 28, 1975.

The DEP's error is in equating a "Category B2 - Trout Waters" use designation under Section 6 of the water quality standards with a Tier 2.5 designation under the AIP. First of all, a Tier 2.5 designation is not a use "set forth in . . . Section 6" of the water quality standards, therefore the reference to uses existing since November 28, 1975, on its face does not apply to a Tier 2.5 designation. Secondly, the types of waters covered under each provision are defined differently. Category B2 is defined to apply to waters "which sustain year-round trout populations;" whereas Sec. 4.1.c of the water quality standards mentions "naturally reproducing trout streams" as one of the types of waters that "may" be considered for inclusion as Tier 2.5 waters. Had it been the intention of the Legislature to make these classifications equivalent, they would have defined them accordingly.

As an additional point we cannot determine that DEP has ever critically evaluated any of the findings of the 1980s-vintage DNR studies. Similarly, we have not found any occasion in the two-decades that these reports have existed when have they ever been exposed to public review or scrutiny. Surely, given the critical nature of the Tier 2.5 designation the DEP must do something more than put forth an uncritiqued study that is over 20 years old and conclude that the justification has been made. Does anyone wonder what the agency would have done if a member of the regulated community had offered a "survey" that was over 20 years old in support of a claim that a specific environmental condition existed today?

D. DEP SHOULD TAKE AN ALTERNATIVE APPROACH WITH THE PRESUMPTIVE LIST THAT MORE PROPERLY IMPLEMENTS THE REQUIREMENTS OF THE AIP

The current opportunity for comment on the Tier 2.5 Presumptive List, provided under Sec. 6.2.b of the AIP, will allow further comments from those who previously filed objections that DEP has rejected. Given the agency's failure to follow the procedural and substantive mandates in the AIP to date, it is justifiably feared that a new round of objection letters will be largely ignored or rejected out of hand by DEP.

We are hopeful, however, that the DEP will recognize that it has not yet fulfilled its delegated responsibilities with regard to the Tier 2.5 list and choose another path which properly implements the AIP. This path should, we suggest, involve a new and adequate review by DEP of each of the streams which received objections in the first round, or which receive objections now. New objections to even the 38 streams which

December 30, 2005

Page 11 of 13

received no initial objections should be accepted by DEP due to the notice deficiencies in the first round.

In preparation for this new review of each stream on the presumptive Tier 2.5 list, DEP should first officially rescind its preliminary determinations and decisions to include streams on the Tier 2.5 list that the agency announced in its letters of late September and early October, 2005.

Next, we suggest that DEP should prepare, and then widely publicize and disseminate revised, thorough and accurate statements and information describing the nature and degree of impact that Tier 2.5 stream designations would or could have on private property owners and on economic development. We would of course expect this new information from DEP to correct the lack of information and inaccuracies that existed in the first round in 2002.

After providing this new and adequate information to the public, DEP should allow for a new public comment opportunity, including the opportunity for objection letters. Each of the new comment letters should be reviewed by DEP and given proper credence, remembering that the burden the AIP places on the objector is minimal – to our understanding there was no intent when the rule was passed that objectors would have to numerically or otherwise prove why a stream should be delisted. Instead, in these reviews DEP should properly carry its burden to address all of the criteria set forth in Sec. 8.1.a.2 of the AIP, and to fully justify why the stream should remain on the list in the face of opposition.

Only subsequent to this new and corrected round of information dissemination, comment opportunity, and thorough and proper review of objections should DEP make its decisions regarding each stream on the Presumptive List. If DEP cannot justify the inclusion of a stream on the Tier 2.5 list, in consideration of all of the criteria of Sec. 8.1.a.2, such stream should not be advanced to the final Tier 2.5 list.

We realize that our suggestions that DEP in effect do the Tier 2.5 notice and comment process over, at least in part, will take time and resources. However, we believe that if DEP persists in its current course of action, far more resources and time will be expended in debates that will be first and foremost about the Tier 2.5 listing process as implemented by DEP, rather than about the merits of and proper category for any given stream.

As members of the Coalition have learned from past experience with the water quality standards, once a criteria or provision is included in the standards it is practically impossible to remove it, regardless of the scientific basis in support of such a change. We believe the same would be true for the inclusion of any stream on the Tier 2.5 list. For this reason it is all the more critical that it be done right the first time.

1. Streams That Are Not Currently Designated As Tier 2.5 Streams Will Retain the Protections Provided for Tier 2 Streams

Should the DEP choose to recommence the review process for streams to be included in the Tier 2.5 list, there are sufficient safeguards in place to assure that water quality in any of the candidate streams is properly safeguarded in the meantime. All streams on the presumptive Tier 2.5 list currently qualify as Tier 2 waters. This means that no new

activity may take place on any of these streams that may result in significant degradation of their water quality without (1) a review of less-degrading or non-degrading alternatives; and (2) full opportunity for public review and comment. See Sec. 9, 60 CSR 5. In addition a regulated entity that seeks authorization for a new or expanded discharge into a Tier 2 stream must perform a baseline water quality assessment which should determine the existing water quality in the stream. No permit may be issued for such an activity unless it assures that all existing uses of the stream are fully protected. If during the process of evaluating a new discharge to a Tier 2 stream the DEP determines that the stream should be classified as a Tier 2.5 water and that the proposed discharge would significantly degrade the water quality of that stream, the agency is free at that point, on its own initiative to nominate the stream for inclusion as a Tier 2.5 water. Presumably, the agency would have sufficient data about the stream and information about potentially affected property owners to proceed expeditiously on the Tier 2.5 nomination. For these reasons we see no risk in DEP pursuing a full review of all streams on the Presumptive List in accordance with these comments.

E. THE ROLE OF THE ENVIRONMENTAL QUALITY BOARD

The purpose of the AIP is to establish the procedures for implementing the antidegradation policy as adopted by the Environmental Quality Board ("EQB") in the state water quality standards, 46 CSR 1. The AIP, as written, recognizes the role of the EQB and assigns certain responsibilities to it. These include reviewing nominations for the designation of streams as Tier 2.5 or Tier 3 streams. With regard to the Presumptive List the AIP provides:

Any final decision by the Secretary with regard to the inclusion of a stream in Tier 2.5 made following the procedure set forth in this paragraph, may be appealed to the EQB. [Sec. 6.2.b.2.]

During the 2005 Regular Session the Legislature passed and Governor Manchin signed SB 287 which transferred all authority for promulgating water quality standards from the EQB to the Secretary of DEP. As a result of that legislation *W. Va. Code* § 22-11-7b now reads, in pertinent part, as follows:

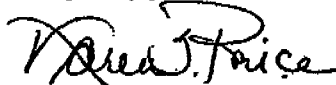
All authority to promulgate rules and implement water quality standards vested in the Environmental Quality Board is hereby transferred from the Environmental Quality Board to the Secretary of the Department of Environmental Protection . . .

It may be argued that the designation of a particular stream as a Tier 2.5 water is a part of the rule-making function with regard to water quality standards. As such, regardless of the current language in the AIP assigning a role in the Tier 2.5 designation process to the EQB, it may be further argued that SB 287 has stripped the EQB of any role in this rulemaking process. At the same time SB 287 has substituted the DEP Secretary for any rule-making function previously performed by the EQB. How does this legislative enactment affect Sec. 6.2.b.2, regarding appeals from final decisions by the Secretary regarding the Presumptive List? The Coalition urges the DEP to provide guidance to regulated entities regarding the effect of SB 287 on the right to appeal a final decision of the Secretary with regard to the inclusion of a stream on the Tier 2.5 list.

F. CONCLUSION

The members of the Coalition hope that you will carefully consider the deficiencies we have described with the implementation of the AIP and the suggestions for rectifying this situation that we have offered. As noted at the outset of these comments, our concerns arise because we believe the proper and adequate implementation of the AIP is a critical issue for the economic health and growth of our state.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Karen S. Price".

Karen S. Price, On Behalf of
ANTIDegradation Coalition

RESPONSIVENESS SUMMARY
LEGISLATIVE RULE TITLE 60, SERIES 5
"Antidegradation Tier 2.5"
PROMULGATED UNDER THE WEST VIRGINIA CODE §22-11-7b(d)

JULY 28, 2006

The Department of Environmental Protection (DEP) would like to take this opportunity to thank those organizations and individuals who submitted written comments and attended the public hearing on the proposed Legislative Rule, Title 60, Series 5.

DEP submitted the Notice of a Public Hearing on a Proposed Rule to the Secretary of State on June 2, 2006. The Secretary of State published the notification in the West Virginia Register, Volume XXIII, Issue 22, dated June 2, 2006. A legal advertisement was published in the *Charleston Gazette* and *Charleston Daily Mail* newspapers. The DEP also publicized the public hearing on its website and through its email mailing list. The public notice announced the date of the public hearing along with notification that written comments would also be accepted. A public hearing was held at the DEP's Charleston office in the Coopers Rock Training Room on July 10, 2006.

A responsiveness summary has been prepared in lieu of individual responses. The summary highlights the issues and concerns that were identified in the written comments received and the public comments made at the hearing. In many cases multiple comments were provided on specific section or issues, and both the comments and responses have been summarized to the extent possible. In addition, many of the concerns expressed during the most recent public comment period have previously been addressed in the earlier Responsiveness Summary developed in June of 2006 and available on the web at www.wvdep.org. The comment letters and transcript of the public hearing held on July 10, 2006 will be included in the submission to the Legislative Rulemaking and Review Committee.

Letter from West Virginia Rivers Coalition

COMMENT: DEP has wholesale delisted the 141 streams and should restore these streams to the list. (Rivers Coalition 3)

RESPONSE: The DEP disagrees that the deletion of 141 streams from the presumptive list was a "wholesale delisting." The agency reviewed the applicable criteria and recommended that the streams should not be included. Fifty of the streams were removed because the original basis for listing the streams (naturally reproducing trout water) was not supported by the evidence. In response to the additional comments received, DEP has reconsidered several streams previously removed and returned them to the proposed list. A compilation of those streams is included at the end of this summary.

COMMENT: The DEP allowed extended opportunity for objections to the list, but inadequate time for support. (Rivers Coalition 3.1)

RESPONSE: The DEP followed the mandates of the Legislature in conducting two public review and comment periods. The initial period was after public notice in the geographic regions of the streams on the presumptive list and was designed to notify property owners of the listing of specific streams. This period included newspaper advertisements, fact sheets and 13 public meetings intended to explain the process to the affected public and the public at large. Although primarily intended for the receipt of objections, there was no prohibition on letters or verbal comments in support of the "presumptive" list during this initial comment phase. The DEP also disagrees with the contention that the "objection" period lasted two years. The initial public comment phase was from February to June 3, 2002. An additional period, during which DEP sent letters to the original objectors requesting validation, both in terms of information provided and property ownership, lasted from May 27, 2003 to July 31, 2003. This period was provided to respond to the numerous comments received that the public did not understand the type of economic development information the agency would consider in its final decision. The remaining time before the proposed list was made public in 2005 was used by the DEP to review the voluminous comments and review the criteria for each of the 444 streams on the presumptive list. The public comment period, from September 26, 2005 through December 31, 2005, was open to anyone to make comments in support or objection to the list. An additional 1600 comments were received during that process.

Once that process was complete, the agency made its determinations, based on the information received, and developed the final draft list. The final draft list, according to the rule, was then subject to an additional thirty-day public comment period, from June 1 to July 11, 2006. During the 2006 Legislature, the statute authorizing the antidegradation rule was modified to clarify that legislative approval was required for promulgation of the Tier 2.5 list as an Appendix.

COMMENT: The DEP granted "exemptions" from the Tier 2.5 list without support. (Rivers Coalition 3.2)

RESPONSE: The DEP is unaware of the source of the claim that "exemptions" were granted. It is clear from the Responsiveness Summary that the DEP applied the criteria in 60 C.S.R. 5-8.1 to each of the streams. No "exemptions" were granted.

COMMENT: The DEP removed streams from the presumptive list even though objectors failed to provide additional evidence to support removal of the stream. (Rivers Coalition 3.3).

RESPONSE: The DEP reviewed each stream and considered all comments received, whether received during the initial or second comment phases. To the extent streams were removed from the list without additional information provided during the second

comment phase, streams were removed due to a reconsideration of the totality of the information provided. The agency considered the regulatory criteria based upon the available information.

The DEP chose to balance the competing interests by giving consideration to economic development "plans" that were fairly specific in nature even though the landowner did not provide evidence that the development would be prevented along a Tier 2.5 stream. The DEP took into consideration that Tier 2.5 designation would not prevent all development, but might require the developer to enhance treatment and therefore increase the cost of the development.

COMMENT: Elkhorn Creek (BST-99) and Loop Creek (K-76) should not have been removed. (River Coalition 3.3)

RESPONSE: Elkhorn Ck. - Elkhorn is well known and valued by sportsmen for its reproducing brown and rainbow trout populations. DEP reviewed the comments and supportive information received and determined that removal of the lower section of Elkhorn Creek was justified. However, DEP determined that the area of Elkhorn Creek above the segment in question to the headwaters, still met the criteria used for the original listing. Accordingly, DEP will segment the stream and designate the upper portion of Elkhorn Creek for Tier 2.5 protection.

Loop Creek - DEP has reviewed the comments and supporting information received on Loop Creek and has determined that adequate information was provided to justify the removal of Loop Creek through objections received from the City of Oak Hill. The objections received referenced increased costs of treatment and user fees, limits to types of businesses and development opportunities and concerns that it would be difficult to add new and expanded sewage treatment facilities of which several have already been planned and received funding. Verbal and written comments received during the public comment period citing anticipated coal development in the watershed as the reason the stream was removed were inaccurate as the agency received no such objections to the original listing.

COMMENT: The DEP failed to accurately consider all eight factors and improperly weighted impact on development to the detriment of other factors. (Rivers Coalition 3.4)

RESPONSE: The DEP did not limit the submission of any data demonstrating the listing would "positively impact private landowners." The DEP also did not remove all streams on which an extractive industry claimed it owned adjacent natural resources. The DEP was required to balance the interests of the public in protecting the stream quality while taking into account potential impact on development of the property. The existing water quality for all streams was considered in the proposed final list. For a more thorough discussion of DEP's response to this comment, see the previously developed Responsiveness Summary, attached.

With regard to the claim that delisting headwater streams will adversely impact downstream water quality and trout populations, the DEP recognizes that the protection of headwater streams is important to downstream water quality. However, it is not realistic to limit development in all waters of the state. The process DEP utilized to determine Tier 2.5 protection involved balancing the needs of headwater protection with the ability of landowners to reasonably develop their assets. Additionally, it should be recognized that the vast majority of the 303 streams retained on the draft Tier 2.5 list are described as 'entire length' or 'from the headwaters downstream' to some specific location.

There was no geographic quota for the listing of streams and it would be improper to propose a stream just because there are few if any others in the same county on the list. Likewise, it would be improper to remove a stream based on a claim that the county has too many streams on the list.

COMMENT: "Reference streams" should have remained on the list. (Rivers Coalition 3.4).

RESPONSE: During the 2005 comment period many people objected to the inclusion of "reference streams" citing a lack of input, authority, etc. DEP originally nominated "reference streams" based on the unique and exceptional aesthetic and ecological value criteria. A "reference stream" is a valuable tool used by the agency to assess the quality of the state's waters. Because resources are not available to assess every individual stream across the state, "reference streams" become important when comparing impacted streams against what similar stream quality would be without such impacts. If "reference streams" are impacted, their value is diminished. Therefore, those streams previously listed as reference on private lands were removed because designating the stream for Tier 2.5 protection would not prevent a stream from losing its reference status, because this status is in large part based on minimal disturbance and a lack of permitted discharges.

As an example, a stream could lose its ability to be considered a reference site if several homes were built in the watershed or if agriculture or other nonpoint source activities became more present in the watershed. Whether the entities complied with BMPs would not change the fact that the stream would no longer meet reference criteria regardless if it had been afforded Tier 2.5 protection.

Similarly, if the water were given Tier 2.5 protection and a new permitted discharging activity was allowed in the watershed, the program would no longer consider the water a reference site because one of the qualifying criteria for a reference site is that there are no permitted discharges in the watershed.

The current Tier 2.5 list contains 16 streams listed only as "reference streams." Ten of those streams received no objections during the previous objection and comment periods. Five other "reference streams" were retained as they are located entirely on public land. One stream, Long Branch (O-2-p-26) is the only stream remaining on the Tier 2.5 list as a

“reference” only even though it does have private land in the headwaters. In this particular instance the stream has two samples exhibiting a high biological score (81.9 and 81.5) which qualify the stream as high quality on public land as well.

COMMENT: Streams with active liming operations should remain on the list. (Rivers Coalition 3.5).

RESPONSE: Contrary to the assertion that the liming activity provides an "exemption" to the mandates of the Clean Water Act, the DEP initially removed streams where the existing quality is artificially improved by the voluntary action of certain landowners. However, after consultation with DNR it has been determined that South Fork of Cherry River, Cold Knob Fork, and Rocky Run all supported native brook trout populations prior to initiation of lime applications, and should be maintained on the proposed list. The DNR and Plum Creek Lumber Company participate jointly in the liming program for these and two other streams, Turkey Creek and Middle Fork which were not removed earlier. Timbering operations are considered nonpoint sources not subject to antidegradation review.

COMMENT: The Fernow Forest streams should remain on the list. (Rivers Coalition 3.5)

RESPONSE: Traditional timbering operations are exempt from antidegradation review if best management practices are followed. However, in the interest of furthering research, the US Forest Service may occasionally conduct or allow experimental activities on the Fernow Forest such as nontraditional best management practices, demonstration pesticide/herbicide applications, etc. Ellick Run and Stonelick Run were removed from the “presumptive” list to avoid possible conflict with legitimate research goals and practices conducted and/or sanctioned by the US Forest Service.

COMMENT: Changes are needed in the existing rule to reflect the judicial ruling. (Rivers Coalition 4).

RESPONSE: The DEP agrees that a few minor changes should be made to the rule to reflect the ruling of the *U.S. District Court in OVEC v. EPA* and the subsequent decision on remand by the EPA. Therefore, the following language will be struck from the rule presented to the Legislature: § 5.2 – the second sentence; § 5.6.c – entire section. In its ruling of August 29, 2003, the U.S. District Court for the Southern District of West Virginia declared these portions of the rule to be inconsistent with the Clean Water Act. On March 29, 2004, the EPA formally disapproved this language in the rule. The DEP has reviewed the language and determined that deletion of these provisions will not affect the agency’s ability to properly implement the antidegradation policy and implementation rule, and that a revision to the language is not necessary. Therefore, the language cannot be relied upon for any regulatory decisions and perpetuation of the language will only serve to confuse persons who wish to review and interpret the rule.

With regard to the comments on the issues presented to EPA on remand by the court for which EPA solicited additional input from the DEP, the DEP responds that these issues are not addressed by the proposed rule change. The DEP has submitted additional information to support this language and will take no action to change the language until a final decision is received from the EPA. Regarding the addition of language to section 5.6.d, identical to the language remanded by the Court at section 6.3.a, the DEP responds that this language was inadvertently omitted from the 2001 rule and should be applicable to Tier 2 streams as well.

Letters from the West Virginia Farm Bureau, the Antidegradation Coalition, the Independent Oil and Gas Association, the West Virginia Coal Association, Allegheny Wood Products, Plum Creek Lumber, and the US Environmental Protection Agency.

COMMENT: Section 6.2 should not be deleted. (WV Farm Bureau)

RESPONSE: As explained above and in more detail in the Responsiveness Summary, the DEP has provided opportunities for comment and due process for landowners equal to or in excess of the requirements of section 6.2. The proposed rule is the termination of the process outlined in section 6.2. Therefore, section 6.2 is no longer necessary.

COMMENT: The DEP failed to inform the public of pending changes in the construction storm water permits. (WV Farm Bureau).

RESPONSE: DEP advised the public during the meetings held in February/March 2002 that construction disturbances exceeding three acres required a permit. The Antidegradation Rule included an exemption for small construction activities of less than three acres. In November 2002, a full six months after the public meetings, DEP issued a new general permit for construction in response to new federal requirements that changed the universe of coverage from three acres down to one acre or greater construction disturbances. This was in response to changes in federal regulations. DEP recognizes that federal regulation changes do not necessarily result in a need to change state rules, and/or permits and therefore did not publicly announce pending permit actions that may or may not occur. Subsequently, individual landowners disturbing more than one acre for construction purposes were required to register under the construction general permit. Land disturbances exceeding one acre involving residential construction, barn building, poultry house construction, etc. are subject to this permitting requirement.

COMMENT: The DEP added mileage to stream segments and has not stated whether any adjacent landowners were notified of the additional mileage that may affect their interests. (WV Farm Bureau)

RESPONSE: The original "presumptive" list, which in many cases listed assigned mileages to the "entire length," was developed from an older database. In the process of reviewing all streams that were on the original list, GIS coverages were used and it was discovered that the lengths of several streams had been slightly underestimated. The

increases in stream length included on the current list were made to more accurately reflect the original description, which did not change. The reach description from the original list was the prevailing source of information provided to the affected public to explain where Tier 2.5 protection was being proposed.

COMMENT: The data supporting the listing of streams was not adequately provided to the public and is not sufficient to support the listing of streams. (WV Farm Bureau; Antidegradation Coalition)

RESPONSE: As explained in the Responsiveness Summary attached, the data supporting the determination that a stream is a naturally reproducing trout stream has been reviewed by the Division of Natural Resources and the DEP. Both agencies agree that the streams listed as naturally reproducing trout streams are capable of sustaining a naturally reproducing trout population. The commenters claim the level of data for these determinations should be equal to the data necessary for background water quality on permit applications. The DEP disagrees. The additional data necessary to establish background water quality is necessary to calculate specific discharge limits. Even if data is sufficient to demonstrate high water quality, it will not cover all the peak and low flow periods necessary to insure that effluent discharges do not violate water quality standards.

COMMENT: The DEP failed to address the requirements of West Virginia Code § 22-1A-1 & 3(c) and section 6.1.a.1 of the Antidegradation Rule. (WV Farm Bureau).

RESPONSE: The statute requires an assessment when "all productive use" of private property will be deprived. The DEP is not aware of any instance, nor has any commenter provided a credible claim where all productive use of private property will be deprived by a designation of a nearby stream as Tier 2.5. There is no basis for a conclusion that the provisions of the Private Property Protection Act are triggered by this proposed rule.

COMMENT: The DEP refused to remove streams from the presumptive list based upon "potential for economic development" and it is "hopeful" that the land could be used for factories, mineral extraction, energy creation commerce and recreation. (WV Farm Bureau).

RESPONSE: The DEP did consider the potential for economic development, but reasonably requested information to demonstrate said potential. The DEP also complied with the mandate to consider the "development of demonstrated natural resources." The comment is directed at the elimination of all streams from Tier 2.5 because the land has a possibility of development at some future time. However, the comment fails to provide any information to support the general allegation that Tier 2.5 designation will prevent any economic development of adjacent property.

COMMENT: The DEP is "forcing an additional layer of regulation" on the "exceptional caretakers of water quality." (WV Farm Bureau).

RESPONSE: Antidegradation is a federal requirement mandated by the Clean Water Act.

COMMENT: The DEP ignored the objections of the Farm Bureau and its members. (WV Farm Bureau).

RESPONSE: The DEP discussed and considered all comments, general and specific, in its deliberations on the rule.

COMMENT: The DEP impermissibly shifted the burden of proof to objectors of stream listing. (IOGA; WV Farm Bureau).

RESPONSE: As explained in various sections of the DEP's Responsiveness Summary, the agency was presented with a "presumptive" list by the Legislature, but reviewed each stream based upon the regulatory criteria for which an objection was received. The agency did review all available information on each stream. Therefore, the agency did fulfill its obligation for individual stream review and did not hold objectors to a standard for "removal" of streams from the list. Apparently the commenter has interpreted the agency's response to indicate that a stream was on the list absent a showing of evidence that it should be removed. The Antidegradation Rule clearly could be interpreted to require DEP to follow such a procedure since the Legislature had included the stream on a "presumptive" list. However, that is not the procedure followed by the agency. The agency reviewed the information provided by objectors during the second public comment period in light of all the applicable criteria. To the extent the DEP included a stream on the list in spite of objections or information about potential adverse economic considerations, the DEP determined that on balance, the quality of the stream justified inclusion on the list.

COMMENT: The DEP should include adoption of the Antidegradation Coalition comments of December 30, 2005. (Antidegradation Coalition; West Virginia Coal Association).

RESPONSE: The Responsiveness Summary addressed the December 2005 comments and is included with the information submitted to the Legislative Rulemaking Committee.

COMMENT: The DEP's process for individual notification "was so flawed that the DEP has no choice but to begin the process again." (Antidegradation Coalition).

RESPONSE: The DEP again encourages the commenter to review the attached Responsiveness Summary.

COMMENT: The DEP should only list streams that have been provided the "thoughtful analysis" provided Watkins Run and only after "careful deliberation and a conclusion that

they are particularly deserving of protection against development." (Antidegradation Coalition).

RESPONSE: Watkins Run was proposed by the Environmental Quality Board to the Legislature as a Tier 2.5 stream through the nomination process. The current listing involves the review of streams previously approved by the Legislature on a "presumptive" list. The DEP has carefully deliberated the qualifications of each of the streams on the proposed list.

COMMENT: There is no need for a Tier 2.5 designation because Tier 2 would adequately protect trout waters and other high quality streams. (Antidegradation Coalition).

RESPONSE: The West Virginia Legislature has determined that there should be streams designated as Tier 2.5 and provided the protection for existing water quality as set forth in the rules. In support of this determination, the Legislature has approved certain streams as qualifying for "presumptive" protection as Tier 2.5. As required by the rule, DEP evaluated the "presumptive" list of streams against the qualifying criteria and made its determination.

COMMENT: Fall Run of Left Fork, Elk River drainage, does not meet the criteria for listing and that DEP and DNR need to develop a clear protocol for determining naturally reproducing trout status. (Antidegradation Coalition).

RESPONSE: DEP relies on the expertise of the coldwater fisheries biologists at the Division of Natural Resources. In this instance, the DNR maintains the viability of this stream as a "naturally reproducing" trout water. According to DNR, natural reproduction is verified when multiple year classes, including young-of-the-year, are collected during population surveys. However, some streams, particularly native brook trout streams, are considered naturally reproducing if only adults or young-of-the-year are collected in the sample.

COMMENT: The "reference stream" designation is inappropriate and such streams should not be included on the list. (Antidegradation Coalition).

RESPONSE: The DEP's position on "reference streams" in regard to Tier 2.5 has been established. See response to WVRC comment 3.4 above.

COMMENT: DEP has not included several definitions related to its Antidegradation Implementation procedures in its latest version of the rule, 47CSR2-2. Also, EPA recommended that in addition to Watkins Run, DEP list all Tier 2.5 streams in Appendix A. (The US Environmental Protection Agency)

RESPONSE: DEP accepts these comments and has made the appropriate modifications to the rule and Appendix A.

COMMENT: The data used to designate streams is old (greater than 4 years) yet DEP requires the use of 12 points of data collected over a 6 month period to obtain a permit. (Allegheny Wood Products)

RESPONSE: The commenter is mixing two separate antidegradation processes. One process is for calculating how much assimilative capacity, on a pollutant-by-pollutant basis, is available for determining a permit limit. The other process (using the presence of reproducing trout or high biological scores) is for the express purpose of determining whether a stream should receive Tier 2 or Tier 2.5 protection. The additional data necessary to establish background water quality is necessary to calculate specific discharge limits. For permitting purposes, even if data is sufficient to demonstrate high water quality, it will not cover all the peak and low flow periods necessary to insure that effluent discharges do not violate water quality standards.

COMMENT: The DEP misled the public on the impact of Tier 2.5 on existing discharges. (Allegheny Wood Products)

RESPONSE: The commenter may be referring to DEP's comments during the public meetings in 2002 that antidegradation review would not affect existing nonpoint source activities, such as timbering operations, farming operations, etc. Section 6.3.f. of the rule does address existing permits but is not applicable to nonregulated discharges, i.e. nonpoint sources. It does provide the DEP with the opportunity to revisit existing regulated discharges to determine if the discharge is protective of Tier 2.5 waters. Regulated dischargers are already subject to reevaluation and potentially more rigorous treatment every five years at the time of permit reevaluation and reissuance. This provision presumably was intended to enable the agency to revisit a Tier 2.5 discharge to evaluate its potential impact in a more expeditious timeframe.

COMMENT: Inconsistency in having streams on 303(d) list and Tier 2.5 list. (Plum Creek Lumber)

RESPONSE: The state's 303(d) List of Impaired Waters contains streams that have documented water quality violations of one or more water quality standards. Even though the stream may not meet water quality standards for a particular parameter, its quality could otherwise be unaffected and indeed could be considered high quality. The lists, therefore, are not necessarily mutually exclusive. The commenter notes the inconsistency due to streams affected by acidity from air deposition which flow through the company's properties. These streams are included on the state's 303(d) list and the Tier 2.5 list.

GENERAL: A fairly large number of comments were received which included general expressions of concern. These comments have been condensed and responded to below. Most supported retaining streams, either in total or by citing specific examples. In addition, some commenters expressed appreciation for the action DEP had taken in response to previous objections. Finally, some commenters continue to object to streams which were retained on the Tier 2.5 list.

Many comments received, both written and oral, were from citizens concerned about DEP's removal of Tier 2.5 protection from 141 "naturally reproducing" trout streams. Many expressed disappointment that DEP had taken this action and urged the agency to reinstate those streams removed.

The presence of "naturally reproducing" trout was only one of three criteria used to justify inclusion on the Tier 2.5 list. Of the 141 streams removed from the original 404 on the presumptive list, only 66 were "naturally reproducing" trout streams. Therefore, the comment that DEP removed protection from 141 trout streams is inaccurate. The remaining 75 streams were originally listed because they were either "reference streams" or high quality streams on public lands. Removing those "naturally reproducing" trout streams from the Tier 2.5 list, however, does not change their status as trout streams. DEP still protects those streams at the elevated levels, i.e. water quality standards, afforded trout streams. DEP, in fact, is currently proposing a list of 337 trout streams in the water quality standards rule which will be afforded extra protection. Tier 2.5 recognizes existing high quality and provides an additional level of protection but the removal of a stream from that list does not mean antidegradation rules will not apply and that stream will not be protected. The significant difference between Tier 2 and Tier 2.5 is the allowance of a socio-economic process to justify an increase in pollutants above existing levels. However, in no case may water quality standards applicable to that stream be exceeded. In response to the additional comments received, DEP has reconsidered several streams previously removed and returned them to the list. A compilation of those streams is included at the end of this summary.

A concern was expressed that removing the Tier 2.5 status takes away a margin of safety should spills or permit violations occur.

Following up on the response to the previous comment, Tier 2.5 antidegradation review limits degradation of existing quality to 10% of the stream's assimilative capacity for a particular pollutant. Tier 2 antidegradation review also limits the degradation to that same 10% but the applicant can submit socio-economic justification for the discharge and receive permit limits up to the stream's water quality standard. In either case, permit limits are based on conservative estimates of stream flow (the lowest average flow in a stream occurring for a seven day period once every 10 years i.e. (7Q10) measured against the maximum design flow of the proposed discharge system. The "worst case" scenario would still be protective of the water quality standards for the stream. Therefore, the process inherently has some margin of safety given that low flows and maximum discharges rarely coincide. In addition, permittees are legally responsible for the proper operation of their wastewater treatment systems and are subject to prosecution for violations. Accidental spills do occasionally occur and may be detrimental to the long-term health of the stream. Permittees are responsible for ensuring quick response, cleanup and reporting which affords some margin of safety from long-term impacts. The level of antidegradation review afforded the permit has no bearing on the likelihood of spills or the proper and effective operation and maintenance of the treatment system.

Commenters noted that the Tier 2.5 process had involved a two-year period where landowners had the opportunity to provide objections and/or comments while the public at large was afforded only a 30-day comment period. They also requested a 30 to 45-day extension to the comment period.

See response to WVRC comment (3.1) above. In regard to the requested extension, the DEP has an obligation to respond to the mandated schedule of the legislative rulemaking process that requires submission of the proposed rules package by established deadline of July 28, 2006.

Many expressed concern that the agency had responded to economic/development pressure to remove streams from the list which should be the very reason those streams should be protected.

DEP followed the process as defined by the rule in fulfilling its obligation to provide adequate opportunity to object to the listing.

Commenters noted that trout reproduction is not necessarily limited to the specific stream where they are found but could involve other streams within the watershed; therefore, more field work is needed to validate and perhaps add more streams to the list.

DEP and DNR have worked diligently over the last three years to verify the information used to identify the naturally reproducing trout streams on the "presumptive" list. Both DEP and DNR agree that the current list is not exhaustive and that many more streams could be characterized as naturally reproducing if supportive data were available. Unfortunately, neither agency has the resources to either field verify the current status of the streams listed or to pursue assessing additional streams at this time. If any stream not already included on the "presumptive" list is worthy of Tier 2.5 designation, it may be considered through the nomination process in Section 8.1 of the rule. The DEP's review of streams in the current rule was limited, by the language, to the "presumptive" list.

Some commenters offered their own fishing logs and water quality/fish information to support maintaining the 141 streams and even recommended adding other streams to the list. A number of commenters provided information and testimonials on specific streams that had been removed.

Some commenters offered access to their personal trout stream information. That information would be more pertinent at this point as support for future nomination of streams for protection through the process contained in the rule.

Some commenters noted that several streams in the southern coalfields, where high quality and naturally reproducing trout streams are rare, had been removed and should be reconsidered for listing.

There was no geographic quota for the listing of streams and it would be improper to propose a stream just because there are few if any others in the same county on the list. Likewise, it would be improper to remove a stream based on a claim that the county has too many streams on the list.

Several streams removed from the original list are valuable as "reference streams" in the Southern West Virginia coalfields where such streams are rare.

See response to Rivers Coalition 3.4 above.

Commenters noted it is easier to remove a stream from the Tier 2.5 list than to add one.

The Antidegradation Rule provides a process to nominate and/or delist streams from Tier 2.5 and/or Tier 3 protection. The 2005 Legislature acted on the nominations of two streams which had completed the process and approved one, Watkins Run. This successful nomination is evidence that the process works.

Commenters noted that the Tier 2.5 list was a compromise anyway and that most of the streams should be Tier 3.

The original antidegradation provisions in the water quality standards rule did not specifically identify the streams designated for Tier 2.5 protection. At the request of the Legislature, DEP worked closely with the Division of Natural Resources (DNR) to develop the "presumptive" list to identify those streams that already existed in the definition and those streams for which additional information existed indicating a unique resource. By developing a list, the intent in the rule was to eliminate the previous uncertainty of the category for regulatory purposes, and to enable the industry and public at large to be aware of where those streams were located. Regarding the Tier 3 comment, the rule now specifically designates waters within federally designated Wilderness areas and outstanding national resource waters as Tier 3. Streams may be nominated for Tier 3 protection through the nomination process detailed in Section 8.2 of the rule.

The value of trout streams to the state's economy represents a significant economic benefit that should be weighed against the argument of economic harm used by objectors as a reason to remove streams from the Tier 2.5 list.

Removal of a stream from the Tier 2.5 list does not remove its status as a trout stream and the Tier 2.5 protection level does not prohibit development on the stream. While the opportunity to exceed the 10% existing quality assimilative capacity via socio-economic justification is not available in Tier 2.5, trout stream water quality standards provide a level of extra protection.

Individual Stream comments – Many commenters requested that DEP reevaluate and remove and/or restore specific named streams to the list. Below are DEP's responses:

COMMENT: Allegheny Wood Products submitted several comment letters objecting to streams still listed as Tier 2.5 despite earlier objections. Blizzard Run, Little River/East Fork Greenbrier, Wolf Run, Frog Run, Right and Left Forks of Clover Run, Thorn Creek, Roaring Creek, West Fork Greenbrier River, Flag Run, Blackwater River.

RESPONSE: The DEP has previously responded to the objection on Blizzard Run by reducing the length of the proposed Tier 2.5 protected segment by .5 miles. In regard to the other streams, due to the volume of comments received during the late 2005 comment period, DEP did not respond individually to any specific letter. Instead, DEP prepared a Responsiveness Summary and notified all commenters of its existence via direct mail. Further, the commenter did not provide development plans with enough specificity for the agency to consider removing these streams. Therefore, all streams listed in commenter's letter were retained.

COMMENT: Continued objections to listing of Left and Right Forks of Files Creek, the West Fork of Greenbrier, Getout Run, Laurel Run, Alec Run, Right Fork of Chenoweth, Right Fork of Buckhannon River. Commenters contend their letters were not specifically responded to and that the Responsiveness Summary did not adequately speak to their objection.

RESPONSE: Due to the volume of comments received during the late 2005 comment period, DEP did not respond individually to any specific letter. Instead DEP prepared a Responsiveness Summary and notified all commenters of its existence via direct mail. Specific to the commenter's earlier objection on the listing of Right and Left Fork of Files Creek and West Fork of Greenbrier the agency has again reviewed the supporting information. While the trout surveys are indeed older, DEP and DNR still contend the streams both support trout reproduction. Further, the commenter did not provide development plans with enough specificity for the agency to consider removing these streams. In regard to the commenter's claim that West Fork of the Greenbrier is not entirely on public land, the DEP concurs. A review of the information indicates approximately 12% of the stream length is bounded by private land. However, the stream is believed to contain reproducing trout and as such, even if the stream were disqualified based on the presence of private land, it would remain for further consideration due to the presence of reproducing trout. Therefore, all streams listed in commenter's letter were retained.

COMMENT: Commenter expressed concern that Laurel Creek (OG-38-d) was removed because of its status as a "reference stream."

RESPONSE: DEP reviewed the comments, evaluated the supportive information received, considered all previous objections and determined that Laurel Creek also

qualifies for protection under the high quality on public land category. The upstream portion is all on public land, therefore the DEP will maintain the upper 1.6 miles of this stream on the Tier 2.5 list.

COMMENT: DEP noted a discrepancy in the mileage for Cranberry River (KNC).

RESPONSE: In evaluating the information it had used to determine status, DEP discovered that a section of this Tier 2.5 listed stream was in the wilderness area. DEP has determined that a correction of the mileage is necessary and has made the appropriate change in Appendix A.

COMMENT: Commenters requested adding the following streams back to the Tier 2.5 list as naturally reproducing trout streams: Laurel Creek (KN-27), Big Run (KE-127), Second Creek (KNG-23), and Hogg Run (MC-12-B-3).

RESPONSE: These streams were removed from the Tier 2.5 list because of a lack of evidence supporting naturally reproducing trout. Objectors were notified of that action. Recent additional information provided by DNR has resulted in verification of reproducing trout populations in Laurel Creek, Big Run and Hogg Run. However, the DEP believes that it would be inappropriate at this time to add these streams to the list without public notice. DNR has noted that reproducing trout populations cannot be verified for Second Creek.

COMMENT: In addition to the specific streams already noted above, the DEP received at least one comment requesting that DEP reinstate, maintain the listing, or add to the list: Camp Creek (KNB-13), Shavers Fork (MCS), Cranberry River (KGC), Gandy Creek (MC-60-T-(S)), Seneca Creek (PSB-28-K), Gladly Fork (MC-60-K), and Hyle Run (MC-54-D), Sand Run (MC-60-D-10), Yoakum (MC-60-D-11), Hominy Creek (KG-24), Grassy Creek (KG-24-E).

RESPONSE: Of these streams, Sand Run, Yoakum Run, Shavers Fork, Gladly Fork, Hominy Creek, and Grassy Creek were removed after consideration of comments, evaluation of supporting information received, and consideration of all previous objections. After further review, DEP still believes these streams should be removed. The DEP suggests that for those that were not listed on the "presumptive" list, commenters pursue the nomination process contained in the rule.

COMMENT: One commenter listed a number of streams for Tier 2.5 nomination.

RESPONSE: The DEP suggests that for those that were not listed on the "presumptive" list, commenters pursue the nomination process contained in the rule.

COMMENT: Several commenters objected to the removal of Big Spring Fork in Pocahontas County, the location of a proposed regional sewage treatment facility.

RESPONSE: DEP reviewed the comments, evaluated the supportive information received, considered all previous objections against the qualifying criteria and determined that adequate information was provided to justify the removal of Big Spring Fork.

Summary of streams maintained in response to public comment:

As noted above, DEP has decided to maintain several streams on the proposed Tier 2.5 list. The actual stream codes and mileages will be added to Appendix A of the rule. The following is a compilation of these streams:

Elkhorn Creek - DEP will segment the stream and designate the upper portion of Elkhorn Creek for Tier 2.5 protection.

South Fork of Cherry River, Cold Knob Fork, Rocky Run - South Fork of Cherry River, Cold Knob Fork, and Rocky Run all supported native brook trout populations prior to initiation of lime applications, and should be maintained on the proposed list.

Laurel Creek (OG-38-d) - The upstream portion is all on public land, therefore the DEP will maintain the upper 1.6 miles of this stream on the Tier 2.5 list.

Cranberry River - DEP has determined that a correction of the mileage is necessary and has made the appropriate change in Appendix A.



west virginia department of environmental protection

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

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

ANTIDEGRADATION/TIER 2.5

Background

In keeping with its mission statement, "Promoting a healthy environment," the Department of Environmental Protection (DEP) has the responsibility to ensure that the water quality of the state is protected and maintained. The DEP supports a clean and healthy environment for all West Virginia citizens and views the Antidegradation Rule as an important component in achieving the goal of environmental protection.

During the 2001 legislative session, lawmakers, environmentalists, industry representatives, landowners, and state government agencies worked together to develop West Virginia's Antidegradation Implementation Rule. Through months of negotiations and compromises, the group successfully mapped a process to ensure that the state's high quality waters are appropriately protected and that all waters' existing uses are maintained.

A significant provision in the *Antidegradation Implementation Procedures Rule* (60CSR5) was the inclusion of a "presumptive" list of 444 streams designated as warranting extra protection under the Tier 2.5 category. Originally, language in the antidegradation provisions of the state's water quality standards had designated such high quality waters, including, but not limited to, streams containing naturally reproducing trout and lands draining state and national forests, as warranting Tier 3 protection. Tier 3, in effect, prohibits activities that degrade existing water quality. The Tier 2.5 category allows for limited degradation but still recognizes and contains provisions for protecting the exceptional quality of such streams.

The original antidegradation provisions in the water quality standards rule did not specifically identify the streams designated for Tier 2.5 protection. At the request of the Legislature, DEP worked closely with the Division of Natural Resources (DNR) to develop the "presumptive" list to identify those streams that already existed in the definition and those streams for which additional information existed indicating a unique resource. By developing a list, the intent in the rule was to eliminate the previous uncertainty of the category for regulatory purposes, and to enable the industry and public at large to be aware of where those streams were located. The list, which represented approximately 6% of the total number of stream miles in the state in 35 counties, included naturally reproducing trout streams, DEP-determined reference streams and streams located on public lands with a high biological score indicating high water quality. The rule required that DEP notify riparian owners of their right to object to the inclusion of their stream on the list.

Promoting a healthy environment.

Objection and Evaluation Process

At the time, the presumptive "Waters of Special Concern," or Tier 2.5 list, generated a considerable degree of concern among state landowners, particularly those who owned or had a legal interest in land abutting those streams. In early 2002, DEP initiated a process to provide those landowners the opportunity to register their objections. DEP determined that the objection process would be an opportunity for landowners themselves to provide information relative to adverse economic impacts. Many objectors were farmers who were concerned that the designation would result in regulations or would somehow inhibit their use and/or sale of their lands. Some were mineral owners who objected to potential burdens or restrictions from accessing their minerals.

DEP was criticized for not individually notifying landowners of the listing. The objection period was advertised and promoted through newspaper advertisements in the affected counties, news releases and a series of 13 public meetings held across the state. During the objection period, which ultimately was extended until July 31, 2002, over 4,000 objections were received. DEP staff then evaluated each objection to determine whether justification existed to maintain or remove streams from the list.

The evaluation process was comprehensive. Each individual objection was reviewed and categorized. Many were form letter objections from farm landowners. Some fell under mineral ownership concerns. Property takings issues were raised. Future land use concerns were expressed. Some disputed the presence of trout in some of the streams, so DEP and DNR reviewed the information to substantiate trout status.

In September 2005, DEP announced the results of its initial evaluation process and formally responded to those entities that had previously objected. In this response, DEP encouraged the objectors to provide any supplemental information they may have in support of their initial objection. Also, at that time, 50 streams were removed from the list due to flaws in original listing information. Another 38* streams received no objections and, according to the Antidegradation Rule, could automatically be submitted to the Legislature for inclusion on a final list. A public comment period was opened on the remaining 356 streams to give the general public the opportunity to provide input on the listing. That comment period expired on December 31, 2005.

Since that time the agency has again been evaluating the more than 2500 comments and supplemental information received. The majority of the comments were from landowners who addressed the agency's specific actions on retaining or removing specific streams. There were comments from the general public who supported retaining specific streams or the entire list. DEP's actions taken in response to the specific stream objections and public comment are represented by the list proposed for legislative action posted on the Web site. DEP notes that the list now includes 303 streams, a reduction of 141 (32%) from the initial presumptive list. Tier 2.5 stream miles, originally 6% of the statewide total (2006.8) covering 35 counties, have been reduced to 3.7% (1157.6) in 30 counties. Tier 2.5 segments in 12 of the remaining 303 streams were also shortened and reflected in the reduced stream mileage. Comments were also received

from industry coalitions, environmental groups, state legislators and county commissions on broader public policy issues.

*During the comment period, the agency was notified by a landowner that an objection to one of the 38 streams had been submitted previously during the original objection period. The DEP has accepted that objection and will, in future references, note that 37 streams received no objections.

What is Next?

The refined “presumptive list” currently has 303 streams and is included in the proposed revisions of the *Antidegradation Implementation Procedures Rule* (60CSR5). The public comment for the rule begins June 2 and ends July 10, 2006. A public hearing will take place July 10, 2006 at DEP’s Charleston headquarters. The public hearing begins at 6 p.m. and ends at 8 p.m. After the comment period closes, the rule will go before the Legislative Rule Making Review Committee in the fall of 2006. Written public comments can be sent to:

West Virginia Department of Environmental Protection
Division of Water and Waste Management:
Attention: Lisa A. McClung, Director
601 57th Street, S.E.
Charleston, WV 25304
or e-mail your comment to: antideg@wvdep.org

ANTIDEGRADATION TIER 2.5 LIST RESPONSIVENESS SUMMARY FOR OBJECTIONS/COMMENTS JUNE, 2006

The following pages address the letters and e-mails recieved from commenters during the objection and comment periods relating to the “presumptive list” of Tier 2.5 waters. The first part of this responsiveness summary categorizes the comments based on common themes, summarizes the comments and provides a response. The later section contains responses to more specific comments.

Necessity of Regulations

***Comment:** Several commenters noted that additional laws to protect high quality waters are not needed. These streams “have been greatly cared for and current law already protects them without further regulation.”*

DEP Response: Antidegradation is a requirement of the federal Clean Water Act intended to preserve the existing quality of the nation’s waters and to prevent and/or minimize future

degradation. In simple terms, states must determine the existing quality of the state waters and protect that quality by imposing requirements on potential dischargers to ensure that the existing quality will be protected. The rule establishes four levels, or tiers, of protection to state streams, Tiers 1, 2, 2.5 and 3. Each tier provides for a graduated level of protection to be used during NPDES permit issuance by the agency. Tier 1 ensures that all discharges to state streams protect water quality standards. Tier 2 ensures that existing quality is protected and is the level of protection afforded to most state waters. Tier 2.5 requires an additional level of protection to a list of "Waters of Special Concern" proposed in the rule, and Tier 3 identifies a list of waters protected as federally designated wilderness areas where no degradation can occur. DEP, through its National Pollutant Discharge Elimination System (NPDES) permitting program, evaluates each application for discharge of pollutants into state waters prior to issuance of a permit to ensure water quality standards are protected. The antidegradation process requires that new or expanded pollutant discharges protect the quality of the water that exists in the stream at that time.

A significant provision of the Antidegradation Rule is the exclusion of nonpoint source activities from the requirements of the antidegradation review process. While nonpoint source activities, such as agricultural land use, timber harvesting and other non-permit controlled land uses, have an obligation to protect water quality during their operations, the installation and maintenance of appropriate, cost-effective best management practices (BMPs) has been determined to be sufficient to comply with the intent of the Antidegradation Rule. BMPs have been and continue to be accepted as an appropriate mechanism to protect water quality.

Data

Comment: *The concerns raised generally related to the age of the data, both water quality and trout status, used to make the determinations. "The observation listed is dated, with the record being made in 1986. No mention was made of any follow-up observations or about the size or vigor of the trout population at the time of the observation." "[O]nly limited water sampling was conducted, with the most recent being in 2003." Other commenters objected to the listing of DEP "reference" streams. The designation of "reference" stream "was made solely by DEP . . . with no notice to land or mineral owners, no public notice, and ostensibly because there has been little development near the stream."*

DEP Response: During the original objection period and the more recent comment period, many commenters provided anecdotal and in some cases visual evidence (photographs) that streams identified as 2.5 based on the presence of naturally reproducing trout could not support fish, let alone trout. Some noted that the streams dried up during the summer. Others noted that local residents living along the streams had never seen trout present. Some pointed out that if trout were present, they were stocked. In response, the DEP and the DNR reevaluated all the information used to make the determination as to trout status. There were, in fact, a number of streams removed from the list because of this exercise. For certain other streams, in many cases it is common for portions to go dry during low flow periods requiring the trout to take refuge either further downstream, in small pools and/or beneath undercut banks until normal flows

return. While some questioned the age of the data, a determination was made that if watershed conditions had not dramatically changed over a reasonable timeframe, it was reasonable to assume that a stream survey, although several years old, could still be representative of instream conditions. Because of the degree of documentation and reexamination, both DEP and DNR contend those streams remaining on the list do contain reproducing trout. The other concern related to the inclusion of DEP "reference" streams on the 2.5 list. "Reference" streams are, by DEP's definition, those streams that are specifically identified as being largely unimpacted by man-induced influences and are then used to compare to other streams in the state. The "reference" streams listed were determined to meet criteria relating to minimum human disturbance and compliance with select water quality criteria. While DEP maintains that the data used to make these determinations is recent and reliable, it does acknowledge that designating "reference" streams, particularly those on private lands, for Tier 2.5 protection would not necessarily prevent activities on streams that may ultimately affect their status as a "reference" stream. For that reason, the DEP has reviewed the "reference streams" on private property and decided to exclude those streams from the list proposed for legislative approval.

Burden of Proof

***Comment:** This was a common theme in many of the comments received. "The DEP has evidently chosen to shift the burden of proof to those objecting to a stream's listing instead of where it properly should reside – within the DEP." "The DEP appears to be placing the burden on the landowners and lessees, asking them to justify removal of streams from the list."*

DEP Response: The "presumptive" list was created, debated and approved by the 2001 West Virginia Legislature. As part of that action, an objection process was initiated which extended into the summer of 2002. This objection process was provided to enable landowners, and persons with interests in properties adjacent to listed streams, to object to the designation. In addition, the process provided the landowners the opportunity to supply the DEP with information that the action was harmful to their interests. Some objections did include the requested information and have resulted in the removal of select streams. For the most part, however, the objections received during the original objection and subsequent comment periods generally were not specific enough to warrant exclusion of streams from the list. During the development of the list, and during DEP's subsequent review of the data used in justifying the stream designation, the DEP used the criteria identified by the legislature in 60CSR5-6.2.b and 8.1.a.2. For all streams included on the Tier 2.5 list, the DEP considered all relevant information pursuant to the various criteria contained in the rule to determine which streams should be on the final list. Some commenters argued that economic or mineral development information was protected by confidentiality rights. Absent that information, DEP considered the potential economic impact of the broad scale application on the types of land uses that were generally present in those areas where Tier 2.5 listed streams existed. For the most part, the predominant land uses in those areas were public and private forests and agriculture. Because the Antidegradation Rule provides exemptions for land uses associated with agriculture and forestry operations with proper applications of BMPs, the DEP determined that impacts from the designation would have minimal to no impact on those landowners and land uses.

Takings

Comment: *Several commenters claimed that the DEP failed to comply with the provisions of the West Virginia Private Real Property Protection Act (PRPPA), W.Va. Code 22-1A-1, et seq. The designation of streams as Tier 2.5 "effectively deprives (landowner) of its ability to use its property in a way that allows for discharge in any state streams." "While not all use of property will be taken, usage could be limited or heavily regulated depriving the landowner of the freedom to use his land as he desires . . ."*

DEP Response: The DEP has reviewed the application of the Private Property Protection Act (PRPPA) as required by the Antidegradation Implementation Procedures Rule (60CSR5-6.2.1.a.). The identification of streams as Tier 2.5 does not trigger any assessment referenced in the PRPPA. The assessment is required only where the DEP considers its actions are "reasonably likely to deprive a private real property owner of his or her property in fee simple or to deprive an owner of all productive use of his or her private real property . . ." Title to private property is unaffected by the stream listing. Furthermore, the designation of streams will not deprive any landowner of "productive use" of the property. Therefore, no assessment is required. The DEP requested that objectors who claim interference with property use provide the agency with specific information. In some cases, the agency decided against listing a stream due to potential limitations on some use of the property. There was no evidence that listing a stream as Tier 2.5 would deprive any property owner of productive use. DEP continues to maintain that the designation will not prevent land uses along the stream. In addition, the stream designation is designed to protect water quality and is an acceptable regulatory action under takings law.

Property Owner Notification

Comment: *The DEP "did not notify each landowner and persons with a financial interest in property adjacent to the streams individually . . . in the initial comment period."*

DEP Response: Section 6.1.a.2. of the Antidegradation Rule states that, "no sooner than six months and no later than 12 months from the effective date of this rule, provide, where practicable, individual notice to property owners along such stream or stream segment. In addition, notice by publication shall be provided to all property owners and others with a legal interest in the property." The DEP complied with the notification procedures during the spring/summer of 2002. In fact, the DEP went further than the rule required by holding a series of 13 public meetings around the state to inform landowners of the process. After initially visiting courthouses in several counties, the DEP quickly determined that the process of simply identifying individual landowners adjacent to the streams in the 35 counties where the streams were located would be impractical, let alone attempting to identify persons with legal interests or just the mineral rights in those properties. Therefore, DEP chose to exercise the opportunity provided by the rule in the phrase "where practicable" and notify property owners through other mechanisms. Notice by publication in local and statewide newspapers, news releases, and the above-mentioned public meetings apparently provided adequate notification to the affected landowners as evidenced by the over 4,000 objection letters received during the process.

Best Management Practices

Comment: *Many commenters cited a specific provision of the Antidegradation Implementation Procedures Rule (60CSR5, 8.1.a.2.A.), noting that DEP had the responsibility to consider the impact of the Tier 2.5 designation on private property owners, specifically that "[t]imber harvesting, road building, cattle and sheep raising or fertilizing our land will be hindered. We remain concerned that the dividing line between point and nonpoint activities changes over time, and today's nonpoint activities might require a permit tomorrow."*

DEP Response: The designation of a stream as Tier 2.5 is intended to prevent significant degradation of the water quality. DEP responded to this concern repeatedly during the objection period, public meetings and numerous phone contacts from concerned citizens. DEP continues to maintain the same position, that the designation will not prevent land uses along the stream. Activities such as farming, oil and gas development or logging, considered to be potential nonpoint sources of pollution, will be deemed in compliance with antidegradation requirements with the installation and maintenance of cost effective and reasonable BMPs. That language is contained in the rule and applies to all levels of protection afforded to state streams -- whether the stream is Tier 1, Tier 2, Tier 2.5 or Tier 3. Some commenters suggested that the BMPs be incorporated into the rule to ensure that landowners understand what will be expected of them. While DEP acknowledges that BMPs, when used, are protective of water quality, it recognizes that each land use and each individual landowner is different. Prescriptively applying specific BMPs through a rule would inhibit a landowner/land user from determining which management practice would best suit the specific situation, i.e. BMP. Input on BMPs is possible through the agencies that have responsibility for their development, i.e. the West Virginia Division of Forestry, the USDA Natural Resources Conservation Service, and the DEP's Office of Oil and Gas. As the evolution of water quality protection continues over time, BMPs can and do change, as do national and state requirements for the application of those BMPs. The DEP cannot base pending decisions on stream designation on speculation that BMPs may change in the future. For these reasons, DEP retained those streams on the list where the majority of the comments related exclusively to the BMP concerns.

Economic Development

Comment: *Many commenters expressed concern that property owners will not be able to use the land for future development. "[T]he designation of these streams as Tier 2.5 will undoubtedly increase the cost of, and may for practical purposes prevent, any economic development. The designation . . . can and will have a chilling effect on development."*

DEP Response: The Tier 2.5 designation is designed to prevent significant degradation of the water quality, and is not intended to prevent the development of adjoining land. The DEP has considered the potential impact on private property owners and has reviewed the comments received regarding future development or land use restrictions. Many of the comments received were very general and failed to provide the DEP with sufficient evidence on which to base a decision to designate a stream as Tier 2 as opposed to Tier 2.5. Permitted discharges into Tier 2.5 designated streams are not prohibited. A more rigorous permit review will be

required and possible alternative treatment technologies may need to be explored, but treatment requirements may not be significantly more restrictive than those in Tier 2 waters especially when one considers that the predominant potential discharges would commonly be domestic sewage. The factors considered by the DEP with regard to economic development included the following: (1) the percentage of the economic benefit of the property which will be eliminated due to a Tier 2.5 designation; (2) the investment made in the property; (3) any specific plans for development of the property; (4) any leases, agreements, or permits which demonstrate plans for development of the property; (5) whether use or development of the property will require a water discharge into the designated stream segment or adjacent streams; (6) whether alternatives to prospective discharges into the stream have been evaluated; and, (7) whether a request for a wasteload allocation or a water discharge permit has been submitted to DEP. On the basis of specific comments that identified pending or planned development, the DEP removed a number of streams from the list.

Impact on Economic Development, Including Demonstrated Natural Resources

Comment: Several commenters cited 60CSR5, 8.1.a.2.G., noting that DEP had the responsibility to consider the impact of the Tier 2.5 designation on economic development, including demonstrated natural resources. "Coal reserves are just one example that is applicable to our properties, and others, in many of the watersheds for streams on the proposed list that could be important to the state's future economy." An oil and gas company "does have the legal right to develop oil and gas wells on these (its) properties and given the fact that prior drilling and production has occurred in these areas, no further proof should be necessary to establish the fact that oil and gas resources on these properties may be further developed in the future."

DEP Response: Again, the designation of a stream as Tier 2.5 is to prevent significant degradation of the water quality, and is not designed to prevent economic development or the development of natural resources. The DEP has issued permits over the past two years to mining companies that include discharge limits that would be applicable on Tier 2.5 streams. Therefore, the designation of a stream as Tier 2.5 does not serve as a general prohibition on mineral extraction activities. The DEP has considered the potential specific impact on economic development, including demonstrated natural resources, and has reviewed the comments received to date in opposition to designation of 2.5 streams. Many of the comments were very general and failed to provide the DEP with sufficient evidence on which to base a decision to designate a specific stream as Tier 2 as opposed to Tier 2.5. The factors considered by the DEP included: (1) the investment made in the property for economic development; (2) any specific plans for the economic development of the property; (3) any leases, agreements, or permits which demonstrate plans for development of the property or natural resources; (4) whether use or development of the property will require a water discharge into the designated stream segment or adjacent streams; (5) whether alternatives to prospective discharges into the stream have been evaluated; (6) whether a request for a wasteload allocation or a water discharge permit has been submitted to DEP; (7) specific documentation of the existence of natural resources; (8) the specific plans, including timetables, for extraction of the natural resources; and (9) an explanation and

supporting documentation of the difference in impact between a Tier 2 designation and a Tier 2.5 designation. It should be noted that DEP has used this reasoning, and in fact the same language, to respond to previous objections regarding DEP responsibility to consider economic impacts on private property owners. The DEP has, on the basis of specific comments that identified pending or planned mineral development, removed Tier 2.5 designation on a number of streams.

Specific Comments

***Comment:** The Antidegradation Rule was challenged in court, *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 732 (2003) and a number of provisions are still awaiting EPA approval, specifically relating to Tier 2.5 issues. Commenters expressed concern that it was unreasonable to expect property owners to anticipate impacts from Tier 2.5 designations on future development plans without knowing the outcome of EPA's actions.*

DEP Response: The commenters are correct that DEP has not received EPA's response to the challenged provisions of the rule, but DEP is working closely with EPA to resolve the issues. DEP contends that the challenged provisions were reasonable and justifiable and has provided EPA with supplemental supporting documentation.

***Comment:** DEP misled the public during the original objection period and in the public meetings regarding permitting of nonpoint sources, individual review of general permit registrations, the impact of Tier 2.5 on existing discharges and the applicability of Tier 2.5 restrictions on upstream landowners.*

DEP Response: Because of the significant public concern subsequent to the adoption of the Antidegradation Implementation Rule, DEP initiated, in addition to the formal objection process required by the rule, a series of 13 public meetings intended to more fully explain the rule and its potential impacts. Much of the concern came from the agricultural community. DEP actions in regard to nonpoint-related permit actions, subsequent to the public meetings, had not been anticipated at the time. DEP staff noted during the public meetings that future federal regulations may prompt required corresponding state response. DEP had advised the public during the meetings that construction disturbances exceeding three acres required a permit. The Antidegradation Rule included an exemption for small construction activities of less than three acres. In November 2002, DEP issued a new general permit for construction in response to new federal requirements that changed the universe of coverage from three acres down to one acre or greater construction disturbances. Individual landowners disturbing more than one acre for construction purposes are required to register under the construction general permit. Land disturbances exceeding one acre involving residential construction, barn building, poultry house construction, etc. are subject to this permitting requirement. In regard to individual antidegradation review of general permits on Tier 2.5 streams, the agency subjected the general permit for construction activities to antidegradation review during the reissuance process. While the registration will not be subjected to an individual antidegradation review, certain additional requirements would be applied to projects on Tier 2.5 streams. Applicants registering for coverage under the general permit will be required to develop and submit a plan for the development, a public notice will be required, and certain additional BMPs could be applied. A

comment noted that during the public meetings DEP had misrepresented the issue of whether a Tier 2.5 designation would affect existing activities. Section 6.3.f. of the rule, does provide the DEP Secretary with the opportunity to revisit existing regulated discharges to determine if the discharge was protective of Tier 2.5 waters. Regulated dischargers are already subject to reevaluation and potentially more rigorous treatment every five years at the time of permit reevaluation and reissuance. This provision presumably was intended to enable the agency to revisit a Tier 2.5 discharge to evaluate its potential impact in a more expeditious timeframe. It does not apply to nonregulated discharges, i.e. nonpoint sources. Finally, a comment noted that the revised Construction NPDES Stormwater permit included language that implied that the watershed upstream of a designated Tier 2.5 stream segment would need to be protected to the same level as the Tier 2.5 segment. DEP has noted that concern and will be developing revisions to that language, subject to public input, which will be incorporated into the permit that is due for reissuance in 2007.

***Comment:** With the transfer of authority for water quality standards rule-making from the Environmental Quality Board to DEP, the appeal provisions of the Antidegradation Rule are unclear. DEP should provide guidance on how to appeal a final decision to retain a stream on the Tier 2.5. list.*

DEP Response: During the 2006 legislative session, legislation was passed making the final Tier 2.5 listing determination a legislative action rather than an appeal process as provided for in the rule. The amendment was made to West Virginia Code Section 22-11-7b.

***Comment:** The recent public comment period was the first opportunity that the general "non-affected" public had to comment on the Tier 2.5 "modified" list. Previous comment periods were open only to adjacent landowners or those with property rights. By the time the general public was provided comment opportunity, 50 streams had been removed, some of which because of DEP's narrow working definition of Tier 2.5 streams. The criteria DEP has used for Tier 2.5 designation may limit designation of other special waters.*

DEP Response: The Antidegradation Rule specified the parameters of the objection process. While attendees at the public meetings were offered the opportunity to submit comments, the objective of the public meetings was to explain the process to the affected landowners so they could more effectively take advantage of the objection rights detailed by the rule. Once the DEP evaluated and responded to the objections received and developed the modified list, the agency submitted that list to general public comment. The modified list excluded those streams that had received no previous objections (38*) and the 50 that the agency had discovered were listed inappropriately. Therefore, the general public was being asked to comment on a list of 356 Tier 2.5 streams. With respect to the 50 streams which were removed for technical data deficiencies, DEP in no way expects this action to preclude future nominations of these waters for Tier 2.5 protection. In this special one-time presumptive process DEP was merely making sure that the criteria used to develop the presumptive list was strictly adhered to. Future nominations for Tier 2.5 listings may take advantage of broader interpretations of the criteria included in the rule.

Comment: *Second Creek in Monroe and Greenbrier counties was removed from the list after the objection process. Supporters of Second Creek requested the reason for the delisting. Concern was expressed that citizens were not being provided adequate information on this and other potentially similar situations and that made it difficult to support maintaining specific streams on the list.*

DEP Response: After a review of fishery surveys on Second Creek by DNR biologists, it was determined that there was insufficient information to characterize the stream as a naturally reproducing trout stream. Although three landowners had registered objections, the primary reason for the delisting was the lack of data, not the merits of the objections. In preparing the Tier 2.5 list for the 2001 legislative process, both DEP and DNR identified trout streams based upon review of best available information. During the ensuing objection and evaluation process, data was reviewed and objections were scrutinized to ensure that any previous inaccuracies were resolved. The delisted streams and reasons for the delisting were posted on DEP's Web site during the comment period. Supporters of delisted streams can nominate them by applying the nomination criteria contained in 60CSR5-8.1. for subsequent action by the DEP and the West Virginia Legislature.

Comment: *"I cannot understand the strong opposition to Tier 2.5 by certain groups in West Virginia. Especially in light of the antidegradation implementation standards exempting nonpoint source activities from antidegradation review, landowners' current uses of the land are not threatened. Only if a change in land use threatens the water quality of our trout streams would Tier 2.5 come into consideration. So it seems contradictory for opponents of Tier 2.5 stream designation to claim that private ownership of land is threatened. Rather, the stream is protected from degradation. This protects value of that land and land downstream."*

DEP Response: While DEP supports this comment, landowners have been afforded the opportunity to object to the designation.

Comment: *Commenter suggested that DEP's process for ranking/scoring streams, the West Virginia Stream Condition Index (WVSCI), did not score warm water streams high enough. Many additional so-called "reference" streams could be identified around the state. "It seems that DEP's laws and regulations place very little importance upon the protection of warm water stream environments."*

DEP Response: DEP agrees that the existing list is not exhaustive and could include any number of additional high quality streams, including warm water streams. The Antidegradation Rule provides a process for nominating state streams for additional protection based on a variety of criteria; coldwater fishery notwithstanding.