

Sophia R. Timmerman
Authorized Signature

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 27, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection

601 57th Street, Charleston, WV 25304

926-0495

LEGISLATIVE RULE TITLE: Antidegradation Implementation Procedures

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

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

May 30, 2007

b. What other notice, including advertising, did you give of the hearing?

Class I legal ad in Charleston Gazette and Daily Mail, DEP Calendar of Events, State Register, E-mail subscriber list, agency news letter and agency website

c. Date of Public Hearing(s) *or* Public Comment Period ended:

July 16, 2007; Public Comment Period ended 5:00 p.m. July 17, 2007

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 27, 2007

- 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
Division of Water and Waste Management
601 57th Street, E.
Charleston, WV 25304
926-0495

- 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.

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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: lmclung@wvdep.org

Fiscal Note Summary

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

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: _____

Signature of Agency Head or Authorized Representative

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. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

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 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 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 21st and May 30th, 2007, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Wednesday – May 30, 2007

10:00 a.m. – 12:00 p.m.

601 57th Street, SE, Charleston, WV

West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Rick Roberts
Karen Price
Bill Raney
Larry Harris - Teleconference
Jackie Hallinan

DEP:

Randy Huffman, Deputy Cabinet Secretary/Director – Division of Mining & Reclamation
Karen G. Watson, Assistant General Counsel
Lisa McClung, Director – Division of Water and Waste Management
John Benedict, Director – Division of Air Quality
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
Pam Nixon, Advocate
Jim Mason, DAQ
Mike Zeto, DWWM – EE
John Morgan, DWWM
Scott Mandirola, DWWM
Greg Adolfson, PIO

VISITORS:

Dave Yaussy
Brittany Carns
Joe Gollehon
Gregory Hoyer
Jeff Mauzy
Amy Christy

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection called the meeting to order at 10:00 a.m. Advisory Council Member Larry Harris joined the meeting via teleconference. Deputy Cabinet Secretary Huffman then turned the meeting over to Karen Watson, Assistant General Counsel for the West Virginia Department of Environmental Protection. Karen informed the Council that the agency had received comments from several Council members and those comments would be appended to the minutes. (see attached) She explained the agency

had representatives from each of the programs to answer questions for the rules identified in those comments. She also explained the agency had made several changes in the rules as a result of those comments.

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

Proposed Rule 6 is now a basic open burning/ incinerator rule. Revised scope includes 'statutory air pollution,' addition of new language for posted operating instructions and open burning or incineration of animal or poultry carcasses during a declared state of emergency. Except for temporary Air Curtain Incinerators for land clearing debris (DOH jobs) and incineration of animal or poultry remains, most Air Curtain Incinerators will now be exempted under Rule 6 and placed under Rule 18.

COMMENT

Larry Harris: Had raised the issue of "low-level radioactive waste" in the last meeting.

DEP Response: DEP has removed the chemotherapeutic waste and low-level radioactive waste provisions from the proposed rule. The proposed rule does not in any way affect current medical waste incineration rules now on the books.

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO₂ & PM NAAQS include correction of SO₂ annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour PM_{2.5} standards, and addition of measurement methods for PM_{2.5}. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO₂ and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Karen Price: Section 4.2.c – PM_{2.5} Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m³. This should be 65 ug/m³, pursuant to 40 CFR 50.7.

DEP Response: On October 17, 2006, the federal NAAQS regulation changed from 65 to 35.

Larry Harris: Restated his concern that the standards may not be stringent enough to protect public health. He also restated his question about the antidegradation language struck from the rule.

DEP Response: DEP cannot lower the NAAQS standards below that of federal levels unless the provisions for the stringency test in §22-1-3a are fully met. 45CSR14, in its entirety, has wholly replaced the intent of the relic anti-degradation language struck in proposed Rule 8.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

Ozone Season CAIR NO_x Rule - Incorporates revisions 40 CFR to Part 96.

Annual CAIR NO_x Rule - Incorporates revisions to 40 CFR Part 96.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

Annual CAIR SO₂ Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

Karen Price: Asked why the opt-in language was deleted from each of these rules.

DEP Response: has removed the opt-in provisions in the three CAIR rules so that West Virginia can say that CAIR equals NO_x RACT for EGUs under the PM_{2.5} implementation rule.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

The Greenhouse Gas Inventory Program Rule is authorized by SB337 passed in the 2007 legislative session. The rule establishes a program which requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount; inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions, capture and sequestration; provides for: a periodic compilation of a greenhouse gas inventory; a determination whether WV is a net sink or emitter; development of a registry for voluntary reductions; and a determination whether greenhouse gas can be developed as an asset for economic development.

COMMENT

Karen Price and Larry Harris: Both asked about the definitions of “anthropogenic” and “biogenic” in the rule and asked for examples of each.

DEP Response: An example of an anthropogenic source is the coal extraction process and an example of a biogenic source is the erosion of soil exposing a coal seam. The agency does not plan

to ask sources to report biogenic activities. In order to receive credit a source must report all of its emissions.

Karen Price: Can the reporting requirement in section 4.1 be made consistent with the emissions inventory requirements.

DEP Response: The date in the rule is March 31st and is the same as the emissions inventory date.

Karen Price: Does not believe fees should be required for greenhouse gas reporting.

DEP Response: The agency will consider the issue.

Karen Price: The last sentence in section 5.3 allowing the Secretary to request information is not authorized by statute.

DEP Response: It is authorized by the statute.

Karen Price: There should be a reasonable protocol for reporting emissions.

DEP Response: DAQ purposely wrote the rule in a manner flexible to the Secretary, as greenhouse gas reduction quantification protocols are still being developed at this time.

Karen Price: Is WV going to sign on to the climate registry or are we going to have our own?

DEP Response: In order to trade, we have to be consistent with other programs, but we do not want to be more specific in the rule.

Bill Raney: The exemption in section 3.2 includes language referring to sources covered by chapter 22-3 as well as sources required to report emissions. We are concerned this may take the exemption in the statute away.

DEP Response: While the agency did not want to require mining extraction to report emissions, thermal dryers associated with coal prep plants often have huge emissions of greenhouse gases. That is the reason the statute and rule only exempt sources permitted under chapter 22-3.

Division of Water and Waste Management

33CSR9 – Standards for Beneficial use of Filtrate from Water Treatment Plants

SUMMARY

This legislative rule establishes a mechanism and requirements for the permitting, siting, bonding, and use of water treatment plant sludge from water treatment plants that has beneficial properties. This rule applies to the beneficial use of water treatment plant sludge and to any person who seeks approval from the Secretary to beneficially use such sludge within the state. This rule is intended to enhance the resource recovery and recycling goals of article fifteen of chapter twenty-two of the West Virginia Code and to encourage the beneficial use of water treatment plant filtrate. Section 22-

15-23 of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

Larry Harris: DEP made changes to this rule during the Interims process last year, and the rule now requires a permit for both short-term and long-term applications. This is a good change. However, we feel that most of the information required in Section 7.3. Permit Application Requirements for long-term permits should also be required for short-term permits.

DEP Response: The requirements of section 7.3 were intended to be directed toward facilities that proposed to land apply filtrate as the beneficial use. It was intended to be applicable to both, if land application was the proposed method of reuse. Section 7.3 will be revised to more clearly reflect the applicability of the requirement for both long-term and short-term, if land application is the proposed beneficial reuse.

Rick Roberts and Larry Harris: Regarding the environmental effects of disposal of sludge are the values in Table 1 of the rule sufficient?

DEP Response: The Table 1 values are the same as the sewage sludge levels in DEP's other rules, and the agency believes they are supported by sound science.

Rick Roberts and Larry Harris: Mr. Harris expressed concern with the distinction between "beneficial reuse" and "disposal." Mr. Roberts believes that his concern is satisfied by the language in section 3.1.b.1.

Rick Roberts: The rule should include general permits as proposed.

Larry Harris: Only individual permits should be allowed under the rule.

DEP Response: There will be public notice in the general permit process.

33CSR30 – Underground Storage Tanks

SUMMARY

There are several new provisions to reflect the 2005 Federal Energy Act, including: secondary containment requirements for new or replaced tanks or piping; secondary containment requirements for new or replaced fuel dispenser systems; tank eligibility for delivery, deposit or acceptance – enables agency to prevent deposit or delivery to a tank that is not in compliance; and training requirements for individuals who operate, maintain or are responsible to address emergencies from spills or releases from underground storage tank systems.

COMMENT

Karen Price: Section 6.1. states "....including any person who accepts a delivery order, accepts payment, delivers or deposits product into an underground storage tank.....". The portion that states "...accepts payment..." should be removed from this section because those individuals within a company who accept payment or make payments most often do not know anything about the underground storage tank (UST), the operation of the UST, or the current regulatory status of the UST.

DEP Response: This language will give the agency a better handle on transporters and middle-men involved in the process.

Karen Price: Section 7.3.a.1. states "....the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods.....".

1. The portion that states "...the date, time and location of the course,...." should be deleted. For large companies with many UST installations and locations there can be numerous individuals that need to be trained. Training will most likely occur on multiple dates, times, and locations that may not always be known until just prior to the training event. When new employees are hired training might occur on short notice and for one individual. The burden of having to report the dates, time and locations would hinder and slow down the training process and restrict a company's ability to comply.

2. The portion that states "...the credentials of the instructors..." should be removed. Credentials will vary from instructor to instructor new instructors might be utilized, and a company might not know which instructors will be used at the various training sessions until just prior to the training session. In addition, the course content is the main issue of concern and should be the main focus in obtaining State approval of a training program.

DEP Response: Regarding dates, times and location of the training the agency will not require the information prior to the training. As far as the credentials of the instructor the agency needs this information as part of its curriculum review, in this case before the training.

Karen Price: Section 7.3.a.2 - This section states that a nonrefundable application fee of \$280 must be submitted with the application. Larger companies may have one training program, but administer the training on multiple dates, times and locations. Having to submit an application for approval of the training program each time the program is administered would be cost prohibitive, burdensome, and would hinder the training process.

DEP Response: The agency agrees and believes the rule only requires a one-time fee.

Rick Roberts: Regarding the \$5.00 per ton fee, how does a source measure the tonnage? Perhaps the agency should consider using a cubic-yard approach.

DEP Response: The agency will consider.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

The proposed revisions reflect updates identified during the federally-mandated triennial review of the Water Quality Standards rule. These include proposed additions to the trout water list, new criteria for nutrients, revisions to criteria in Appendix E and a use redesignation in the Guyandotte River Basin.

COMMENT

Larry Harris: Does the use removal in section 7.2.d follow the federal Clean Water Act requirements?

DEP Response: Yes, the agency followed all the requirements, federal and state, and required extensive information from the company. The agency also conducted two public meetings.

Bill Raney: Mr. Raney repeated his concern with the listing of trout waters in the rule and the fact that the list has to be approved by the Legislature. Karen Price agreed with this comment. Jackie Hallinan and Larry Harris did not agree with this comment.

Karen Price: Questioned the need for Appendix D, because the Category C use applies to all state waters.

DEP Response: Agency will consider.

Karen Price: Will the agency consider not making use removals go through the legislative process.

DEP Response: The agency decided not to include any language pertaining to this issue at this point in time, but will be subjecting this issue to the public participation process in the coming months.

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

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. 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. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

COMMENT

Larry Harris: Scientific criteria should be used to add or delete streams from the Tier 2.5 list.

Rick Roberts: Can the SRF program give priority to facilities impacted by the Tier 2.5 list?

DEP Response: Agency will take this under advisement.

Larry Harris: Is the nomination process adequate?

DEP Response: The agency believes the process is generally adequate and workable. If, however a large number of streams are nominated at one time, the individual notification requirements may be difficult and costly.

At this point in the meeting, Bill Raney submitted written comments regarding several mining rules. (see attached)

60CSR8 - Environmental Excellence Program

Greg Adolfson summarized the rule revisions. He said the changes would provide more flexibility for the agency to approve or disapprove of incentives in the program, as well as other flexibilities.

SUMMARY

Changes are being proposed to the Environmental Excellence Program Rule (60CSR8) to better align with and follow the momentum of the United States Environmental Protection Agency's National Environmental Performance Track Program. Additionally, the primary purpose for the changes is to give more flexibility to the Department of Environmental Protection Cabinet Secretary in areas such as: Eligibility Criteria for Participation (section 4); Environmental Performance Record (section 5); Environmental Management System (section 6); Public Participation (section 8); Incentives (section 9); Procedures for Application (section 10); and Annual Performance Report (section 14). Language, such as "may include, but will not be limited to, the following," has been added to allow for this flexibility.

COMMENT

Rick Roberts: Why is section 6.2 completely deleted?

DEP Response: The section is not completely deleted, just the 1996 standards. This will allow the agency to use the most current standards.

Bill Raney: How many companies are participating in the program?

DEP Response: There are two in the National Program, Toyota and Dow.

Jackie Hallinan: The program is a good idea.

Meeting was adjourned by Deputy Cabinet Secretary Randy Huffman.

Council meeting - 5/30/10
Comments
Submitted
by Bill Raney

Bill...

Here are some preliminary comments provided by the Environmental-Technical Committee on the rules that will be reviewed by the Advisory Council:

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

Inclusion of a stream in the codified list contained in the rule forever locks in unrealistic WQS on that stream regardless of existing and/or future water quality. The lower standards are very problematic for the coal industry by targeting iron and aluminum.

WVCA believes the list is immaterial to protection of the existing use if it is indeed a trout stream.

WV DEP, in the NPDES permitting process, will apply appropriate trout stream effluent limitations if the agency believes a stream to have a trout population regardless of whether or not it is on the codified list contained in the water quality standards rule or not. The only difference is that in the permitting process, the applicant has the opportunity to present data and sampling to refute the agency's assertion that a stream is a trout stream, and has a right of appeal if they continue to disagree with agency's assignment of trout stream limits. The ability to dispute the trout stream designation is very important, especially since some of the data supporting the current initiative to expand the codified list is decades old.

If a trout stream is included on the codified list approved by the legislature, the only option for removing that designation is to once again pursue a legislative fix. Under those circumstances, it is easier to just challenge the entire expansion of the trout stream list.

The massive expansion of the trout stream list as currently proposed is much more restrictive than the standards found in surrounding states, where the regulatory agencies have developed different levels and categories of trout streams. West Virginia continues to treat all trout streams the same as though they were native, naturally-reproducing, cold water streams that deserve the highest levels of protection. This is simply not true, as many streams in West Virginia are stocked trout streams where the existing, in-stream water quality is lower than the established effluent guidelines for native trout streams.

Mining & Reclamation Rule (38 CSR 2)

Main concern relates to 14.15.c.2, regarding contemporaneous reclamation and valley fills:

This revision will penalize operators that are constructing “bottom-up” valley fills, the agency’s preferred method of fill construction by unnecessarily restricting when such fill can be counted as “reclaimed” under the state’s contemporaneous reclamation rules. These rules already vastly exceed the federal requirements and those of any other surrounding state, and this change will only make them worse.

Additionally, this proposed revision was deleted during the Legislative session in 2007.

401 Water Quality Certification Rule (47 CSR 5A)

The changes to this rule are totally un-necessary, and add further detail and complication to a state mitigation rule when the Legislature has specifically instructed the agency to better align its mitigation program with that of the Corps of Engineers. Several years ago, the Legislature passed a bill directing WV DEP to provide state mitigation credit for Corps mitigation. While this has occurred, we feel the revisions to this rule will drive the two programs further apart. Additionally, we know of no state statutory revision that necessitates these changes...the state mitigation program has functioned for years without this level of detail, and we question why it’s needed now.

Further, we are concerned that the rule seeks to change definitions that should only be revised in the statute with Legislative approval. For example, the revisions jettison the long-used references to stream types and insert reference to ordinary high water mark. This appears to be an effort to expand the definition of “waters of the state” to all cover every erosional feature, regardless of whether or not it actually functions as a stream.



West Virginia Coal Association

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

July 18, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 47 CSR 5A, "Rules for Individual State Certification of Activities Requiring a Federal Permit".

WVCA is a non-profit state trade association representing the interests of the West Virginia coal industry on policy and regulatory issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's primary goal is to enhance the viability of West Virginia's coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments regarding the West Virginia Department of Environmental Protection's (WVDEP) proposed revisions to the state's Clean Water Act ("CWA") Section 401 certification rule.

General Comments

WVCA is very concerned about the WVDEP's proposal to add detail to its § 401 mitigation program, particularly at this time. The WVDEP has not articulated any problems with implementation of its existing mitigation program pursuant to this rule, and the WVCA sees no benefit to adding further detail and complexity now. Even more importantly, the WVCA understands the history of the WVDEP's § 401 mitigation program, and believes that the very basis for its development years ago no longer exists. The WVDEP's program has been fully replaced by the federal mitigation program which has developed into a comprehensive program and is the subject of new joint United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") rules to update and conform their collective mitigation goals and requirements. The state's mitigation requirements, at least as they relate to mitigation for activities permitted by a CWA § 404 permit, have become obsolete and duplicative.

History of State § 401 Mitigation Requirements.

The state's mitigation program as maintained by the WVDEP and implemented through the § 401 rules is not a required component of the federal § 404 permitting program. The § 401 certification program is intended to insure that

issuance of a federal permit does not result in a violation of state water quality standards:

CWA section 401 provides that states certify that federal activities or activities requiring federal approvals relative to CWA section 404 would not violate applicable effluent limitations, or other limitations, or other water quality requirements.¹

Instead, the state has independently required mitigation as a condition of § 401 certification. Implementation of the state's mitigation program and requirements dates from a time when the Corps imposed no federal mitigation requirement on mining operations authorized by the § 404 General Permit for coal mining operations, Nationwide Permit 21("NWP 21"):

[NWP] 21. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. **The notification must include an OSM or state-approved mitigation plan (emphasis added).**²

Based on the requirements of the NWP 21, a state mitigation plan was required for a mining-related § 404 permit (usually a NWP 21) to be issued by the Corps:

Prior to reissuance of NWP 21 in January 2002, the COE [Corps] considered mitigation adequate with the inclusion of an OSM or state-approved SMCRA onsite mitigation plan in the permit application.³

¹ Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-42.

² Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec. 13, 1996. 61 Fed. Reg. 241.

³ Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-52.

West Virginia implemented this program through the § 401 certification program which imposed monetary or in-lieu fee requirements on coal mining related § 404 permits.

In 2002, the Corps revised and reissued NWP 21 adding a condition that the Corps' District Engineer require federal mitigation, reviewed and approved by the Corps in accordance with its joint mitigation rules and regulations maintained with the EPA.⁴ The revised and reissued NWP 21 allowed the Corps to consider state mitigation when determining federal mitigation, but removed the automatic acceptance of state-required mitigation as sufficient for § 404 authorization. From this point on, the state mitigation requirements as maintained in the § 401 certification process became duplicative because the Corps was requiring federal mitigation plans as part of the § 404 permitting process.

Federal Mitigation Requirements are Comprehensive.

Coal mining-related § 404 permitting and mitigation has evolved since the Corps's reissuance of NWP 21 in 2002. Most mining projects are now permitted using the Corps' Individual Permit process and mitigation plans are now developed based on the Corps's and EPA's combined preference for on-site, in-kind mitigation to restore the impacted aquatic resource.

As you know, coal mining operations are typically subject to the federal CWA § 404 program and the state § 401 certification program because of

⁴ Final Notice of Issuance, Reissuance and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Jan. 15, 2002. 67 Fed. Reg. 10.

activities undertaken in jurisdictional waters. The steeply-sloped terrain of West Virginia is permeated by small ephemeral and intermittent streams that serve to drain natural runoff into larger perennial stream systems. Any development in these areas--coal mining or otherwise--will result in some form of impact to small streams. Unlike many other activities subject to § 404 permitting and § 401 certification, mining activities are mostly temporary in nature, with the reclamation process providing a unique opportunity for reconstruction of impacted stream segments.⁵ The Corps has recognized this opportunity for on-site, in-kind replacement/restoration of impacted aquatic resources and issued guidance encouraging this type of mitigation:

This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.

Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.

...Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating...features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.⁶

⁵ See pages ____ of attachment "A", comments filed by WVCA concerning the draft federal mitigation rule.

⁶ "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining." U.S. Army Corps of Engineers. May 7, 2004

Council meeting - 5/30/07
Comments
Submitted
by Bill Raney

Bill...

Here are some preliminary comments provided by the Environmental-Technical Committee on the rules that will be reviewed by the Advisory Council:

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

Inclusion of a stream in the codified list contained in the rule forever locks in unrealistic WQS on that stream regardless of existing and/or future water quality. The lower standards are very problematic for the coal industry by targeting iron and aluminum.

WVCA believes the list is immaterial to protection of the existing use if it is indeed a trout stream.

WV DEP, in the NPDES permitting process, will apply appropriate trout stream effluent limitations if the agency believes a stream to have a trout population regardless of whether or not it is on the codified list contained in the water quality standards rule or not. The only difference is that in the permitting process, the applicant has the opportunity to present data and sampling to refute the agency's assertion that a stream is a trout stream, and has a right of appeal if they continue to disagree with agency's assignment of trout stream limits. The ability to dispute the trout stream designation is very important, especially since some of the data supporting the current initiative to expand the codified list is decades old.

If a trout stream is included on the codified list approved by the legislature, the only option for removing that designation is to once again pursue a legislative fix. Under those circumstances, it is easier to just challenge the entire expansion of the trout stream list.

The massive expansion of the trout stream list as currently proposed is much more restrictive than the standards found in surrounding states, where the regulatory agencies have developed different levels and categories of trout streams. West Virginia continues to treat all trout streams the same as though they were native, naturally-reproducing, cold water streams that deserve the highest levels of protection. This is simply not true, as many streams in West Virginia are stocked trout streams where the existing, in-stream water quality is lower than the established effluent guidelines for native trout streams.

Mining & Reclamation Rule (38 CSR 2)

Main concern relates to 14.15.c.2, regarding contemporaneous reclamation and valley fills:

This revision will penalize operators that are constructing "bottom-up" valley fills, the agency's preferred method of fill construction by unnecessarily restricting when such fill can be counted as "reclaimed" under the state's contemporaneous reclamation rules. These rules already vastly exceed the federal requirements and those of any other surrounding state, and this change will only make them worse.

Additionally, this proposed revision was deleted during the Legislative session in 2007.

401 Water Quality Certification Rule (47 CSR 5A)

The changes to this rule are totally un-necessary, and add further detail and complication to a state mitigation rule when the Legislature has specifically instructed the agency to better align its mitigation program with that of the Corps of Engineers. Several years ago, the Legislature passed a bill directing WV DEP to provide state mitigation credit for Corps mitigation. While this has occurred, we feel the revisions to this rule will drive the two programs further apart. Additionally, we know of no state statutory revision that necessitates these changes...the state mitigation program has functioned for years without this level of detail, and we question why it's needed now.

Further, we are concerned that the rule seeks to change definitions that should only be revised in the statute with Legislative approval. For example, the revisions jettison the long-used references to stream types and insert reference to ordinary high water mark. This appears to be an effort to expand the definition of "waters of the state" to all cover every erosional feature, regardless of whether or not it actually functions as a stream.



West Virginia Coal Association

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

July 18, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 47 CSR 5A, "Rules for Individual State Certification of Activities Requiring a Federal Permit".

WVCA is a non-profit state trade association representing the interests of the West Virginia coal industry on policy and regulatory issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's primary goal is to enhance the viability of West Virginia's coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments regarding the West Virginia Department of Environmental Protection's (WVDEP) proposed revisions to the state's Clean Water Act ("CWA") Section 401 certification rule.

General Comments

WVCA is very concerned about the WVDEP's proposal to add detail to its § 401 mitigation program, particularly at this time. The WVDEP has not articulated any problems with implementation of its existing mitigation program pursuant to this rule, and the WVCA sees no benefit to adding further detail and complexity now. Even more importantly, the WVCA understands the history of the WVDEP's § 401 mitigation program, and believes that the very basis for its development years ago no longer exists. The WVDEP's program has been fully replaced by the federal mitigation program which has developed into a comprehensive program and is the subject of new joint United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") rules to update and conform their collective mitigation goals and requirements. The state's mitigation requirements, at least as they relate to mitigation for activities permitted by a CWA § 404 permit, have become obsolete and duplicative.

History of State § 401 Mitigation Requirements.

The state's mitigation program as maintained by the WVDEP and implemented through the § 401 rules is not a required component of the federal § 404 permitting program. The § 401 certification program is intended to insure that

issuance of a federal permit does not result in a violation of state water quality standards:

CWA section 401 provides that states certify that federal activities or activities requiring federal approvals relative to CWA section 404 would not violate applicable effluent limitations, or other limitations, or other water quality requirements.¹

Instead, the state has independently required mitigation as a condition of § 401 certification. Implementation of the state's mitigation program and requirements dates from a time when the Corps imposed no federal mitigation requirement on mining operations authorized by the § 404 General Permit for coal mining operations, Nationwide Permit 21("NWP 21"):

[NWP] 21. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. **The notification must include an OSM or state-approved mitigation plan (emphasis added).**²

Based on the requirements of the NWP 21, a state mitigation plan was required for a mining-related § 404 permit (usually a NWP 21) to be issued by the Corps:

Prior to reissuance of NWP 21 in January 2002, the COE [Corps] considered mitigation adequate with the inclusion of an OSM or state-approved SMCRA onsite mitigation plan in the permit application.³

¹ Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-42.

² Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec. 13, 1996. 61 Fed. Reg. 241.

³ Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-52.

West Virginia implemented this program through the § 401 certification program which imposed monetary or in-lieu fee requirements on coal mining related § 404 permits.

In 2002, the Corps revised and reissued NWP 21 adding a condition that the Corps' District Engineer require federal mitigation, reviewed and approved by the Corps in accordance with its joint mitigation rules and regulations maintained with the EPA.⁴ The revised and reissued NWP 21 allowed the Corps to consider state mitigation when determining federal mitigation, but removed the automatic acceptance of state-required mitigation as sufficient for § 404 authorization. From this point on, the state mitigation requirements as maintained in the § 401 certification process became duplicative because the Corps was requiring federal mitigation plans as part of the § 404 permitting process.

Federal Mitigation Requirements are Comprehensive.

Coal mining-related § 404 permitting and mitigation has evolved since the Corps's reissuance of NWP 21 in 2002. Most mining projects are now permitted using the Corps' Individual Permit process and mitigation plans are now developed based on the Corps's and EPA's combined preference for on-site, in-kind mitigation to restore the impacted aquatic resource.

As you know, coal mining operations are typically subject to the federal CWA § 404 program and the state § 401 certification program because of

⁴ Final Notice of Issuance, Reissuance and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Jan. 15, 2002. 67 Fed. Reg. 10.

activities undertaken in jurisdictional waters. The steeply-sloped terrain of West Virginia is permeated by small ephemeral and intermittent streams that serve to drain natural runoff into larger perennial stream systems. Any development in these areas--coal mining or otherwise--will result in some form of impact to small streams. Unlike many other activities subject to § 404 permitting and § 401 certification, mining activities are mostly temporary in nature, with the reclamation process providing a unique opportunity for reconstruction of impacted stream segments.⁵ The Corps has recognized this opportunity for on-site, in-kind replacement/restoration of impacted aquatic resources and issued guidance encouraging this type of mitigation:

This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.

Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.

...Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating...features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.⁶

⁵ See pages ____ of attachment "A", comments filed by WVCA concerning the draft federal mitigation rule.

⁶ "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining." U.S. Army Corps of Engineers. May 7, 2004

In addition to the Corps's above-cited guidance for mining, on-site, in-kind mitigation remains the preferred means of performing mitigation for other authorized impacts to aquatic resources:

In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.⁷

Mitigation should be required, when practicable, in areas adjacent or contiguous to the discharge site. On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat.⁸

Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.⁹

To satisfy the Corps's preference (enunciated in previously-cited Regulatory Guidance Letters issued by the Corps) for in-kind mitigation, or a functional replacement of the impacted resources, a Functional Assessment Protocol, referred to as the "Central Appalachian Protocol", has been used for several years now by the Huntington District to assist in assessing and assigning mitigation requirements for mining-related projects.¹⁰

Unfortunately, the WVDEP has to date largely ignored the mitigation guidance and requirements developed and imposed by the Corps, as well as the functional assessment protocol. The WVDEP has continued to implement its duplicative § 401 mitigation requirements, and typically requires mitigation above

⁷ Regulatory Guidance Letter No.01-1. U.S. Army Corps of Engineers, October 31, 2001.

⁸ Regulatory Guidance Letter No.02-2. U.S. Army Corps of Engineers, December 24, 2002.

⁹ Compensatory Mitigation Guidelines- Huntington District . U.S. Army Corps of Engineers, Huntington, WV District. January 30, 2004.

¹⁰ See attached power point presentation—Central Appalachian Protocol.

and beyond that which is required by the Corps despite the mandate of W. Va.

Code § 22-11-7a(a)(2)(C):

The Director shall provide credit for any mitigation that is a required component of the permit issued by the United States Army Corps of Engineers pursuant to 33 U.S.C. § 1344 to the extent that it satisfies required mitigation pursuant to this section.

Because a comprehensive federal mitigation program is being implemented, the WVDEP's failure to provide credit for such mitigation *as mandated* is a serious concern to the WVCA. To the extent a state program is relevant at all, perhaps to address the limited circumstances where the state's definition of "waters of the state" is broader than the CWA definition of "waters of the United States," it should be narrowly tailored to address that need. The WVCA cannot support proposed revisions that are not so narrowly tailored.

WVCA urges WVDEP to postpone pursuit of these proposed revisions at this time and to more fully consider the need for its separate mitigation program in light of (1) the federal mitigation now required as part of a § 404 permit, (2) the possibility of creating inconsistencies with the draft federal Corps and EPA rule for mitigation, (3) the deletion of NWP 21 conditions relating to state mitigation, and (4) the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Specific Comments

Page 4 4.2.f.2.A. Economic Information about the coal mining operations, including, without limitation, the estimated number of jobs created, the estimated proportion of employees who will be residents of West Virginia, the estimated annual payroll, the

estimated annual coal production (if applicable), the estimated life of the operation, the estimated severance tax for the operation, the estimated annual property tax, and such other economic information as may be requested by the agency.

WVCA questions why this level of information is needed for the § 401 certification process. Similar information is provided to the Corps under the § 404 permitting program and to the state through the Community Impact Statement. The justification for requiring duplicative information as part of the § 401 certification process is lacking. Further, we are puzzled as to why this information is required only for mining operations. Sections 404 and 401 of the CWA apply to all manner of filling activities, not just coal mining operations. If this information is needed by the WVDEP to properly implement the § 401 certification process, then it should be required for all dredge and fill activities. If it is not, then it should be removed from the proposed revisions. Without further explanation and justification, the WVCA does not support this proposed revision.

4.2.f.4. A Delineation of the Stream to be Impacted. The length, width and depth of the stream segment impacted shall be measured. Width and depth measurements shall be made at one hundred (100) foot intervals. The stream delineation shall indicate the ephemeral and intermittent/perennial segments to be impacted. The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of an intermittent stream, as defined in 46 CSR 1-2.9 and/or 38 CSR 2-2.71. the ordinary high water mark. The applicant shall provide a table listing the station number with the corresponding acreage, including the drainage area from the toe of the pond and the toe of the fill.

As proposed, this revision appears to extend the reach of the state's jurisdiction and expand the WVDEP's mitigation requirements under the § 401 certification program. While this change may be motivated by a desire to more closely align the state's mitigation requirements with those of the Corps, the

WVDEP's first and most needed step in that direction is compliance with W. Va. Code § 22-11-7a(a)(2)(C). Until the WVDEP revises its mitigation rules and policies to accept Corps-required mitigation, this proposed change will serve only to increase the amount of in-lieu fee mitigation provided to the state, with no resulting environmental benefit. Further, the proposed change appears to be counter to the authorizing statute which bears no mention of the "ordinary high water mark." The WVCA does not support this proposed revision.

6.2.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

WVCA believes that this proposed revision extends the authority of the state beyond the authorizing, underlying statute:

1) If the applicant's surface coal mining operation will not impact waters of the state designated as national resource waters and streams where trout naturally reproduce and will not impact wetlands of the state in a manner inconsistent with all applicable state or federal standards as the case may be, as required by the federal Clean Water Act, and if the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is less than two hundred fifty acres, then the director may issue a water quality certification pursuant to the requirements of this section. If the watershed above the toe of the farthest downstream permanent structure impacted is equal to or greater than two hundred fifty acres, the director shall require that mitigation be undertaken. Additionally, the director may require mitigation for temporary impacts to waters of the state as specified in subdivision (2) of this subsection.

(2) If the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is greater than or equal to two hundred fifty acres and all other necessary requirements are met consistent with this section, the director shall further condition a water quality certification on a requirement that the applicant mitigate the expected water quality impacts under the following conditions...

The above-cited statute contains no reference to "1/2 acre" of stream.

Apparently, the agency is attempting to further extend its jurisdiction or merely implementing past policies that existed with respect to coal and non-coal mitigation. Since the statute contains no reference to 1/2 acre of stream, WVCA suggests the agency delete this proposed revision. If the agency truly believes that this change is necessary, it should seek a legislative revision to 22-11-7(a) and only then seek to modify the rule.

~~6.2.d.1. Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts in watersheds greater than or equal to two hundred and fifty (250) acres from the toe of the farthest downstream permanent structure, and/or exceeds a 1/4 acre of loss or impact of stream. Monetary compensation for stream impacts resulting from coal related activities shall be assessed as follows:~~

6.2.d.1.A Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts

6.2.d.1.B Temporary coal related stream impacts resulting from structures (excluding stream crossings) that will be removed prior to final bond release will be assessed at \$20,000 per acre of stream impact per each five-year period of impact and/or prorated for each year the impact occurs.

6.2.d.1.C Temporary coal related stream impacts resulting from stream crossings (i.e. culverting) and stream relocations where the stream impact is greater than or equal to two hundred one (201) lineal feet, but less than or equal to four hundred (400) lineal feet and is in place for five years or more, shall be assessed at \$20,000 per acre for the first five (5) year period and prorated for each additional year the impact shall occur. A temporary stream impact resulting in more than four hundred (400) linear feet shall be monetary compensated at a rate of \$20,000 per acre per each five (5) year term and/or prorated for

each year the impact occurs.

As noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, because § 404 permit mitigation plans cover both permanent and temporary impacts, there is no need for the duplicative state provision for monetary mitigation. As explained in our general comments, the Corps and EPA have continuously stressed a desire for on-site, in-kind mitigation. Using the "Central Appalachian Protocol", coal mining operations have been providing on-site, in-kind mitigation through the reclamation and stream reconstruction process. These projects have been embraced by the Corps and EPA through mining-specific regulatory guidance.

WVCA questions the need for these revisions, and urges WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

6.2.d.1.D Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate \$30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

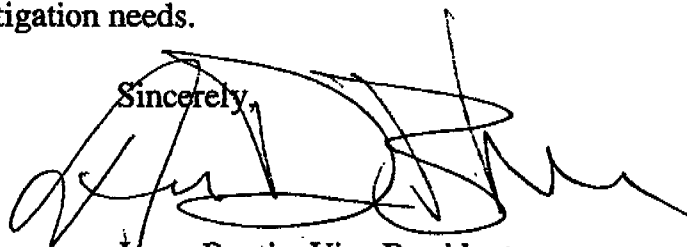
Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation plans cover

both permanent and temporary impacts to all impacted aquatic resources, including wetlands, and there is no need for the duplicative state provision for monetary mitigation for wetland impacts.

To the extent WVDEP nevertheless chooses to pursue this proposed revision, it has no justification for the \$30,000 replacement value proposed. In addition, by proposing this specific amount, the WVDEP has excluded any opportunity to determine a monetary mitigation amount for wetlands on a case-by-case basis, which could be either higher or lower than \$30,000 per acre.

In-lieu fee payment for wetlands impacts is a desirable option to have, but we question whether the agency will ultimately determine that wetland replacement as already specified in the rule is sufficient. The WVCA cannot support this proposed revision without additional justification and explanation, and again urges the WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jason Bostic', is written over the word 'Sincerely,'.

Jason Bostic, Vice President
Regulatory & Technical Affairs



West Virginia Coal Association

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

Ms. Gloria Shaffer

West Virginia Department of Environmental Protection

Division of Water and Waste Management-

Water Quality Standards Program

601 57th Street SE

Charleston, WV 25304

Via Electronic Mail: Gishaffer@wvdep.org

Re: Comments on 2007 Triennial Review of Water Quality Standards

Dear Ms. Shaffer:

Pursuant to the September 22, 2005 announcement by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's first triennial review of water quality standards.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's producing members account for 80 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally

criteria. EPA is currently in the process of revising the nationally-recommended selenium criteria.⁶ Because of the flawed nature of the current selenium criteria and its inappropriate application to flowing waters in West Virginia, WVCA is supportive of this federal initiative. However, we caution WV DEP to fully analyze the appropriateness of applying any federally-revised standard in West Virginia. Available information seems to indicate that a state-specific selenium standard for West Virginia may be warranted, as fish populations appear to be healthy and diverse in streams with identified selenium concentrations.⁷ The pressing nature of selenium also warrants that WV DEP investigate a state-specific criteria for West Virginia since the federal revisions remains pending. The agency has recently completed draft TMDL documents that impose selenium allocations based on the existing water quality criteria, and will continue to develop and implement selenium TMDLs, adding urgency to this important issue.

Trout Streams

In the EQB's last triennial review, it proposed adding some 400 streams to the list of Trout Waters contained in the water quality standards rule. The EQB allowed only a 30-day comment period on this major expansion of the Trout Waters list. The EQB proposal was based only on the recommendations of the

⁶ See Attachment "F", October 29, 1999 Federal Register Notice published by EPA regarding revision of the selenium criteria and Attachment "G", December 17, 2004 Federal Register Notice announcing draft criteria and requesting public comments.

⁷ See Attachment "H", relevant pages from comments filed by the National Mining Association and WVCA regarding the programmatic Mountaintop Mining/ Valley Fill Environmental Impact Statement and *Fish Communities and Their Responses to Environmental Factors in the Kanawha River Basin, West Virginia, Virginia, and North Carolina*. U.S. Geological Survey, 2001.

West Virginia Division of Natural Resources, with no accompanying data or information on whether or not the streams actually meet the requirements to be classified as trout waters. Based on the lack of information regarding the current status of the proposed trout waters and the limited opportunity for comment provided, the West Virginia Legislature rejected the revision.

The permitting ramifications of classifying streams as trout waters can be significant, as different water quality standards (uniformly more stringent) apply to trout streams. Incorrectly classifying a water as a trout stream can have serious economic impacts for property owners and NPDES dischargers along that streams and should not be taken lightly by WV DEP. Before the agency undertakes any effort as part of its 2007 triennial review to list any additional streams as trout waters, WV DEP should conduct scientific investigations of water quality and fish populations in order to ascertain if a water body meets the criteria required of a trout stream. The agency should also hold hearings in the communities where such streams are located to take comment from the persons most familiar with the conditions of these streams.

We appreciate the agency's consideration of these comments

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', is written over the words 'Respectfully Submitted,'. The signature is stylized with a large, sweeping initial 'J' and 'B'.

Jason D. Bostic
West Virginia Coal Association



West Virginia Coal Association

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

July 17, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 38 CSR 2

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 38 CSR 2, the state's Mining and Reclamation rules.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's membership accounts for over 80 percent of the Mountain State's underground and surface coal production. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation.

WVCA appreciates the opportunity to provide comments to the West Virginia

Department of Environmental Protection (WV DEP) regarding the proposed revisions to the state's mining and reclamation rule.

Specific Comments

3.2.g. Notice of Technical Completeness. After the Secretary deems a Surface Mine Application technically complete, the Secretary shall cause the applicant to advertise stating such. The notice shall state that the application has been deemed technically complete by the Secretary and include a fifteen (15) day public review period. Provided, however, Notice of Technical Completeness may not be necessary if the application was technically complete prior to the end of the comment period of the original advertisement and a decision is made within ninety (90) day of the end of the comment period or informal conference.

WVCA believes this revision is unnecessary. Existing state rules provide the agency with authority to require re-advertisement:

3.2.e. Re-advertisement. After a Surface Mine Application (SMA) has been advertised once a week for four successive weeks, and is determined by the Secretary to have had a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement, he may require one (1) additional advertisement to be published with a ten (10) day public comment period.

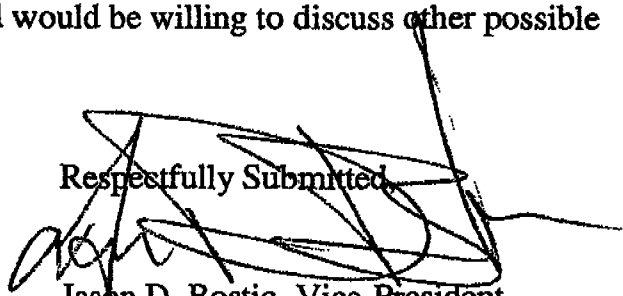
As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement..." for changes that are substantive WV DEP has always required re-advertisement. Additionally,

the proposed revisions exceed the corresponding federal requirements maintained by the Office of Surface Mining (OSM) at 30 CFR 773.6. Because the agency has already has the authority to require re-advertisement, WVCA suggests that WV DEP delete the proposed revision.

14.15.c.2. Areas within the confines of excess spoil disposal fills which are under construction provided the fill is being constructed in the "conventional" method, i.e., completed from the toe up, or those fills which are being constructed progressively in lifts from the toe up or are being progressively completed from the toe up by constructing benches and appropriate drainage control structures (ditches, flumes, channels, etc.) from the toe up as soon as the ~~area is available to do so~~; first two lifts are in and are seeded and certified;

WVCA is extremely concerned about this proposed revision and believes that it will unnecessarily restrict operating flexibility and thereby discourage the construction of "bottom-up" valley fills. WVCA strongly suggests the agency delete this proposed revision. This entire section of rules already exceeds the corresponding federal requirements of OSM, but members of WVCA negotiated the rules in good faith to remedy an agency-perceived problem with valley fill construction. These rules have been scrutinized and approved by the West Virginia Legislature and OSM. WVCA is concerned as to why the agency believes this change is necessary, and would be willing to discuss other possible remedies to the situation.

Respectfully Submitted,



Jason D. Bostic, Vice-President
Regulatory & Technical Affairs

Surface Mining 38 CSR 2 (agreement)
401 Certification 47 CSR 5A 45CSR42
TROUT LISTING

2.5
"Biogenic Sources"
include
COAL

TITLE 45

LEGISLATIVE RULE DEPARTMENT OF ENVIRONMENTAL PROTECTION DIVISION OF AIR QUALITY

SERIES 42 GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

3.2 turned on
exemption into
on inclusion
5.3 "shall provide
information"

§45-42-1. General.

1.1. Scope. -- This rule establishes a greenhouse gas emissions inventory program in West Virginia which:

1.1.a. Requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount of greenhouse gases on an annual basis;

1.1.b. Inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions and sequestration of greenhouse gas emissions;

1.1.c. Provides for a periodic compilation of a greenhouse gas emissions inventory and a determination whether West Virginia is a net sink or emitter of greenhouse gases;

1.1.d. Provides for development of a registry to record voluntary reductions of greenhouse gas emissions; and

1.1.e. Provides for a determination whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development.

1.2. Authority. -- W.Va. Code §22-5-19.

1.3. Filing Date. --

1.4. Effective Date. -- June 1, 2008.

§45-42-2. Definitions.

2.1. "Air pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution.

2.2. "Air pollution" or "statutory air pollution" means and is limited to the discharge into the air by the act of man substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

2.3. "Anthropogenic" means a direct result of human activities or the result of natural processes that have been influenced by human activities.

2.4. "Area source" means, for purposes of this rule, a collection of similar sources of air pollutants within a geographic area. Area sources collectively represent individual sources that are small and numerous, and that typically have not been inventoried as a stationary or mobile source.

2.5. "Biogenic" means a naturally occurring biological source or process that is not significantly affected by human actions or activity.

Biogenic
Sources
include
COAL

2.6. "Capture" means the collection of greenhouse gas emissions from a stationary source.

2.7. "*De minimis*" means emissions from a stationary source that are equal to or less than ten thousand tons per year for carbon dioxide, four hundred seventy-six tons per year for methane, thirty-two and six tenths tons per year for nitrous oxide, eight hundred fifty-five thousandths tons per year for hydrofluorocarbons, one and nine hundredths tons per year for perfluorocarbons and forty-two hundredths tons per year for sulfur hexafluoride.

2.8. "Emission" means the release, escape or discharge of regulated air pollutants or greenhouse gases into the air.

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF₆).

2.10. "Mobile source" means a variety of onroad and nonroad vehicles, engines, locomotives, marine vessels, airplanes and other equipment that generate air pollutants and greenhouse gas emissions, and that move or can be moved from place to place.

2.11. "Regulated air pollutant" means, for purposes of this rule, any air pollutant regulated under rules promulgated by the Secretary pursuant to W.Va. Code §22-5-4.

2.12. "Reservoir" means a geological site where a greenhouse gas is securely stored.

2.13. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §§22-1-6 or 22-1-8.

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage

in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink.

2.15. "Sink" means any process, activity or mechanism which removes a greenhouse gas from the atmosphere. Forests are considered sinks because they remove carbon dioxide through photosynthesis.

2.16. "Source" means, for purposes of this rule, any process or activity which releases a greenhouse gas into the air.

2.17. "Stationary source" means any building, structure, facility, installation, stationary process or process equipment which emits or may emit any regulated air pollutant or greenhouse gas.

2.18. "Ton" means a short ton, or 2000 pounds.

2.19. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W.Va. Code §22-5-1 et seq.

§45-42-3. Applicability.

3.1. Any stationary source that emits one or more greenhouse gases on an annual basis greater than the *de minimis* amounts listed in the table below, and reports emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14), shall be an affected source required to report emissions of all greenhouse gases to the Secretary under section 4:

Greenhouse Gas Compound	tons/year
carbon dioxide	10,000
methane	476
nitrous oxide	32.6

Any facility, etc.

45CSR42

hydrofluorocarbons	0.855
perfluorocarbons	1.09

sulfur hexafluoride	0.42
---------------------	------

3.2. Stationary sources which are regulated by the Secretary under W.Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W.Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

§45-42-4. Reporting Requirements.

4.1. By March 31, 2009, and March 31 of each year thereafter, affected sources shall report to the Secretary the quantity of all greenhouse gases emitted in the previous calendar year.

4.2. Affected sources shall only be required to report annual quantities of anthropogenic non-mobile source greenhouse gas emissions at the source, and shall not be required to report biogenic emissions of greenhouse gases.

4.3. The Secretary shall determine the form and format of the information reported by affected sources under subsection 4.1 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF₆

Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis.

4.5. Reports of greenhouse gas emissions submitted to the Secretary under this section shall be signed by a responsible official and shall include the following certification statement: "I, the undersigned, hereby certify that the data transmitted to the West Virginia Department of Environmental Protection is true, accurate, and complete, based upon information and belief formed after reasonable inquiry."

§45-42-5. Greenhouse Gas Emissions Inventory.

5.1. The Secretary shall periodically compile an inventory of greenhouse gas emissions to:

5.1.a. Characterize the relative contributions of greenhouse gas emissions from stationary, area, mobile and biogenic sources in West Virginia; and

5.1.b. Determine the extent to which greenhouse gas emissions are offset by the rate of sequestration, and whether West Virginia is a net sink or emitter of greenhouse gases.

5.2. The greenhouse gas emissions inventory shall include the emissions from stationary sources reported under section 4, and other relevant information regarding significant emissions, reductions, and sequestration of greenhouse gases from stationary, area, mobile

2nd plants under title 18 only stationary sources

entire surface Area / underground Area is a AREA SOURCE

and biogenic sources requested by the Secretary under subsections 5.3 and 5.4.

5.3. To inventory greenhouse gas emissions reductions, the Secretary shall consult with the citizenry and other entities such as industry trade groups that have information relating to greenhouse gas emissions reductions, and sequestration. Upon request of the Secretary, such entities shall provide relevant information relating to greenhouse gas emissions reductions; capture and sequestration.

5.4. The Department of Agriculture, the Division of Forestry, Marshall University, West Virginia University, West Virginia Geological and Economic Survey, and the Department of Transportation shall enter into interagency agreements with the Secretary and at the Secretary's request provide:

5.4.a. Relevant information relating to greenhouse gas emissions from area, mobile and biogenic sources;

5.4.b. Relevant information relating to greenhouse gas emissions reductions and sequestration; and

5.4.c. Any assistance the Secretary may request during the development of the greenhouse gas emissions inventory.

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

§45-42-6.Greenhouse Gas Emissions Registry Program.

6.1. The Secretary shall develop a registry for the recordation of voluntary reductions of greenhouse gas emissions.

6.2. The greenhouse gas emissions registry program shall be as consistent as possible with developing regional, national, or international programs designed to monitor, quantify and register reductions in greenhouse gas emissions with respect to:

6.2.a. Development of criteria, based on a set of standardized emissions accounting, reporting and verification protocols, to determine baseline emissions and quantification of voluntary reductions in emissions of greenhouse gases;

6.2.b. Public recognition of such voluntary emissions reductions;

6.2.c. Consideration of voluntary greenhouse gas emission reductions when determining baselines and reduction requirements under future federal greenhouse gas emission reduction programs; and

6.2.d. The ability of sources to participate in future greenhouse gas emission trading programs.

§45-42-7.Economic Development Potential.

7.1. Using information obtained, gathered or developed under this rule, the Secretary will determine whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development in West Virginia.

§45-42-8.Inconsistency Between Rules.

8.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method or rule.

[P Premium Content](#) | [Register](#) | [Log In](#) | [Help](#)

Biogenic

[Search](#)[Dictionary](#) | [Thesaurus](#) | [Encyclopedia](#) | [All Reference](#) | [The Web](#)

ADVERTISEMENT

13 results for: *Biogenic*

Displaying 1 best match. [Browse all 13 results](#) below.View results from: [Dictionary](#) | [Thesaurus](#) | [Encyclopedia](#) | [All Reference](#) | [the Web](#)

Biogenic substance

Wikipedia, the free encyclopedia - [Cite This Source](#)

A **biogenic substance** is a substance produced by life processes. It may be either constituents, or secretions, of plants or animals.

Examples

Coal and oil are examples of constituents which have undergone changes over geologic time periods.

Chalk, and limestone are examples of secretions (marine animal shells) which are of geologic age.

Cotton and wood is are biogenic constituents of contemporary origin.

Pearls, silk and amberggris are examples of secretions of contemporary origin.

Wikipedia, the free encyclopedia © 2001-2006 *Wikipedia contributors* (*Disclaimer*)*This article is licensed under the [GNU Free Documentation License](#).**Last updated on Tuesday January 02, 2007 at 08:21:59 PST (GMT -0800)**[View this article at Wikipedia.org](#) - [Edit this article at Wikipedia.org](#) - [Donate to the Wikimedia Foundation](#)*[13 More from Wikipedia »](#)

All 13 results for: *Biogenic*

[13 from Wikipedia](#)[About Reference.com](#) | [Privacy Policy](#) | [Terms of Use](#) | [Link to Us](#) | [Contact Us](#)Copyright © 2007, [Lexico Publishing Group, LLC](#). All rights reserved.

Free download! Get instant dictionary, thesaurus, and encyclopedia access with our Firefox [browser tools](#).

ADVERTISEMENT

 Indicates **premium content**, which is available only to subscribers.

From: "Charles Harris" <clharris@hsc.wvu.edu>
To: <jhallinan@hallinanlaw.com>, <rick@lcpd.com>, <braney@wvcoal.com>, <PWHITE@wvdep.org>, <karen@wvma.com>, <wvml@wvml.org>
Date: 5/24/2007 7:54:40 PM
Subject: Re: May 30, 2007 Meeting

Trish: I received some last minute comments on 33CSR8 that I would like to submit:

§33-9-2. Definitions -- Section 2.5 defines "Beneficial Use" as "the use of a non-hazardous material for a specific beneficial purpose where it is done in a manner that protects groundwater and surface water quality, soil quality, air quality, human health, and the environment." We are concerned that it has not been adequately demonstrated that this filtrate is non-hazardous, and point to the current "inter-sex" fish issue in the Potomac River drainage which illustrates that there are unanswered questions concerning unmonitored pollutants in sludge from both water and waste treatment facilities.

§33-9-2. Definitions - Section 2.5 defines beneficial uses as including "use as a fertilizer substitute, soil amendment, cover material, fill material, mulch or horticultural product, or other purpose approved by the Secretary." However, Section 33-9-3, in sub-Section 3.1.b.1 requires that "The use proposed is a reuse, and not a disposal." We suggest that the use of this filtrate as fill material is actually simply a disposal and not a "reuse." We believe this material should not be used as fill material. This would also require a change to Section 33-9-5, sub-Section 5.2.

§33-9-5. Standards for Beneficial Use of Filtrate - sub-Section 5.3 states, "The Secretary may approve the use of filtrate as fill material within fifty (50) feet of surface water upon submission of information sufficient to show that the fill material will have no significant impact on the quality of runoff reaching the surface water." Even the U.S. Forest Service has adopted stronger stream buffers for sediment runoff. DEP should develop stronger stream buffers for this rule, and there should be no discretion.

§33-9-7. -- DEP made changes to this rule during the Interims process last year, and the rule now requires a permit for both short-term and long-term applications. This is a good change. However, we feel that most of the information required in Section 7.3. Permit Application Requirements for long-term permits should also be required for short-term permits.

§33-9-8. Draft Permits and Public Comment. Section 8.2.a. provides for a 30-day public comment period for long-term permits, but only a 15-day public comment period for short-term permits. We oppose the shortened public notice provisions for short-term permits. The 30-day comment period should apply in both instances.

§ 33-9-11. General permits. We oppose the development of a General Permit to cover the provisions of this rule. Specific individual permits are necessary to inform potentially affected parties of the application of this material.

Appendix A -- Frequency of Monitoring. The Legislative Rule-Making Review Committee last session accepted an amendment proposed by industry that reduced monitoring tests to once a year. While we would prefer even more frequent monitoring than proposed in this rule, we hope DEP will strongly oppose any attempts to reduce the monitoring provisions provided in this rule.

Charles L. Harris
Professor of Biochemistry
West Virginia University
School of Medicine
304-293-7749

>>> "Patricia White" <PWHITE@wvdep.org> 05/21/07 4:21 PM >>>
Please be advised of the following meeting:

Comments on DEP Rules for 2007

Communicated by Larry Harris, Public Advisory Council Member

I would like to commend the staff of the DEP for the hard work and expertise used in preparing and reviewing the rules with Council. As promised, I include below some of the technical and other issues raised during the May 21 meeting of the Council, omitting some questions that were answered at the meeting. Members of the environmental community who reviewed the rules raised some of the questions.

Some of the issues mentioned below are related to the act of valley fills and determining compensation for this process. I have pointed out my view to Council previously that the permitting of valley fills is essentially allowing the destruction of upper tributaries of watersheds. As such the process should be outlawed, in my view.

47CSR2 Water Quality

We learned that the B2 list is essentially the same as submitted previously and includes the definition of trout waters cited on page 2 of the rule.

.Page 11: Why is the temperature regulation on Stony River being removed?

47CSR2 (7.2.d.9) — The removal of variances, etc. on the Blackwater seems to be a strength, but why do these rivers remain "reserved" on the list? Why not just remove them?

47CSR2 (7.2.d.34.1): Adds language for site-specific applicability of water use categories and water quality criteria: "Pats Branch from its confluence with the Guyandotte River to a point 1000 feet upstream shall not have Water Use Category A and Category D1 designation."

* Is this a use removal? Yes was the answer.

* If so, did this go through the appropriate public process and use attainability analysis to justify a use removal. Did the use and attainability

analysis follow the federal Clean Water Act provision. (i.e. how was this decision justified)? Not sure this was fully answered.

47CSR2 (Appendix E):

Are the changes in concentrations for cadmium, copper, and others in Appendix E consistent with EPA changes/recommendations? Some of the changes in hardness calculations are in response to comments from our groups last year asking DEP to be consistent—so this is good.

47CSR5A

47 CSR 5A (State Certification)

*****47CSR5A (4.2.f.4):** seems to be weakening the system for determining stream miles (delineation). DEP inserts the language: "The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of the ordinary high water mark."

This will result in fewer stream miles being "delineated" as actual stream miles, it seems. Why would you move upstream (where there are fewer inputs) to find a high water mark? Thus, it also seems fewer miles of headwaters will be mitigated for impacts.

47CSR5A (6.2.b): Typo—"loses" should be "losses"

47CSR5A (6.2.d.1): Is there a discrepancy between how monetary compensation for coal versus non-coal impacts is assessed? It may be worth determining that coal is not getting a break, in comparison to non-coal.

For example—why is it lineal miles for coal and acreage for non-coal? If they are going to assess from the high water mark—as discussed above—will this not result in fewer stream miles and thus fewer miles to mitigate/compensate? Also, there is no assessment for non-coal related temporary impacts—why?

60 CSR5 Antidegradation

I made the suggestion that the list of Tier 2.5 streams (156 in the current rule) should be returned to the same number as began the legislative session, which is 309 streams. A scientific process that included expertise

from the WVDNR, which manages trout waters, arrived at the list of 309 streams. The list now submitted with the bill was reduced by the political process. Politics should not determine which streams merit protection from pollution; science should.

Other issues:

2.11 Explanation of the addition of this trading section is needed. Is this similar to EPA rules and consistent with the Clean Water Act?

3.9 Which advisory committee is this phrase referring to:

5.5b is removed. Why?

Is the procedure for nomination and addition of streams to the tier 2.5 list adequate?

Comments from Adam Webster (WVRC)

60CSR5 (2.11) : It's good that DEP provides "upstream controls" and mentions "for the same parameter" in the first sentence of the "trading" definition. Overall, the definition is good, but it is important to remember that the intent of the definition is not to allow cross-pollutant trading. With this in mind, the second sentence—"More than one parameter of concern may be traded on a given stream"—needs to be worded more restrictively (i.e. despite what the first sentence says, the second sentence could be interpreted as if cross-pollutant trading is allowed).

*** 60CSR5 (5.2) : Removes (strikes) the language: "Water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection".

Does this suggest the default is Tier 1 (if data does not suggest otherwise)? If so, why?

60CSR5 (5.6.c) : The deletion is a response to lawsuit. However, the new 5.6.c suggests they cannot assess assimilative capacity when dealing with pH,

DO, temperature, and fecal coliform. We feel that they can assess these parameters and should not treat them separately.

45CSR42 Greenhouse Gases

The fact that the DEP is beginning to deal with the process of greenhouse gases that lead to global warming is commendable. Some questions on the rule were raised by Dr. Kotcon:

The greenhouse gases emissions inventory rule (45-42-1) needs to be >strengthened considerably. The sections on emissions inventory >(section 5, pages 3-4) is so vague as to be meaningless, especially >as it deals with sequestration for area sources and sinks. I do not >see how any meaningful data can be generated with this language. How would the carbon sequestration be estimated? Has there been studies estimating the biogenic incorporation of CO₂ per acre of woodland, for example? The rule appears to be a vague in how it would be implemented.

Air Quality and Emission Rules (see below)

45CSR8 Ambient Air Quality Standards

Don Garvin pointed out that the the antidegradation language was removed from this rule, and it was explained that the agency feels these provisions are now covered in 45-CSR-14("Prevention of Significant Deterioration.") However, the language that was stricken does not appear in 45-CSR-14, and the stricken language is the ONLY statement in the rules of West Virginia's antidegradation policy for air quality. The environmental community still believes the stricken language should be restored.

Here is what should be reinstated:

§45-8-2. Anti-Degradation Policy.

2.1. Pursuant to the best interests of the State of West Virginia, it is the objective of the Secretary to obtain and maintain the cleanest air possible, consistent with the best available technology.

2.2. Where the present ambient air is of better quality than the established standards, the Secretary will develop long-range plans to protect the difference between the present quality and the established standards. The plans will be based upon the best available forecasts of probable land and air uses in these areas of high air quality.

2.3. The air quality of these areas will not be lowered unless it has been clearly demonstrated to the Secretary that such a change is justifiable as a result of necessary economic or social development and will not result in statutory air pollution. This will require that any industrial, public, or private project or development which could constitute a new source of air pollutants, within an area of such high air quality, provide the best practicable control available under existing technology as part of the initial project or development.

45CSR41 Control of Annual SO₂ emissions

45CSR6 Control of Air Pollution from Refuse Combustion

45CSR39 Nitrogen Oxides

I raised the general concern whether the standards for air quality were consistent with the EPA guidelines or not. Further, were any recognized health authorities consulted when these levels were determined? I also raised the issue that West Virginia is increasing supplying electricity to the population east of our mountains. New transmission lines are proposed that are to be connected with coal burning power plants. Billy Jack Gregg, Consumer Advocate for the WV PSC has pointed out that the states receiving our generated power will not permit generation plants in their region. They are concerned about air pollution and its various effects. But they need power, so they turn to West Virginia. This helps the coal industry and generation plants, but puts the health of West Virginians in jeopardy. I feel that our air quality and emission limits should be even more stringent than the EPA calls for in order to protect our citizens. This should be particularly true for power plants that export electricity.

Dr. Kotcon has raised the following issues:

45-CSR-8 Ambient Air Quality Standards

The standards for PM_{2.5} and Ozone are not adequately protective. I recommend that the standards be lowered from 15 $\mu\text{g}/\text{m}^3$ to 13 $\mu\text{g}/\text{m}^3$ in section 4.2.b., and from 0.08 ppm to 0.07 ppm in section 4.4.b.

The air standards (45-8-1) retains the standards for PM_{2.5} and ozone
>that the EPA Clean Air Scientific Advisory Council has already
>determined to be inadequate. Keeping these old standards will kill
>dozens or hundreds of West Virginians each year.

>The rule on refuse combustion (45-6-1) attempts to revise the
>definition of low-level radioactive waste and revives the
>Below-Regulatory_Concern (BRC) issue from some years ago. It also
>creates a large number of exemptions for "temporary" pollution
>sources. I am not yet sure if this re-opens old battles over
>medical waste incineration, but this was a really hot issue a few
>years back.

Questions/Comments on DEP's 2007 Proposed Rules

Comment submitted
by Karen Price at
Council
meeting
5/30/07

- **45 CSR 8 Ambient Air Quality Standards**

Section 4.2.c – PM_{2.5} Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m³. This should be 65 ug/m³, pursuant to 40 CFR 50.7.

- **45 CSR 39, 45 CSR 40, 45 CSR 41**

The opt-in unit language is deleted from each of these rules. What is the purpose for the deletion of these provisions?

- **33 CSR 30, Underground Storage Tank Rules**

Section 6.1. states "....including any person who accepts a delivery order, accepts payment, delivers or deposits product into an underground storage tank.....". The portion that states "...accepts payment..." should be removed from this section because those individuals within a company who accept payment or make payments most often do not know anything about the underground storage tank (UST), the operation of the UST, or the current regulatory status of the UST.

Section 7.3.a.1. states "....the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods.....".

1. The portion that states "...the date, time and location of the course,...." should be deleted. For large companies with many UST installations and locations there can be numerous individuals that need to be trained. Training will most likely occur on multiple dates, times, and locations that may not always be known until just prior to the training event. When new employees are hired training might

occur on short notice and for one individual. The burden of having to report the dates, time and locations would hinder and slow down the training process and restrict a company's ability to comply.

2. The portion that states "...the credentials of the instructors..." should be removed. Credentials will vary from instructor to instructor new instructors might be utilized, and a company might not know which instructors will be used at the various training sessions until just prior to the training session. In addition, the course content is the main issue of concern and should be the main focus in obtaining State approval of a training program.

Section 7.3.a.2 - This section states that a nonrefundable application fee of \$280 must be submitted with the application. Larger companies may have one training program, but administer the training on multiple dates, times and locations. Having to submit an application for approval of the training program each time the program is administered would be cost prohibitive, burdensome, and would hinder the training process. The State should clarify or make provision for a company to submit one application for the training program that will be administered to all company UST facilities. This will make the \$280 application fee reasonable and the application process less burdensome.

INDUSTRY'S REVISIONS

45CSR42

**TITLE 45
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY**

**SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM**

§45-42-1. General.

1.1 Scope -- This rule establishes a greenhouse gas emissions inventory program in West Virginia which:

1.1.a. Requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount of greenhouse gases on an annual basis;

1.1.b Inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions and sequestration of greenhouse gas emissions;

1.1.c. Provides for a periodic compilation of a greenhouse gas emissions inventory and a determination whether West Virginia is a net sink or emitter of greenhouse gases;

1.1.d. Provides for development of a registry to record voluntary reductions of greenhouse gas emissions; and

1.1.e Provides for a determination whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development.

1.2 Authority -- W Va Code §22-5-19.

1.3. Filing Date --

1.4. Effective Date -- June 1, 2008.

§45-42-2. Definitions.

2.1. "Air pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution

2.2. "Air pollution" or "statutory air pollution" means and is limited to the discharge into the air by the act of man substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

2.3. "Anthropogenic" means a direct result of human activities or the result of natural processes that have been influenced significantly by human activities.

2.4. "Area source" means, for purposes of this rule, a collection of similar sources of air pollutants within a geographic area. Area sources collectively represent individual sources that are small and numerous, and that typically have not been inventoried as a stationary or mobile source.

2.5. "Biogenic" means a naturally occurring biological source or process that is not significantly affected by human actions or activity.

2.6. "Capture" means the collection of greenhouse gas emissions from a stationary source

2.7. "*De minimis*" means emissions from a stationary source that are equal to or less than ten thousand tons per year for carbon dioxide, four hundred seventy-six tons per year for methane, thirty-two and six tenths tons per year for nitrous oxide, eight hundred fifty-five thousandths tons per year for hydrofluorocarbons, one and nine hundredths tons per year for perfluorocarbons and forty-two hundredths tons per year for sulfur hexafluoride.

2.8. "Emission" means the release, escape or discharge of regulated air pollutants or greenhouse gases into the air.

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF₆)

2.10. "Mobile source" means a variety of onroad and nonroad vehicles, engines, locomotives, marine vessels, airplanes and other equipment that generate air pollutants and greenhouse gas emissions, and that move or can be moved from place to place.

2.11. "Regulated air pollutant" means, for purposes of this rule, any air pollutant regulated under rules promulgated by the Secretary pursuant to W.Va. Code §22-5-4

2.12. "Reservoir" means a geological site where a greenhouse gas is securely stored.

2.13. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §§22-1-6 or 22-1-8

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage

in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink

2.15. "Sink" means any process, activity or mechanism which removes a greenhouse gas from the atmosphere. Forests are considered sinks because they remove carbon dioxide through photosynthesis.

2.16. "Source" means, for purposes of this rule, any process or activity which releases a greenhouse gas into the air.

2.17. "Stationary source" means any building, structure, facility, installation, stationary process or process equipment which emits or may emit any regulated air pollutant or greenhouse gas.

2.18. "Ton" means a short ton, or 2000 pounds.

2.19. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W.Va. Code §22-5-1 et seq

§45-42-3. Applicability.

3.1. Any stationary source that emits one or more greenhouse gases on an annual basis greater than the *de minimis* amounts listed in the table below, excluding biogenic emissions, and reports emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14), shall be an affected source required to report emissions of all greenhouse gases emitted above *de minimis* amounts to the Secretary under section 4:

Greenhouse Gas Compound	tons/year
carbon dioxide	10,000
methane	476

nitrous oxide	32.6
perfluorocarbons	1.09
sulfur hexafluoride	0.42

3.2. Stationary sources which are regulated by the Secretary under W Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

§45-42-4. Reporting Requirements.

4.1. ~~By March 31, 2009, and March 31 of each year thereafter, affected~~ Affected sources shall report to the Secretary the quantity of all greenhouse gases emitted above de minimis amounts in the previous calendar year at the same time such sources are to report emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14).

4.2. Affected sources shall only be required to report annual quantities of anthropogenic non-mobile source greenhouse gas emissions directly at the source, and shall not be required to report biogenic or mobile emissions of greenhouse gases, or indirect emissions of greenhouse gases, such as emissions occurring offsite from energy consumption.

4.3. The Secretary shall determine the form and format of the information reported by affected sources under subsection 4.1 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas

hydrofluorocarbons	0.855
--------------------	-------

emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF₆ Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis

4.5. Reports of greenhouse gas emissions submitted to the Secretary under this section shall be signed by a responsible official and shall include the following certification statement: "I, the undersigned, hereby certify that the data transmitted to the West Virginia Department of Environmental Protection is true, accurate, and complete, based upon information and belief formed after reasonable inquiry."

4.6. Greenhouse gases reported under this section are not subject to fees under 45 CSR 30, unless the greenhouse gases are otherwise regulated by the Secretary.

§45-42-5. Greenhouse Gas Emissions Inventory.

5.1. The Secretary shall periodically compile an inventory of greenhouse gas emissions to:

5.1.a. Characterize the relative contributions of greenhouse gas emissions from stationary, area, mobile and biogenic sources in West Virginia; and

5.1 b. Determine the extent to which greenhouse gas emissions are offset by the rate of sequestration, and whether West Virginia is a net sink or emitter of greenhouse gases.

5.2. The greenhouse gas emissions inventory shall include the emissions from stationary sources reported under section 4, and other relevant information regarding significant emissions, reductions, and sequestration of greenhouse gases from stationary, area, mobile and biogenic sources requested by the Secretary under subsections 5.3 and 5.4.

5.3. To inventory greenhouse gas emissions reductions, the Secretary shall consult with the citizenry and other entities such as industry trade groups that have information relating to greenhouse gas emissions reductions, and sequestration. ~~Upon request of the Secretary, such entities shall provide relevant information relating to greenhouse gas emissions reductions, capture and sequestration.~~

5.4. The Department of Agriculture, the Division of Forestry, Marshall University, West Virginia University, West Virginia Geological and Economic Survey, and the Department of Transportation shall enter into interagency agreements with the Secretary and at the Secretary's request provide:

5.4.a. Relevant information relating to greenhouse gas emissions from area, mobile and biogenic sources;

5.4.b. Relevant information relating to greenhouse gas emissions reductions and sequestration; and

5.4.c. Any assistance the Secretary may request during the development of the greenhouse gas emissions inventory.

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure

that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

§45-42-6. Greenhouse Gas Emissions Registry Program.

6.1. The Secretary shall develop a registry for the recordation of voluntary reductions of greenhouse gas emissions.

6.2. The greenhouse gas emissions registry program shall be as consistent as possible with developing regional, national, or international programs designed to monitor, quantify and register reductions in greenhouse gas emissions with respect to:

6.2.a. Development of criteria, based on a set of standardized emissions accounting, reporting and verification protocols, to determine baseline emissions and quantification of voluntary reductions in emissions of greenhouse gases;

6.2.b. Public recognition of such voluntary emissions reductions;

6.2.c. Consideration of voluntary greenhouse gas emission reductions when determining baselines and reduction requirements under future federal greenhouse gas emission reduction programs; and

6.2.d. The ability of sources to participate in future greenhouse gas emission trading programs.

§45-42-7. Economic Development Potential.

7.1. Using information obtained, gathered or developed under this rule, the Secretary will determine whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for net economic development or will result in a deterrent to net economic development in West Virginia.

§45-42-8.Inconsistency Between Rules.

8.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method or rule

**Summary of Industry's Suggested Changes and Comments on
45 CSR 42, Greenhouse Gas Emissions Inventory Program**

- Section 2.3. The definition of “anthropogenic” should be revised to state that it is the “result of natural processes that have been influenced significantly by human activities”. Adding the term “significantly” makes the definition consistent with the definition of “biogenic” which means a “naturally occurring biological source or process that is not significantly affected by human actions or activity.”
- Section 3.1. Applicability. This section should be revised to clarify that only individual greenhouse gases emitted above the *de minimis* amounts are required to be reported. Otherwise, affected sources that trigger any of the *de minimis* amounts could be required to report emissions of all of the greenhouse gases even if they are below the *de minimis* amounts. We do not believe that this is DEP’s intent. Also, this section should be revised to clarify that the *de minimis* amounts do not include biogenic emissions.
- Section 4.1. Reporting Requirements. This section should be revised to require reporting of greenhouse gases at the same time the air emissions inventory reporting is required. Sources should not be required to report their emissions at two different times. This section should also be clarified so that only greenhouse gases emitted above the *de minimis* amounts are required to be reported.
- Section 4.2 should be revised so that “mobile” emissions of greenhouse gases are not required to be reported. This section should also be revised to clarify that only direct emissions and not indirect greenhouse gas emissions (e.g., emissions occurring offsite from electricity consumption) are required to be reported. The references in section 4.3 to programs like Climate Leaders could lead sources to include indirect and direct emissions in their reporting. This would lead to double counting of electric generation greenhouse gas emissions and to higher source emissions compared to the *de minimis* amounts.
- Section 4.6 should be added so that sources will not be subject to fees for reporting greenhouse gas emissions, as the purpose of such reporting is to create an inventory, not to generate fees.
- Section 5.3. This section should be revised to delete the requirement that certain entities, including trade associations, must provide relevant information on greenhouse gas emissions, reductions, capture and sequestration to the Secretary upon request. This requirement is not found in the statute and could be interpreted to require such entities to report reductions, which is also not required under the statute.

- **Section 7.1. Economic Development Potential** This section should be revised to require the DEP to also determine whether reduction and sequestration will result in a deterrent to net economic development – not just whether it will be an asset.
- **Additional questions/issues:**
 - A reasonable protocol for reporting greenhouse gas emissions from stationary sources should be developed. Affected sources should not be required to report emissions from individual units within a stationary source if such emissions are insignificant. Affected stationary sources should have the option to report all of its greenhouse gas emissions in the aggregate.
 - Over 30 states have signed on to “The Climate Registry”. Does West Virginia intend on signing on? The rule indicates that West Virginia will have its own registry independent of “The Climate Registry”. Does DEP intend to rely upon any greenhouse gas registry programs, such as the Chicago Climate Exchange Registry, in developing the registry program?

MEMORANDUM

TO: Karen Price
FROM: David L. Yaussy
DATE: May 29, 2007
SUBJECT: DEP Advisory Council Rules

**A. Rules for Individual State Certification of Activities Requiring a Federal Permit.
Title 47, Series 5A.**

No comment.

**B. National Pollutant Discharge Elimination System (NPDES) Program.
Title 47, Series 10.**

We would urge the DEP to update the rule. It still contains references to the Chief, rather than the Director (See, for example, Sections 5.13.d.1, 6.2 and 9.1.a.)

Has the DEP updated this rule to reflect changes in the Code of Federal Regulations that were made since it was last comprehensively updated?

**C. Antidegradation Implementation Procedures.
Title 60, Series 5.**

We agree that the State should do away with Section 6.2. There is no need for an initial presumptive listing procedure at this point. As for the 156 (I counted 157, but I may have miscounted) streams in Appendix A, we will disagree with all those listed except the 39 to which no objections were ever lodged.

D. Requirements Governing Water Quality Standards.

Title 57, Series 2.

There are a couple of minor errors – Section 2.2 has a “then” that should be “than” and Section 6.1 is missing text

We remain disappointed that the State continues to interpret its water quality standards to apply all uses in all streams at all times. Section 6.1 clearly provides that B and C are the only default, or universal, uses

Memorandum
May 29, 2007
Page 2

Appendix D should be eliminated. Category C, Water Contact Recreation, is a default use, and listing all streams with that use assigned to them suggests that there are streams that do not have that designation.

Appendix A. The DEP is listing a huge number of trout streams with no justification for their listing. If streams meet the requirements of trout waters, they qualify as such; if they do not, there is no reason to list them. Unless the DEP can document that each stream has year round, multi-age populations, they should not be listed.

DLY:shb

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Monday – May 21, 2007

1:00 p.m. – 3:00 p.m.

601 57th Street, SE, Charleston, WV

West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Rick Roberts
Karen Price
Bill Raney
Lisa Dooley
Larry Harris
Jackie Hallinan

DEP:

Randy Huffman, Deputy Cabinet Secretary/Director –Division of Mining & Reclamation
Karen G. Watson, Assistant General Counsel
Ken Ellison, Director - Division of Land Restoration
Lisa McClung, Director – Division of Water and Waste Management
John Benedict, Director – Division of Air Quality
Lewis Halstead, DMR
Ken Politan, DMR
Charlie Sturey, DMR
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
James Martin, Chief, Office of Oil & Gas
Carroll Cather, DWWM
Pam Nixon, Advocate
David L. Vande Linde, Blasting
Jim Mason, DAQ
Mike Zeto, DWWM – EE
Matt Sweeney, DWWM

VISITORS:

Ann Bradley, Spilman Thomas & Battle
Charlie Burd, IOGA
Don Garvin, WVEC
Dave Yaussy, Robinson & McElwee

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection
called the meeting to order at 1:00 p.m.

Karen Price stated that the Council did not have enough time to review the rules, therefore was requesting to have another meeting to discuss further and the remaining of the Council agreed. The Council will meet May 30, 2007 at 10:00 a.m. – WVDEP – 601 57th Street, SE – Charleston, WV 25304 – West Virginia Room (3001).

Deputy Cabinet Secretary Huffman apologized for the short time period regarding the rules getting out to Council. Randy Huffman then introduced Karen Watson, Assistant General Counsel to discuss with the Council the DEP bills that had passed in the 2007 Regular Legislative Session:

- SB 337 – Establishing New Greenhouse Gas Inventory Program
Approved by Governor – April 4, 2007
- SB 425 – Relating to Water Pollution Control Revolving Fund
Approved by Governor – April 4, 2007
- SB 465 – Establishing Dam Safety Rehabilitation Revolving Fund
Approved by Governor – March 27, 2007
- SB 490 – Relating to Underground Storage Tank Insurance Fund
Approved by Governor – April 3, 2007
- SB 524 – Requiring Proof of Lawful Disposal of Solid Waste
Approved by Governor – March 28, 2007
- SB 588 – Removing Tax Expiration Date on Manufacturing or Production of Synthetic Fuel From Coal
Approved by Governor – April 4, 2007

Karen Watson then gave a brief summary of each proposed rule for the 2008 legislative session:

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

Proposed Rule 6 is now a basic open burning/ incinerator rule. Revised scope includes ‘statutory air pollution,’ addition of new language for posted operating instructions and open burning or incineration of animal or poultry carcasses during a declared state of emergency. Except for temporary Air Curtain Incinerators for land clearing debris (DOH jobs) and incineration of animal or poultry remains, most Air Curtain Incinerators will now be exempted under Rule 6 and placed under Rule 18.

COMMENT

Mr. Harris: Why does it allow low-level radioactive waste?

DEP Response: To allow crematories to dispose of bodies with chemo drugs. Does not allow high-level radioactive compounds related to research.

Council wanted to know if the agency would accept comments in writing after the meeting (e-mail in comments)

DEP Response: Yes

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO₂ & PM NAAQS include correction of SO₂ annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour PM_{2.5} standards, and addition of measurement methods for PM_{2.5}. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO₂ and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Mr. Harris: Are we sure we are protecting the public's health? We should not be lowering standards so that our energy being transmitted to other states doesn't pollute our air. Are we aware of EPA's Science Advisory Panel?

DEP Response: CAIR aims to lower emissions at power plants. Utility controls are helping us meet targets earlier. EPA's regional approach has generally been successful and we are seeing tremendous benefits. The agency is aware of the EPA's panel, and EPA is considering more stringent regulations but has not done so yet.

45CSR16 – Standards of Performance for New Stationary Sources

SUMMARY

Revisions to rule incorporate annual incorporation by reference updates and exclusions.

COMMENT

No questions.

45CSR18 – Control of Air Pollution from Combustion of Solid Waste

SUMMARY

CISWI Rule 18 combines and incorporates by reference all current federal Section 111/129 combustion regulation into one rule. Old Rule 24 will be repealed and replaced. New exemption section is consistent with revised Rules 6, 25 and 34. Revisions also include revised scope, extensive federal counterpart language updates, improved citing and consistency.

COMMENT

No questions.

45CSR25 – Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities

SUMMARY

Revisions to the proposed rule include general annual incorporation by reference and revisions required to maintain consistency with the DWW's rule 33CSR20 and federal counterpart regulation. Addition of direct incorporation by reference of new provisions published in the Federal Register. Language for pathological waste incinerators is revised for clarity.

COMMENT

No questions.

45CSR34 – Emission Standards for Hazardous Air Pollutants

SUMMARY

Rule 34 now combines all NESHAP regulations previously adopted under both Rules 15 & 34. Old Rule 15 will be repealed and replaced. Revisions to Rule 34 incorporate annual NESHAP updates under Parts 61 & 63. Some Part 63 standards affecting non-major sources of hazardous air pollutants are being excluded from incorporation by reference: Oil and Natural Gas; Polyvinyl Chloride and Copolymers; Primary Copper Smelting; Secondary Copper Smelting; and Primary Nonferrous Metals.

COMMENT

No questions.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

SUMMARY

Annual CAIR NO_x Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

SUMMARY

Ozone Season CAIR NOx Rule - Incorporates revisions 40 CFR to Part 96.

COMMENT

No questions.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

SUMMARY

Annual CAIR SO₂ Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

The Greenhouse Gas Inventory Program Rule is authorized by SB337 passed in the 2007 legislative session. The rule establishes a program which requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount; inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions, capture and sequestration; provides for: a periodic compilation of a greenhouse gas inventory; a determination whether WV is a net sink or emitter; development of a registry for voluntary reductions; and a determination whether greenhouse gas can be developed as an asset for economic development.

COMMENT

Mr. Raney: Is the exclusion still there for coal preparation activities?

DEP Response: Yes, section 3.2. (45CSR42)

Mr. Raney: How do we quantify sequestration?

DEP Response: Don't think we will get down to stationary source level. Agency will look at area

sources and biogenic activities. Once we get information, we will compile in an inventory.

Division of Water and Waste Management

33CSR9 – Standards for Beneficial use of Filtrate from Water Treatment Plants

SUMMARY

This legislative rule establishes a mechanism and requirements for the permitting, siting, bonding, and use of water treatment plant sludge from water treatment plants that has beneficial properties. This rule applies to the beneficial use of water treatment plant sludge and to any person who seeks approval from the Secretary to beneficially use such sludge within the state. This rule is intended to enhance the resource recovery and recycling goals of article fifteen of chapter twenty-two of the West Virginia Code and to encourage the beneficial use of water treatment plant filtrate. Section 22-15-23 of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

Lisa Dooley: Public notice of permits – who bears the cost – there has to be a more efficient way of getting notices out than Class I legal ads. This is a suggestion for the future.

DEP Response: Applicant bears cost – DEP is trying other methods of getting the information out – but not everyone has access to e-mail.

400 people on DEP's mailing list to receive permits by e-mail and we have between 30-40 who receive permits by US mail.

33CSR20 – Hazardous Waste Management System

SUMMARY

This amendment will adopt by reference approximately two years of changes to federal regulations by adopting the federal regulations in effect as of June 1, 2007 consisting of changes that correct errors in previously enacted Dye and Pigment rule and Manifest rule, allow more hazardous waste, allow greater flexibility in SW-846 testing and monitoring, allow more mercury containing devices to be managed as universal waste, streamline permitting process through a standardized permit, allow additional headworks and de minimus waste exemptions, reference Clean Air Act standards for hazardous waste combustors, allow a series of paperwork burden reductions for hazardous waste management facilities, corrects errors in 40 CFR (federal regulations) and excludes cathode ray tubes from the definition of solid waste under certain conditions. Language corrections, updated references and a change as the result of an EPA comment regarding annual groundwater monitoring at corrective action sites are also included in the amended rule. The rule amendment is not projected to require additional operating expenses above current levels as the amendments are generally de-regulatory in nature.

COMMENT

No questions.

33CSR30 – Underground Storage Tanks

SUMMARY

There are several new provisions to reflect the 2005 Federal Energy Act, including: secondary containment requirements for new or replaced tanks or piping; secondary containment requirements for new or replaced fuel dispenser systems; tank eligibility for delivery, deposit or acceptance – enables agency to prevent deposit or delivery to a tank that is not in compliance; and training requirements for individuals who operate, maintain or are responsible to address emergencies from spills or releases from underground storage tank systems.

COMMENT

No questions.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

The proposed revisions reflect updates identified during the federally-mandated triennial review of the Water Quality Standards rule. These include proposed additions to the trout water list, new criteria for nutrients, revisions to criteria in Appendix E and a use redesignation in the Guyandotte River Basin.

COMMENT

Mr. Raney: Would like to have the trout water list stay within the agency and be able to discuss the science on a case-by-case basis before the EQB, not the Legislature.

DEP Response: The DEP believes the scientific basis for the proposed trout streams is clear and does not need to be litigated before the EQB.

Mr. Harris: Commented on the changes in Appendix E and asked whether the formula change for copper and cadmium resulted in a more or less stringent standard.

DEP Response: The changes in Appendix E are recommended by EPA, updating MCL's, etc. The revised hardness formulas represent EPA's latest science.

47CSR10 – National Pollutant Discharge Elimination System (NPDES)

SUMMARY

The proposed revisions to the National Pollutant Discharge Elimination System Rule reflect updates/additions made to the various federal regulations that govern the NPDES program. The proposed changes also include specific language in section 14 of the rule relating to the Pretreatment Program to ensure that the rule is consistent with the most recent federal pretreatment regulations in 40 CFR Part 403.

COMMENT

No questions.

47CSR34 – Dam Safety

SUMMARY

The proposed revisions establish requirements governing the disbursement and use of moneys in the Dam Safety Rehabilitation Revolving Fund, authorized by SB 465 in the 2007 legislative session.

COMMENT

Ms. Hallinan: Any progress being made in reducing the number of deficient dams?

DEP Response: Not very much. The fund initiative is badly needed.

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

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. 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. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

COMMENT

Mr. Harris: Suggested we file with 309 streams instead of 156 streams because Legislature will further reduce.

Mr. Raney: Suggested we start with 39.

Mr. Harris: Asked about section 2.11 in the definitions regarding “trading” and if it includes cross-pollutant trading.

DEP Response: The definitions were unchanged from the ones the EQB first adopted in 2001. The agency does not think it allows cross-pollutant trading.

Division of Mining and Reclamation

38CSR2 – Surface Mining Reclamation Rule

SUMMARY

§38-2-3.2.g. Notice of Technical Completeness is new language and is to provide the public an opportunity to review the application once technical review is completed. §38-2-5.4.e.1 is removing language that is contrary to returning the natural drainway to its original pattern, profile, and dimensions once drainage control structure is removed. The changes in §38-2-5.6 clarify what operations may be exempt from conducting a “Surface Water Runoff Analysis”, monitoring requirements and removes phase-in compliance schedule that expired on June 19, 2006. Changes to §38-2-6 removes duplication of rules for Blasting and after this change, all the requirements for blasting will be contained in Surface Mining Blasting Rule, Title 199 Series 1. New §38-2-11.8 titled “Bond Credit for Reclamation of Bond Forfeiture Site under a No Cost Reclamation Contract” encourages qualified operators to undertake reclamation of bond forfeiture sites for the purpose of eliminating hazards to human health and safety, abating pollution of surface and ground waters and the contribution of sediment to adjacent areas, and restoring land to beneficial uses. Changes in §38-2-14.15.c.2 and 14.15.d.3 are clarifying contemporaneous reclamation rules on excess spoil disposal. The changes in 14.15.e remove a phase-in compliance schedule that expired in 2004. The changes in §38-2-23 are being made to make the mining rule consistent with the proposed changes in the State’s NPDES Mining Rules.

COMMENT

No questions.

47CSR5A – Individual State Certification of Activities Requiring a Federal Permit

SUMMARY

The proposed amendments to this rule are being made to adopt into rule requirements that have been applied through past practices for coal related activities requiring mitigation and issuance of a 401 State Certification of a 404 Permit. Ratios for monetary compensation for temporary impacts are detailed. Monetary compensation for permanent impacts to wetlands from coal related activities are made the same as non-coal related. Additional economic and stream measurement information is being requested to be added to the 401 application.

COMMENT

Mr. Harris: How do we determine the “ordinary high water mark” under section 4.2.f.4 and how is it determined on a small stream?

DEP Response: The US Army Corps of Engineers is responsible for determining “waters of the U.S.” under the rule.

Mr. Harris: What are the differences between coal and non-coal impacts and how are they determined?

DEP Response: Rule has to be consistent with statute.

47CSR30 – WV/NPDES Rules for Coal Mining Facilities

SUMMARY

The proposed amendments to this rule are being made to allow general clean-up of sections referencing outdated names of agencies and references to the EQB governing rule making. This rule addresses the Secretary as being the person as head of all actions. References to the “Director” are changed to “Secretary” to eliminate the need to distinguish between the Director of Mining and Reclamation and the Director of Water and Waste Management when issuing a coal related WV/NPDES permit. This rule adds provision for storm-water coverage for certain minimal activities without the requirement for modification through application to the permit. This rule also provides for an advanced approval of transfer of a WV/NPDES Permit to coincide with the advanced approval of the corresponding Article 3 Permit. This rule clarifies provisions related to coal remining operations and provides a remining water quality standard variance for any parameter of concern.

COMMENT

No questions.

199CSR1 - Surface Mining Blasting Rule

SUMMARY

The proposed amendments change the following sections: 2.27. Adds the definition of “other structure” (structures built by the permittee); 2.38 Clarifies definition of “surface mine operation”; 3.2.C. Plan for blasting should include seismic monitoring when within 1000 ft of a structure, and performance specifications for blasting seismographs; 3.4. Areas of blasting that will be regulated for shaft and slope development; 3.6.c.3. Requiring field practice guidelines for blasting seismographs; 3.7a Request for alternate limits must have written consent of the owner; 3.9. Minimum qualifications and continuing education requirements for surveyor; 4.1.b. Allows the agency to consider blasting experience of applicants that was gained prior to the last three years; 4.5.d. Requires applicants who have been suspended or revoked in other states to show cause as to why should be issued a certification; 4.9.a.2 process for issuing a temporary suspension to a blaster and appeal rights; 4.13 Clarifies blasters responsibility of training the blasting crew; 5.2.a.3&4 Clarifies

the investigations process on a claim of blasting damage; 6.1 Requiring that any arbitrators that are removed from the list must be done with cause; and 7.3 Detonators and initiation systems are not considered for calculation of fees.

COMMENT

No questions.

Office of Oil and Gas

35CSR3 – Coalbed Methane Wells Rule

SUMMARY

The WVDEP, Office of Oil and Gas is proposing to revise existing rule 35CSR3. Series 3 is a legislative rule in place to enforce the provisions in WV Code §22-21-1 et seq., Coalbed Methane Wells and Units, commonly referred to as the Coalbed Methane Act. The revisions will: Address the establishment of special field rules to promote the orderly development of coalbed methane fields; Protect the correlative rights of all owners located within the geographic area for which special field rules are established; Provide a process by which the Review Board may hold a hearing on an application for special field rules and issue such rules; Insert language (Section 17) which was inadvertently deleted from the rule during the 2006 legislative session. This language existed in the rule prior to the revisions in 2006.

COMMENT

Is this the same rule that went through last year?

DEP Response: Yes, except for two sections that had changes:

16.2.e – advertisement “15 days”

16.1.6.1 – “FOIA” issue that came out of the LRMRC.

Mr. Raney: Is this the product of the stakeholders group?

DEP Response: Yes.

Ms. Hallinan: What is a field rule?

DEP Response: Special spacing procedure for coalbed methane wells. It deals with pooling and royalty issues.

Division of Land Restoration

33CSR10 – Recycling Assistance Grant Program

SUMMARY

This rule sets out guidelines and procedures for providing assistance grants to local governments and other interested parties for the purpose of planning, initiating, expanding, or upgrading recycling programs, provide related public education programs, and assist in recycling market procurement efforts.

COMMENT

No questions.

60CSR3 – Voluntary Remediation and Redevelopment Rule

SUMMARY

This legislative rule establishes the eligibility, procedures, standards and legal documents required for voluntary and brownfield cleanups and updates risk protocol standards, including updates to the de minimis table. It also includes changes to the land use covenant section to incorporate the components of the Uniform Covenant Act.

COMMENT

Ms. Dooley: Are there grant dollars for brownfields?

DEP Response: Yes

The next scheduled Advisory Council Meeting will be on May 30, 2007 at 10:00 a.m. Mr. Huffman asked the Council members to notify the DEP of which rules they want to discuss so the right agency person can be at the meeting. He also asked them to submit comments prior to the meeting if possible.



west virginia department of environmental protection

Executive Office
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0440
Fax: (304) 926-0446

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

August 7, 2007

Ms. Judy Cooper
Director, Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

Re: 60CSR5, "Antidegradation Implementation Procedures"

Dear Ms. Cooper:

The West Virginia Department of Environmental Protection recently discovered two clerical errors that were made in the above-referenced rule filed with your office on July 27, 2007. The errors occurred on pages 4 and 10 of the rule in sections 4.3 and 6.3.a.3. Instead of striking through certain language in these sections, the language was entirely removed. These were clerical errors as evidenced by the agency's "Response to Comments" document. The agency explained in paragraph #35 of the Response that it was going to delete language from the rule that EPA had disapproved.

Accordingly, please find enclosed a corrected version of the rule in which the language proposed to be deleted from the existing rule is now shown as stricken-through as per your office's requirements. The Department would appreciate your replacing the rule that was filed previously with the enclosed version and apologizes for any inconvenience. Please let me know if you have any questions concerning this matter, and as always, we appreciate your office's assistance and cooperation.

Sincerely,

Karen G. Watson
Assistant General Counsel

Enclosure
KGW/tw

FILED
2007 AUG -7 PM 3:10
OFFICE OF THE SECRETARY OF STATE

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

SERIES 5
ANTIDEGRADATION IMPLEMENTATION PROCEDURES

FILED

2007 AUG -7 PM 3:10

OFFICE OF THE SECRETARY
SECRETARY OF STATE

§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 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. In most cases, less-degrading or non-degrading pollution control alternatives shall be considered reasonable where the costs of such alternatives are less than 110% of the costs of the pollution control measures associated with the proposed activity.

~~2.2:~~ 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 or fecal coliform will be deemed insignificant provided that:

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

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

5.6.c.3. For fecal coliform, necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

5-6.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 or 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, Appendix E, Table 1.~~

~~6.3.a.4.~~ 6.3.a.3. For fecal coliform, necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

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, 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</u> <u>(MILES)</u>
--------------------	--------------------	-----------------	---------------------------------

Tug Fork Watershed
BST-60-D

CUB BRANCH

The section of stream within Panther Creek State Park, - tributary of Panther Creek of Tug Fork River

0.3

Kanawha River Watershed
(Upper & Lower)
K-13

LITTLE SIXTEENMILE CREEK

Upper section of stream that is within Chief Cornstalk WMA - tributary of the (Lower) Kanawha River

1.2

UNT OF FIVEFORK BRANCH

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

1.9

BAYS FORK

Entire length - tributary of Middle Fork of Davis Creek of (Lower) Kanawha River

1.9

HOFFMAN HOLLOW

Entire length - tributary of Middlelick Branch of Davis Creek of (Lower) Kanawha River

2.3

SHREWSBURY HOLLOW

Entire length - tributary of Davis Creek of (Lower) Kanawha River

1.5

LOOP CREEK

Entire length - tributary of Kanawha River

20.0

Elk River Watershed

KE-135

Entire length (south headwater fork incl.) This stream is located approx. 1.78 mi. upstream Blackhole Run - tributary of Elk River

1.9

KE-136

Begins with headwater forks downstream to mouth - tributary of Elk River

1.4

KE-137

Entire length (south headwater fork included) - tributary of Elk River

2.6

KE-139-B

Begins with headwater forks downstream to mouth - tributary of Old Field Fork of Elk River

2.5

KE-98-C-1

Tributary of Left Fork of Holly River of Elk River - section within Elk River WMA

1.5

Gauley River Watershed

KG-34-B

Begins with headwater forks downstream to mouth - tributary of Cherry River

1.5

KG-34-H

Entire length - tributary of Cherry River

16.3

<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>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-4</u>	<u>BARRENSHEE 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-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-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>
<u>New River Watershed</u>			
<u>KN-17</u>	<u>MANNS CREEK</u>	<u>Entire length within Babcock State park Boundaries</u>	<u>5.2</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</u>	<u>2.6</u>

Left hand Fork - tributary of (Lower) New River
Section w/n New River Gorge National River - tributary of (Lower) New River
from HW downstream to confluence w/ Mash Fork
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

FALL BRANCH
CAMP CREEK
MASH FORK

KN-37
KNB-13
KNB-13-D

1.9
9.3
2.9

Greenbrier River Watershed

<u>KNB-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>KNB-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>KNB-53-G</u>	<u>BARCLAY RUN</u>	<u>Entire length - tributary of Knapps Creek of Greenbrier River</u>	<u>1.7</u>
<u>KNB-60</u>	<u>LAUREL RUN / GREENBRIER R</u>	<u>Entire length - tributary of Greenbrier R.</u>	<u>3</u>
<u>KNB-66-E-4</u>	<u>LEFT PRONG</u>	<u>Entire length - tributary of Galford Run of Sitling Creek of Greenbrier River</u>	<u>3.3</u>
<u>KNB-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>KNB-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>KNB-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>KNB-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>KNB-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>KNB-68-A-6-A</u>	<u>GRIFFIN RUN</u>	<u>Entire length - tributary of North Fork of Deer Creek of Deer Creek of Greenbrier River</u>	<u>1.7</u>
<u>KNB-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>KNB-74</u>	<u>TROUT RUN</u>	<u>Entire length - tributary of Greenbrier River</u>	<u>1.1</u>
<u>KNB-78</u>	<u>EAST FORK GREENBRIER RIVER</u>	<u>uppermost 5.5 miles (above Abes Run) - Entire length - tributary of Greenbrier River</u>	<u>5.5</u>
<u>KNB-78-C</u>	<u>LITTLE RIVER / EAST FORK GREENBRIER</u>	<u>From headwaters to confluence of Buffalo Fork - tributary of East Fork of Greenbrier River</u>	<u>6.3</u>
<u>KNB-78-G</u>	<u>FIVEMILE HOLLOW</u>	<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>2.3</u>
<u>KNB-78-H</u>	<u>POCA RUN</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-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>Cheat River Watershed</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-2</u>	<u>WATKINS RUN</u>	<u>Entire length - tributary of Flag Run</u>	<u>1.5</u>
<u>MC-45</u>	<u>TOBES RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>1.2</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-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-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-G</u>	<u>LYNN RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>1.3</u>
<u>MC-60-K-1</u>	<u>THREE SPRING RUN</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-11</u>	<u>MCCRAY CREEK</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>2.4</u>
<u>MC-60-K-14</u>	<u>DANIELS CREEK</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>3.2</u>
<u>MC-60-K-17</u>	<u>EAST FORK GLADY FORK</u>	<u>Section upstream of Louk Run - tributary of Gladly 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 Gladly Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-2-A</u>	<u>HOG RUN</u>	<u>Entire length - tributary of Panther Camp Run of Gladly 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 Gladly Fork of Dry Fork</u>	<u>1.7</u>
<u>MC-60-K-6</u>	<u>BAKER CAMP RUN</u>	<u>Entire length - tributary of Gladly 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 -</u>	<u>2.1</u>

<u>MC-60-R</u>	<u>TORY CAMP RUN</u>	<u>tributary of Laurel Fork of Dry Fork</u>	<u>2.4</u>
<u>MC-60-T</u>	<u>GANDY CREEK</u>	<u>Entire length - tributary of Dry Fork</u>	<u>18.5</u>
<u>MC-60-T-1</u>	<u>LOWER TWO SPRING RUN</u>	<u>Entire length except lowermost 1.3 miles - tributary of Dry Fork</u>	<u>2.3</u>
<u>MC-60-T-10</u>	<u>NARROW RIDGE RUN</u>	<u>Entire length - tributary of Gandy Creek of Dry Fork</u>	<u>2.2</u>
		<u>Entire length (downstream of Spruce Knob Lake) - tributary of Gandy Creek of Dry Fork</u>	
<u>MC-60-T-11</u>	<u>WARNER RUN</u>	<u>Entire length - tributary of Gandy Creek of Dry Fork</u>	<u>1.8</u>
<u>MC-60-T-2</u>	<u>UPPER TWO SPRING RUN</u>	<u>Entire length - tributary of Gandy Creek of Dry Fork</u>	<u>2.5</u>
<u>MC-60-T-3</u>	<u>SWALLOW ROCK RUN</u>	<u>Entire length - tributary of Gandy Creek of Dry Fork</u>	<u>1.8</u>
<u>MC-60-T-6</u>	<u>TAYLOR RUN</u>	<u>Entire length - tributary of Gandy Creek of Dry Fork</u>	<u>0.9</u>
<u>MC-60-T-8</u>	<u>BIG RUN</u>	<u>Entire length - tributary of Gandy Creek of Dry Fork</u>	<u>3.8</u>
<u>MCS-12</u>	<u>LITTLE LAUREL RUN</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>1.3</u>
<u>MCS-13</u>	<u>LITTLE BLACK FORK</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>4.7</u>
<u>MCS-3-A</u>	<u>SOUTH BRANCH</u>	<u>Entire length - tributary of Hadditt Run of Shavers Fork of Cheat</u>	<u>3.6</u>
<u>MCS-40</u>	<u>YOKUM RUN</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>2.6</u>
<u>MCS-46</u>	<u>RED RUN</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>2.8</u>
<u>MCS-47</u>	<u>BLISTER RUN</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>2</u>
<u>MCS-49</u>	<u>LAMBERT RUN</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>3.2</u>
<u>MCS-5</u>	<u>LAUREL RUN / SHAVERS FORK</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>3.5</u>
<u>MCS-50</u>	<u>FIRST FORK</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>5.4</u>
<u>MCS-53</u>	<u>BEAVER CREEK</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>1.7</u>
<u>MCS-54</u>	<u>SECOND FORK</u>	<u>Entire length - tributary of Shavers Fork of Cheat</u>	<u>4.1</u>
<u>Tygart River Watershed</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>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>1.6</u>
<u>MT-64-C</u>	<u>GLADE RUN</u>	<u>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>1.2</u>
<u>MT-64-E</u>	<u>MEATBOX RUN</u>	<u>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>1.8</u>
<u>MT-64-F</u>	<u>POTATOHOLE RUN</u>	<u>Entire length - tributary of Mill Creek of Tygart Valley</u>	<u>3.4</u>
<u>MT-66-B</u>	<u>MCGEE RUN</u>	<u>Entire length - tributary of Riffle Creek Tygart Valley</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</u>	<u>1</u>

O-2-P-23
O-2-P-25
O-2-P-26
O-2-P-27
O-2-Q-14
O-2-Q-16

ARKANSAS BRANCH
SWEETWATER BRANCH

LONG BRANCH
SPRUCE FORK
RICH CREEK

BLUELICK BRANCH

Lake - tributary of Beech Fork of Twelvepole Creek
Entire length - tributary of West Fork of Twelvepole Creek
Entire length w/n Cabwaylingo S.P. - tributary of West Fork of Twelvepole Creek
Entire length - tributary of West Fork of Twelvepole Creek
Entire length - tributary of West Fork of Twelvepole Creek
The section of Rich Creek w/n East Lynn Lake WMA - tributary of East Fork of Twelvepole Creek
Entire length to East Lynn Lake - tributary of East Fork of Twelvepole Creek

2
0.9

2.6
1.8
1.3

2.3

Guyandotte River Watershed

OG-102
OG-29-C
OG-38-D

OG-61

OG-96-A
OGM-8-B

Entire length - tributary of Guyandotte River
Entire length - tributary of Sixmile of Guyandotte River
Headwaters downstream to unnamed tributary between Doss Fork and Chestnut Oak Creek
Entire length of stream that is w/n Chief Logan S.P. - tributary of Guyandotte River
Entire length - tributary of Big Run Creek to Guyandotte River
Begins with headwater forks downstream to approx. 0.93 mi. upstream of the convergence of the Left Fork and Right Fork of Mill Creek - tributary of Mill Creek of Mud River of Guyandotte River

1.6
1
1.6

2.8

1.6
2.7

Potomac Direct Drains

Watershed
P-9-G-2

SOUTH FORK INDIAN RUN

Entire length - tributary of Indian Creek

3.8

Cacapon River Watershed

PC-0.9
PC-1
PC-10

CONNER HOLLOW
CONSTANT RUN
EDWARDS RUN

Entire length - tributary of Cacapon
Entire length - tributary of Cacapon
Headwaters downstream to about 0.9 mi. from mouth - tributary of Cacapon

3.8
2.6
7

South Branch/Potomac River Watershed

PSB-28-A-1

BIG RUN

Entire length - tributary of Jordan Run of North Fork of South Branch Potomac

2.6

<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-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-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-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-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-2-B</u>	<u>LONG RUN</u>	<u>Beginning at the N/S Forks downstream to mouth - tributary of Roaring Creek of Seneca Creek</u>	<u>2.2</u>
<u>PSB-28-K-3</u>	<u>HORSECAMP RUN</u>	<u>Headwaters to mouth - tributary of Seneca Creek</u>	<u>4.1</u>
<u>PSB-28-K-4</u>	<u>STRADER RUN</u>	<u>Entire length - tributary of Seneca Creek</u>	<u>2.6</u>
<u>PSB-28-K-6</u>	<u>WHITES RUN</u>	<u>Entire length - tributary of Seneca Creek</u>	<u>3.9</u>
<u>PSB-28-K-6-B</u>	<u>UPPER GULF RUN</u>	<u>Entire length - tributary of Whites Run of Seneca Creek</u>	<u>2.7</u>
<u>PSB-30</u>	<u>LONG RUN</u>	<u>Entire length - tributary of South Branch Potomac</u>	<u>2.9</u>
<u>PSB-32</u>	<u>BRIGGS RUN</u>	<u>Entire length - tributary of South Branch Potomac</u>	<u>4.6</u>

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

DNR CODE	STREAM NAME	LENGTH (miles)
----------	-------------	----------------

Fug Fork Watershed

BST-60-D	GUB 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

KC-10-22	WHITE OAK BRANCH	2.08
KC-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	10.54
KE-111-K-2	LITTLE SUGAR CREEK	7.64
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	2.54
KE-14-P	PANTHER HOLLOW	1.55
KE-50-B-10	IKE FORK	1.88
KE-50-1	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	1.54
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
	145.90 total miles	

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	KUHN BRANCH	1.94
KG-20	GOLLISON 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	9.48
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	BIRCH LONG RUN	2.18
KGC-23-E	CHARLES CREEK	2.59
KGC-24-C	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	ALDRICH BRANCH	1.25
KGW	WILLIAMS RIVER	34.70
KGW-1	CRAIG RUN	2.00
KGW-19	UPPER BANNOCK 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	2.44
KN-24	SLATER CREEK	5.08
KN-26	PINEY CREEK	16.94

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	PINGH 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	CRANE 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	BARCLAY RUN	1.71
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	POGA 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	GLUBHOUSE RUN	11.02
KNG-79-C-3	HINKLE RUN	10.44
		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
MG-12-B-6	MILL RUN	3.95
MG-18	ROARING CREEK	8.03
MG-1-A	RYAN HOLLOW	2.33
MG-20	ELSEY RUN	3.40
MG-2-A	DARNELL RUN	2.08
MG-33-A	FLAG RUN	5.54
MG-36	WOLF CREEK	6.90
MG-41	LONG RUN	1.22
MG-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	4.84
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	ELKLICK RUN	4.52
MC-60-C-3	JOHN B. HOLLOW	1.12
MC-60-D-10	SAND RUN	3.19
MC-60-D-11	YOAKUM RUN	2.48
MC-60-D-	LOWER BLACKWATER RIVER	2.62
MC-60-G	RED RUN	5.56
MC-60-I	MILL RUN	2.92
MC-60-J	ELKLICK RUN	2.59
MC-60-K	GLADY FORK	31.34
MC-60-K-1	THREE SPRING RUN	1.25
MC-60-K-11	MCGRAY CREEK	2.41
MC-60-K-15	DANIELS CREEK	3.18

MC-60-K-16	WEST FORK GLADY FORK	6.13
MC-60-K-16	WEST FORK GLADY FORK	4.27
MC-60-K-17	EAST FORK GLADY FORK	7.28
MC-60-K-17-A	LOUK RUN	1.19
MC-60-K-2	PANTHER CAMP RUN	1.73
MC-60-K-2-A	HOG RUN	1.17
MC-60-K-4	FIVE LICK CREEK	1.74
MC-60-K-5	WOODFORD RUN	1.14
MC-60-K-6	BAKER CAMP RUN	1.19
MC-60-L	BIG RUN	3.69
MC-60-N	LAUREL FORK	24.52
MC-60-N-4	BEAVERDAM RUN	2.12
MC-60-N-8	FIVE LICK RUN	2.45
MC-60-O	RED CREEK	6.77
MC-60-O-1	BIG RUN	3.47
MC-60-O-2	FLATROCK RUN	2.89
MC-60-O-3	GANDY RUN	2.26
MC-60-P	SPRUGE RUN	3.25
MC-60-Q	HORSE CAMP RUN	4.59
MC-60-R	TORY CAMP RUN	2.43
MC-60-T	GANDY CREEK	15.68
MC-60-T-1	LOWER TWO SPRING RUN	2.29
MC-60-T-10	NARROW RIDGE RUN	2.16
MC-60-T-11	WARNER RUN	2.24
MC-60-T-2	UPPER TWO SPRING RUN	2.53
MC-60-T-3	SWALLOW ROCK RUN	1.82
MC-60-T-6	TAYLOR RUN	0.87
MC-60-T-8	BIG RUN	3.75
MC-60-T-9	GRANTS BRANCH	2.80
MCS	SHAVERS FORK	7.26
MGS-12	LITTLE LAUREL RUN	1.34
MGS-13	LITTLE BLACK RUN	4.74
MGS-14	CLIFTON RUN	2.11
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	1.64
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	BLAGK 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	ZEDS 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	MCGEE RUN	3.40
MT-66-C	BACK FORK	2.01

MT-67	RAFE RUN	1.54
MT-68	BECKY CREEK	9.41
MT-68-A	BIG BRANCH	2.25
MT-72	HAMILTON RUN	2.49
MT-73	CLAY RUN	2.61
MT-74	ELKWATER FORK	5.20
MT-74-A	MOWRY RUN	2.34
MT-74-B	LIMEKILN RUN	1.93
MT-75	STEWART RUN	8.08
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	BEARGAMP 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 SPRUCE 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-D LAUREL CREEK 2.60

OG-61 BUFFALO CREEK 3.01

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 CONOR 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 GOVE 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-G-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	3.71
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	HORSEGAMP 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 _____ GAPON RUN _____ 2.19

_____ Total number of streams _____ 444

_____ Total Miles _____ 2006.80

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

IN THE MATTER OF:

PROPOSED RULE 60CSR5

Anti-degradation Implementation Procedures

TRANSCRIPT OF PROCEEDINGS had or testimony of adduced pursuant to the West Virginia Rules of Civil Procedure in the above-entitled action, on the 16th day of July, 2007, commencing at 7:00 p.m. and concluding at 7:34 p.m., at the office of the West Virginia Department of Environmental Protection, 601 57th Street, S.E., Cooper's Rock Training Room, Charleston, Kanawha County, West Virginia, pursuant to notice to all interested parties.

BEFORE: JESSICA GREATHOUSE, Facilitator
Public Information Office

ORIGINAL

NANCY MCNEALY
CERTIFIED COURT REPORTER

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

I N D E X

Reporter's Certificate.....Page 40

1 MS. GREATHOUSE: Because there are so many
2 folks here for the Tier 2-5 hearing that's not really
3 suppose to start until seven o'clock, we'll go ahead and
4 start the Tier 2-5 hearing and just keep the record open
5 beyond seven o'clock so that those who are here to make
6 comments can do so and then leave if you have other things
7 that you need to do. I'll start the hearing out much the
8 same as I did for the first hearing.

9 The purpose of tonight's hearing is to
10 accept comments on Proposed Rule 60CSR5 - Anti-degradation
11 Implementation Procedures.

12 Please make sure you have signed in and
13 indicated if you're going to make a comment. Comments
14 shall be limited to the proposed revisions to the rule.
15 Copies of the rules are available from the Secretary of
16 State's Office or from the DEP webpage at
17 [www.WVDEP.org/2008 Rules](http://www.WVDEP.org/2008_Rules).

18 We are here this evening to listen to your
19 comments and questions and include them in the official
20 record. Written comments must be submitted to the West
21 Virginia Department of Environmental Protection Public
22 Information Office, 601 57th Street, S.E., Charleston, West
23 Virginia, 25304. Comments may also be e-mailed to
24 Comments@WVDEP.org. This meeting is being recorded

1 tonight. The comment period will end at 5:00 p.m. on July
2 17th, 2007.

3 I will read the commentor's names in the
4 order that they are listed on the sign-in sheet. When you
5 come up to make your comments, speak state your name and
6 your affiliation. The first speaker is Gary Zuckett.

7 MR. ZUCKETT: Thank you very much. My name is
8 Gary Zuckett. I'm with the West Virginia Citizen Action
9 Group. I'm the Executive Director and Citizen Action is
10 signatory onto the Rivers Coalition's letter commenting on
11 the 2.5 and also the previous hearing that we just had and
12 I just want to say a few words about 2.5.

13 We believe that all of the original streams
14 that were evaluated under the Tier 2.5 Program plus one
15 should be included in the rule that goes to the Legislature
16 and the plus one is one that I believe that Loop Creek is
17 not on that 309 stream list, and somebody correct me if
18 Loop Creek is not on that list, then I'm wasting my breath,
19 but I really feel Loop Creek could be used as a poster
20 child for this whole process, because and I believe you
21 will have some testimony by individuals later in this
22 session about Loop Creek that are much more knowledgeable
23 than I am, but the fact that millions of dollars of
24 taxpayer money both federal and state has been used in the

1 Loop Creek drainage over the last ten years to turn it from
2 basically what used to be a sewer into a reproducing trout
3 stream now, and the fact that this stream along with
4 hundreds of others are not going to be put on that list is
5 I think really indicative of the political process that
6 went into the list that we have before us today.

7 What I call the polluters' lobby has been
8 very effective in narrowing this list down, oh, with a
9 campaign of half-truths and no truths, I guess, which is a
10 nice way of saying lies. The truth is that the polluters'
11 lobby doesn't really want any streams protected. They want
12 to be indiscriminate in what they do. Farmers are being
13 told that they're going to have to fence off their streams
14 or put diapers on their cows when in reality farmers are I
15 believe exempted from this as is coal mining from this
16 list. So what we have here is basically a politicized
17 list, which really should be a scientific list as was
18 originally developed.

19 *Forbes Magazine* just came out with a
20 business rating on West Virginia and put us number 50 out
21 of the states and the business climate here, and they
22 mention specifically quality of life as one of the things
23 that they rated us lacking in their business climate survey
24 and I believe that, you know, obviously this -- keeping our

1 streams clean is a quality-of-life issue, so I really
2 encourage the DEP to amend their rule to add the 310
3 streams that really should be on that, send that to the
4 legislature and fight for what's right. Thank you very
5 much.

6 MS. GREATHOUSE: The next speaker is John David.

7 MR. DAVID: Thank you kindly. John David is
8 my name. I'm with the Page-Kincaid Public Service District
9 on Loop Creek. I'm also Director of the Southern
10 Appalachian Labor School and I work at WVU Tech for a
11 living. I've just been reading all these things -- I've
12 brought some articles with me. I'm going to pass out a few
13 later for those of you that might want to catch up.

14 About a year ago we were here I think
15 dealing with 2.5 and since then I've heard numbers that 444
16 and then it's 309 and it's 157 and Don says now it's 47.
17 It's like, you know, we're going, you know, all over the
18 place. I just want to say as Gary Zuckett noted a moment
19 ago, water is a very precious resource in West Virginia.
20 We feel that on Loop Creek -- that's why we spent over \$15
21 million in public funds to clean it up. It can be done and
22 we are proud that our wastewater systems that we have
23 constructed there are in total compliance with 2.5, and we
24 are very pleased that our brothers and sisters in Oak Hill

1 have joined as well and their system is also in compliance
2 and we have a couple of other systems on the drawing boards
3 that are going to be in compliance. So we know it can be
4 done.

5 We are concerned, of course, because we
6 think water is a public good. In West Virginia water is
7 owned by everybody. It's a public good in the sense that
8 it's a good that is not owned by private individuals. It's
9 owned by the citizens of the state. It's one of our last
10 resources that should be probably protected to a great
11 extent while we have a chance and as a public good, I think
12 it's wrong that people consider it to be private property
13 and that if it goes through private land, that becomes just
14 simply a convenient place where they can dump. I think
15 that is not right. I think it's illegal. I don't think
16 that it should be allowed.

17 So, basically, I don't understand really
18 why since it is public property, since water is public
19 property, since the streambed is public property, since the
20 banks are public property up to whatever level it is, flood
21 level or something like that, why, you know, it's an issue.

22 The State Code clearly says that it is
23 declared to be the public policy of the State of West
24 Virginia to maintain reasonable standards of purity and

1 quality of the water of the state consistent with number 1,
2 public health and public enjoyment thereof; 2, the
3 promulgation and protection of animal, bird, fish and other
4 aquatic and plant life. I mean, that's State Code 22-11-2,
5 clear, simple, but, you know, I did receive this morning at
6 the Kincaid post office and haven't opened these yet. I
7 was going to let my friend Julian Martin open these up for
8 me.

9 Look at these certified letters I got from
10 the extractive industry that's on Loop Creek that wants to
11 tell -- I haven't opened these yet -- at \$5.21 a piece,
12 they all arrived to the Southern Appalachian Labor School
13 telling us that, you know, they are going to, I guess --
14 want to get our permission or they want to photograph
15 things or do blasting or whatever it is, whatever.

16 Julian, I'm going to have you open these up
17 at some point. I've not -- they're unopened so I'm curious
18 what's in them, but I suspect that's what we're talking
19 about.

20 I think that we should keep 2.5 in all the
21 streams. I think it's important for us to, you know,
22 really fight for that. I'm not in favor of just having 47
23 or 157 or even 309. I think they all should be protected,
24 and I think it would be good for West Virginia to say that

1 we are Wild and Wonderful and we're not open for pollution.
2 Thank you kindly.

3 MS. GREATHOUSE: Next speaker is Randy Kesling.

4 MR. KESLING: Hi, my name is Randy Kesling.
5 I'm the current President of the Mountaineer Chapter of
6 Trout Unlimited and I would just like to read to you our
7 position -- our chapter's position on the Tier 2.5 issue.

8 The Mountaineer Chapter of Trout Unlimited
9 strongly objects to the West Virginia Department of
10 Environmental Quality proposal to propose legislation that,
11 in essence, states that consider over half of the 309
12 streams currently listed under the Tier 2.5 are no longer
13 representative of waters of special concern to it.

14 It is totally inappropriate for the DEP to
15 take such a position, which flies in the face of the
16 conclusions reached as a result of the DEP's six year, \$1
17 million process to develop an anti-degradation policy and
18 to establish an integral Tier 2.5 list. We question the
19 authority under which the DEP presumes to ignore results of
20 that taxpayer-funded study by arbitrarily proposing the
21 wholesale reduction of the number of the Tier 2.5 protected
22 streams.

23 This proposed reduction in the number of
24 Tier 2.5 protected streams is without apparent scientific

1 basis and is in stark contrast to the position that the DEP
2 itself embraced in 2006, which based on the results of its
3 multi-year million dollar study it proposed 309 streams to
4 be protected under Tier 2.5.

5 We firmly believe that as proposed this
6 arbitrary legislation will result in substantial
7 degradation of significant numbers of streams which
8 currently support reproducing and/or year-round trout
9 populations. This unchecked decline in water quality that
10 would be allowed under this legislation would have serious
11 negative impact on trout and trout supporting aquatic
12 animal population.

13 The Mountaineer Chapter of Trout Unlimited
14 respectfully request that the DEP increase the number of
15 streams which it proposes for Tier 2.5 protection from the
16 proposed 157 to the scientifically based number of 309 and
17 a number that the DEP has previously recognized as
18 appropriate. To do otherwise would reflect a profound
19 ignorance of the true value of the water result of the
20 state and the monetary and esthetic value of state's cold
21 water fisheries. Thank you.

22 MS. GREATHOUSE: The next speaker is Chris Byrd.

23 MR. BYRD: I'm from Clarksburg, West
24 Virginia. I'm also with T.U., but I would prefer to speak

1 as a private citizen. You know, I had to take a half day's
2 work -- I had to take off a half day's work to come down
3 here without pay, but I really appreciate the opportunity
4 to tell this agency that, you know, their anti-degradation
5 implementation procedures rule that they are proposing is
6 an absolute insult to the general public.

7 You know, this rule needs to be rewritten
8 by this agency, and it needs to be rewritten to include at
9 the very least the 309 streams that were submitted in the
10 2007 legislature. That's the least they could do. Really,
11 I mean, they ought to go back and submit any streams that
12 they have science on. You know, at one time they had,
13 what, 444 streams on their original presumptive list?

14 You know, the 2.5, really most of them
15 should be Tier 3 and they really ought to stand by that.
16 You know, this is an agency that's charged with protecting
17 our resources and it needs to do its job. This isn't
18 timber. This isn't coal. This is water. It falls from
19 the sky. It's everybody's.

20 I would ask that this agency not be
21 influenced by our "Open for Business" governor. I mean
22 surely he knows -- he's smart enough to know what this
23 water is worth. This agency is being asked to protect
24 waters that -- you know, it's probably going to turn out

1 that they're going to be worth a whole lot more than all
2 the coal and all the timber and all the oil that we've
3 taken out of this state in the last hundred years, but
4 they're only going to be worth economically, you know, if
5 they continue to run pure and unspoiled.

6 I'd also ask that this agency not be
7 influenced by special interest.⁵ You know, the same people
8 that my friend Don Garvin likes to call the dirty water
9 coalition. You know, they know that they are exempt from
10 most of this stuff. They're exempt from nonpoint source
11 pollution in most cases and these are the very same people
12 who would raise holy hell if I try to take something from
13 them, but they don't mind going to this agency and trying
14 to influence it. They don't mind being in the halls during
15 the legislative session trying to get this agency to write
16 the rules so that they can take what's mine. The water is
17 mine.

18 It might well flow -- I mean, it might well
19 flow through private land, but it's the people's water and
20 this agency needs to do its job. It needs to strive to
21 ensure that the people's property receives the maximum
22 protection. I for one strongly resent DEP even considering
23 writing a rule that condones the taking of my property,
24 clean water. Thank you.

1 MS. GREATHOUSE: The next speaker is Shawn
2 Fetter.

3 MR. FETTER: Sean Fetter, once again, with
4 Mountaineer Chapter T.U., a concerned citizen. I want to
5 just tell you that my friends Randy and Chris spoke well on
6 this issue and that I don't know a lot of details here, but
7 I know that when I hear the list was at 309 streams and
8 then it went down to 157 and wants to go even lower, I've
9 just got to ask myself what the heck is going on here? You
10 know, what is controlling the decision-making process?

11 I teach science at Elkins Middle School. I
12 can tell you right now looking at what I have to look at on
13 the internet or, you know, looking at the different studies
14 that are done, it doesn't look to me like any science was
15 used to take the streams down a notch. A lot of science
16 was used to try and get the streams listed at 309. That
17 something I can believe in.

18 I can only look at what's happening and,
19 you know, as a concerned citizen say, you know, when is it
20 going to be that instead of making decisions based on our
21 pocketbook, we make it based on our health and future
22 generations. The future generations that I'm teaching to
23 at Elkins Middle School, and the waterways do belong to the
24 public. The Public Lands Corporation under West Virginia

1 The Public Lands Corporation under West
2 Virginia Code 20-1-(a)-(1) has or knows and has preached
3 that they are a public trust. All the waterways in this
4 state, all 100,000 acres of rivers and streams are part of
5 a public trust. Part of the public trust, the streambed to
6 the normal high water mark.

7 To try and tell someone that the stream
8 that they live by is not worthy of protection while this
9 stream, I don't know how you can look someone in the face
10 and tell them that. I don't particularly live on the banks
11 of any stream, but if I did, you better darn well believe
12 that it would be worthy of protection and I'd fight for --
13 I'd fight for it even more. Just because it's not in our
14 own backyard doesn't mean it's not important.

15 So I as a concerned citizen want to see the
16 list stay at least 309, if not more, and I would like to
17 see it go to Tier 3 instead of 2.5, but at least that
18 allowance has been made, but I don't want to go any lower
19 than that. Thank you.

20 MS. GREATHOUSE: The next speaker is Don
21 Garvin.

22 MR. GARVIN: Well, this has been a long
23 journey. The 2007 legislative session behind us. You
24 don't know how much pain I'm in. Let me start by saying

1 that I know that Cabinet Secretary Timmermeyer feels that
2 there should be 309 streams on that Tier 2.5 list, but
3 we've gotten our self into a position here where politics
4 has changed reality and I believe the agency from the very
5 beginning has botched the whole anti-degradation process.

6 They never once was pro-active after the
7 2001 rule. They allowed the regulated community and the
8 other industry groups that are concerned about this to
9 undergo a massive six-year campaign of misinformation.
10 They had legislators convinced that this was a taking when
11 it's far from it and now the position you're in is really
12 strange because you told the legislature -- the agency told
13 the legislature publicly just this last February that 309
14 streams qualified for Tier 2.5 protection and as an aside
15 at one of the DEP advisory council meetings, Lisa McClung,
16 the Director of Water and Waste Management Division,
17 basically admitted that she feels that we will be lucky to
18 get the 47 streams.

19 I really don't know what you see at DEP --
20 what the agency sees that shows them that the political
21 climate has changed one bit, and the West Virginia
22 Environmental Council has signed onto the Rivers
23 Coalition's group comments. Personally, I think the agency
24 ought to withdraw the rule.

1 They have not worked to facilitate any kind
2 of coming to agreement between all the stakeholders
3 involved in anti-degradation and because I think it's
4 futile and because I think that we won't -- that the agency
5 won't succeed in getting Tier 2.5 beyond the default 47
6 that was the legislative compromise offered last year, I
7 have an amendment. I've prepared the following which I'm
8 going to submit to the Public Information Office tonight.
9 This is a letter to Lisa McClung.

10 On behalf of the West Virginia
11 Environmental Council, I hereby officially submit and
12 nominate the attached list of West Virginia's exceptional
13 rivers and streams for designation as Tier 3 outstanding
14 national resource waters under the anti-degradation
15 provisions and procedures contained in 60CSR5.8.2.

16 For the most part the following list of
17 streams have been previously identified by the West
18 Virginia DEP and the West Virginia DNR as Tier 2.5 waters
19 of special concern and is contained in the original
20 presumptive list of Tier 2.5 streams and appendix C of
21 60CSR5 the state anti-degradation implementation rule
22 adopted in 2001.

23 It is our position that the rivers and
24 streams contained in the attached list deserve greater

1 protection than is provided under Tier 2.5 and fully
2 qualify for Tier 3 designation as defined under the federal
3 Clean Water Act anti-degradation policy 40CFR131.12.a,3.

4 This section of the Clean Water Act states,
5 "Where high quality waters constitute an outstanding
6 national resource, such as waters of national and state
7 parks and wildlife refuges and waters of exceptional
8 recreational or ecological significance, that water shall
9 be maintained and protected."

10 "Further it is our position that the rivers
11 and streams contained in the attached list fully satisfy at
12 least six of the qualification criteria as established
13 under 60CSR5.8.2.a.2 and we've included the qualifying
14 criteria with each entry on the list. Although we feel
15 that many more West Virginia waters are also eligible for
16 Tier 3 protection, we have compiled the attached list based
17 on location."

18 "These streams are located either totally
19 or primarily on public lands. They are all of high water
20 quality, have exceptional ecological, recreational and
21 esthetic value and their designation would have
22 insignificant or no impact on private lands. These streams
23 deserve the highest level of protection available under the
24 law and that's Tier 3. Respectfully, Donald S. Garvin,

1 Jr., on behalf of the West Virginia Environmental Council."

2 Thank you.

3 MS. GREATHOUSE: The next speaker is Matt
4 Noerpel.

5 MR. NOERPEL: Thank you. My name is Matt
6 Noerpel. I live down in Rock Creek in the Coal River
7 Valley in Raleigh County. I work with a small community
8 group down there, Coal River Mountain Watch, but I'm
9 speaking mostly on behalf of myself here this evening.

10 I was here last year around this time when
11 we're debating, or not really debating, at all. It was
12 completely one-sided the reduction of streams from 444 on
13 this list to 309 and there was one person who was in favor
14 of that change and at least fifty people in this room
15 against that change.

16 One of the people who spoke asked the
17 question what's the point? What's the point of the DEP in
18 general? A number of those streams were taken off that
19 list because there was planned development there. In other
20 words, there was a reason for them to be protected and
21 that's why they were taken off that list, so the DEP would
22 only protect streams where nothing was threatening them
23 where they didn't need to be protected. That question has
24 yet to be answered to my knowledge.

1 I have another question that I'd like to
2 raise here tonight and that's why am I here and why is
3 everyone else here? Do you care about us and what we have
4 to say? As far as I know, Ms. Greathouse, you're the only
5 person for the DEP here tonight aside from the court
6 reporter. I don't know if you have a final say in the
7 number of streams on this list, but no one else here has
8 presented themselves as someone who has any decision-making
9 authority for the DEP.

10 Personally, I'm a little curious as DEP is
11 in general a wholly unaccountable organization, and I'd also
12 like to reiterate again, I said this went from 444 to 309,
13 now 157 and we all came out against it. 444 was what I
14 considered a good start. A good start at preserving this
15 state's waterways and fixing and lifting up the already
16 degraded waterways, such as the one in front of my house,
17 the Coal River. There are no live trout or reproducing
18 trout in the Coal River anymore. They stock it off a
19 bridge in front of my house and, honestly, I consider that
20 a little insulting that the DEP and the DNR thinks that
21 they can put non-needed rainbow trout in that river instead
22 of actually preserving it to a or keeping it at a level
23 where native trout will be able to return there and live
24 there. There have not been trout there for as long as I've

1 been around. It's been in bad shape for a while, but I
2 certainly would like to see it lifted up out of that pretty
3 dismal state that it's in.

4 So in conclusion, I guess, I'd say 309 is
5 unacceptable; 310 is unacceptable. 444 unacceptable but a
6 good start. It's the right direction. Protecting our
7 streams is in general something I agree with and so I
8 encourage you to go back to that 444, you or whoever else
9 has the authority to do this, who I don't know, and then
10 add to that as time goes on and we have the funds and the
11 resources to do that. Thank you.

12 MS. GREATHOUSE: The next speaker is Evan
13 Hansen.

14 MR. HANSEN: My name is Evan Hansen and again
15 I'm speaking on behalf of the West Virginia Rivers
16 Coalition, and I'd like to start with a comment on one
17 particular section of the rule, which is section 5.2 where
18 part of the paragraph is deleted, and this is a deletion
19 that speaks to whether or not streams that don't have data
20 would be treated as Tier 1 or Tier 2 streams. Although
21 it's a little bit unclear when reading the paragraph after
22 the deletion, it sure seems like this change is to default
23 streams without sufficient data to Tier 1 protection
24 instead of Tier 2 protection, and I know that most of us

1 are here to talk about Tier 2.5 or possibly even Tier 3,
2 but this is actually an important issue as well, because if
3 we're going to default streams to Tier 1 protection instead
4 of Tier 2, that's going to be more pollution and it's going
5 to mean dirtier streams, but I do think the big issue here
6 has to do with Tier 2.5. list and really this is about our
7 vision for the future do we think that we can have large
8 numbers of clean streams in concert without the economy or
9 do we have to race to the bottom with little control over
10 pollution of our prize trout streams.

11 I think most people here that are speaking
12 so far believe we can have both. It's a question about
13 science versus politics as well. This has been said
14 already and I'll say again. DEP did a good thing in the
15 past when they proposed a list of the 444 streams that we
16 talked about last year. That was a list that was based on
17 science. It was based on our expert agency, the DNR, and
18 this was a list that was already somewhat low, because the
19 agencies knew they were going to get a lot of flack for it
20 and they needed to only list those streams that they could
21 defend well.

22 Well, then that 444 went down to 309 and
23 DEP stood firm and as Don Garvin mentioned, they stated
24 publicly more than once I believe and they wrote in

1 response to comments that this was based on science -- 309
2 is the list based on science -- and now we're down to 157
3 and this is not all based on science. This is based as far
4 as we can tell what the governor has told the DEP to do and
5 that's the definition of politics.

6 To me this is such an important issue that
7 -- this is the kind of issue where DEP as the environmental
8 agency needs to stand up to the governor. The governor, no
9 matter how much he cares about streams or likes to fish or
10 anything like that, he's not qualified to make these
11 decisions. This is a decision that the expert agencies are
12 qualified to make and have made and I haven't seen any
13 indication that there's any science that backs up this
14 massive de-listing down to 157.

15 I'd be interested to see if there is any
16 presented in the response to comments presented today but
17 so far there's no indication that it's anything other than
18 politics and I think DEP can do better than that. Thank
19 you.

20 MS. GREATHOUSE: The next speaker is Larry Orr.

21 MR. ORR: Thank you. My name is Larry Orr.
22 I already told you that once, so I'll skip all the stuff
23 about who I am and how much I know and all that. Regarding
24 60CSR5, the West Virginia Council of Trout Unlimited

1 strongly objects to the reduction of the number of proposed
2 category Tier 2.5 streams to 157.

3 Of the number of the proposed streams
4 should be at least the 309 streams, and when I say 309, I
5 want to include Loop Creek so it's 309 or 310 depending
6 upon on how you're counting, but those are the streams that
7 were in the rules package that was introduced to the 2007
8 legislative session.

9 The reduction from the initial presumptive
10 list of 444 streams to 309 prior to that session was done
11 by the DNR and DEP and had some scientific basis.
12 Reduction of 309 or 310, whatever it was, to 157 in the
13 current proposed legislation was purely political and had
14 no basis. All reproducing trout streams should have Tier
15 2.5 protection.

16 I talked a little bit earlier about trout
17 fishing in West Virginia and bringing in \$80 million
18 annually with 2,000 miles of trout streams. Only a
19 fraction of these streams are included in 309 that were
20 proposed to be given Tier 2.5 protection in the legislation
21 -- introduced to the 2007 legislative session.

22 The wholesale reduction of Tier 2.5 streams
23 for political purposes must be reversed. It's not in the
24 interest of economy, West Virginia or its quality of life.

1 I previously said that water is the most important natural
2 resource in West Virginia. There's no alternative material
3 to replace water with, but we must give the proper
4 protection for this precious commodity.

5 Again, Trout Unlimited is not anti-business
6 or anti-development. It's time for West Virginia to comply
7 with federal water quality requirements by enacting the
8 anti-degradation implementation procedures and including
9 the 309 streams plus Loop Creek for Tier 2.5 protection as
10 presented in the package that was originally sent to the
11 2007 legislature. Thank you.

12 MS. GREATHOUSE: The next speaker is Ed Hayne.

13 MR. HAYNE: My name is ED Hayne and I'm a
14 resident of Charleston here. I'm speaking tonight as a
15 concerned citizen and as a trout fisherman. I was here a
16 year ago and I'm not going to get into as many details as I
17 did that evening, but I would like to comment on the
18 proposed rule change 60CSR5 and I'm very concerned that
19 every time I read about this process or I hear about this
20 process, the number of streams continues to decline.

21 Now the most recent reduction or de-listing
22 went from 309, maybe 310 as Larry Orr said, down to 157
23 with a stroke of a pen. Now everything that I respect and
24 know about a number of people who work within the DEP

1 agency and the DNR is that they are consummate
2 professionals, a lot of them. They're biologists. They're
3 in the field. They know these waters. They know these
4 streams like no one else's business.

5 You've heard other people say that and I'll
6 say it again. You cannot -- you should not and you should
7 never be allowed to change a decision based on science with
8 a pen, irregardless of what's going on in the process.
9 That upsets me; that concerns me and I think that the
10 citizens of this state and the anglers and anyone concerned
11 with the clean water resource needs to open their eyes to
12 this process and what's occurring. It's being politicized
13 at the eleventh hour. Unfortunately, this is the eleventh
14 hour plus almost seven years.

15 West Virginia is one of the few states in
16 this nation that does not have this anti-degradation clean
17 water rule as required by law. Once again, we're last in
18 something. We're last enacting it and here at the end it's
19 being politicized to the tenth degree.

20 I would like to see the list return to 309.
21 I happen to think and honestly believe and know somewhat
22 that that's probably a third of the reproducing trout
23 streams in the State of West Virginia. They are all over
24 the place.

1 Now I know this and I'm not a professional
2 biologist but I've spent 40 years pursuing trout in this
3 state. I keep a data bank. I spoke a year ago about
4 specific numbers and just let me say that 309 would be a
5 fabulous starting point. There was a lot of work that went
6 into those numbers. 309 great starting point.

7 We should be adding streams to this process
8 instead of subtracting and I think that's what concerns me,
9 and I know there's people at work at the present time
10 trying to address this situation. I'm greatly concerned
11 that this thing is going to spin on what's considered as
12 insufficient data. I really think that we don't have
13 enough data on these streams. We really need a concerted
14 effort and monies directed to finding where these
15 reproduction -- reproducing trout streams are, and I might
16 add I'm also concerned that this 2.5 category is a
17 compromise to begin with, with industry.

18 It seems like every time the process
19 continues, they're trying to whittle away more and more in
20 the process as though no compromise is good enough for
21 them. 309, 157, 47, 38, only the streams that were not
22 objected to I even heard that. That's ludicrous. The
23 water belongs to us as many people stated in there and at
24 some point in the future, and this is what I truly believe,

1 this isn't an issue about reproducing trout so much. What
2 it is an issue about is clean water and West Virginia in
3 the future. Their greatest most precious, most valuable
4 resource you watch will be clean water. We take it for
5 granted in this state and I think it's about time that we
6 enact some legislation that protects this water for the
7 future, for future generations.

8 My friend here Shawn in the front row talks
9 about the kids he teaches. What are we going to leave
10 them? Well, one legacy we can leave them is clean water.
11 It's easier to keep it clean than to clean it up, and
12 that's the real situation that I see with the Tier 2.5
13 Program and I would hope that the legislature would receive
14 a package from the DEP that has 309 streams on it, and I
15 would hope that they would enact it and also hope that it
16 is not as difficult in the future to get a stream added to
17 the list, because I can assure you that whatever number
18 comes out of the legislature, there's going to be concerted
19 efforts by many individuals to nominate and add streams to
20 the process and let's hope it doesn't take three years or
21 whatever it took to get a Watkins-Glen or Watkins Hollow on
22 the list.

23 I think all the streams -- I think the
24 decision on listing or de-listing streams should be based

1 on nothing more than science and I know that's probably a
2 far-fetched idea and a dream, but once again, I don't think
3 the politicians are qualified in any regard to de-list so
4 many streams just on their own. They're there for a
5 reason. They were there for a reason and I think they need
6 to be put back and that concludes my comments.

7 MS. GREATHOUSE: The next speaker is Don Gaspar.

8 MR. GASPAR: I just have about four comments.
9 I've followed Ed Hayne this time, Julian Martin last time,
10 but I did want to say, and this occurred to me just in
11 listening here, that I had heard I believe TV yesterday
12 that West Virginia has \$1 million for improving septic
13 systems and the governor's office announced this and it's
14 great. It's a great kind of recovery program going in
15 place right now to augment what we've had before, but the
16 idea of recovery is very much a part of the Clean Water Act
17 itself.

18 We have TMD owls for improving water
19 quality and to take a step backwards at all by lowering our
20 standards is I don't believe acceptable at all under the
21 Clean Water Act that is ultimately -- it's not our governor
22 -- is going to make a compromise reducing our numbers but
23 whether they're going to insist, I think, the USEPA on a
24 science-based list and if this West Virginia DEP thinks

1 can go forward finally with something unworkable and I
2 think the citizens at some point will question the USEPA.
3 If this is what our state offers finally, I think citizens
4 will ask if this is a acceptable process and conclusion.

5 So I'm speaking in a way for the future
6 that was mentioned here. Tourism, I think, increases 10
7 percent per year now and a lot of it's based on the quality
8 of our waters and this is a headwaters state. We have --
9 are blessed with a lot of water and we have a lot of
10 economies based on that and the individual landowner will,
11 I think, if he's willing to pollute his stream for some
12 reason, and I don't know why that he would, he has a
13 downstream neighbor that he's affecting, and this is our
14 heritage too that achimenes this good water quality that we
15 all share that he has no right to pollute and the Clean
16 Water Act says essentially that. Thank you.

17 MS. GREATHOUSE: The next speaker is Carol
18 Warren.

19 MS. WARREN: Hi, I'm Carol Warren and I work
20 with the West Virginia Council of Churches. We believe
21 that clean water is not a commodity. It's a basic human
22 right. Everybody needs it in order to live. We all need
23 it and there is no substitute. If we foul our water, we
24 don't have anything that can take its place.

1 Just imagine if you went into a restaurant
2 and you cut into your steak and something yucky and slimy
3 ran out of it or you had something red and glowing on your
4 salad. Well, if you're anything like me, you would be
5 throwing a fit. We would not tolerate having toxic
6 substances or dirty substances put into our food. Why
7 would in the world would we want toxic or dirty substances
8 to be put into our water and especially our very cleanest
9 water.

10 We believe that we have a moral obligation
11 to our children and to our grandchildren and their
12 grandchildren to take care of the state's most pristine
13 waters and we have some wonderful water here in the state.
14 We are sitting on the mother lode of the eastern seaboard.
15 You know, if you really look at the hydrological charts,
16 we've got it all. We've got good surface water. We've got
17 good ground water.

18 We think that the DEP should restore at the
19 very least the 309 streams to the Tier 2.5 list that were
20 there last year and protect all of our precious waters to
21 the greatest extent possible.

22 One of the gentlemen was talking about
23 quality of life and just on a personal note because I'm
24 also speaking as a concerned citizen, I'm a tenth

1 generation West Virginia. My family has been here for over
2 250 years and my ancestors I'm sure had some rough times,
3 but I think they also would agree that they had a really
4 good quality of life.

5 My daughter and my granddaughter don't live
6 here and that makes me really sad because I'd like to spend
7 more time with them, but in a way sometimes I'm glad that
8 they live in California because they have public policy
9 there that protects their environment and their health and
10 I think it's a shame that we can't do that here.

11 MS. GREATHOUSE: Is there anyone else that
12 would like to make a comment? Julian?

13 MR. MARTIN: There maybe someone here who --
14 correct me if I'm wrong on this but Slatyfork is not on the
15 157 list; is that correct? We found it on last year's 300
16 and -- is it 309? Found it on that list, but it's not on
17 this year's list. Now that's a joke.

18 Slatyfork is the nicest damn place you've
19 ever been in your whole life and they're taking it off the
20 list and do you know why, because those people up there at
21 Snowshoe want to flush their commodes down there. They are
22 sending a ten-inch pipe five miles overtop of these caves,
23 these limestone caves that -- all these sinkholes and stuff
24 -- and they're going to build a waste treatment plant right

1 across the creek, right across the river from the Sharp
2 farm and it's not on the list this time and you can bet
3 that's the reason why.

4 Well, I think -- is this thing broke?
5 Anyway for Slatyfork not to be on there is just a
6 monumental joke. I mean, that's ludicrous. That's
7 hilarious. I mean, it's a sham. This whole thing is a
8 sham and we know it. We're up against something awful and
9 if we don't raise holy hell, big-time raise hell and get
10 people down there storming those offices, it ain't going to
11 change because these people here are controlled by the
12 governor. They're controlled by the guy that put we're
13 open for business. Our legs are spread. Come on in.
14 That's who controls them.

15 MS. GREATHOUSE: The next speaker is Dick
16 Waybright.

17 MR. WAYBRIGHT: Okay, I'm Dick Waybright,
18 Executive Director of the West Virginia Forestry
19 Association. These comments are filed on behalf of the
20 members of the West Virginia Forestry Association. Our
21 association represents individuals in the business that
22 involves the management of forests, the production of
23 timber and the manufacture of wood products.

24 In 2000 the number of business

1 organizations and representatives of the rural landowner
2 community agreed strictly in the spirit of compromise to
3 support the creation of a Tier 2.5 category of streams that
4 would be protected under the state's anti-degradation
5 program. The other side of that compromise included a
6 clear set of rules by which West Virginia streams could be
7 nominated for listing in the Tier 2.5.

8 The West Virginia Department of
9 Environmental Protection has failed to follow these
10 procedures in a way that is acceptable to potential
11 affected landowners. These failures include the lack of
12 individual notice to landowners along proposed streams as
13 required and a general failure to respond in an amenable
14 way to more than 4,000 letters of objections they received.

15 The 2000 compromise did not include a
16 blanket list of Tier 2.5 streams that would circumvent the
17 agreed-upon reviewed procedures. DEP is insistent on a
18 presumptive list of Tier 2.5 streams in our view violates
19 the spirit of compromise.

20 As the process has unfolded, DEP has both
21 by action and failures to act aggregated its
22 responsibilities to affirmatively demonstrate that streams
23 proposed to these lists in fact meet their own criteria.
24 They have effectively shifted the burden the proof that the

1 legislature rightly placed with the agency to the citizens
2 of the state.

3 The rural landowner community has
4 endeavored to cooperate by agreeing to a limited number of
5 streams that might be included on a blanket or presumptive
6 list. We are not able or willing to agree to a blanket
7 listing of streams outside the reformed listing procedure
8 where private property is adjacent to the waters; therefore
9 we oppose the blanket or presumptive listing of streams
10 other than those which receive no objections in the earlier
11 public comments or those which including their headwaters
12 are wholly contained on public-owned land.

13 We request that the legislature act to
14 protect the rights of the citizens by being casually -- who
15 are being casually abridged by requiring that the agency to
16 adhere to its own nomination and listed procedures and
17 state law.

18 The relief we seek does not harm the rule
19 nor does it do any fashion less than the protection that's
20 contemplated for waters that meet clearly set forth -- the
21 criteria set forth by the DEP. Thank you.

22 MS. GREATHOUSE: The next speaker is Jamie
23 Kinsey.

24 MS. KINSEY: Good evening. I'm here

1 representing the West Virginia Farm Bureau and behalf I'm
2 also a landowner and a production agriculturist. We
3 believe that Tier 2.5 is a taking, is an effect of a
4 private property land ownership's ability to have economic
5 progress. For example, if one of these streams were to be
6 designated on my land, it would hinder my ability to
7 produce a product and thus would have a hamper on my income
8 that year.

9 We also feel that through the past the DEP
10 did not notify the landowners through proper notification,
11 through their process through the years. We also feel
12 that the under 56 streams is not enough. We feel the
13 streams -- the 38 streams that did not receive an objection
14 could be put on that list but we still feel it probably
15 needs to be worked on on those streams and I thank you and
16 have a good evening.

17 MS. GREATHOUSE: The next speaker is Dave
18 Sypolt.

19 MR. SYPOLT: Hello, I'm Dave Sypolt, and it
20 was mentioned earlier that politicians are not qualified to
21 determine what streams to be included or excluded and I
22 might agree with that, but a politician can read and
23 understand the law and without much difficulty even I can
24 clearly understand that the DEP has failed on several

1 points of the law.

2 Not notifying landowners as required, not
3 responding effectively to more than 4,000 objections or
4 objection letters which were received, not doing the
5 required studies, most importantly, shifting the burden of
6 proof from the West Virginia Department of Environmental
7 Protection to the private landowner, even though the rule
8 is clear that the responsibility is with the DEP. Using
9 inadequate data to justify the listings and using 20-year
10 old studies with questionable, unverified data.

11 Now to Ms. McClung I wish to register my
12 objection to the process by which the DEP has attempted to
13 promote the presumptive Tier 2.5 stream list to the list
14 for waters of special concern. I recall the long and
15 typically unproductive discussions last legislative session
16 in 2007 over Senate Bill 255 and its proposed authorization
17 of appendix C presumptive list into the appendix A waters
18 of special concern.

19 The primary objection rested in the fact
20 that the DEP did not exercise due care in following the
21 rules set forth by which the streams were being nominated
22 into the waters of special concern. I'm certain that if
23 the proper procedures were not completely followed this
24 time, we'll find ourselves in the same impasse next year.

1 You can't take something from me; that's the clean water.
 2 You don't have a right to pollute. You do not have that
 3 right, so that's not a taking from you, and that's what I
 4 have to say about that. It's not to take away my fish, my
 5 water. It belongs to me. It belongs to you and it belongs
 6 to everybody else here. Thank you.

7 MS. GREATHOUSE: Is there anyone that would
 8 like to make a comment? Last call? Back here.

9 MS. O'FARRELL: Good evening. I'm Mary Ellen
 10 O'Farrell. I live here in Charleston where I was raised,
 11 and I do not hunt or fish. My husband hunts and I have
 12 found listening to the comments this evening of great
 13 interest because I am so surprised by the presumption of
 14 Bible-reading and Bible-believing Christian people that we
 15 have the right to pollute what God made. We don't own what
 16 God made. The earth is the Lord's and the fullness
 17 thereof, the world and all they that dwell within.

18 What will we offer our children in exchange
 19 for clean water and clean air. We can't replace these. It
 20 is very prideful to think that something that will benefit
 21 us in the short term is enough to offer our children. I
 22 have three grown sons and it's my doubt that they will live
 23 here and one reason they will not live here is because of
 24 our crummy policies that allow the deterioration, the

1 polluting, poisoning and fouling of air and water for quick
2 short-term gain. It's very regrettable, but there is
3 nothing I can say to my children. I can't tell them that
4 it isn't true that we're not really like this, because this
5 is what we're like I'm sorry to say.

6 Please think better of it. I address these
7 comments to the DEP.

8 MS. GREATHOUSE: Is there anyone else that would
9 like to make a comment? No other comment? Okay.

This completes our public hearing tonight.
The official comment period ends tomorrow July 17th at 5:00
p.m. We will file our rule with our responses to your
comments with the Secretary of State's Office. Thank you
again for your interest and participation. This closes the
formal record.

(WHEREUPON, the hearing was closed.)

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

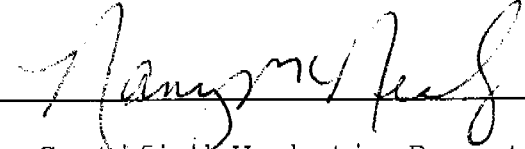
STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

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

Given under my hand this 22nd day of July,
2007.

My commission expires November 26, 2010.




Certified Verbatim Reporter

TIER 2.5

dep

west virginia department of environmental protection

WV DEP-DIVISION OF WATER AND WASTE MANAGEMENT WATER QUALITY STANDARDS PROGRAM SIGN IN SHEET

MEETING:

DATE AND TIME:

Location:

Attendees:

Name	Company	Telephone Number	Email Address
------	---------	------------------	---------------

1.

2.

3.

4.

5.

6.

7.

8.

9.

10.

11.

12.

13.

✓	Gary Zuehlert	WV-CAG	
✓	John David	P&S-Kincaid	PSD
✓	Randy Kesling	T.U. mntare-	RKesling@ma.RR.CO
✓	Chris Syrd	MCTU	C BYRD@MA.RR.CO
✓	Shawn Fetter	MCTU	304-823-2355 wvwhitetailwater@yahoo.com
✓	Don Garvin	WVEC	(304) 395-0078 DSGJ@aol.com
	Gary M. Hershey	MCTU	304-457-4856 gmhershe@msn.com
	Edward G. Griffin	MCTU	624-6684
✓	MATT NOERPTEL	CRMW	304 554-2324 matt@crmw.net
✓	Evan Hansen	WVRC	292-2450 ehansen@downstreamstrategies.com
	Joe Peabody	WVRC	637-7201 jpeabody@wvrc.org

SPEAK

	Name	Company	Telephone Number	Email Address
14.	Paul Curry	T.U.	945-2719	
15.	John Lavender	T.U.	764 8123	
16.	Don Lyons	T.U.	595 1344	
✓ 17.	LARRY ORR	WVCTU	965 7185	edkorse@suddenlink.net
18.	May Robertson	KUCTO	744-9338	troutcreeper@peoplepc.com
19.	JACK WILLIAMS	KUCTO	776-2566	JACKWILLIAMS@SUDDENLINK.NET
20.	LARRY BEHNER	KUCTO	776-4059	lrbehner9@msn.com
✓ 21.	Ed Hayne	KUCTO	345-6960	
✓ 22.	DON GADDER	MCTU	472 3704	NONE
23.	Robert Bittner	JLC MCTU	289 5596	
24.	Robt. Bittner	SK MCTU	358 3530	
25.	JULIAN MARTIN	WV/HIGHLANDS CO. >	342-8989	MARTIN JUL @ AOL . IE
26.	Nelson Sorah	TU	344-9190	NSORAH@AOL.COM
27.	JOHN GAGNON		344-2684	JGAGNON@MINDSPRING.COM
✓ 28.	Carol Warren	WVCC	847-5721	peacelovemom@gmail.com
29.	Jim BAZZLE	RAINBOW PRS	7045932	jbazze@aol.com
30.	Janet Gagnon	—	344-2684	jsgagnon@mindspring.com
31.	Tim Craddock		743-3471	tcraddock@suddenlink.net
32.	Veff Nelson	TU	768-3933	jnelson@attplaybrown.com
33.	Barney W. Frazier, Jr.		926-8316	
34.	LINDA K TENNANT	STB	720-3420	ltennant@spilmanlaw.co.
35.				
36.				
37.				

Name

Company

**Telephone
Number**

**Email
Address**

★ 38. Waybright, Dick -

★ 39. Jamie Kinsey

★ 40. Dave Syport

41.

42.

43.

44.

45.

46.

47.

48.

49.

50.

51.

52.

53.

54.

55.

56.

57.

58.

59.

60.



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

July 11, 2007

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 Abes Run (KNG-78-L)

Dear Ms. McClung:

It was discovered by our company TODAY that we own land directly above Abes Run in Pocahontas County that your agency has included in the presumptive list of Tier 2.5 streams. Since DEP has refused to notify each individual landowner that their land is going to have restrictions placed upon it if it becomes a Tier 2.5 stream, hundreds of landowners are unaware of the potential loss of their rights under this Rule. This is completely unacceptable. It is very disturbing that my office was informed of the comment deadline via a telephone call yesterday from a state association instead of being notified by your agency. Your website is extremely difficult to navigate and once locating the Tier 2.5 information, it still does not contain information about the public hearing and comment period! Since yesterday, we spent hours going over the list and maps, trying to determine if we own land along or above these streams. Once again, the burden has been placed on the landowner to determine if their land is affected. This is NOT what was intended by the Legislature and agreement with the business community.

There should not be a presumptive list of Tier 2.5 streams. Each stream should be nominated, proven by DEP that it has recent data to show it should be listed as a high quality stream, and submitted to the WV Legislature for approval/denial as the Rule dictates.

I strongly object to the classification of this stream as a Tier 2.5 stream. As private landowners directly above Abes Run, we are extremely concerned about

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Sawmills
Dry Kilns

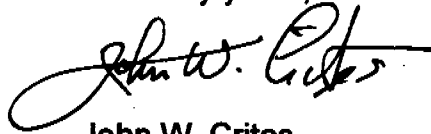
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

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 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 Abes Run from the Tier 2.5 list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites", with a stylized flourish at the end.

John W. Crites
Chairman

JWC/dhr

cc: Senator Walt Helmick
Senator Clark Barnes
Delegate Bill Hartman
Delegate Bill Proudfoot



July 11, 2007

Airport Road • Petersburg, West Virginia

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 North Fork Deer Creek (KNG-68-A)

Dear Ms. McClung:

It was discovered by our company TODAY that we own land along the North Fork Deer Creek in Pocahontas County that your agency has included in the presumptive list of Tier 2.5 streams. Since DEP has refused to notify each individual landowner that their land is going to have restrictions placed upon it if it becomes a Tier 2.5 stream, hundreds of landowners are unaware of the potential loss of their rights under this Rule. This is completely unacceptable. It is very disturbing that my office was informed of the comment deadline via a telephone call yesterday from a state association instead of being notified by your agency. Your website is extremely difficult to navigate and once locating the Tier 2.5 information, it still does not contain information about the public hearing and comment period! Since yesterday, we spent hours going over the list and maps, trying to determine if we own land along these streams. Once again, the burden has been placed on the landowner to determine if their land is affected. This is NOT what was intended by the Legislature and agreement with the business community.

There should not be a presumptive list of Tier 2.5 streams. Each stream should be nominated, proven by DEP that it has recent data to show it should be listed as a high quality stream, and submitted to the WV Legislature for approval/denial as the Rule dictates.

I strongly object to the classification of this stream as a Tier 2.5 stream. 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

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Sawmills
Dry Kilns

Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

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 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 North Fork Deer Creek from the Tier 2.5 list.

Sincerely yours,


John W. Crites
Chairman

JWC/dhr

cc: Senator Walt Helmick
Senator Clark Barnes
Delegate Bill Hartman
Delegate Bill Proudfoot

July 11, 2007

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 in Pocahontas County that your agency has included on your revised presumptive list of Tier 2.5 waters. I was just informed YESTERDAY by a state association, not DEP, that your agency is accepting written comments on the revised presumptive list of streams and the deadline is Tuesday, July 17. Upon visiting your website, we had a very difficult time finding the Tier 2.5 information and found NO information about the comment deadline or public hearing! This is precisely the reason we, as landowners, are so opposed to the methods used by DEP to notify the public. My company has been extremely involved in the process since 2000 but just today discovered two more streams that affect our land on your list. Each individual landowner MUST be notified by your agency of each tract that affects them so they have the ability to respond!

There should **not** be a presumptive list of Tier 2.5 streams. Each stream should be nominated, proven by DEP that it has recent data to show it should be listed as a high quality stream, and submitted to the WV Legislature for approval/denial as the Rule dictates.

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, is overstepping your authority, and this is a violation of private property rights.

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

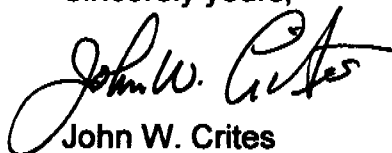
Sawmills
Dry Kilns

Dimension
Panels

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 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 cursive script, appearing to read "John W. Crites".

John W. Crites
Chairman

JWC/dhr

cc: Senator Walt Helmick
Senator Clark Barnes
Delegate Bill Hartman
Delegate Bill Proudfoot



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

July 11, 2007

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 in Pocahontas County that your agency has included on your revised presumptive list of Tier 2.5 waters. I was just informed YESTERDAY by a state association, not DEP, that your agency is accepting written comments on the revised presumptive list of streams and the deadline is Tuesday, July 17. Upon visiting your website, we had a very difficult time finding the Tier 2.5 information and found NO information about the comment deadline or public hearing! This is precisely the reason we, as landowners, are so opposed to the methods used by DEP to notify the public. My company has been extremely involved in the process since 2000 but just today discovered two more streams that affect our land on your list. Each individual landowner MUST be notified by your agency of each tract that affects them so they have the ability to respond!

There should not be a presumptive list of Tier 2.5 streams. Each stream should be nominated, proven by DEP that it has recent data to show it should be listed as a high quality stream, and submitted to the WV Legislature for approval/denial as the Rule dictates.

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, is overstepping their authority, and this is a violation of private property rights.

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Sawmills
Dry Kilns

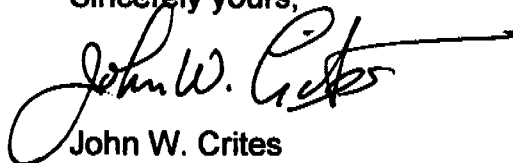
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

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 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 Little River/East Fork Greenbrier 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

cc: Senator Walt Helmick
Senator Clark Barnes
Delegate Bill Hartman
Delegate Bill Proudfoot



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

July 11, 2007

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 Right Fork Clover Run (MC-51-A)

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc. owns land along the Right Fork Clover Run in Tucker County that your agency has included on your revised presumptive list of Tier 2.5 waters. I was just informed YESTERDAY by a state association, not DEP, that your agency is accepting written comments on the revised presumptive list of streams and the deadline is Tuesday, July 17. Upon visiting your website, we had a very difficult time finding the Tier 2.5 information and found NO information about the comment deadline or public hearing! This is precisely the reason we, as landowners, are so opposed to the methods used by DEP to notify the public. My company has been extremely involved in the process since 2000 but just **today** discovered two more streams that affect our land on your list. Each individual landowner **MUST** be notified by your agency of each tract that affects them so they have the ability to respond!

There should **not** be a presumptive list of Tier 2.5 streams. Each stream should be nominated, proven by DEP that it has recent data to show it should be listed as a high quality stream, and submitted to the WV Legislature for approval/denial as the Rule dictates.

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, is overstepping your authority, and is a violation of private property rights.

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Sawmills
Dry Kilns

Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

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 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 Right Fork Clover Run from the Tier 2.5 list.

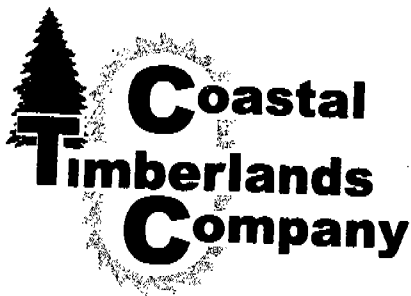
Sincerely yours,

A handwritten signature in black ink, appearing to read "John W. Crites". The signature is fluid and cursive, with a large initial "J" and a stylized "C".

John W. Crites
Chairman

JWC/dhr

cc: Senator Jon Hunter
Senator David Sypolt
Delegate Stan Shaver



2
Timberland Management

P.O. Box 709
Buckhannon, West Virginia 26201
Phone: 304-460-7000
Fax: 304-460-7100

July 10, 2007

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

RE : Objection to a proposed Tier 2.5 listing of a stream, specifically Mill Creek MT-64

Dear Director McClung :

We have responded in the past regarding our objections to the inclusion of Mill Creek MT-64 in the list of proposed Tier 2.5 streams. Our letters to your office dated March 9, 2002 and November 22, 2005 (copies enclosed) list our objections to this proposal. We stand by our objections as stated in those letters and wish to re-emphasize our position on this matter.

We ask that your staff consider changing the description of the included section of the stream so as to include only that portion that lies within the boundaries of the Kumbrabow State Forest. This would reduce the length of the included section of Mill Creek by approximately two miles, and leave approximately 8.7 miles of Mill Creek on the Tier 2.5 Streams List. By making this reduction in the length of the included section of Mill Creek most, if not all, of the privately owned land along Mill Creek would be excluded from the impact of this stream designation.

Sincerely,

Edward G. Kraynok
Vice President



Timberland Management

P.O. Box 709
Buckhannon, West Virginia 26201
Phone: 304-472-2854
Fax: 304-472-2388

November 22, 2005

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

RE : Objection to a proposed Tier 2.5 listing of a stream, specifically Mill Creek
MT-64.

Dear Director McClung :

We have responded with our initial objections to the listing of this stream by letter dated the 9th day of March, 2002. We stand by our objections and wish the objections to remain of record to be used in your final consideration process. Also as a matter of record, in October of 2003 Coastal Lumber Company changed the name of the corporation to Coastal Forest Resources Company, and subsequently in October of 2003 authorized Coastal Timberlands Company to transact business in West Virginia.

We wish to further expound on our objection to the inclusion to the above referenced stream for Tier 2.5 designation. We believe that the designation of this stream as a Tier 2.5 stream will cause our adjoining property to have a lower value. The Tier 2.5 designation will be, in effect, an encumbrance on our property, thus causing the property value to be lower to a majority of prospective purchasers as well as lenders of capital who finance the purchase of land. Lower property values result in lower property taxes and thus less tax income to the respective County and State.

Your response to our initial question on the impact on private property owners was "The designation of a stream as Tier 2.5 is to prevent significant degradation of the water quality, and is not designed to prevent the development of land in the watershed." Although it may be true that Tier 2.5 designation is not designed to prevent land development, the designation does place additional burdens to those adjoining landowners who may want to develop some or all of their property. Those burdens are the additional costs of documentation involved in the various processes of permitting which



Hardwood Lumber
Pine Lumber & Plywood
Treated Wood Products

Corporate Headquarters
P.O. Box 829
Weldon, North Carolina 27890
Telephone: (919) 536-4211
Fax: (919) 536-3102
Please Respond To:

March 9, 2002

Mr. Michael Callaghan
Secretary
WV Department of Environmental Protection
1356 Hansford Street
Charleston, WV 25301

Re: Objection to proposed Tier 2.5 listing of a stream, specifically Mill Creek of Tygart
Valley River in Randolph County, DNR stream number MT-64.

Dear Secretary Callaghan :

Coastal Lumber Company is the owner of timberland along Mill Creek of the Tygart Valley River that you have included on your presumptive list of Tier 2.5 waters. This property is listed as Tax Ticket number 10244 and Parcel 01 on Tax Map 111 in Huttonsville District of Randolph County. As an affected party, I object to the classification of this stream as a Tier 2.5 stream. I request that you provide detailed and adequate justification as required by 60 CSR 5&6 2b and 60 CSR 5 & 8.1.a 2 as follows for inclusion of this stream:

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, when applicable.

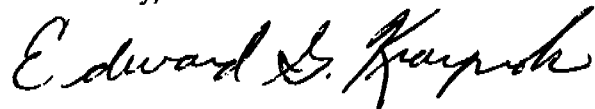
The interests of Coastal Lumber Company which will be affected, and the nature of the effects that we believe this Tier 2.5 stream listing will have on Coastal Lumber Company are :

1. The ability to properly practice silviculture; to grow, manage, and harvest timber on this property.
2. The ability to properly develop the minerals underlying this property.
3. The ability to properly manage all forms of wildlife on this property.
4. The ability to properly develop any recreational uses of the property.
5. The ability to develop the property for any agricultural purposes.
6. The ability to develop or subdivide the property for housing, industrial, or construction purposes.

We realize that the development of this legislation is in response to the 1972 Federal Clean Water Act. However, the attempted listing of the extremely high number of streams will place an unnecessary financial burden on the affected landowners, as well as the taxpaying general public, by the additional cost of administration and enforcement of this legislation. We also feel that the existing laws and regulations are more than adequate to ensure that the quality of the water in the State of West Virginia is not degraded, and in fact, improved.

I will look forward to your prompt and timely response.

Sincerely,

A handwritten signature in cursive script, reading "Edward G. Kraynok".

Edward G. Kraynok
Land Manager

July 17, 2007

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 opposes the 156 streams proposed on the presumptive Tier 2.5 list.

Our objections are based on both procedural violations perpetrated by the WV DEP and to the general taking of property rights that will be eventually realized if this part of the rule is implemented.

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.

We believe that if implemented, these listings have the potential of depriving landowners both adjacent to the stream and upstream of a proposed Tier 2.5 stream.

The WVDEP has failed to adequately address its obligations under the West Virginia Real Property Protection Act (22-1A-1). Specifically to Tier 2.5, 60 CSR 5-6.1a.1 mandates compliance with this provision.

The code is as follows:

(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

According to 60 CSR 5 6.3.a, no significant degradation will be allowed beyond the 10 percent assimilative capacity of baseline water quality. The WVDEP has failed to provide anecdotal instances where some infringement on property rights would occur under 22-1A-1. These scenarios are easily construed.

For instance, Landowner A and Landowner B both own properties adjacent to the same Tier 2.5 stream. Landowner A builds a campground on his property assuming the entire 10 percent assimilative capacity. Landowner B desires to build a campground on his property that produces similar discharges. Because the assimilative capacity has already been consumed by Landowner A's campground, Landowner B's plans for development of his property would likely be denied.

In this instance, (5) of 22-1A-1 would be unable to be met because of there is no flexibility in the rule. Therefore, would this not be deemed a taking by the state depriving the owner of its intended use?

Similar scenarios can be built for logging, natural resources and construction of any type, including agriculture that disturb more than one acre. Under the NPDES Construction permits, all planned construction activity on Tier 2.5

streams must apply for this type of permit if more than an acre is disturbed. The thresholds for obtaining this permits are much more intense and predictable and much more costly. This type of permit also requires a public comment period. It seems contrary to our rights as property owners and to privacy to allow the public to comment on the construction of a barn, a road or a house.

We also question the removal of old language in 6.2 Initial Presumptive Listing for Tier 2.5 because the WVDEP has yet to meet the criteria in this section.

No evaluation of the impact on private property owners was done prior to inclusion of any stream on the list. This is a contrary to section 8.1.a.2.A. of the rule.

The list was constructed without adequate representation from affected parties. No landowner with property adjacent to any stream on the presumptive Tier 2.5 list was contacted nor were any organizations representing landowners' interests. This is a contrary to section 8.1.a.2.B. of the rule

With the absence of any consideration given to economic development when including a stream on the presumptive Tier 2.5 streams, 8.1.a.2.G was also infringed upon.

In many cases, especially with alleged trout streams, existing water quality data is either non-existent, extremely outdated and/or sparse. If little or no water quality exists, it is scientifically unfeasible to justify the listing of a stream as Tier 2.5. Where your agency does provide water quality data, some measurements date back more than ten years and some streams have only one sampling. In these instances, 8.1.a.2.E was breached. Some trout stream listings were supported from a report that dates back to 1984. Much of these data are not recent and of questionable reliability. The rule requires them to be both recent and reliable.

WVDEP not only did not provide adequate data, but also switched the burden of proof to the affected landowners. This action altered the implementation of the rule from requiring your agency 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.

Section 2.4 of 60-5-1 defines baseline water quality a "the ambient concentration established at the time of an initial antidegradation review under rules effective May 17, 2001, for a stream segment or any other waters of the state." Given the presentation of supportive scientific data for listing a stream as Tier 2.5 thus far, which has been weak in most instances, it is impossible to imagine how any accurate baseline water quality level can be or has been established on the effective date. It is reasonable to question how these streams could be considered Tier 2.5 when many may not actually meet all high quality criteria thresholds.

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.

WVDEP received more than 4,000 objections in the initial comment period. Your agency has stated publicly that of all the 444 streams on the initial presumptive Tier 2.5 list, only 38 of them did not receive objections. While you have not provided substantiated evidence of the effect on private property owners as called for in the criteria, the outcry of these more than 4,000 affected citizens should be evidence enough. **More than 4000 families in West Virginia have been ignored.**

WVDEP's failure to consider the economic impact of the listing of 356 streams is unmanageable. To tell objectors that they must provide plans for development ignores any prospective development or change in land use with ownership. If we look back to the development that has occurred in the general area of the majority of streams over the past twenty years we can see the economic impact of the list.

Many major developments, in particular tourism attractions created more than twenty years ago, would probably not have come to fruition had these rules been in place at the time of implementation. Many of the Tier 2.5 streams are near the three major ski resort areas in the state.

If West Virginia is "Open for Business" how can the consideration of the impact on economic development be ignored given our history and our state's continual efforts to expand economic opportunities? We assure that the implementation of this will have significant economic impact on many regions of the State and will affect many generations to come.

In closing, 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 somewhat unbelievable.

While we, as farmers and landowners, take pride in the job we have done to protect the quality of these waters, we also feel that it is inherently unfair that we are targeted for this same reason.

We are asking that all of the 156 streams that received have previously been rejected to be removed from the Tier 2.5 list. For the streams that did not receive objections, WVDEP should begin the process over again, starting with notice to each individual property owner. With the list trimmed down to less than forty, this should be a manageable task.

Sincerely,

James. F. Kinsey

Executive Secretary



Route 250/92, P.O. Box 7 • Bartow, West Virginia 24920-0007

Tel: (304) 456-4597 • Fax (304) 456-3416

July 12, 2007

Lisa A. McClung, Director
Division of Water & Waste Management
WV Department of Environment Protection
601 57th Street SE
Charleston, WV 25304

Dear Lisa A. McClung

Ref: Object to New Rule on antidegradation 2.5 stream

For the following streams:

Gandy Creek Code MC-60-T-S Timberland Property
Tory Camp Run Code MC-60-R Timberland Property
East Fork Greenbrier River Stream Code KNG-78 Industrial Site

Our company property joins the East Fork Greenbrier River Stream Code KNG-78.

We object to having this river as one of the 156 streams put on a antidegradation plan to provide water with a level of protection known as Tier 2.5 (being a component of the Clean Water Act).

If this 2.5 is passed it would effect the operation of our business in many ways, Example:
decrease the value of our industrial property
not being able to have access to property in various locations if need to do so
lack of increase in building or production in certain areas of our plant

We understand that our rivers and streams need to be protected for the environment and sportsmanship, but we also need the river streams to continue operating businesses, and giving jobs to the local people who have land and a home by this river.

Speaking for our company the tier 2.5 rule on the KNG-78 stream is already a healthy trout stream and does not need to be regulated as a 2.5.

Sincerely,

Barry E. Frazee, Vice-President

5



PARDEE MINERALS LLC

340 MacCorkle Avenue S.E.
Suite 300
Charleston, WV 25314

Telephone: 304-343-4353
Telecopier: 304-343-4279

July 11, 2007

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

Dear Director McClung:

This letter responds to your proposed list of tier 2.5 streams of June 7, 2007 concerning the inclusion of Mash Fork, KNB-13-D on the presumptive list of Tier 2.5 streams established by the state's anti-degradation rule. We are confused as to WVDEP's justification for the proposed Tier 2.5 listing for Mash Fork in Mercer County. In WVDEP's response to Section 8.1 a.2.F., unique or exceptional ecological, recreational or aesthetic resource value, Mash Fork was designated as a **High Quality Stream on Public Land** and is located entirely on public land. This statement is in error, while the lower section of Mash Fork is located in Camp Creek State Park, the upper section, approximately half of the entire section designated for Tier 2.5 inclusion is on Pardee Resources Company property.

It is our hope that, after careful consideration of all the qualification criteria and especially the fact that this stream has been erroneously designated as being a high quality stream on public land which in fact a large portion is not on public land. We request that the WVDEP and the State of West Virginia **NOT** to include Mash Fork on the Tier 2.5 list.

Sincerely,

John M. Praskwicz, P.E.
Senior Vice President - Coal Division

:JMP

cc: Jeffrey W. Wagner
George D. Curtin III
David P. Foulke



The Senate of West Virginia

Charleston

DAVE SYPOLT
Post Office Box 5
Kingwood, WV 26537

(304) 357-7914 (Senate)
(304) 698-5299 (Mobile)
davesypolt@wvsenate.com

July 16, 2007

COMMITTEES:

Energy, Industry and Mining
Government Organization
Interstate Cooperation
Agriculture
Finance
Military

Ms. Lisa McClung, Director
WV Department of Environmental Protection
Division of Water and Waste Management
601 57th Street
Charleston, WV 25301

Re: Comments on 60 CSR 5

Dear Ms. McClung,

I wish to register my objection to the process by which the DEP has attempted to promote the presumptive tier 2.5 stream list to the list for waters of special concern. I recall the long and typically unproductive discussions last regular legislative session (2007) over SB255 and its proposed authorization of Appendix C presumptive list into Appendix A waters of special concern.

The primary objection rested in the fact that the DEP did not exercise due care in following the rules set forth by which streams were to be nominated into the waters of special concern. I am certain that if the proper procedures are not completely followed this time, we will find ourselves at the same impasse next year.

My suggestion is to accept the verbiage set forth in the EPA's document known as the Clean Water Act and, similar to Pennsylvania, simply accept the requirement without naming specific waterways, streams, or rivers. Then, on an individual basis, and as needed, the DEP may exercise their authority and promote these presumptive waters to waters of special concern after due diligence for the law has been observed.

Proposed rule:

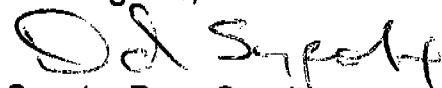
(a) *Antidegradation policy.* This antidegradation policy shall be applicable to all waters of the United States within the State of West Virginia, including wetlands.

(1) Existing in-stream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the inter-governmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources.

(3) Where high quality waters are identified as constituting an outstanding National resource, such as waters of National and State parks and wildlife refuges and water of exceptional recreational and ecological significance, that water quality shall be maintained and protected.

Best regards,


Senator Dave Sypolt

West Virginia Forestry Association

P.O. Box 718 - Ripley, WV 25271 - Phone: 304-372-1900 - FAX: 304-372-1907
E-Mail: wvfa@woodventures.net - www.wvfa.net - www.wvfa.org



July 16, 2007

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

Dear Director McClung:

These comments are filed on behalf of the members of the West Virginia Forestry Association. Our association represents individuals and businesses involved in the management of forests, the production of timber and the manufacturing of wood products.

In 2000 a number of business organizations and representatives of the rural landowner community agreed, strictly in a spirit of compromise, to support the creation of a "Tier 2.5" category of streams that would be protected under the state's anti-degradation program. The other side of that compromise included a clear set of rules by which WV streams could be nominated for listing as "Tier 2.5." The WV Department of Environmental Protection has failed to follow these procedures in a way that is acceptable to potentially affected landowners. These failures include the lack of individual notice to landowners along the proposed streams as required and a general failure to respond in a meaningful way to the more than 4000 letters of objection they received.

The 2000 compromise did not include a blanket list of Tier 2.5 streams that would circumvent the agreed upon review procedures. DEP's insistence on a "presumptive" list of Tier 2.5 streams, in our view, violates the spirit of the compromise.

As the process has unfolded, DEP has both by actions and failures to act abrogated its responsibility to affirmatively demonstrate that streams proposed to be listed in fact meet their own criteria. They have effectively shifted the burden of proof that the legislature rightly placed with the agency to the citizens of the State.

The rural landowner community has endeavored to cooperate by agreeing to a limited number of streams that might be included on a blanket or presumptive list. We are not able or willing to agree to the blanket listing of streams outside the agreed upon listing procedure where private property is adjacent to the waters. Therefore, we oppose the blanket or presumptive listing of streams other than those which received no objections in earlier public comments or those which, including their headwaters, are wholly contained on publicly-owned land.

We request that the Legislature act to protect the property rights of citizens from being casually abridged by requiring that the agency adhere to its own nomination and listing procedures and state law.

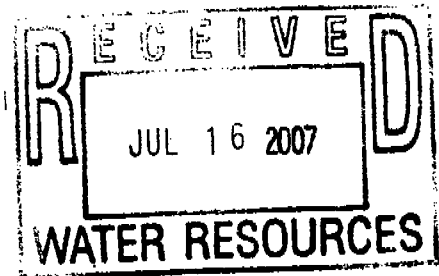
The relief we seek does no harm to the rule nor does it in any fashion lessen the protections contemplated for waters that meet clearly set forth criteria.

Sincerely,

A handwritten signature in black ink, appearing to read "Dick Waybright", with a long, sweeping horizontal line extending to the right.

Dick Waybright,
Executive Director

July 13, 2007



Lisa A. McClung, Director
Div. of Water & Waste Management
WV Dept. of Environment Protection
601 57th St. SE
Charleston, WV 25304

Dear Ms. McClung:

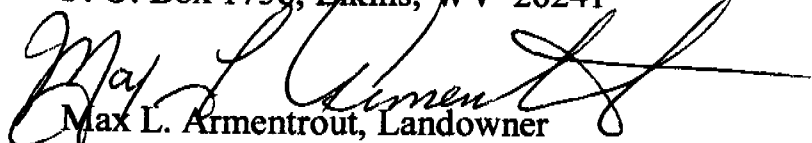
The West Virginia DEP has issued a new rule on antidegradation, which contains 156 streams that they plan to list as 2.5 streams.

I previously wrote a letter containing a list of the streams that we wish to not be listed. As a private landowner, I feel compelled to take this opportunity to strongly oppose the Tier 2.5 list. Streams that I have concern about are listed below:

High Ridge Run	PSB-28E
Big Run	PSB-28EE
Sawmill Branch	PSB-28EE-2
Back Run	PSB-28-EE-2A
Teter Camp Run	PSB-28-EE-3
Seneca Creek	PSB-28-K
Long Run	PSB-28-K-2-B
Horsecamp Run	PSB-28-K-3
Strader Run	PSB-28-K-4
Whites Run	PSB-28-K-6

We feel that the existing laws and regulations are stringent enough to maintain our current superior water quality.

TRIPLE A FARMS
P. O. Box 1758, Elkins, WV 26241

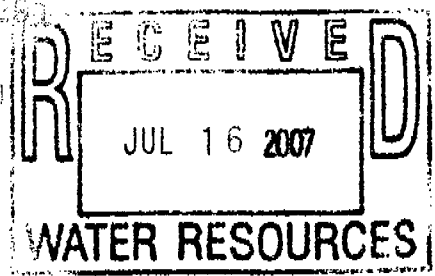

Max L. Armentrout, Landowner

9

Beckwith Lumber Company, Inc.

Manufacturers
WEST VIRGINIA HARDWOODS

SLATY FORK, WEST VIRGINIA 25285
PHONE (800) 872-1220



July 13, 2007

Lisa A. McClung, Director
Division of Water & Waste Management
601 57th Street SE
Charleston WV 25304

Dear Ms. McClung:

We are still very concerned about any stream that is not on Public Lands being listed under Tier 2.5 by the DEP. We feel this is government taking of our property rights without compensation and request that you remove the following streams which we own property on and feel that the classification will burden our possession and use of our property. As stated before we object to any stream being Tier 2.5 unless totally within Public Land but object to the following streams on which we own property.

<u>STREAM NAME</u>	<u>STREAM CODE</u>
Crooked Fork	KE 139-B
Williams River	KGW

Thank you for considering our request.

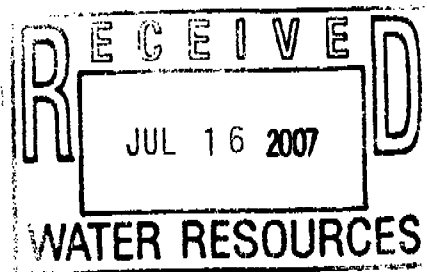
Beckwith Lumber Company, Inc.

Ralph W. Beckwith
Ralph W Beckwith
President

CRANBERRY LUMBER COMPANY

263 WHITE OAK DRIVE
BECKLEY, WEST VIRGINIA 25801
TELEPHONE: (304)255-2240
FAX: (304)255-2248

July 12, 2007



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

Re: Objection to proposed Tier 2.5 listing of a stream; specifically Fall Branch of New River, Raleigh County, DNR stream number KN-37

Dear Ms. McClung:

Cranberry Lumber Company is the owner of that certain tract of fee property containing 573 acres, more or less, situate on the waters of Fall Branch, in Richmond District, Raleigh County, West Virginia, Tax Map Number 10, Parcel 3. Listing Fall Branch among the Tier 2.5 streams will likely limit, increase the costs of or even eliminate potential uses of the property. Future plans for the property could become directly prohibited or too costly to be completed. We therefore request that Fall Branch not be listed as a Tier 2.5 stream.

Sincerely,

A handwritten signature in cursive script, appearing to read "Douglas F. Noel".

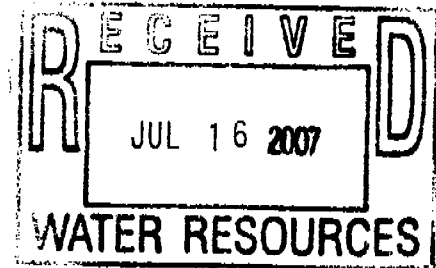
Douglas F. Noel
Land Manager

(11)

LAUREL LANDS, INC.

P.O. BOX 1514
ELKINS, WEST VIRGINIA 26241

July 13, 2007



Lisa A. McClung, Director
Div. of Water & Waste Management
WV Dept. of Environment Protection
601 57th St. SE
Charleston, WV 25304

Dear Ms. McClung:

The West Virginia DEP has issued a new rule on antidegradation, which contains 156 streams that they plan to list as 2.5 streams.

I previously wrote a letter containing a list of the streams that we wish to not be listed and again we are objecting to the same streams listed below being 2.5 streams:

Right Fork Clover Run	Stream Code MC 51-A
Left Fork Clover Run	" " MC 51-B
Little Laurel Run	" " MCS-12
Blister Run	" " MCS-47
Laurel Run/Shavers Fork	" " MCS-5
Beaver Creek	" " MCS-53
Mill Creek	" " MT-64
Glade Run	" " MT-64C
McGee Run	" " MT-66-B

We would appreciate you taking our objection into consideration.

Sincerely,

LAUREL LANDS, INC.


Max L. Armentrout, President

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

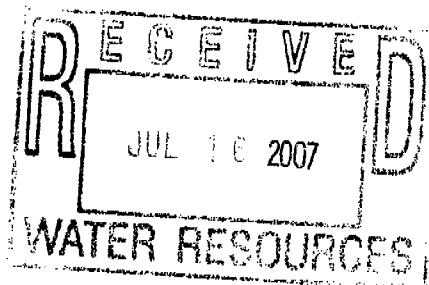
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of MAXWELL RUN (MC-54-C)

Dear Director McClung:

This letter is in regards to the proposed listing of MAXWELL RUN (MC-54-C) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

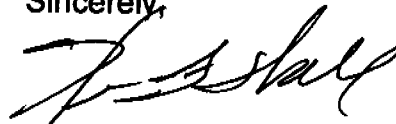
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. F. Wall', written in a cursive style.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

12

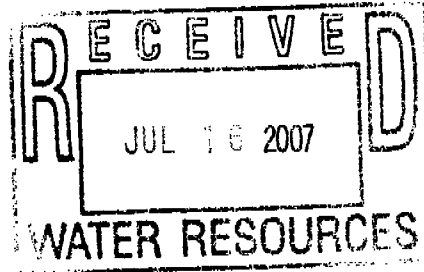
NATURAL RESOURCE PARTNERS L.P.

**1035 Third Avenue • P. O. Box 2827
Huntington, WV 25727-2827
(304) 522-5757 • Fax (304) 522-5401**

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of LICK CREEK (KGW-20-A)

Dear Director McClung:

This letter is in regards to the proposed listing of LICK CREEK (KGW-20-A) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin F. Wall", written in a cursive style.

Kevin F. Wall

Vice President & Chief Engineer

KFW/g

12

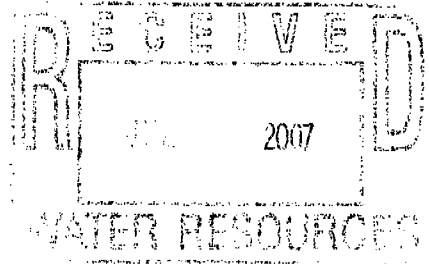
NATURAL RESOURCE PARTNERS L.P.

**1035 Third Avenue • P. O. Box 2827
Huntington, WV 25727-2827
(304) 522-5757 • Fax (304) 522-5401**

kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of TEA CREEK (KGW-20)

Dear Director McClung:

This letter is in regards to the proposed listing of TEA CREEK (KGW-20) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

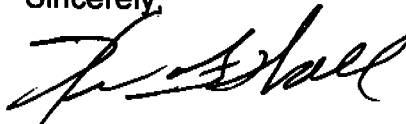
Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin F. Wall", written in a cursive style.

Kevin F. Wall

Vice President & Chief Engineer

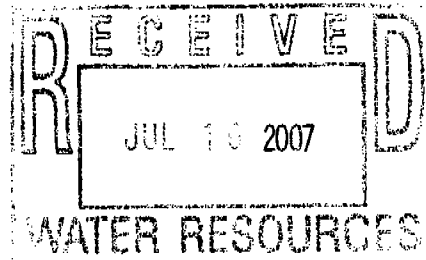
KFW/g

NATURAL RESOURCE PARTNERS L.P.**1035 Third Avenue • P. O. Box 2827****Huntington, WV 25727-2827****(304) 522-5757 • Fax (304) 522-5401**

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of JONATHAN RUN (KGW-2)

Dear Director McClung:

This letter is in regards to the proposed listing of JONATHAN RUN (KGW-2) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

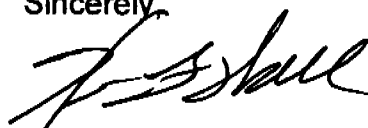
Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. F. Wall', written in a cursive style.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

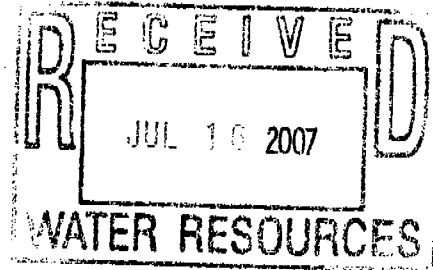
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of SUGAR CREEK (KGW-21)

Dear Director McClung:

This letter is in regards to the proposed listing of SUGAR CREEK (KGW-21) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

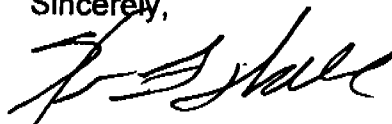
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. F. Wall", written over a horizontal line.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

12

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

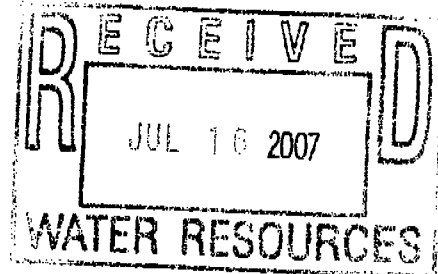
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of HANGING ROCK BRANCH (KGC-15)

Dear Director McClung:

This letter is in regards to the proposed listing of HANGING ROCK BRANCH (KGC-15) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

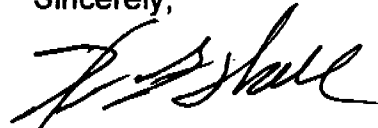
Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. F. Wall", written in a cursive style.

Kevin F. Wall

Vice President & Chief Engineer

KFW/g

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

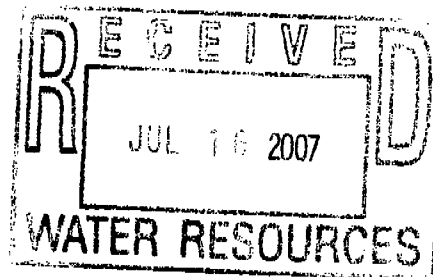
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of MAXWELL RUN (MC-54-C)

Dear Director McClung:

This letter is in regards to the proposed listing of MAXWELL RUN (MC-54-C) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

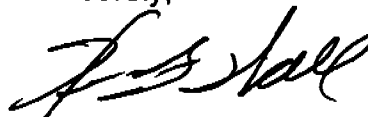
Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. F. Wall", written in a cursive style.

Kevin F. Wall

Vice President & Chief Engineer

KFW/g

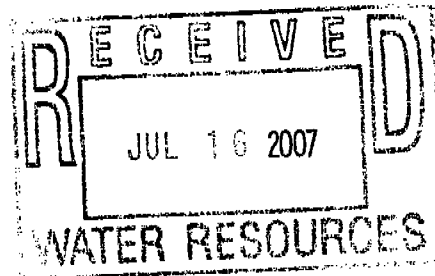
NATURAL RESOURCE PARTNERS L.P.

**1035 Third Avenue • P. O. Box 2827
Huntington, WV 25727-2827
(304) 522-5757 • Fax (304) 522-5401**

kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of LITTLE LAUREL CREEK (KGW-22)

Dear Director McClung:

This letter is in regards to the proposed listing of LITTLE LAUREL CREEK (KGW-22) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

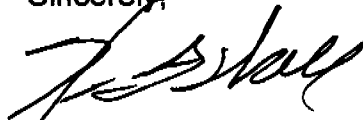
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Wall', written over a horizontal line.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

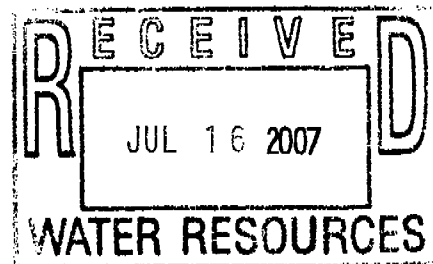
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of LITTLE LAUREL CREEK (KGW-22)

Dear Director McClung:

This letter is in regards to the proposed listing of LITTLE LAUREL CREEK (KGW-22) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

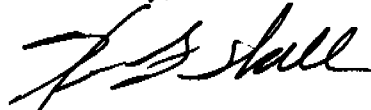
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. F. Wall", written in a cursive style.

Kevin F. Wall
Vice President & Chief Engineer

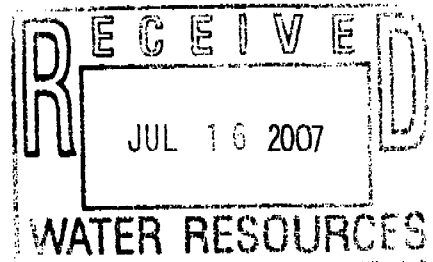
KFW/g

NATURAL RESOURCE PARTNERS L.P.**1035 Third Avenue • P. O. Box 2827****Huntington, WV 25727-2827****(304) 522-5757 • Fax (304) 522-5401**

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of UPPER BANNOCK SHOALS RUN (KGW-19)

Dear Director McClung:

This letter is in regards to the proposed listing of UPPER BANNOCK SHOALS RUN (KGW-19) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

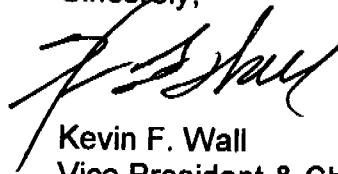
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. F. Wall", written in a cursive style.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

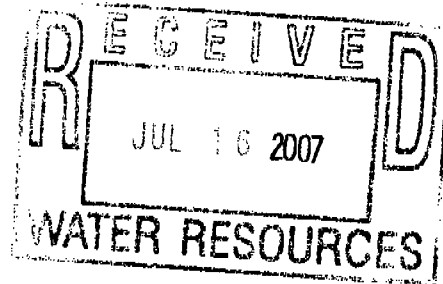
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of WILLIAMS RIVER (KGW)

Dear Director McClung:

This letter is in regards to the proposed listing of WILLIAMS RIVER (KGW) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

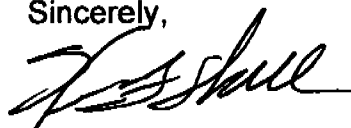
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Wall", written over a horizontal line.

Kevin F. Wall
Vice President & Chief Engineer

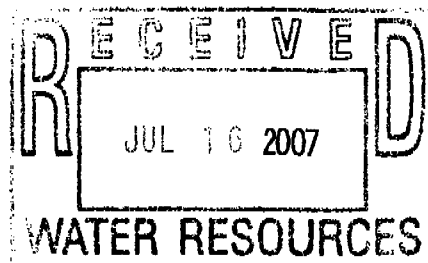
KFW/g

NATURAL RESOURCE PARTNERS L.P.**1035 Third Avenue • P. O. Box 2827****Huntington, WV 25727-2827****(304) 522-5757 • Fax (304) 522-5401**

July 13, 2007

kwall@wpplp.com

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



Re: Proposed Tier 2.5 designation of CRANBERRY RIVER (KGC)

Dear Director McClung:

This letter is in regards to the proposed listing of CRANBERRY RIVER (KGC) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

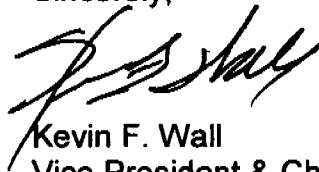
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Wall", written over the printed name.

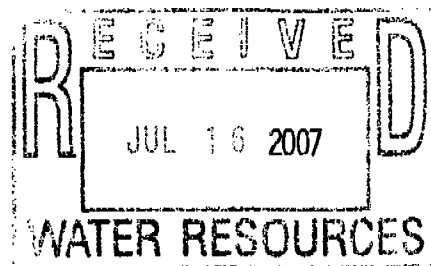
Kevin F. Wall
Vice President & Chief Engineer

KFW/g

NATURAL RESOURCE PARTNERS L.P.**1035 Third Avenue • P. O. Box 2827****Huntington, WV 25727-2827****(304) 522-5757 • Fax (304) 522-5401**kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of LAUREL RUN / ELK RIVER (KE-137)

Dear Director McClung:

This letter is in regards to the proposed listing of LAUREL RUN / ELK RIVER (KE-137) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

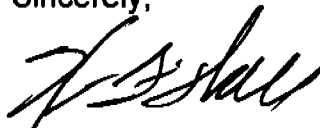
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. F. Wall', written over the printed name.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

12

NATURAL RESOURCE PARTNERS L.P.

1035 Third Avenue • P. O. Box 2827

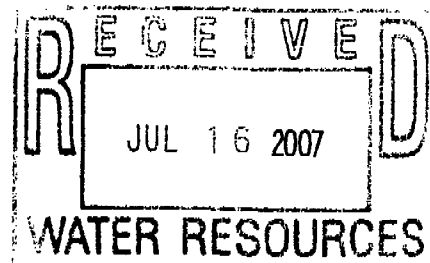
Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

kwall@wpplp.com

July 13, 2007

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



Re: Proposed Tier 2.5 designation of PROPS RUN (KE-136)

Dear Director McClung:

This letter is in regards to the proposed listing of PROPS RUN (KE-136) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

WPP LLC is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

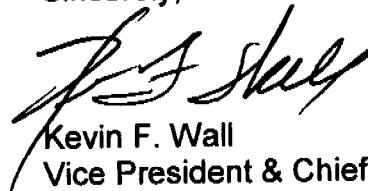
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "KFW", is written over the printed name and title.

Kevin F. Wall
Vice President & Chief Engineer

KFW/g

13

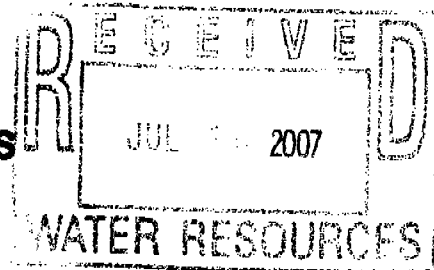
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



July 13, 2007

kwall@wpplp.com

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

Re: Proposed Tier 2.5 Designation of LICK BRANCH (KGW-9)

Dear Director McClung:

This letter is in regards to the proposed listing of LICK BRANCH (KGW-9) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

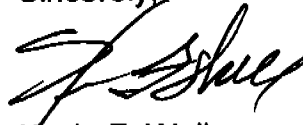
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Wall', written over a horizontal line.

Kevin F. Wall
Vice President - Engineering

KFW/g

134

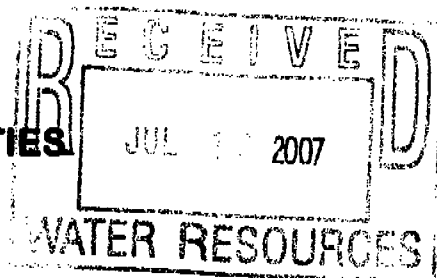
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



kwall@wpplp.com

July 13, 2007

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

Re: Proposed Tier 2.5 Designation of SPICE RUN (KGW-4)

Dear Director McClung:

This letter is in regards to the proposed listing of SPICE RUN (KGW-4) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

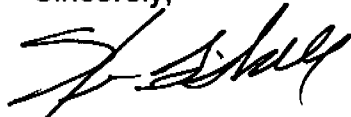
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Wall', written over a horizontal line.

Kevin F. Wall
Vice President - Engineering

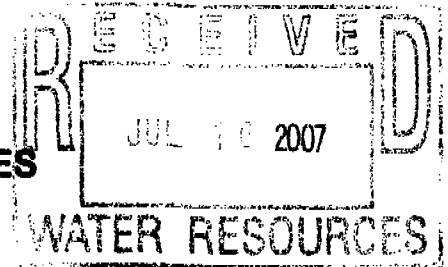
KFW/g

13c

WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827
Huntington, WV 25727-2827
(304) 522-5757 • Fax (304) 522-5401



July 13, 2007

kwall@wpplp.com

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

Re: Proposed Tier 2.5 Designation of CRAIG RUN (KGW-1)

Dear Director McClung:

This letter is in regards to the proposed listing of CRAIG RUN (KGW-1) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

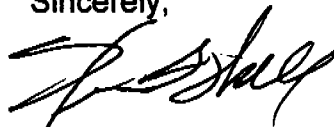
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

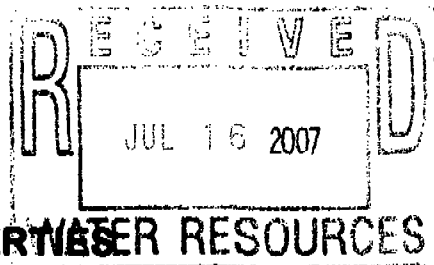
I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin F. Wall', written in a cursive style.

Kevin F. Wall
Vice President - Engineering

KFW/g



WESTERN POCAHONTAS PROPERTIES WATER RESOURCES

Limited Partnership

1035 Third Avenue • P. O. Box 2827
Huntington, WV 25727-2827
(304) 522-5757 • Fax (304) 522-5401

kwall@wpplp.com

July 13, 2007

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

Re: Proposed Tier 2.5 Designation of ALDRICH BRANCH (KGC-9)

Dear Director McClung:

This letter is in regards to the proposed listing of ALDRICH BRANCH (KGC-9) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

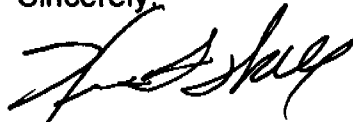
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin F. Wall', written in a cursive style.

Kevin F. Wall
Vice President - Engineering

KFW/g

13e

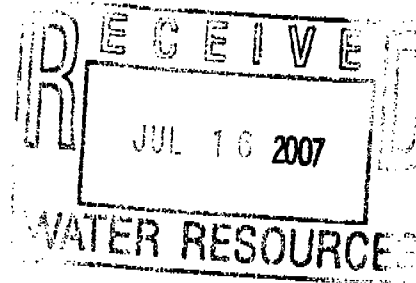
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



July 13, 2007

kwall@wpplp.com

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

Re: Proposed Tier 2.5 Designation of DOGWAY FORK (KGC-19)

Dear Director McClung:

This letter is in regards to the proposed listing of DOGWAY FORK (KGC-19) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

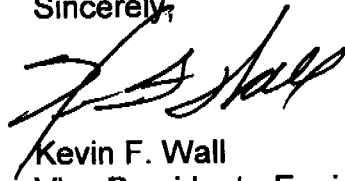
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Wall', written over the printed name.

Kevin F. Wall
Vice President - Engineering

KFW/g

13f

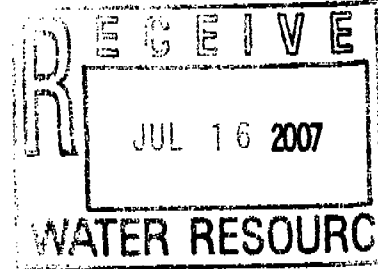
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



July 13, 2007

kwall@wpplp.com

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

Re: Proposed Tier 2.5 Designation of BIG RUN (KE-135)

Dear Director McClung:

This letter is in regards to the proposed listing of BIG RUN (KE-135) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

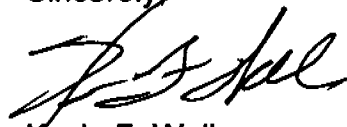
Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'KFW', is written over the word 'Sincerely,'.

Kevin F. Wall

Vice President - Engineering

KFW/g

139

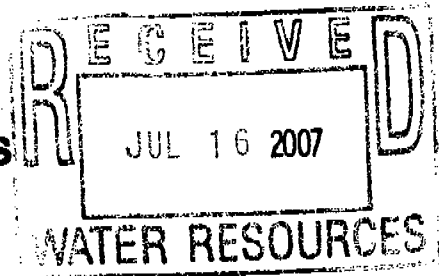
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



kwall@wpplp.com

July 13, 2007

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

Re: Proposed Tier 2.5 Designation of WHITE OAK FORK (KGW-8)

Dear Director McClung:

This letter is in regards to the proposed listing of WHITE OAK FORK (KGW-8) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

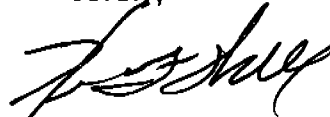
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin F. Wall", written in a cursive style.

Kevin F. Wall
Vice President - Engineering

KFW/g

134

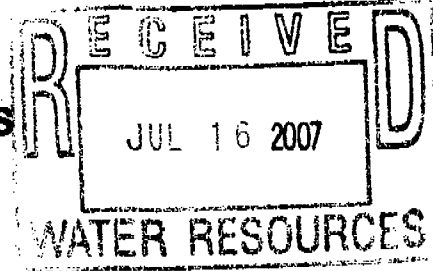
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



July 13, 2007

kwall@wpplp.com

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

Re: Proposed Tier 2.5 Designation of BARRENSHE RUN (KGC-4)

Dear Director McClung:

This letter is in regards to the proposed listing of BARRENSHE RUN (KGC-4) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. F. Wall", written in a cursive style.

Kevin F. Wall
Vice President - Engineering

KFW/g

131

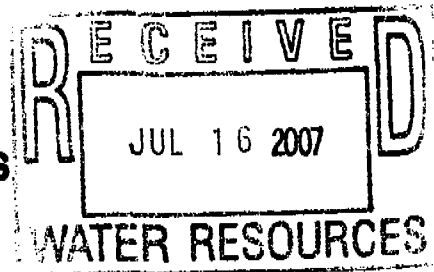
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



July 13, 2007

kwall@wpplp.com

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

Re: Proposed Tier 2.5 Designation of LICK BRANCH (KGC-14)

Dear Director McClung:

This letter is in regards to the proposed listing of LICK BRANCH (KGC-14) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

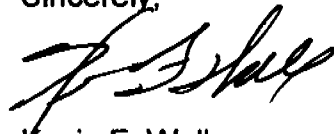
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Wall', written over a horizontal line.

Kevin F. Wall
Vice President - Engineering

KFW/g

13j

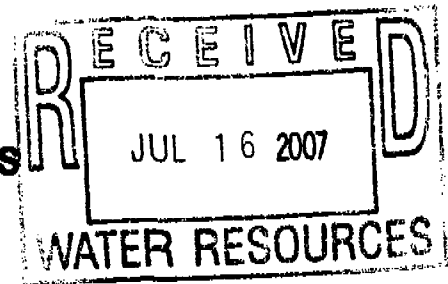
WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401



kwall@wpplp.com

July 13, 2007

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

Re: Proposed Tier 2.5 Designation of NORTH FORK CHERRY RIVER (KG-34-H)

Dear Director McClung:

This letter is in regards to the proposed listing of NORTH FORK CHERRY RIVER (KG-34-H) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the mineral owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these mineral rights.

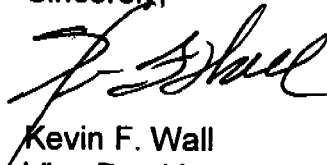
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

One of the ostensible reasons this stream was listed is that it is a High Quality Water on Public Lands. While it may be possible the surface is in public ownership, it is not the case that all the mineral estate as we are the owner. We feel this should be a consideration in determining which of these streams should receive Tier 2.5 protection. We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause this mineral ownership to be unmineable with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

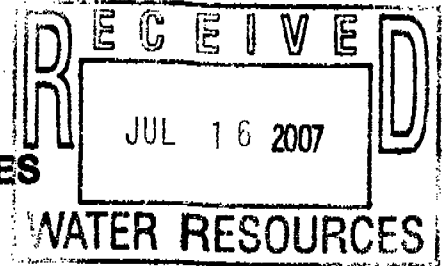
Sincerely,

A handwritten signature in black ink, appearing to read "K. Wall", written over a horizontal line.

Kevin F. Wall
Vice President - Engineering

KFW/g

13k



WESTERN POCAHONTAS PROPERTIES

Limited Partnership

1035 Third Avenue • P. O. Box 2827

Huntington, WV 25727-2827

(304) 522-5757 • Fax (304) 522-5401

kwall@wpplp.com

July 13, 2007

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

Re: Proposed Tier 2.5 Designation of MAXWELL RUN (MC-54-C)

Dear Director McClung:

This letter is in regards to the proposed listing of MAXWELL RUN (MC-54-C) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the surface owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these surface rights.

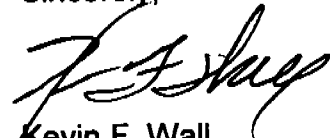
In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause our ownership to be reduced in value with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung
Page 2
July 13, 2007

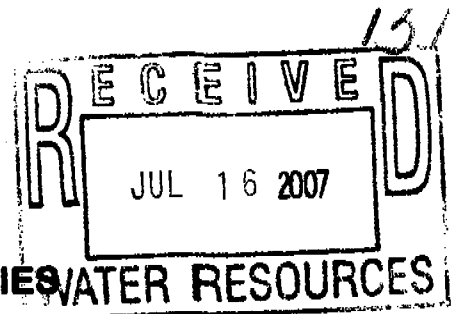
I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. F. Wall', written in a cursive style.

Kevin F. Wall
Vice President - Engineering

KFW/g



WESTERN POCAHONTAS PROPERTIES WATER RESOURCES

Limited Partnership

**1035 Third Avenue • P. O. Box 2827
Huntington, WV 25727-2827
(304) 522-5757 • Fax (304) 522-5401**

kwall@wpplp.com

July 13, 2007

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

Re: Proposed Tier 2.5 Designation of LAUREL RUN (KNG-60)

Dear Director McClung:

This letter is in regards to the proposed listing of LAUREL RUN (KNG-60) as a Tier 2.5 Stream under the Antidegradation Implementation procedures proposed by the WV Department of Environmental Protection (DEP).

Western Pocahontas Properties Limited Partnership is the surface owner adjacent to this stream. We hereby request that this stream be omitted from the final list. The inclusion of this stream on the list of Tier 2.5 Streams will adversely affect development of these surface rights.

In reviewing the revised List of Streams, we again examined the data on stream quality provided us during the earlier listing process. We again reiterate our position that the observations on stream quality are very limited in number (one or two separate data points) and are dated in that they are at least 10 years old.

We are currently paying ad valorem taxes on this property and the designation of the stream as a Tier 2.5 could ultimately cause our ownership to be reduced in value with the resulting loss of tax revenues to the county. We would be willing to meet with any of your representatives to show them the location of our properties in the areas, if you would wish to confirm this.

Ms. Lisa A. McClung

Page 2

July 13, 2007

I will also stress that not including a stream on the Tier 2.5 list does not preclude it from being so designated at some point in the future. Any of these or other streams may still be nominated and after presentation of scientific data and public input, a more reasoned decision could be made as to whether to move the stream from Tier 2 protection to Tier 2.5. In many ways, it seems that this method of determining which streams should be classed as Tier 2.5 is more equitable to all interested parties and all viewpoints could be considered in each stream's specific case.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Wall", written over a horizontal line.

Kevin F. Wall

Vice President - Engineering

KFW/g



WEST VIRGINIA CHAMBER OF COMMERCE
The Voice of Business in West Virginia

July 17, 2007

RECEIVED

JUL 17 2007

WATER QUALITY STDS

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

Re: Comments to Revisions to Antidegradation Implementation Procedures: 60 CSR 5

Dear Director McClung:

These comments are filed on behalf of the Environmental Committee of the West Virginia Chamber of Commerce. The West Virginia Chamber of Commerce is the largest trade association in West Virginia representing business and employers. As such, the Chamber is vitally concerned with regulations issued by the Department of Environmental Protection that may affect our members. The Chamber also recognizes that a healthy environment is good for business and continuously looks to support those reasonable regulatory programs that are necessary to assure a healthy environment for all West Virginians. It is from this perspective that we offer these comments on the proposed revisions to Antidegradation Implementation Procedures, 60 CSR 5 (the "Proposed Rule").

- **Sec. 2.4** – The Proposed Rule would add a definition for "baseline water quality" which references the rule as effective May 17, 2001. Because this rule will be periodically amended, future initial antidegradation reviews may be performed pursuant to revised versions. For this reason we recommend the deletion of the phrase "under the rules effective May 17, 2001."
- **Sec. 2.7** - The Proposed Rule would add a definition for "parameter of concern" to include not only those substances for which water quality criteria have been developed, but also any other parameter "where the discharge of such parameter has a reasonable potential to either cause or contribute to a violation of the narrative criteria outlined under 47 CSR 2, section 3." We submit that the inclusion of parameters that have no numeric criteria is not consistent with the overall scheme for administering the antidegradation program. The antidegradation review is intended to evaluate the impact of a new discharge on the assimilative capacity of the receiving stream. Trying to apply this concept to parameters that have no numeric criteria will result in the *de facto* creation of a

water quality criterion for that substance. Such action would avoid the procedural requirements of the West Virginia Administrative Procedures Act and the State Water Pollution Control Act and therefore be unlawful. For these reasons, we object to the inclusion of substances that have no numeric water quality criteria within the definition of "parameter of concern."

We also object to the use of the term "parameter" within the definition for the term "parameter of concern" as being circuitous and recommend that the phrase "pollutant or condition" be substituted for the term "parameter" where it appears within the body of the definition.

- Sec. 2.12 – This section proposes a definition for "trading" and includes the statement that "[u]nused permitting capacity cannot be traded." We object to this statement if it means that an upstream facility that chooses to place greater controls on its discharge and accept more restrictive permit limits but in doing so would not be able to trade those reductions. If the agency chooses to retain this statement, some explanation should be provided as to how it would be applied.
- Sec. 5.6.c - The Chamber generally supports the inclusion of alternative standards for determining whether degradation is "significant" for dissolved oxygen, pH and fecal coliform. These standards have been approved by EPA Region 3 for application to Tier 2.5 waters and we assume they would allow the same approach for Tier 2 waters. As to the alternative standard for temperature, however, we object to the proposed Section 5.6.c.3 which would define "significant degradation" for Tier 2 waters as an increase of more than 2-degrees Fahrenheit (2° F). In its letter to you dated November 14, 2006, EPA Region 3 disapproved this alternative standard for Tier 2.5 waters because "there is no data or explanation as to whether a 2° F increase results in an insignificant or trivial lowering of water quality." We are not aware of any new evidence that has been developed by the WVDEP to justify the 2° F increase standard. For this reason we recommend that proposed section 5.6.c.3 be deleted until such justification has been developed.
- Sec. 9.6 – This section of the Proposed Rule strikes references to appeals to the Environmental Quality Board. For clarification, we recommend that the proviso at the end of this section be revised to read as follows: "provided that the designation of waters as Tier 2.5 waters pursuant to the rulemaking provisions of subsections 6.2 and 8.1 shall not be subject to appeal to the Board."
- Appendix A List of Tier 2.5 Waters – The Proposed Rule would add 156 streams to the list of streams to be designated as "waters of special concern" or Tier 2.5 waters. The Chamber understands that the DEP has reduced this list from the list of 309 streams that was presented to the Legislature during the 2007 Regular Session. In its briefing document that accompanied the Proposed Rule the agency states that "[t]he list of 156 waters is comprised of 37 waters that did not receive objections in the formal objection

T. M. Boggs to Lisa McClung

Comments to Revision to Antidegradation Implementation Procedures: 60 CSR 5

July 17, 2007

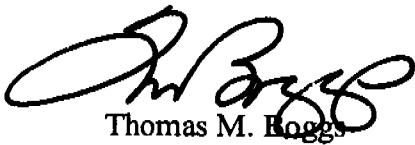
Page 3 of 3

period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their biological scores, and Loop Creek." Although DEP has included a map on its website illustrating the locations of these streams, the map does not indicate those streams which may be located on public land and whether there are any tributaries or upstream segments of those streams that are not on public land but would nevertheless be subject to the same restrictions as the listed streams. We urge that DEP provide the public with this type of information before a stream is proposed for inclusion on the list.

Previous comments filed by the regulated community have raised concerns with the type of notice provided to private landowners during the rulemaking process. The Chamber incorporates by references those previous comments, and, in particular, the comments of the Antidegradation Coalition dated July 10, 2006, and filed with the DEP, to the extent they apply to provisions of the rule that are included in the Proposed Rule. In addition to the extent private property owners will be impacted by the listing of a stream, the Chamber objects to such listing and urges the agency to consider other means of assuring that proper notice in compliance with the rule is provided. We also renew our objection to the use of any data that is not "recent and reliable" to support the agency's proposed listing. See 60 CSR 5, §3.4.

We appreciate the opportunity to offer comments on these important issues and we would welcome any questions or comments DEP may have regarding our recommendations.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Boggs", written in a cursive style.

Thomas M. Boggs
Vice President

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:

"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

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.

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.

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), Glady 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 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.

¹⁵ http://www.envirovaluation.org/index.php?title=wtrf_www_wtrf_com_channel_7_cbs_wheeling&more=1&c=1&tb=1&pb=1 Accessed: July 5, 2006.

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.

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.***

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.

¹⁶ http://www.asafishing.org/asa/statistics/saleco_trends/state_allfish_2001.html Accessed: July 5, 2006.

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

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.

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.

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 Ellick 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.*

52
RECEIVED
WVDEP

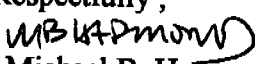
JUL 16 2007

WV DEP
601 57th Street
Chas . WV 25304

PUBLIC INFORMATION OFFICE

To whom it may concern,

As a native West Virginian , a father of young children , and a practicing oncologist in Charleston , I write to encourage you to stray from the path you seem to have accepted with your plan to allow the further degradation of so many of our beautiful streams . We should be protecting MORE than the 300 proposed – don't you realize that water is required for the survival of humankind ? Water shortages are occurring almost everywhere in the world -- including the US , and here in WV , we are already told not to eat fish from rivers which had potable water only 100 , and in some cases 50 years ago. Our state is poor , and has very little industry , but we do have an abundance of beauty the preservation of which is our responsibility!!! As you are the one in a position of influence , it is even more YOUR responsibility , so please make your decision knowing that God will judge us on how we treat His Earth , and that the lives of current and future generations are in your hands .

Respectfully ,

Michael B. Harmon MD
Suite B1 3100 MacCorkle Ave.
Chas. WV 25304

JUL 18 2007

Ms. Jessica Greathouse
W.V. D.E.P.
601 57th St.
Charleston, W.V. 25304

PUBLIC INFORMATION OFFICE

Dear Ms. Greathouse,

July 17, 2007

I attended your D.E.P. meeting for citizen comments last night, and appreciate the opportunity you had given us and your listening. I hope you will gather there is a broad and growing citizen support for preserving and improving water quality. For example, the million dollars for improved septic systems for W.Va., and all the federal programs including the old Clean Water Act itself.* I believe this U.S. E.P.A. will be forced to prevent degradation by court order, if necessary - as they had to do on so many other issues. The next administration in Washington will not let this issue so stray from the thrust of law of the land, with its clean-up, T.M.D.L.s, etc. Citizen suits, again may have to play a role, unless the Governor changes and would rather take the high ground. Cutting a contested 157 in half is not a compromise; it is a capitulation to would be polluters - not what he or your E.P.A. is supposed to do.

W.Va. can become characterized as Wild and Wonderful Water. With the highest average elevations in the east, W.Va. is a headwater state. This is attractive to tourism, growing at 10%+ per year, and to industry looking for clean water for their intake and quality of life. The nature perception is enhanced by the presence of an abundance of water recreation grounded in clean water: swimming, boating, fishing. Trout fishing and the mere presence near-by of a native brook stream enhances the entire area's outdoor experience - and property values. Nothing connotes pristineness like their presence in the minds of a growing number. This is very important for our future. It was stated we have "the Mother Load" of clean water.

I will be brief, but please note "existing use" maintenance should not allow you to reduce standards for coal or other development.

I need not remind you that you often heard that water is a public good. It is a "commons", not owned by the landowner. There is no "taking" of landowner rights as the Farm Bureau said, rather the "taking" argument applies to a polluter who has degraded water quality for downstream users and the rest of the area that might have otherwise been considered pristine. Few landowners want to pollute "his" stream, and that of his downstream neighbors - should he have any "right" to? What does the Clean Water Act say?

Lastly, "stewardship", a word I did not hear. The Farm Bureau understands it well. They know "legacy" too. There is common-ground, and hope. You can be a proud Environmental Protection Agency.

Thank you for your time. Good luck.

Sincerely,



*Enclosed notes

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

B-2 "TROUT WATERS" (337 streams)

1. Public enjoyment
2. Propagation & protection of animal, bird, fish and other aquatic and plant life.
3. Expansion of agriculture & industry providing a healthy permanent foundation.

We would comment briefly on each as to their meaning and spirit. In our view no consideration of a short-term goal of degradation is stated or implied to any degree. Pollution is viewed as bad and unlawful to king of our common natural resource of clean water.

"PUBLIC ENJOYMENT" of good water quality is expressed:

1. In cleansing, relaxing fun of swimming.
2. In boating.
3. In merely trips to the shore to look at it, in walking along our many beautiful streams with their clean water.
4. In living near by.
5. In traveling to an area characterized by clean water, spending time there and experiencing a greater enjoyment of the area enhanced by it. The best expression of this is how values (even property values) are raised by the presence of trout or native brook trout.

"PROPAGATION", of ecosystem integrity, and its "protection" should mean to most regulators that appropriate biological science was followed. The highest water quality should be "protected" to nourish the greatest biodiversity, stability and productivity.

"EXPANSION", as immediately above, with the added clear aspect of "sustainability" is implied in "providing a healthy, permanent foundation". It will not permit "a race to the bottom", that should be illegal.

We submit that these are the fair biological implications of these three legal guidances.

Note 1A "Trout Waters" are next defined.

"TROUT WATERS"

"Waters that sustain year-round trout populations."
Trout that do not survive the maximum summer temperatures disqualify that reach - more exactly.

They may be sustained by fingerling stockings that do survive the summer temperatures!

Many of our fingerling trout stocked waters qualify, especially brown.

Example: Rt. Fk. Leathersood (Brook), Homney Cr. (Brown)
They are not limited to reaches where
Natural reproduction has been found, at all; or has been sufficient to sustain the population, as do our N. Brook Trout Populations.

Natural reproduction is not a factor at all.

"Year-round" can (should, does) mean any trout stocking that that survives the summer temperatures to any extent - no specific extent is required - --no percent. A trace will do. Further, survival any one summer will do; it need not be successful every summer - every other summer -- etc. Some catchable-size stocking results in at least a few that survive the summer temps, and escape the fishery to populate the reach the next year -as "hold-overs". Most do. The unknown extent of micro-habitats of cooler water, enabling trout to survive the maximum summer temperatures of the main flow, is important downstream. The last troubling suggestion is that reaches with only trout potential (not yet limed, etc.) are not protected.

NOTE 2

Again, expert input is required by law, and the agency responsible is WV DNR - Fish. It should be noted that if they do not know they have said so - a professional, and to us, a reassuring statement.

NOTE 3

The definition of "trout water" for these regulations should remain "waters where sustained year-round trout populations or trout reproduction have been documented". See Note 1A.

NOTE 4

The date Nov. 28, 1975 has nothing to do with the professional judgement whether trout are present year-round in a reach or not, or the potential of that reach. Much fishery data prior to 1975 is valid and useful in expert evaluations.

4A

The brown trout fingerling introductions have resulted in excellent populations and extensions of "trout waters".

4B

A second fortunate circumstance is that stream-side tree canopies have closed over many miles of trout stream - extending them downstream as cool trout water.

4C

Acid Rain, in contrast, unfortunately, is continuing to acidify watersheds and headwater streams. This loss is particularly significant for native brook trout. It is a moving target. Restoration though is possible because DNR-Fish has a very effective "fix" - limestone sand can be dropped from helicopters into headwaters, neutralizing acid and enriching streams and restoring particularly trout streams. (See the detail on the Middle Fork River that follows - though it is delivered by truck.) Such potential trout streams should be added to this protective list. There are 100 miles of such streams on the National Forest and 100 miles in counties to the west of it.

It is instructive to look more closely at Mill Creek in Kumbrabow and Right Fork of Leatherwood for they indicate why DNR-Fish expertise must be relied upon. (Some landowners will know some of what is going on in their particular stream but do not understand Acid Rain effects regionally and through time. Only a brief partial tutorial would be appropriate here.

Mill Creek historically W.Va.'s longest native brook trout stream, lost the four less acid tolerant fish species

associated with the brook trout through the 1960's as it acidified. Then brook trout reproduction also began to fail in the 1980's, being restricted to one tiny richer tributary. As only a few larger brook trout were present and reproduction was so rare, it was limed in the 1990's. This fishery was restored just in time throughout all its 11 miles with all its complimentary sustaining food web. Further the upper 7 miles is above a waterfall and the other 4 fish species could not return. They are competitors and predators on brook trout. It permits the brook trout to become twice as abundant - twice as good a fishery in a stream that without liming now would be barren.

Further, DNR-Fish has a fish toxicant that will do the same thing - eliminate competing fish that become dominant as streams become warmer. (In the original forest all these mountain streams were cool enough that brook trout was the only fish present.) Fish toxicants can be used above a barrier generally after removal of some adult spawners for restocking and/or leaving "trout-only" cooler headwater reaches untreated - or spawners can be brought from a nearby population if none any longer exist there. Originally many brook trout streams were connected. It is called "restoration": it restores the trout-only population to these lower reaches. They do well without the other fish species as in the original forest. Such potential trout waters should be protected.

Right Fork of Leatherwood is a beautiful stream draining 8 miles from the National Forest. It drops in a 35' waterfall to private land on its way to Elk River 4 miles below. There were, as in Mill Creek the same 4 species and the native brook trout above the falls. They disappeared in the 1960's from this undisturbed watershed. Their loss takes place always first in the more acid headwaters. Some reinvasion from below, even to the headwaters at first, takes place as streams all become less acid in summer. In this case, once lost in acid spring-time flows, above the waterfall, they could not reinvade above. The U.S.F.S. noted this loss above the falls in 1972, and DNR-Fish confirmed and noted its significance. For 30 years now, a Trout Unlimited Chapter from Clarksburg has been backpacking 3-4" hatchery brook trout in the lower almost 2 mi. to the water fall. These fish grow well without competition, populating the stream. They do not reproduce successfully either. One day limestone sand will be added to its remote headwaters, and native brook trout from its Left Fork or Bergoo Creek stocked - and anglers will have to return only to fish this beautiful stream. Further DNR-Fish has a marvelous "tiger trout" that does not reproduce at all. It is very strong, clean and beautiful: and as all its food is used in body building. It is very productive. It produces a fine fishery of such density that it can support a greater fishing pressure. It can probably utilize a little warmer water that would be dominated otherwise by creek chubs. It would soon reduce

creek chubs. Its numbers and distribution can be absolutely controlled as it does not reproduce. Such potential "trout waters" should be protected. Finally it should be added that this same pattern of "fish loss" due to regional Acid Rain has been repeated in the Cranberry River (where even the smallmouth bass moved downstream out of the Backcountry Wilderness in the 1960's and 1970's) and in the North Fork of Cherry. Stream reaches near Davis and Shavers Fork have similarly been effected. They are so acid in the spring that hatchery catchable-size stockings have to be restricted until May in these streams.) It is a familiar pattern known to experts; some have been limed, some have not. "Trout stream" reach identification had best be left to DNR-Fish experts. No one approaches their knowledge or has their responsibility to understand W.Va.'s trout fishery resources.

NOTE 5

Within the Federal Rules, Sections 4.1a and 6.16 of 47 CSR2 existing uses must be protected. Where did the idea that degradation could occur come from? Compromises have already been made. Are they legal?

NOTE 6

Rather Section 101(a) requires their water quality be restored. This is the clear intent of the US EPA as evidenced by their list of impaired waters and their T.M.D.L. recovery program. What makes any one think anything less would be legal?

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), Gladly 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.*

Donald Gasper
4 Ritchie St.
Buckhannon, WV 26201

**RECEIVED
WVDEP**

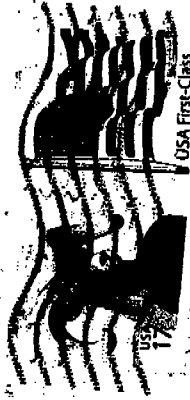
JUL 18 2007

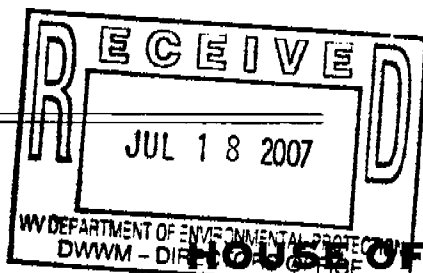
PUBLIC INFORMATION OFFICE

Ms. JESSICA GREATHOUSE
W.V. D.E.P.
601 57th St.
CHARLESTON, W.V.
25304

CLARKSBURG WV 263

17 JUL 2007 PM 2 1

[illegible]



cc: P. Campbell

**HOUSE OF DELEGATES
WEST VIRGINIA LEGISLATURE**

BUILDING 1, ROOM 230-E
1900 KANAWHA BLVD., EAST
CHARLESTON, WV 25305-0470
PHONE (304) 340-3146

STAN SHAVER
RT. 1, BOX 478
TUNNELTON, WV 26444
Phone: (304) 568-2696
Capitol E-mail: sshaver@mail.wvnet.edu
Home E-mail: turkeyman@labs.net

July 12, 2007

Committees:
Education
Veterans Affairs &
Homeland Security
Employee Suggestions Award
Board - Vice Chairman
Agriculture & Natural
Resources

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 Right Fork Clover Run (MC-51-A)

Dear Ms. McClung:

As the Delegate representing the 46th District I have to agree with the letter sent to you by John W. Crites requesting the removal of Right Fork Clover Run from the Tier 2.5 list. **You can take this as being my official notice that I want it removed!**

It will be my objective during the 2008 legislative session to remove any stream the DEP has listed for Tier 2.5 that has **any part of it on "private property"** located in Tucker County or Southern Preston County.

I have attached Mr. Crites letter of protest, to my letter of protest, for your review.

Sincerely yours,

Delegate Stan Shaver
46th District
Tucker and Southern Preston County



ALLEGHENY WOOD PRODUCTS, INC.



Airport Road • Petersburg, West Virginia

July 11, 2007

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 Right Fork Clover Run (MC-51-A)

Dear Ms. McClung:

My company, Allegheny Wood Products, Inc. owns land along the Right Fork Clover Run in Tucker County that your agency has included on your revised presumptive list of Tier 2.5 waters. I was just informed YESTERDAY by a state association, not DEP, that your agency is accepting written comments on the revised presumptive list of streams and the deadline is Tuesday, July 17. Upon visiting your website, we had a very difficult time finding the Tier 2.5 information and found NO information about the comment deadline or public hearing! This is precisely the reason we, as landowners, are so opposed to the methods used by DEP to notify the public. My company has been extremely involved in the process since 2000 but just **today** discovered two more streams that affect our land on your list. Each individual landowner **MUST** be notified by your agency of each tract that affects them so they have the ability to respond!

There should **not** be a presumptive list of Tier 2.5 streams. Each stream should be nominated, proven by DEP that it has recent data to show it should be listed as a high quality stream, and submitted to the WV Legislature for approval/denial as the Rule dictates.

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, is overstepping your authority, and is a violation of private property rights.

Main Office
P.O. Box 867
Petersburg, WV 26847
Telephone: (304) 257-1082
Fax: (304) 257-2342
www.AlleghenyWood.com

Sawmills
Dry Kilns

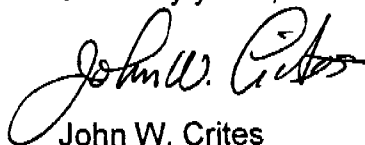
Dimension
Panels

QUALITY APPALACHIAN HARDWOOD LUMBER

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 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 Right Fork Clover Run from the Tier 2.5 list.

Sincerely yours,



John W. Crites
Chairman

JWC/dhr

cc: Senator Jon Hunter
Senator David Sypolt
Delegate Stan Shaver



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street, S.E.
Charleston, WV 25304
Telephone: (304) 926-0495
Fax: (304) 926-0463

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

RESPONSE TO COMMENTS
LEGISLATIVE RULE TITLE 60 SERIES 5
“ANTIDegradation IMPLEMENTATION PROCEDURES”
PROMULGATED UNDER THE WEST VIRGINIA CODE §22-11-7b

July 27, 2007

The Department of Environmental Protection's (DEP) Division of Water and Waste Management (DWWM) would like to take this opportunity to thank those organizations and/or individuals who submitted written comments as well who attended the public hearing on the proposed Legislative Rule, Title 60, Series 5, “Antidegradation Implementation Procedures.”

DWWM submitted the Notice of a Public Hearing on a Proposed Rule to the Office of the Secretary of State on May 30, 2007, and concurrently, to the Legislative Rule Making Review Committee. The Secretary of State published the notification in the West Virginia Register, Volume XXIV, Issue 22, on June 1, 2007. Also, the agency published a Class I legal advertisement in the Charleston newspapers announcing the agency's intent. The public notice announced the date of the public hearing along with the 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 16, 2007.

During the public hearing, oral comments were presented. A Response to Comments has been prepared to highlight the issues and concerns that were identified in the oral and written comments received during the comment period. The comments and responses have been summarized to the extent possible.

Comment summaries will appear first, followed by the agency's response in bold.

RESPONSE TO COMMENTS

60CSR5 - Antidegradation Implementation Procedures

July 27, 2007

1. The DEP received multiple comments encouraging the agency to retain the original 444 streams, at least keeping the 309 streams proposed to the Legislature in 2006.

After a lengthy process of reviewing comments and objections, the DEP is proposing 156 streams to be designated as Tier 2.5, a positive step forward to provide additional protection to these special waters.

These streams are comprised of the 37 streams that did not receive any objections in the formal objection period, those streams that contain reproducing trout and are 100% on public land, and those streams listed as high quality on public land based on their high biological scores. The DEP is also proposing to designate Loop Creek as Tier 2.5.

Additional streams may be added through the nomination process following the provisions of 60CSR5 Section 8.1.

2. Several commenters resubmitted a letter dated December 5, 2005, from the "Antidegradation Coalition."

The DEP reviewed and responded to these comments in the July 2006 Responsiveness Summary (<http://www.wvdep.org/Antideg>).

3. Several commenters noted that additional laws to protect high quality waters are not needed, stating ...these streams "have been greatly cared for and current law already protects them without further regulation."

Antidegradation is federally mandated and a requirement of the 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.

4. Concern was raised regarding the age of the data, both water quality and trout status, used to make the determinations.

Both DEP and DNR have extensively reviewed the information supporting the listing of the 156 proposed waters. In all cases, documentation exists indicating either the presence of reproducing trout or highly diverse benthic macroinvertebrate communities that are believed to be indicative of the current condition of those waters.

5. Commenters stated that the previous list of all 444 streams should be reconsidered for Tier 2.5 status because Tier 2.5 was a compromise to the streams being designated Tier 3.0.

DEP acknowledges that, prior to passage of 60CSR5, reproducing trout streams and waters in state and national forests were afforded Tier 3 protection. 60CSR5 did include the Tier 2.5 category, which was widely viewed as a compromise between Tier 3 and Tier 2 protections. In 2001, 60CSR5 contained a presumptive list of 444 Tier 2.5 waters, and these waters were then subject to objection and public comment periods. After reviewing comments and objections, the agency is proposing that 156 of these streams be designated as Tier 2.5. Additional streams may be added through the nomination process set forth in Section 8.1 of the rule.

6. Comments were received stating that reducing the number of streams contradicts the federal Clean Water Act.

The Clean Water Act allows flexibility for states to create unique protection levels, such as Tier 2.5, and assign streams to those protection levels as the state deems appropriate. As such, the DEP does not believe the proposed rule contradicts the Clean Water Act.

7. The DEP appears to be placing the burden on the landowners and lessees, asking them to justify removal of streams from the list.

DEP is following the procedures and criteria in 60CSR5 to designate streams for Tier 2.5 protection, which was approved in 2001 by the West Virginia Legislature. As part of this process, an objection period was required by rule that 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 and supply DEP with information that the action was harmful to their interests. On numerous occasions during the development of the list, DEP comprehensively considered objections using the criteria identified by the Legislature in 60CSR5-6.2.b and 8.1.a.2. As a result, numerous streams were removed from the proposed list.

8. The DEP "did not notify each landowner and persons with a financial interest in property adjacent to the streams individually."

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 visiting courthouses in several counties, DEP determined that the process for identifying individual landowners adjacent to the streams in 35 counties would be impractical. It would be even harder to identify persons with mineral rights interests 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 provided adequate notification to the affected landowners as evidenced by the more than 4,000 objection letters received during the process.

9. Several commenters stated that only streams on public lands should be listed; likewise, several commenters stated that protecting only streams on public lands does little, if anything, in the way of protection.

The opposing views submitted on this issue typify the complexity associated with recommending Tier 2.5 protection for West Virginia's waters. DEP acknowledges that some streams are not entirely on public land. However, no component of the antidegradation regulation precludes additional protection of exceptional quality waters if they are on private land. The DEP considered the possible impacts to landowners and mineral owners in previous proceedings. DEP does not agree that the protection being sought is meaningless. The proposed list of waters is intended to expand the Tier 2.5 protection process in the state from one stream to 157.

10. Comments were received stating that because streams can be nominated in the future, there is no need to place 157 streams on the list.

DEP was given a specific charge by the legislature to pursue Tier 2.5 protection for either the whole list of 444 presumptive Tier 2.5 water or an appropriate subset thereof. The list offered for consideration in the 2008 legislative session is the agency's fulfillment of the initial charge.

Streams that are given Tier 2.5 status may be later removed from the list. The removal of a Tier 2.5 stream process is contained in the rule in Section 8.1.a.3.

11. Several commenters wanted a more detailed map on the Web site, showing highway routes, public boundaries, and other information included on the map.

A GIS coverage of the proposed Tier 2.5 waters currently is on DEP's Web site under the antidegradation page. Further GIS information on the public property boundaries, state roads, etc. can be found: <http://wvgis.wvu.edu/data/data.php>

12. The Web site did not "easily" have the comment period listed and the public hearing date.

DEP apologizes for any difficulty the public may have had in finding information relative to the hearing and/or comment period. It is the agency's intent to make this important information readily available. The hearing was listed on the Calendar of Events section on DEP's home page. In addition, it was listed in a Class I legal advertisement and was sent to

the public notice e-mail subscriber notification list. To receive future notifications of Legislative Rules and permit actions in your county, register for e-mail notifications at www.wvdep.org.

13. "If West Virginia is 'Open for Business', how can the consideration of the impact on the economic development be ignored given our history and our state's continual efforts to expand economic opportunities?"

DEP believes it has balanced economic development with environmental protection as required in the rule. The agency has exhaustively reviewed information both in support of and against various lists of waters suggested for Tier 2.5 protection.

14. Several commenters expressed concern about the economic impact and loss of mineral rights that may occur if their business, land, etc. exist along a Tier 2.5 stream.

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 Best Management Procedures, the DEP determined that impacts from the designation would have little to no impact on those landowners and land uses.

15. Commenters expressed concern that property owners will not be able to use the land for future development. Tier 2.5 protection will increase the cost of doing business or hinder economic development.

The Tier 2.5 designation is designed to prevent significant degradation of existing 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 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, and depending upon specific circumstances, Tier 2.5 status may or may not require more rigorous controls for new activities.

16. DEP should not have a presumptive list and the Tier 2.5 process should start over and follow the requirements set forth in the rule. The commenter further suggested DEP follow Pennsylvania's procedure, and not list streams. Another commenter suggested the agency "withdraw Appendix A as proposed and resubmit the rule, after public notice, careful study by a thorough methodology. . ."

RESPONSE TO COMMENTS

60CSR5 - Antidegradation Implementation Procedures

July 27, 2007

The agency must follow the requirements of West Virginia law to take the original presumptive list of 444 waters through an objection and notice period, then return the agency-recommended list to the legislature for modification, denial or approval. The list offered for consideration in the 2008 legislative session is the agency's fulfillment of the initial charge. Further, the agency believes having a Tier 2.5 category, with no listed streams, could lead to uncertainty amongst the regulated community as to what requirements may be needed to protect the existing high quality of the streams.

17. A comment was submitted suggesting that the agency remove Maxwell Run, Little Laurel Creek, Sugar Creek, Hanging Rock Branch, Upper Bannock Shoals Run, Williams River, Cranberry River, Laurel Run of the Elk River, and Props Run, as they are not entirely on public lands.

DEP acknowledges that the aforementioned streams are not entirely on public land. However, no component of the antidegradation regulation precludes additional protection of exceptional quality waters if they are on private land. The DEP considered the possible impacts to landowners and mineral owners in previous proceedings.

18. A mineral owner associated with White Oak Fork, Barrenshe Run, Lick Branch and the North Fork of the Cherry River commented that the inclusion of these streams would adversely affect his future operations and should be removed.

See Comment # 15 response.

19. A comment was received stating protecting streams on public lands was meaningless.

DEP does not agree that the protection being sought is meaningless. The proposed list of waters is intended to expand the Tier 2.5 protection process in the state from one stream to 157. Additionally, some streams classified as both trout and high quality on public land, and a limited number of streams labeled high quality on public land, do have private land along the riparian corridor.

20. A comment was made that the reducing of the number of streams was 'TAKING' away from the West Virginia citizens.

Both industry and citizens have questioned whether the DEP's proposed rule with its listing of 156 streams as Tier 2.5 streams represents an unconstitutional "takings" or a violation of the Private Real Property Protection Act (the Act) found at W.Va. Code 22-1A-1 et seq. The industry commenters allege that the agency's actions in listing streams may deprive a property owner of the productive use of his or her property and state that the Act requires the agency to perform the assessment described in the statute. Citizens have alleged that the

DEP's removal of streams from the Tier 2.5 list is an unconstitutional "taking" of the public's property.

Neither industry's nor citizens' allegations are well-founded. The agency has completed a legal analysis of this issue and does not believe its actions are unconstitutional or in violation of statute.

21. A comment was made that DEP should use the 'trout water standard' and not 'warm water standard' for future permitting actions on streams that support reproducing trout.

Any stream known to sustain year round trout populations, or known to have attained the use on or after November 28, 1975, will have the protections afforded to trout waters in 47CSR2, Requirements Governing Water Quality Standards.

22. If a stream is documented to support reproducing native brook trout after 1975 and is no longer supporting this use, then that stream should be placed on the 303(d) list.

If DEP has information documenting failure to attain the trout water designated use, then it would recognize the impairment in its assessment procedures and appropriately classify the water.

23. Comment suggesting Spring Run, Milroy District in Grant County, be added to Tier 2.5 list.

Spring Run (PSB-25-C-2) did not meet the criteria used to create the final proposed list (see response to Comment #1). It was originally included because of the presence of reproducing trout. Streams included solely for that reason were retained on the list only if entirely on public land; Spring Run is entirely on private land. Additional streams may be added through the nomination process following the provisions of 60CSR5 Section 8.1.

24. Second Creek, Second Creek, W.Va., should be relisted as a Tier 2.5 stream.

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. 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.

25. 60-5-3.8 – "Valley fill" exception should be removed.

RESPONSE TO COMMENTS

60CSR5 - Antidegradation Implementation Procedures

July 27, 2007

Sections 3.7 and 3.8 are currently under review by EPA and any revisions to these sections would be premature at this time.

26. Areas designated as 3.0 should be "wilderness management areas" not "designated as federal wilderness."

The definition of Tier 3 was not proposed for revision and therefore is not appropriate for consideration at this time. The focus of this rulemaking effort is to advance the agency's recommendations for Tier 2.5 and to address modifications necessitated by a federal court ruling.

27. A question was asked how the construction of an oil and gas well road that crosses a stream would be impacted by Tier 2.5.

60CSR5-1-5.b addresses nonpoint sources activities operating in compliance with cost-effective and reasonable best management practices to protect water quality. Oil and gas operations are specifically referenced in this section. Operators are deemed in compliance with antidegradation requirements with proper installation and maintenance of appropriate best management practices as per DEP Office of Oil and Gas permits. A stream's designation as Tier 2.5 would not impact the construction, provided that established BMPs for the industry are installed and maintained.

28. The question was raised as to whether a segment that is upstream of the listed portion of a Tier 2.5 stream should be afforded the same protection.

Permitted discharges in streams and/or stream segments designated as Tier 2.5 are evaluated to ensure that existing water quality standards are protected by applying appropriate discharge limits. More protective treatment requirements may be applied to those permittees. Permitted discharges upstream of Tier 2.5 streams or stream segments are similarly evaluated to ensure protection of water quality standards. The proximity of the discharge and the potential of that discharge to affect water quality standards in the downstream segment would be evaluated on a case-by-case basis. 60CSR5-6-3.g states "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."

29. Request that a segment of Mill Creek be removed from list because it is not part of Kumbrabow State Forest.

DEP reviewed the request, but found no detailed information that would support a reconsideration of previous decisions.

30. Request to remove the part of Mash Fork that is not a part of Camp Creek State Forest.

DEP acknowledges that upstream portions of Mash Fork are on private land. However, the commenter provided no detailed information on how this listing would adversely affect the company's future plans.

31. Comment was made suggesting the agency delete language "under the rules effective May 17, 2001" from Section 2.4, as the effective date of the rule will change from time to time.

DEP concurs with the commenter's observation and will make the suggested modification.

32. Comment was received describing concern with the definition of "parameter of concern" alleging that the definition was not consistent with the overall antidegradation pollutant by pollutant scheme. Comment further encouraged DEP to substitute pollution or condition for the term parameter.

The definition of "parameter of concern" is not new. The definition was contained, verbatim, in 46CSR1, (effective date May 17, 2001; approved by EPA May 29, 2004). It is being transferred to 60CSR5 per EPA's recommendation to include all definitions related to antidegradation implementation that were previously contained in 46CSR1.

Antidegradation assessments to date have not been based solely upon narrative criteria and various obstacles would have to be overcome to calculate and allocate assimilative capacity in the absence of numeric criteria. But narrative water quality criteria have the same force of law as numeric criteria and nothing precludes the evaluation of existing use protection, the characterization of existing quality, or the projection of impact to existing quality from a regulated activity, as related to a narrative criterion. Furthermore, 47CSR2 Section 9 authorizes the Secretary's regulation of the discharge of pollutants for which water quality standards are not established to "protect state waters" through the establishment of a "safe concentration value."

As for the commenter's suggestion to change "parameter" to "pollutant" or "condition," the agency does not agree that the term is circuitous or is in need of revision. The term "parameter of concern," as defined, has been used for many years, and the intent of the sections containing the term are understandable.

33. Comment was received seeking clarification if unused permitted capacity can be traded. If trading is allowed, then the language in the rule needs to be clarified.

The definition of trading proposed in Section 2.11 was transferred, verbatim, from 46CSR1 (effective date May 17, 2001; approved by EPA May 29, 2004) per EPA's recommendation to include all definitions related to antidegradation implementation that were previously

contained in 46CSR1. Prior to implementing this section the agency expects that more detailed guidance and procedures will be developed.

34. Being adjacent to a Tier 2.5 stream will restrict my access to the land.

As per 60CSR5-1-5.b 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. This would not affect landowner access to land. Activities subject to permits would not be prohibited if appropriate treatment is applied.

35. Comment was received suggesting in Section 5.6.c the agency should delete the 2 degrees Fahrenheit regulation as no new scientific data exists to prove that a temperature change of only 2 degrees Fahrenheit is harmful to the stream.

DEP concurs with the commenter that this language was disapproved by the EPA and thus is not effective for Clean Water Act purposes. DEP will remove the language from the proposed regulation. Similarly, EPA disapproved the language in Section 4.3 relating to Tier 1 protection for the Kanawha and Monongahela rivers. The agency will make this update as well.

36. DEP is not following the original compromise that was agreed upon by government, business and environmental groups.

DEP is following the procedures and criteria in 60CSR5 to designate streams for Tier 2.5 protection, which was approved in 2001 by the West Virginia Legislature.

37. Tier 2.5 will result in a loss of land rights and decrease property values.

The DEP previously provided opportunity for landowners to object to the designation by submitting information specific to the landowner's situation. In fact, the agency did remove streams from the list due to potential limitations on some use of the property. The DEP has reviewed the application of the Private Property Protection Act as required by the Antidegradation Implementation Procedures Rule (60CSR5-6.1.a.1) and determined that the designation of streams will not deprive any landowner of "productive use" of the property.

38. Protecting these waters will result in an increase in tourism, property values and protect our drinking water supply.

RESPONSE TO COMMENTS

60CSR5 - Antidegradation Implementation Procedures

July 27, 2007

The DEP agrees that protection and maintenance of the state's water resources provides increased opportunities for tourism, recreation and enhancement of the quality of life for all citizens of the state.

39. Commenter questioned strike-through language of 5.2 "Water segments that support the minimum fishable/swimmable . . ." Does this set Tier 1 as default or does language need clarified?

The second sentence in section 5.2 was declared "arbitrary and capricious" by the U.S. District Court for the Southern District of West Virginia in Ohio Valley Environmental Coalition v. Horinko, 279 F. Supp. 2d 732 (Aug. 29, 2003). Thus, the proposed rule removes this sentence. The Court's rationale was that the qualifying term "generally" was inappropriate in light of the fact that the rule contains no exceptions to the regulatory language concerning designating Tier 2 waters. We refer the commenter to the thorough discussion on this issue by the Court. The remaining language in section 5.2 is not unclear on the issue raised by the commenter. It states that only when an impairment results in "failure to attain minimum uses," does the Tier 1 status apply.

40. Commenter sought clarification of whether Slaty Fork was still on the list, and remarked about the area's quality.

Slaty Fork is not being proposed for Tier 2.5 protection.

41. Commenter suggested that DEP advance only those streams that were not objected to, or are entirely, including the headwaters, on public land.

DEP has considered many different options for selecting the number of streams to advance for Tier 2.5 protection. The list of 156 waters is the agency's recommendation.

42. Comment was submitted stating that the proposed language strikes references to appeals to the Board and suggested clarifications to the proviso at the end of the section.

The changes do not strike the reference to appeals to the Environmental Quality Board. They simply remove language that is superfluous regarding the nature of the hearing before the Board. (The Board's hearings are held in accordance with the Administrative Procedures Act.) The new language also removes, however, any authority of the Board to hear appeals concerning the designation of Tier 2.5 streams, consistent with an amendment to W.Va. Code §22-11-7b made in 2006 by the legislature.