DECEMBER 8

DECEMBER INTERIM ATTENDANCE
Legislative Interim Meetings
December 8, 2007

Public HEARING

Saturday, December 8, 2007
9:00 a.m. - 11:00 a.m.

Legislative Rule-Making Review Committee

Earl Ray Tomblin, ex officio nonvoting member	____	~~Robert "Bob" Kiss, ex~~ Richard Thompson officio nonvoting member	____

Senate		**House**	
Minard, Chair	✓	Brown, Chair	✓
Fanning, Vice Chair	____	Miley, Vice Chair	____
Prezioso	____	Burdiss	✓
Unger	____	Talbott	✓
Boley	✓	Overington	____
Facemyer	____	Sobonya	✓

I certify that the attendance as noted above is correct.

_____

Debra Graham

Please return to Benda in Room 132-E for Fax to 347-4819 ASAP, due to payroll deadline.

PUBLIC HEARING

The Legislative Rule-Making Review Committee will hold a public hearing on Saturday, December 8, 2007, in the Senate Judiciary Committee Room, 208W, from 9:00 a.m. to 11:00 a.m., to receive comments on the following rules of the Department of Environment Protection:

- **Office of Waste Management**
  Hazardous Waste Management System, 33CSR20

- **Office of Water Resources**
  Requirements Governing Water Quality Standards, 47CSR2

- **Office of Water Resources**
  National Pollutant Discharge Elimination System (NPDES) Program, 47CSR10

- **Secretary's Office**
  Antidegradation Implementation Procedures, 60CSR5

REGISTRATION OF PUBLIC
AT COMMITTEE MEETINGS

WEST VIRGINIA LEGISLATURE

Committee: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE **Date:** 12-8-07

Please print or write plainly.

NAME	ADDRESS	REPRESENTING	RULE NUMBER	Please mark with an (X) if you desire to make a statement.
JULIAN MARTIN	1525 Hampton Rd Charleston, WV 25314	WV HIGHLANDS CONSERVANCY		
HOMER SWEENEY	2231 McKINLEY AVE ST. ALBANS, WV 25177	MYSELF		
MATT NOERPEL	PO BOX 86 NAOMA, WV 25140	SELF	47CSR2	X
DON GASPER	4 RITCHIE ST BUCKHANNON	WV HIGHLANDS CONSERVANCY		
Bob Jones	GMC Homer Co. Kenova			

*Please return to Felisha Sutherland - Room MB-49

REGISTRATION OF PUBLIC
AT COMMITTEE MEETINGS

WEST VIRGINIA LEGISLATURE

Committee: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE **Date:** 12/8/07

Please print or write plainly.

NAME	ADDRESS	REPRESENTING	RULE NUMBER	Please mark with an (X) if you desire to make a statement.
LARRY ORR	104 HILLCREST AVE ELKVIEW, WV 25071	WV COUNCIL TROUT UNLIMITED	47CSR2 60CSR5	X
Dr. Jesse Purvis	P.O. Box 246 Glen Jean, WV 25846	National Park Service	60 CSR 5	X
Eric Autenreith	RR3 Box 554 A Fayetteville WV 25840	Plateau Action Network (PAN)	47CSR2 60CSR5	X
Sara Martin	PO Box 315 Fayetteville WV 25840	Concerned Citizen	47CSR2 60CSR5	X
DON GARVIN	PO Box 666 Buckhannon 26201	WV Environmental Council	Both Water Rules	X

*Please return to Felisha Sutherland - Room MB-49

The site on the Sharp Farm is a karst floodplain.

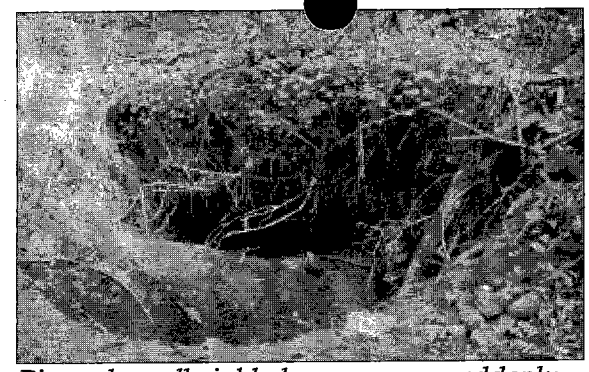
Karst is land with sinkholes, underground rivers, and caves. It is unstable, like land over old mine workings. Big Spring Fork dries up in places in summer and fall because the stream runs underground in caves. Sinkhole collapse occurs and water is swallowed up on the site. Pollution and untreated sewage spilled into sinkholes will contaminate trout streams and wells.

Who says the sewage plant won't work?

Expert hydrologists and geologists who were not paid by the project to OK the site say it is not suitable for a plant. Heavy construction equipment and 7-million-pound sewage tanks can collapse voids in the underlying limestone causing damage to facilities. Damaged equipment can leak millions of gallons of raw sewage into caves, springs, and streams.

Runoff from spring rains and snowmelt pour over the site. A floodwall will not keep the water out. Water will pass under the floodwall through caves and gush up through the boil holes, causing equipment damage or a washout around foundations. Raw sewage spilled from failed equipment can pollute two of WV's best recreation streams – the Big Spring Fork and Elk River.

Hollow land is no place to put a sewage plant. Why would anyone risk building a $20 million facility containing known karst hazards?



Big and small sinkholes can open suddenly and swallow buildings.

What can you do?

1. Make a phone call.

Call your local, state and federal representatives. Tell them you want a complete technical investigation and risk analysis of the proposed site -- or any alternative site -- before any taxpayer funds are spent on the sewage plant.

Pocahontas County Commissioners
304-799-6063
State Senator Walt Helmick 304-357-7980
U.S. Senator Robert Byrd 304-342-5885
U.S. Senator Jay Rockefeller 304-347-5372

2. Sign the petition.

Go to www.SaveTheSharpFarm.com Web site. Add your name to the petition.

3. Make a contribution to 8 Rivers legal challenge fund.

8 Rivers is conducting an expensive legal challenge to force officials to comply with the law and conduct a proper site and environmental assessment. Our attorney has visited the site and reviewed applicable statutes, and is confident that our legal challenge will succeed. Mail your check to the address on the front of the brochure, or use our Web site. Your support is greatly appreciated!

8

Reasons why we <u>SHOULD NOT</u> build a sewage plant on a karst floodplain

It is not safe.
It will collapse.
It will flood.
It will wash away.
It will pollute.
It will cost more to build.
It will cost more to maintain.
It's a $20 million mistake.

8 Rivers Safe Development, Inc.
P.O. Box 114
Cass, WV 24927

8RiversSafeDevelopment.com

8 Rivers Safe Development is a nonprofit corporation organized for charitable and educational purposes to advocate and encourage the conservation and protection of karst, caves, and karst landscapes, and to encourage safe development on karst terrains.

Why the sewage plant will wash away

Photo of flooding near the proposed sewage plant site – November 29, 2005

The plant is in the path of floods.

The plant is sited within the floodplain, just downstream of a long channelized section of Big Spring Fork. The U.S. Rt. 219 bridge is a debris trap that causes flood-water to back up over the site. Federal law prohibits building any project with federal funds on a floodplain. It's too dangerous. When collapse and flooding occur, builders and government agencies will claim such events are "*acts of God.*" Who will pay? The PSD's customers will be stuck with clean-up and repair cost.

Above the floodplain?

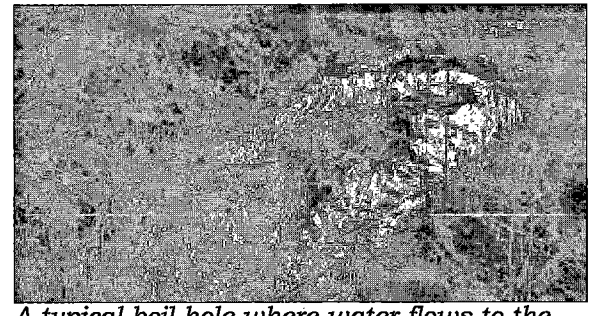
The U.S. Army Corps of Engineers, without examining the site, said it was not a floodplain. Unfortunately they made their decision based on average rainfall and a computer model. Local residents know the site floods regularly. The photo above was taken just upstream of the proposed site and clearly shows the potential for flooding.

Raw sewage will cascade down the mountain & along the valley.

Raw sewage will flow in a 5-mile long PVC pipe that will cross Big Spring Fork and several well known caves and springs. Failure in the line or the overflow of a manhole or pumping station can result in raw sewage spills into the underground stream system.

Contaminants in karst travel at speeds of feet per second where normal groundwater flow is measured at feet per year. It could take 10 - 20 years for underground streams to recover from a single spill. No fishing, no swimming, no wells.

Sewage is now treated where it originates – up on the mountain. This is much safer; Less risky than transporting raw sewage in PVC piping over 5 miles to a regional plant.



A typical boil hole where water flows to the surface from caves in the hollow limestone below.

Why not select a better site?

Officials say they are reluctant to reconsider alternate sites – even when faced with facts and evidence that the present site won't work physically and financially. Why take costly risks?

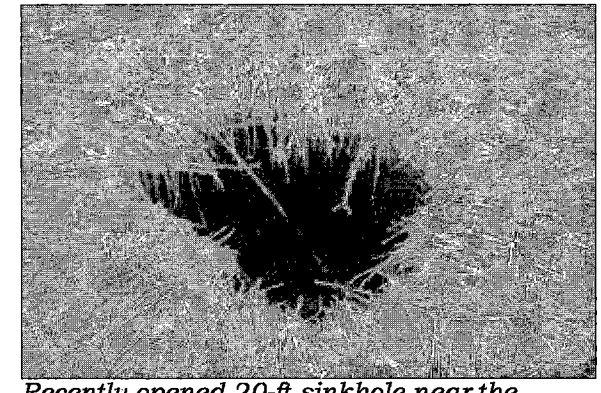
$20 million is a LOT of money. Is the sewage plant needed at all?

New technology installed on the existing treatment plant could save an estimated $5 to $10 million dollars -- without the need for building a regional plant.

A complete investigation would examine the feasibility and safety of more modern, less expensive options – on karst-free land.

Who is 8 Rivers Safe Development?

We are a nonprofit corporation of citizens and taxpayers, centered in Pocahontas County, WV. Our county contains the headwaters of 8 significant rivers. Our position is that it is cheaper to prevent collapse, flooding, and contamination upstream than pay for expensive clean-ups and fines downstream. We welcome the support of those who value safe development as the key to economic health.



Recently opened 20-ft. sinkhole near the proposed site of the regional sewage plant.

Save Cave • Rivers

www.8RiversSafeDevelopment.com

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

IN REPLY REFER TO:

December 7, 2007

A3815(NERI)

Legislative Rule-Making Review Committee
West Virginia Legislature
West Virginia Capitol
Charleston, WV 25305

Dear Chairs Brown and Minard:

We appreciate the opportunity to comment on proposed changes to West Virginia's antidegradation implementation procedures (Title 60 Series 5 of the Code of State Regulations). The National Park Service manages three units of the National Park System (parks) in southern West Virginia that were established primarily for their aquatic resources. These parks are New River Gorge National River, Bluestone National Scenic River, and Gauley River National Recreation Area. The presence of the three parks generates over 130 million dollars of annual revenue for a four-county (Summers, Raleigh, Fayette, and Nicholas) region. Park visitors that generate this revenue are drawn here because of the high-value aquatic resources in these parks.

The National Park Service has continually worked with a variety of local, state, and federal organizations and individuals to focus effort on water quality concerns in and around these three parks. These efforts have led to a number of projects that have benefited local and regional water quality. These projects include sewage treatment plant upgrades in Hinton (New River) and extension of sewer service by Hinton to the Madam Creek area, plant and collection system upgrades in Beckley (Piney Creek), plant upgrades and system service extension in Mount Hope (Dunloup Creek), approval of a watershed plan to buy out willing sellers from flood-prone properties along Dunloup Creek, system upgrades in Oak Hill (Arbuckle Creek) and Fayetteville (Wolf Creek and Marr Branch), creation of the Wolf Creek trust to improve conditions in that stream, establishment of a demonstration project to provide sewer equivalency to the unserved community of Winona (Keeney Creek), and preparation of a county-wide waste water master plan for Fayette County.

Given the amount of effort and funds expended, the National Park Service is disappointed that several streams in the three parks were removed from the initial list of waters proposed for Tier 2.5 protection. These streams include Collison Creek (KG-20) and Dogwood Creek (KG-19A) in Gauley River National Recreation Area, and Ephraim (KN-18), Buffalo (KN-23), Laurel (KN-27), Glade (KN-29), and Pinch (KN-29E) Creeks in New River Gorge National River. In addition, while Slater Creek (KN-24) in New River Gorge National River remained on the list, the length of protected waters decreased from 5.1 miles to 0.8 miles. National Park Service data indicates that these streams have excellent water quality and support healthy, productive, and diverse assemblages of aquatic life. We are especially perplexed by the removal of Buffalo Creek from the presumptive list, since this stream is managed by the West Virginia Division of Natural Resources as a fly-fishing only (catch-and-release) stream for a naturally reproducing brook trout population. In addition to the above-noted high quality streams, the National Park Service is disappointed that other high quality streams within the three parks-- including the park's namesake rivers, the New, the Gauley and the Bluestone-- were not included in the initial presumptive list of waters to be considered for Tier 2.5 protection.

It is the National Park Service's position that the State of West Virginia should take all available steps to maintain and improve the water quality in waters of the three parks. This action will maintain and protect the high quality waters that these parks were established to preserve, and ensure that the economic force generated by these three parks will remain vibrant. Towards this end, the National Park Service urges that the above noted streams be restored to the list of those to be offered Tier 2.5 protection.

Again, thank you for this opportunity to submit our comments.

Sincerely,

Deborah A. Darden

for Don Striker
Superintendent

The Environment

America's Greenest States

Brian Wingfield and Miriam Marcus 10.17.07, 6:00 AM ET

In Pictures: America's Greenest (And Least Green) States
Table: Complete State Rankings

Related Stories
In Pictures: America's Greenest (And Least Green) States
Hall of Fame
In Pictures: The Best States For Business
In Pictures: The Best Quality Of Life
In Pictures: The Best Labor Pools

WASHINGTON, D.C. - When you think "green," you think New Jersey, right? OK, maybe not. But perhaps you should.

The Garden State ranked seventh in our first-ever list of America's Greenest States, a surprise winner amid places synonymous with environmentalism like Vermont, Oregon and Washington. More startling: The congested East Coast is a lot more environmentally friendly than you thought.

Sure the Western U.S., with its big skies and open spaces feels green--but when you look at broader measurements of humans' impact on the environment, including consumption patterns, air and water quality, and waste, as well as policy, they don't fare as well.

In Pictures: America's Greenest (And Least Green) States

Table: Complete State Rankings ← click on this for the list of State's Rankings.

Despite the acreage and lack of people, as well as mountains of regulation in California, Westerners drive further and use more resources than their cramped Eastern cousins. Still, Idaho, Colorado, New Mexico and Nevada all finished in the top 20.

On top: Vermont, Oregon and Washington. All have low carbon dioxide emissions per capita (or "carbon footprints"), strong policies to promote energy efficiency and high air quality, as indicated by their major metro areas that are low in smog and ozone pollution. They're also among the states with the most buildings (on a per capita basis) that have received the U.S. Green Building Council's benchmark certification, known as Leadership in Energy and Environmental Design (LEED).

A clutch of Eastern states round out the top 10. New Jersey makes the cut not because it excels in one particular area--though it has implemented strong policies to promote energy efficiency--but because it gets relatively high marks in just about every category. In only five states did people travel fewer miles in their vehicles than they did in New Jersey in 2005, the most recent year for which government data is available. That same year, 42 states exceeded their Clean Water Act permit limits by levels greater than New Jersey did, according to the watchdog group U.S. PIRG. And 33 states managed more toxic waste per capita than New Jersey. In other words, don't let the poor air quality in Newark fool you.

Another example: Maryland. Only 10 states have a lower carbon footprint per capita than Maryland, and the state has a relatively low instance of water facilities exceeding their Clean Water Act permits, according to PIRG. In addition, Maryland ranks 40th in total energy consumption nationwide, and it managed less toxic waste per capita than all but six states in 2005. And earlier this year it joined a group of Northeast and Mid-Atlantic states to cap greenhouse gas emissions and trade emissions credits.

Then there's tiny Rhode Island. The state has mandated that utilities obtain 16% of their power from renewable fuel sources by 2020. It has the lowest energy consumption per capita of any state in the country, and only two states have lower carbon footprints than Rhode Island, government data show.

One of the most startling findings on our list is that California doesn't crack the top 10, despite routinely setting the bar for environmental policy. At least five of its metropolitan areas, including Los Angeles, Bakersfield and Fresno, appear on the American Lung Association's 2007 list of cities with the worst long-term smog and ozone pollution. And 69% of its major water facilities exceeded their Clean Water Act permit limits at least once in 2005, according to PIRG. That's the 10th worst percentage in the country.

Likewise, there's no Rocky Mountain high in the top 10. Colorado, famous for outdoor recreation, does have great air quality, but its carbon footprint per capita is only the 24th best in the nation. It doesn't have particularly poor water quality or energy efficiency policies or an abnormally high amount of toxic waste, but the state's rankings in these categories aren't outstanding either. It clocks in at No. 13 on our survey.

A bit about our methodology--we ranked each state in six equally weighted categories: carbon footprint, air quality, water quality, hazardous waste management, policy initiatives and energy consumption.

Because carbon dioxide is the most prevalent greenhouse gas, carbon footprint provides a fairly good example of overall emissions levels. For air quality, we have relied on the American Lung Association's 2007 State of the Air Report to determine which metro areas have the best and worst pollution. Because EPA's most recent comprehensive data on water quality is five years old, we have relied on PIRG's water assessment released in October 2007 to complete our analysis in that area. Each state's hazardous waste management per capita has been determined using the most recent information available (2005) from EPA.

For our rankings on policy initiatives, we use the American Council for an Energy-Efficient Economy's energy efficiency scorecard, released in June 2007. Regarding energy consumption and lifestyle choice, we examined a number of factors, including vehicle miles traveled and the number of alternative fuel and

hybrid-electric vehicles per capita by state, as well as the number of buildings that have received the U.S. Green Building Council's energy efficient "LEED" certification. We have also relied on information from the Energy Information Administration, the Environmental Protection Agency, Department of Transportation, the Natural Resources Defense Council and the Sierra Club. All data are the most recent available.

So who's at the bottom? Mississippi, Louisiana, Alabama, Indiana and, at No. 50, West Virginia. All suffer from a mix of toxic waste, lots of pollution and consumption and no clear plans to do anything about it. Expect them to remain that way.

My name is Larry Orr and I am the Chairman of the West Virginia Council of Trout Unlimited. WVCTU has more than 1700 members. Our mission is to conserve, protect and restore the coldwater fisheries of WV and their watersheds.

I am a chemical engineer and retired from Union Carbide in 1999 as a Senior Project Manager. I managed the design and construction of chemical plants around the world for 38 years. When I first came to the Kanawha Valley in 1961, the Kanawha River was not suitable for recreation in the Charleston area. The chemical industry acted as a good neighbor, cleaned up its' act by designing and operating its' plants according to the appropriate water quality standards, and now people fish, boat and swim in the Kanawha River in the Charleston and South Charleston areas. It is time that the extractive industries are required to step up and be good neighbors by treating the waters of West Virginia with the respect and concern that is deserved.

REQMTS GOVERNING WATER QUALITY STDS

The main point on 47CSR2 is that the definition of B2 trout streams must remain the same; "Trout waters are defined as waters which sustain year-round trout populations. Excluded are those waters which receive annual stockings of trout but which do not support year-round trout populations." This is a good and proper definition.

ANTIDEG IMPLEMENT NEEDED

The West Virginia Council of Trout Unlimited strongly objects to the reduction of the number of proposed Category Tier 2.5 streams to 157 in 60CSR5. The number of proposed streams should be at least the 309 streams that were in the rules package introduced to the 2007 Legislative Session. The reduction from the initial presumptive list of 444 streams to 309 prior to that session was done by the DNR and DEP and had some scientific basis. The reduction from 309 to 157 in the current proposed legislation was purely political and has no basis.

Trout fishing in WV brings in $80 million annually. There are 2000 miles of trout streams in WV, so this converts to $40,000 per mile of trout stream. Only a fraction of these streams are included in the 309 that were proposed to be given Tier 2.5 protection in the legislation introduced to the 2007 legislative session. The wholesale reduction of Tier 2.5 streams for political purposes must be reversed. It is not in the interest of the WV economy or its quality of life.

Water is the most important natural resource in WV – not coal, oil, gas, timber or other extractive materials. There is no alternative material to replace water as there is with extractive industry materials used for the production of energy. Pure water is required for sustenance of life and maintenance of health. We must provide the proper protection for this precious commodity.

Almost all of our Trout Unlimited members live and work in WV. We are not anti business or anti development. We believe that business and development can operate and grow in a responsible manner while still maintaining the quality of our waters and the recreational value. We have worked with various companies (including oil and gas and coal companies) on trout stream restoration projects in WV and have reached win – win solutions for both sides.

It is time for WV to comply with federal water quality requirements by enacting the Antidegradation Implementation Procedures and including the 309 streams for Tier 2.5 protection as presented in the package that was originally sent to the 2007 Legislature.

PAN
P.O. Box 482
Fayetteville, WV 25840

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

December 8, 2007

Dear Governor, Senators and Delegates- Ladies and Gentlemen,

60CSR5

Please do the right thing and stand up for West Virginia. Please restore all 309 streams to the Tier 2.5 list or defeat the rule as proposed and pass the Water Quality Standards Rule. 61CSR2

West Virginia has just been singled out as being in LAST place in the United States for our lack of environmental stewardship and no apparent plan to do anything about it...

Coal may "keep the lights on" and the coal mining heritage is a proud one for those who actually dig the coal. But for the coal operators, and the timber barons, the legacy is one of abuse of the land and the people. They have left a trail of wrecked streams forests and communities that cost us taxpayers endless millions upon millions of dollar to clean up and repair. AND it makes us sick to live there. Who would want to move his family here to live and start a business?

West Virginia is at the bottom of so many lists because of this heritage of abuse. And the abuse thrives in a state where lies, ignorance and demagoguery are allowed to trump good science, civil debate and **moral responsibility to care for our own people and God's Green Earth.**

The long time, independent farmers of the Farm Bureau have been good stewards of their land. Farms don't survive to be passed on for generations unless they have been taken care of. The farmers along the listed Tier 2.5 streams and the "B-2" trout streams should be proud of this measure of their stewardship. What ever they do now to ensure clean streams is working and they should have nothing to fear. I suggest that the fear mongers- industrial farm interests and other big business developer types have sowed the seeds of "losing the rights to use their own land", half-truths, misleading statements, inaccurate info... polite words for lies.

West Virginia is our piece of Earth to care for. **We CAN have really clean streams, lakes, air and really healthy forests and farmland AND economic prosperity**- not just survival- but real economic prosperity. The examples are all over this planet, where communities have demanded high environmental standards from businesses and residents and have created the most attractive, healthy, safe and prosperous communities. The technology exists. The knowledge to plan our communities for Smart Growth exists. The help is there for the asking. We just need to want it. We...You, CAN lift this state up by doing the right thing.

Thousands of state employees whose jobs are to care for our streams, forests and wildlife, have worked for years to meet the mandates of the Federal Clean Water Act. Thousands of watershed group volunteers have been led to believe that their efforts actually make a difference in this state. The DEP, WV Conservation Agency, Division of Forestry and the DNR have made great efforts and have been enormously successful, through the Stream Partners and Save Our Streams programs, in fostering awareness and supporting the volunteer efforts to care for our state's waters.

The science is good. Good faith negotiations between interested parties went on for years. **309 streams soundly qualify for Tier 2.5 status.**

Think of the message you will send to these Thousands of West Virginians, and the rest of the country. You can pull the rug from under all these people and send the message to the rest of the world that West Virginia is number 50 and we're here to stay...

... Or, you can stand up for our already clean streams. Stand up for sound science. Stand up for the Wild and Wonderful in West Virginia. Please do the right thing.

Please restore all 309 streams to the Tier 2.5 list or defeat the rule as proposed and pass the Water Quality Standards Rule.

Sincerely,

Eric Autenreith,

Board Member, Plateau Action Network Fayetteville, WV 304-574-1067 ericaut@citynet.net

This material was prepared by:
Don Garvin
Legislative Coordinator
West Virginia Environmental Council

West Virginia's Tier 2.5 Streams – Background and Timeline

Background:

Prior to 1972, rivers, streams, and lakes throughout the nation were badly polluted. In West Virginia, extractive industries, chemical facilities, and development took a toll on many of the state's 32,000 miles of rivers and streams. Many streams throughout the Mountain State (indeed, throughout states nationwide) had become acid-stained, trashed, and lifeless.

The 1972 Clean Water Act was designed to counter these trends.

The federal Clean Water Act basically required states to do two things: first, to clean up their polluted rivers, lakes and streams; and second, to protect their clean waters from becoming dirty.

In order to clean up polluted waters, the federal law required states to set specific water quality standards for harmful pollutants, and to regulate the discharge of those pollutants by issuing National Pollutant Discharge Elimination System (NPDES) permits which require polluters to meet discharge limitations, with the eventual goal of zero discharge. It can be argued that states have been largely successful at cleaning up polluted waters as required by the Clean Water Act.

However, meeting the "antidegradation" goals of the Act – protecting rivers, lakes and streams from becoming more polluted – has remained a challenge for states and the federal government. The Clean Water Act's antidegradation policy was designed to achieve the maintenance part of the Act's objective – "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" – by keeping clean waters clean and preventing further pollution of others.

The goal of federal antidegradation policy is to protect "existing uses" and ensure that waters are not unnecessarily degraded. The policy requires states to protect all waters from further degradation that would impact "existing uses," and mandates states to prevent any further degradation of their highest quality rivers and streams. In order to accomplish this, the Act created a "tier" system, requiring states to place rivers and streams into different categories, or tiers, based on how polluted they are. Higher quality streams are placed into higher tiers that require increased protections. Three levels of protection are provided under the Act – Tier 3, Tier 2, and Tier 1 – with Tier 3 streams being the highest category.

While the federal Environmental Protection Agency has been relatively aggressive, to one degree or another, in forcing states to clean up polluted waters, most analysts would agree that its efforts to require states to implement the antidegradation provisions of the Act have been timid, at best. In fact, the State of West Virginia was finally forced to enact an antidegradation implementation

plan in 2001, but only as a direct result of the filing of a notice of intent to sue the EPA for not requiring the state to take action.

Prior to 2001 – in the early 1990's – West Virginia had adopted an antidegradation policy, but without an implementation plan. It was during the negotiations over the antidegradation policy that West Virginia created a fourth category of stream protection – Tier 2.5.

The Tier 2.5 concept was created by the WV Division of Natural Resource's Office of Water Resources (the regulating agency at that time) as a compromise with industry to avoid having to list all reproducing trout streams in the Tier 3 category, which would allow no degradation. Prior to that time the state regulatory agency had considered all "native" Eastern brook trout streams as Tier 3 waters.

The WV Division of Environmental Protection (the current state regulatory agency) admits this fact in its July 27, 2007 DEP Response to Public Comments document: "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."

The state has enshrined this compromise into law by creating the Tier 2.5 category of protection, the second-highest level of protection, into both the antidegradation policy and the antidegradation implementation plan. Accordingly, Tier 2.5 waters include, but are not limited to: " . . . naturally reproducing trout streams, federally designated rivers under "Wild and Scenic Rivers Act," . . . , waters in state parks and forests, waters in National parks and forests, waters designated under the "National Parks and Recreation Act of 1978," and waters with unique or exceptional aesthetic, ecological, or recreational value." These streams are also referred to as "Waters of Special Concern."

Timeline:

- March 2001 – WV legislature passed rule 60 CSR 5, the "Antidegradation Implementation Procedures" rule, which contained a list of **444 Tier 2.5 waters**. The list was developed in close consultation between WV DEP regulators and WV DNR biologists. However, in a last minute concession to the state's polluting industries, the legislature made this a "presumptive" list, requiring the DEP to develop and consider an objection process for affected landowners, as well as a general public comment process, before finalizing the Tier 2.5 stream list.

- Early 2002 – WV DEP initiated the process to register concerns provided by landowners affected by presumptive Tier 2.5 list. WV DEP then extended the comment period until July 31, 2003. During this extension, WV DEP solicited its first extended request to landowners to provide additional information in support of their objections to listed streams. As part of this process, the DEP conducted numerous public hearings across the state.

- Fall 2005 – WV DEP opened another comment period for objectors, encouraging them to provide more detailed information in support of their objections. During this period they again extended the comment period, this time until December 31, 2005.

- Spring 2006 – WV DEP announced its proposed amendment to rule 60 CSR 5, which contained a pared down list of **309 Tier 2.5 streams** as the finalized Tier 2.5 stream list. The DEP said they removed **50 streams** from the list "because the information used to list the streams was flawed" originally. And they removed **an additional 85 streams** from the list for a variety of reasons, including "impact on property owners" and "impact on economic development, including demonstrated natural resources." DEP said they received more than 4,000 objection letters, primarily form letters provided to landowners by the Farm Bureau. According to DEP **38 streams received no objections** and "therefore, automatically go to the final Tier 2.5 list."

- Winter 2007 – After lengthy negotiations with industry groups and other stakeholders, the WV legislature decided not to act on DEP's proposed amendment to rule 60 CSR 5. During those negotiations, DEP Secretary Stephanie Timmermeyer proposed a compromise list of **156 streams** – the **38 streams** that received no objections from landowners and an **additional 114 streams** that the agency claimed were reproducing native brook trout streams located totally on public lands. However, the different industry interests represented in the negotiations could not come to agreement on the compromise. Also during the session the Senate Judiciary Committee accepted an amendment offered by Senator Walt Helmick (D – Pocahontas County) that reduced the Tier 2.5 list to just **38 streams**, the streams that DEP said received no objections from landowners. A similar amendment offered by Delegate Bill Hamilton (R – Upshur County) failed to pass in the House Judiciary Committee. As a result of all of this, the Speaker of the House of Delegates decided to pull all of DEP's proposed legislative rules from consideration.

- Spring 2007 – WV DEP again announced a proposed amendment to rule 60 CSR 5, paring the list of **309 Tier 2.5 streams** proposed in 2006 down to the compromise list of **156 streams** offered during the 2007 legislative session negotiations with stakeholders.

- Winter 2008 – The WV legislature will again attempt to grapple with the Tier 2.5 stream list, this time beginning with a Tier 2.5 stream list of **only 156 streams** that has already been highly compromised.

History of Antidegradation Protections for Reproducing Trout Streams

There have been at least three basic Sections of West Virginia Legislative Rules Governing Water Quality Standards (46CSR1 - now 47CSR2) that address (Outstanding) National Resource Waters: Section 2 (Definitions), Section 4 (Anti-Degradation Policy) and parts of Section 7 (West Virginia Waters).

There were few changes in the language of these three sections from 1980 until 1991. During the ensuing few years there were numerous meetings/discussions and negotiations between members of the Water Resource Division, the Water Resources Board (later known as the Environmental Quality Board) and industry, that led to the most significant change in 1995 (– possibly 1994).

I. 1984 through 1991 (and probably as early as 1980 or 1981):

1) Section 2. Definitions: "National Resource Waters" are those whose unique character, ecological or recreational value or pristine nature constitutes a valuable national or State resource.
2) Section 4. Anti-Degradation. "In all cases, waters which constitute and outstanding national resource as designated in Section 7.3.d shall be maintained and protected and improved where necessary."
3) Section 7. (West Virginia Waters) [Through the years this Section included subsections pertaining to "high quality waters" and "National Resource Waters"]
National Resource Waters shall include but are not limited to the following waters of the State:
(a) All Federally designated rivers under the "Wild and Scenic Rivers Act", P.L. 95-542, as amended, 16 U.S.C. 1271 et seq.
(b) All naturally reproducing trout streams. [This possibly appeared in 1980, and was definitely proposed in 1981. However, subsection (b) was definitely part of rule from 1984 – 1995.]
(c) All streams and other bodies of water in State and National Forests and Parks and recreation areas. [The word "Parks" does not appear in subsection (c) after 1991.]
National Rivers [...wording added by 1984: "'National Parks and Recreation Act of 1978.' Public Law 95-625, as amended, 16 U.S.C. 1, et seq."]

II. Rumblings of discontent were alluded to in the Board's response to comments re: 7.3 in the **RATIONALE DOCUMENT dated October 14,1988**, i.e. "The Board also declined to address the other comments at this time but will give them due consideration in the 1989 review.

III. 1991: The Board proposed clarifying Section 7.3 and Section 2.8 by adding the word "Outstanding" to the existing phrase "National Resource Waters".

The **August 19, 1991 RATIONALE DOCUMENT** on this matter reads as follows:

Proposed Change to Section 2 – Definition of "National Resource Waters":

The Board proposed to add the word "outstanding" before the term "National Resource Waters" and to reorder the definitions to maintain the alphabetical order.

Comments and Responses

One comment concurred with the proposed addition.

One comment was received concerning the "far-reaching" effects of this proposal. The commentor cited EPA's policy regarding Outstanding National Resource Waters [40 CFR 131.12(a)(3)]:

> "Where high quality waters constitute an outstanding National resource, such as waters of National and State park and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

This policy has no allowance for lessening water quality and is usually interpreted as a ban on new or increased discharges. The commentor noted that this removes the ability of the State to determine that important social and economic development outweighs strict preservation of water quality in such streams.

The Board is aware of this policy and its implementation. In addition, the Board points out Section 46-1-4.g of its own rules currently in effect which reads:

> "In all cases, waters which constitute an outstanding national resource as designated in Section 7.3.d shall be maintained and protected and improved where necessary."

This language (with different section references and the list of designated streams (now in Section 7.3.d) has been in the rules since before 1984. The implementation of this rule should have been as the commentor noted even without the current proposal which is intended for clarification. However, the Board recognizes that this may not, in fact, have been implemented in this way and could create unintentional impacts.

Board Action

The board withdraws the proposal but will assess streams in section 7.3.d. for possible designation as Outstanding National Resource Waters during the next year.

IV. 1993: In 1993 the wording of Section 4 (Anti-Degradation) changed significantly, but the definition of National Resource Waters in Section 2 and description/list in Section 7 remained unchanged.

V. 1994(?) 1995:

In the definition Section 2 "National Resource Waters" became "Outstanding National Resource Waters" and reference to Section 7 was eliminated. Otherwise, the definition remained the same.

Portions of Section 7 were incorporated into Section 4 (Anti-Degradation) and Anti-Degradation was further defined.

New "Tier"-type descriptions were written into Section 4. Wild and Scenic Rivers, naturally reproducing trout streams, other bodies of water in State and National Forests and Recreation Areas and National Rivers via the "National Parks and Recreation Act of 1978", were in effect demoted to a new, lower level of protection called "waters of special concern".

Once the Anti-Degradation implementation policy was worked out, the new "waters of special concern" level would be known as "Tier 2.5" and the now more limited category of Outstanding National Resource Waters would be "Tier 3". However, language in the new Tier 3 category left the door open for additional waters to be elevated to that status in the future. Streams assigned to (the WV specific) Tier 2.5 were obviously intended to be among those to be reestablished as deserving the highest level of protection afforded by Tier 3.

This material was presented by:
Don Garvin
Legislative Coordinator
West Virginia Environmental Council

West Virginia Forestry Association

P.O. Box 718 - Ripley, WV 25271 - Phone: 304-372-1955 - FAX: 304-372-1957
E-Mail: wvfa@wvadventures.net - www.wvfa.net - www.wvfa.org

December 6, 2007

Legislative Rule-Making Review Committee
Public Hearing
Saturday, December 8, 2007

Dear Committee Members:

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,

Dick Waybright
Executive Director

West Virginia Farm Bureau

One Red Rock Road, Buckhannon, WV 26201
Phone: (304) 472-2080· 1-(800) 398-4630
Fax: (304) 472-6554

December 7, 2007

Dear Legislative Rule-Making Committee:

The West Virginia Farm Bureau supports only adding the 38 streams that received "no objection" from landowners to the presumptive Tier 2.5 stream list.

Our objections are based on both procedural violations perpetrated by the WVDEP 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.

There were seven specific criteria that WVDEP was supposed to consider when selecting a stream for Tier 2.5 classification. They include impact on private property owners; adequate representation of affected parties; location of the water; previous special designations; impact on economic development in the area, including development of demonstrated natural resources; existing water quality; and unique or exceptional ecological, recreational or aesthetic resource value.

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?

WVDEP has failed to meet the standard for any stream on the list. They have not considered the economic impact of listing a stream, or provided adequate representation for affected parties. During the initial notification process, WVDEP chose to ignore the law that required individual landowner notification in favor of a "legal ad" in local newspapers. This process ignored the rights of landowners who lived distant from the land or just did not receive and read the local paper. WVDEP also chose to require landowners to prove their stream should not be on the list instead of doing what the law requires, proving that they should be on the list. This shift of the burden of proof should not be allowed to occur.

In most cases, the WVDEP stream quality data is lacking. For some trout waters, it is non-existent. There are listings that have only one sample taken as many as 10-15 years ago. A report used to justify the listing of trout streams dates back to 1984.

WVDEP received more than 4,000 objections in the initial comment period. The 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 they 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.**

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 you to support only the 38 "no objection" streams to the Tier 2.5 list.

Sincerely,

James F. Kinsey
Executive Secretary

Sincerely,

Don Michael
Director of Governmental Affairs

MEMORANDUM

TO: Judiciary Chair Webster and Legislative Rulemaking Chair Brown
FROM: Joe Altizer, House Counsel
RE: Background on Tier 2.5 Stream Designation
DATE: December 6, 2007

The antidegradation-Tier 2.5 issue has been before the Legislature every year in some form for many years. In 2001, the Legislature worked with interest groups to design a process to allow the designation of streams within the Tier system that is protective of current existing water quality uses throughout the state. Part of the result of that process in 2001 was the creation of a "presumptive list" of 444 streams for special protection under the Tier 2.5 designation. The DEP was charged with verifying that these steams met the 2.5 standard, with notice to adjoining riparian land owners about the pending designation. The DEP did not give "actual" notice to all landowners but did undertake an extensive advertisement and notice campaign to make property owners aware of the pending designation. Last year the DEP came forth with a list of 303 streams of the 404 it concluded met the 2.5 designation.

The rule has always provided that non-point source dischargers only have to follow best management practices for their industry regardless of the water they are discharging into, and do not have to get variances and are not impacted by the 2.5 designation. Non-point discharges include forestry and agricultural activities and in most cases, oil and gas drilling and extraction.

There are 4 tiers which reflect the waters' existing protections: Tier 1 applies to all waters and requires that existing uses of every state water body must be protected; Tier 2 - High Quality Waters is the default level of protection that applies to all water bodies unless otherwise designated. This designation prevents degradation of a water's assimilative capacity by more than 10%. Tier 2 allows a variance of this antidegradation limitation for a social-economic reason. Tier 2.5 provides the same level of protection as Tier 2 *except* no social-economic variance may be given. In no circumstance may any variance allow a water quality violation for a water body. Tier 3 waters are the best of the state water bodies, deemed "Outstanding Natural Water Resources" and no degradation of these waters may occur.

The 303 streams that the DEP recommended last year for listing as Tier 2.5 water bodies represent less than 4% of state streams. The Tier 2.5 stream list is the first attempt (except for the previous listing of one stream) by this state to establish Tier 2.5 based on findings by the DEP and DNR that these streams are appropriate for listing as Tier 2.5. Groups opposing the implementation of the 2.5 list have objected to the notice or lack thereof to riparian right owners and according to them the use by the DEP of old or flawed science associated with designating these streams. The DEP has consistently stood up for its notice process as meeting the statutory notice requirements and the scientific process it used to designated these streams.

Breakdown of the status of the Streams:

37 Streams with no objections.

70 Streams 100% on public lands with objections.

107 Streams that either have a percentage of public land or had no objections

156 Streams with any percent on public lands or no objections.

303 Total proposed by DEP in its 2007 RS legislative proposal as properly designated Tier 2.5 streams.

Last session, several alternative "compromises" were offered by various interested parties. My notes reflect that these were:

1. The DEP's original proposal for listing 303 streams as Tier 2.5 streams.

2. Speaker Thompson's first suggestion. 107 with actual notice to property owners before listing the other 49.

3. Speaker Thompson's revised proposal with assent of the DEP. All 156 listed with the right of person who did not get notice to have their protest be heard, and removed to Tier 2.0 following same criteria used by the DEP when the 156 were originally listed as Tier 2.5.

4. Del. Hartman amendment. List 39 streams with no objection.

5. Chair Webster suggested compromise- Allow contest of all of the 303 stream's Tier 2.5 status, with DEP having to prove original test was valid, and if stream currently lower than Tier 2.5, requiring DEP to show intervening human impact that caused that reduction.

6. Ann Bradley- industry compromise- Use 303 as "proposed list" for Tier 2.5 designation only upon permit application for discharge. Until then deemed Tier 2.0.

7. Dick Waybright suggested compromise- 107 Tier 2.5, but 38 without objection stay listed no matter what. 70 streams deemed 100% public, if private property owner shows they own land. that stream portion deemed Tier 2.

8. The DEP is offering in this years rule proposal to list the 156 streams with any percent on public lands or no objections.