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

Form #5

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

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

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

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

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

TITLE OF RULE BEING PROPOSED: Designation of Tier 3 Waters

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



Authorized Signature

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

FILED

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

§47-2A-1. General.

- 1.1 Scope. -- This rule provides guidance and clarification for designating a Tier 3 water pursuant to the provisions of 47CSR§2-4.1.c.
- 1.2. Authority. -- W. Va. Code §22-11-7b and 47CSR§2-4.1.c.
- 1.3. Filing. -- October 28, 2008.
- 1.4. Effective Date. -- December 1, 2008.

§47-2A-2. Definitions.

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

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

§47-2A-3. Applicability.

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

§47-2A-4. Tier 3 Designation.

- 4.1. Waters Located in Federal Wilderness Areas.

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

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

4.2.a. All high quality waters or naturally reproducing trout streams located within the boundaries of state parks, national forests or units within the national park system, bounded on both sides of the water by public land, will be designated Tier 3 waters.

4.3. Specifically Designated Federal Waters.

4.3.a. Waters specifically designated under the Wild and Scenic Rivers Act and the National Parks and Recreation Act of 1978, as amended, will be designated Tier 3, notwithstanding ownership status of the land bordering those waters. Waters included in these designations are currently limited to portions of the main stem of the Bluestone River as described under 16 U.S.C. §1274(a)(65) and portions of the main stem of the New River as described under 16 U.S.C. §460m et seq.

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

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

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

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

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

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

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

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

6.1. Waters immediately upstream of a Tier 3 segment will be considered Tier 1 or Tier 2, as appropriate, unless subsequently designated Tier 3. With respect to the protection of downstream Tier 3 segments, the provisions of 60CSR§5-6.3 apply.