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Legislative committee doubles size of protected-stream list

By Ken Ward Jr.
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Lawmakers unexpectedly doubled the size of a protected-stream list Tuesday, setting the stage for another legislative battle over West Virginia's water quality.

The fight over the stream list — which has waged off and on since 2001 — is expected to be the biggest environmental issue of the 2008 session.

"Everyone will get another shot at this," said Sen. Joe Minard, D-Harrison and chairman of the Joint Legislative Rulemaking Review Committee. "This is only one step in the process."

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A day before the regular session starts, Minard's committee increased the number of streams on the Department of Environmental Protection list from 157 to 309.

Delegate Mike Burdiss, D-Wyoming, proposed the change as he unfurled a giant map showing West Virginia and the state's more than 2,000 streams.

"As a legislator, I think that I have a responsibility to vote for clean water for my residents," said Burdiss, a retired coal miner and United Mine Workers lobbyist.

"What are we doing here?" Burdiss said. "The Chamber [of Commerce] says to vote to pollute, to degrade the water?"

Delegate Joe Talbott, D-Webster, agreed.

"Water is the most important asset in West Virginia," Talbott said. "It's more important than coal, more important than timber."

The committee approved the amendment and advanced the rule, both by voice votes. The rule must be approved by the full Legislature.

The committee action returned to the DEP's "Tier 2.5" list of streams 152 waterways that Gov. Joe Manchin in June 2007 ordered agency Secretary Stephanie Timmermeyer to remove from the inventory of streams that were to receive special protections under the federally required anti-degradation policy.

Streams on the list are clean, and the anti-degradation policy aims to keep them that way.

The federal Clean Water Act requires states to adopt and enforce anti-degradation policies to keep streams from being made dirtier. State officials have been working on their policy for years. Final implementation has been delayed numerous times, in large part because of industry complaints about various steps in the process.

For example, as DEP Assistant General Counsel Karen Watson told lawmakers Tuesday, the Tier 2.5 category of streams itself exists only because of one of a series of compromises made with regulated industries.

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Under the state's policy, streams in this category could not be degraded more than 10 percent.

The Tier 2.5 category was created to keep many state streams from ending up classified as Tier 3, a category that allows no degradation at all.

"It doesn't mean zero discharge," Watson said of the Tier 2.5 designation. "It means you can't pollute as much as you otherwise might pollute."

Earlier this week, on Monday, the rulemaking committee had approved a separate DEP list of several hundred streams that are to receive special protections as trout habitat. Various industry groups, especially coal operators, are expected to battle to reduce the size of that list.

And at Tuesday's meeting, the rulemaking committee approved a new rule to control oil and gas drilling in state forests.

The rule requires drillers to give notice and the state Division of Natural Resources to accept public comments on drilling proposals.

"We believe this is a huge step for the forests and the forest users," said David McMahon, a lawyer who has worked with citizens pushing for the new forest protections.

On the Tier 2.5 list, representatives of the West Virginia Chamber of Commerce, the state Forestry Association and the Farm Bureau criticized the DEP rule during Tuesday's committee meeting.

Timber and agriculture groups have been especially critical of the stream list, complaining that individual landowners along state-owned waterways were not each given notice of the proposed listings.

Watson said that such notices would have been impossible for DEP to do, and that

lawmakers previously approved a more general public notice, comment period and hearings.

“There are many landowners who may see their stream listed, but may not have known about it,” said Dick Waybright, executive director of the forestry association.

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But industry officials also noted that DEP had received more than 4,000 objections to streams being listed. Waybright and Don Michael, a Farm Bureau lobbyist, said they would only support listing 38 streams — those for which no landowner objections were received by DEP.

Delegate Kelli Sobonya, R-Cabell, insisted that the committee allow anyone at Tuesday’s meeting who owned property along a listed stream be allowed to address lawmakers.

Minard asked if any landowners were present, and the only person who came to the podium was Roger Sherman, a lobbyist for Mead Westvaco.

Sherman said that while timber operations are exempt from the anti-degradation rules, his company might someday want to do something else on its land that required a permit that would be subject to the rules.

Sen. John Unger, D-Berkeley, asked Sherman to identify which streams on the DEP list Mead Westvaco owned property along.

“I can’t recall that,” Sherman said. “I was not prepared to speak today. I’m not sure which list we’re talking about.”