

1 ENGROSSED

2 COMMITTEE SUBSTITUTE

3 FOR

4 **Senate Bill No. 562**

5 (By Senators Kessler (Mr. President), Beach, D. Facemire,
6 Fanning, Hall, Helmick, Prezioso, Plymale and Klempa)

7 _____
8 [Originating in the Committee on Natural Resources;
9 reported February 15, 2012.]
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11
12 A BILL to amend and reenact §22-11-7b of the Code of West Virginia,
13 1931, as amended, relating to establishing a public policy for
14 narrative water quality standards; establishing a procedure to
15 determine compliance with the biologic component of the
16 narrative water quality standard; clarifying rule-making
17 authority; and allowing an affected water intake owner to
18 waive the one-half mile zone requirement contained in water
19 quality standards established by the Department of
20 Environmental Protection.

21 *Be it enacted by the Legislature of West Virginia:*

22 That §22-11-7b of the Code of West Virginia, 1931, as amended,
23 be amended and reenacted to read as follows:

24 **ARTICLE 11. WATER POLLUTION CONTROL ACT.**

25 **§22-11-7b. Water quality standards; implementation of**

1 **antidegradation procedures; procedure to**
2 **determine compliance with the biologic component**
3 **of the narrative water quality standard.**

4 (a) All authority to promulgate rules and implement water
5 quality standards ~~vested in the Environmental Quality Board is~~
6 ~~hereby transferred from the Environmental Quality Board to~~ is
7 vested in the Secretary of the Department of Environmental
8 Protection. ~~as of the effective date of the amendment and~~
9 ~~reenactment of this section during the 2005 regular session of the~~
10 ~~Legislature: Provided, That the legislative rule containing the~~
11 ~~state's water quality standards shall remain in force and effect as~~
12 ~~if promulgated by the Department of Environmental Protection until~~
13 ~~the secretary amends the rule in accordance with the provisions of~~
14 ~~article three, chapter twenty-nine-a of this code. Any~~
15 ~~proceedings, including notices of proposed rulemaking pending~~
16 ~~before the Environmental Quality Board, and any other functions,~~
17 ~~actions or authority transferred to the secretary shall continue in~~
18 ~~effect as actions of the secretary.~~

19 (b) All meetings with the secretary or any employee of the
20 department and any interested party which are convened for the
21 purpose of making a decision or deliberating toward a decision as
22 to the form and substance of the rule governing water quality
23 standards or variances thereto shall be held in accordance with the
24 provisions of article nine-a, chapter six of this code. When the
25 secretary is considering the form and substance of the ~~rule~~ rules

1 governing water quality standards, the following are not meetings
2 pursuant to article nine-a, chapter six of this code: (i)
3 Consultations between the department's employees or its
4 consultants, contractors or agents; (ii) consultations with other
5 state or federal agencies and the department's employees or its
6 consultants, contractors or agents; or (iii) consultations between
7 the secretary, the department's employees or its consultants,
8 contractors or agents with any interested party for the purpose of
9 collecting facts and explaining state and federal requirements
10 relating to a site specific change or variance.

11 (c) In order to carry out the purposes of this chapter, the
12 secretary shall promulgate legislative rules in accordance with the
13 provisions of article three, chapter twenty-nine-a of this code
14 setting standards of water quality applicable to both the surface
15 waters and groundwaters of this state. Standards of quality with
16 respect to surface waters shall protect the public health and
17 welfare, wildlife, fish and aquatic life and the present and
18 prospective future uses of the water for domestic, agricultural,
19 industrial, recreational, scenic and other legitimate beneficial
20 uses thereof. The water quality standards of the secretary may not
21 specify the design of equipment, type of construction or particular
22 method which a person shall use to reduce the discharge of a
23 pollutant.

24 (d) The secretary shall establish the antidegradation
25 implementation procedures as required by 40 C. F. R. 131.12(a)
26 which apply to regulated activities that have the potential to

1 affect water quality. The secretary shall propose for legislative
2 approval, pursuant to article three, chapter twenty-nine-a of the
3 code, legislative rules to establish implementation procedures
4 which include specifics of the review depending upon the existing
5 uses of the water body segment that would be affected, the level of
6 protection or "tier" assigned to the applicable water body segment,
7 the nature of the activity and the extent to which existing water
8 quality would be degraded. Any final classification determination
9 of a water as a Tier 2.5 water (Water of Special Concern) does not
10 become effective until that determination is approved by the
11 Legislature through the legislative rule-making process as provided
12 ~~for~~ in article three, chapter twenty-nine-a of the code.

13 (e) All remaining variances shall be applied for and considered
14 by the secretary and any variance granted shall be consistent with
15 33 U. S. C. Section 1311(p) of the Federal Water Control Act. At
16 a minimum, when considering an application for a remaining variance
17 the secretary shall consider the data and information submitted by
18 the applicant for the variance; and comments received at a public
19 comment period and public hearing. The secretary may not grant a
20 variance without requiring the applicant to improve the instream
21 water quality as much as is reasonably possible by applying best
22 available technology economically achievable using best
23 professional judgment. Any such requirement will be included as a
24 permit condition. The secretary may not grant a variance without
25 a demonstration by the applicant that the coal remaining operation
26 will result in the potential for improved instream water quality as

1 a result of the remaining operation. The secretary may not grant a
2 variance where he or she determines that degradation of the
3 instream water quality will result from the remaining operation.

4 (f) (1) It is declared to be the public policy of this state
5 that any interpretation and implementation of West Virginia's
6 narrative water quality standards, which have been authorized by
7 the Legislature in a promulgated administrative rule, is the
8 responsibility of the department. It is further declared to be the
9 public policy of this state that the department's interpretation of
10 West Virginia's narrative water quality standards must fully comply
11 with the statement of public policy set forth in section two of
12 this article.

13 (2) Measuring compliance with the biologic component of West
14 Virginia's narrative water quality standard requires evaluation of
15 the holistic health of the aquatic ecosystem and a determination
16 that the stream: (i) Supports a balanced aquatic community that is
17 diverse in species composition; (ii) contains appropriate trophic
18 levels of fish, in streams that have flows sufficient to support
19 fish populations; and (iii) the aquatic community is composed of
20 benthic invertebrate assemblages sufficient to perform the
21 biological functions necessary to support fish communities within
22 the assessed reach, or, if the assessed reach has insufficient
23 flows to support a fish community, in those downstream reaches
24 where fish are present.

25 (3) The secretary shall propose rules for legislative approval
26 in accordance with the provisions of article three, chapter

1 twenty-nine-a of this code that are necessary to implement the
2 provisions of this section.

3 (g) The one-half mile zone requirement contained in §7.2.a.2,
4 series two, title forty-seven of the West Virginia Code of State
5 Rules, is not applicable to any stream segment upstream from the
6 intake of a public water supply (Water Use Category A) if the
7 affected water intake owner waives the benefit of the rule in a
8 writing provided to the department. To remain effective, the
9 waiver must be renewed by the downstream water intake owner for
10 each permit renewal of an affected upstream discharger. Any waiver
11 under this subsection may be revoked by the owner of an affected
12 intake upon the provision of written notice to the department.
13 Upon receipt of the notice of revocation, the department shall
14 modify any upstream permit to impose requirements in accordance
15 with the one-half mile zone requirement.