

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 562**

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

6 _____
7 [Originating in the Committee on Natural Resources;
8 reported February 15, 2012.]
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11 A BILL to amend and reenact §22-11-7b of the Code of West Virginia,
12 1931, as amended, relating to establishing a public policy for
13 narrative water quality standards; establishing a procedure to
14 determine compliance with the biologic component of the
15 narrative water quality standard; and clarifying rulemaking
16 authority.

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

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

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

21 **§22-11-7b. Water quality standards; implementation of**
22 **antidegradation procedures; procedure to**
23 **determine compliance with the biologic component**
24 **of the narrative water quality standard.**

25 (a) All authority to promulgate rules and implement water

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

15 (b) All meetings with the secretary or any employee of the
16 department and any interested party which are convened for the
17 purpose of making a decision or deliberating toward a decision as
18 to the form and substance of the rule governing water quality
19 standards or variances thereto shall be held in accordance with the
20 provisions of article nine-a, chapter six of this code. When the
21 secretary is considering the form and substance of the ~~rule~~ rules
22 governing water quality standards, the following are not meetings
23 pursuant to article nine-a, chapter six of this code: (i)
24 Consultations between the department's employees or its
25 consultants, contractors or agents; (ii) consultations with other
26 state or federal agencies and the department's employees or its

1 consultants, contractors or agents; or (iii) consultations between
2 the secretary, the department's employees or its consultants,
3 contractors or agents with any interested party for the purpose of
4 collecting facts and explaining state and federal requirements
5 relating to a site specific change or variance.

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

19 (d) The secretary shall establish the antidegradation
20 implementation procedures as required by 40 C. F. R. 131.12(a)
21 which apply to regulated activities that have the potential to
22 affect water quality. The secretary shall propose for legislative
23 approval, pursuant to article three, chapter twenty-nine-a of the
24 code, legislative rules to establish implementation procedures
25 which include specifics of the review depending upon the existing
26 uses of the water body segment that would be affected, the level of

1 protection or "tier" assigned to the applicable water body segment,
2 the nature of the activity and the extent to which existing water
3 quality would be degraded. Any final classification determination
4 of a water as a Tier 2.5 water (Water of Special Concern) does not
5 become effective until that determination is approved by the
6 Legislature through the legislative rule-making process as provided
7 ~~for~~ in article three, chapter twenty-nine-a of the code.

8 (e) All remining variances shall be applied for and considered
9 by the secretary and any variance granted shall be consistent with
10 33 U. S. C. Section 1311(p) of the Federal Water Control Act. At
11 a minimum, when considering an application for a remining variance
12 the secretary shall consider the data and information submitted by
13 the applicant for the variance; and comments received at a public
14 comment period and public hearing. The secretary may not grant a
15 variance without requiring the applicant to improve the instream
16 water quality as much as is reasonably possible by applying best
17 available technology economically achievable using best
18 professional judgment. Any such requirement will be included as a
19 permit condition. The secretary may not grant a variance without
20 a demonstration by the applicant that the coal remining operation
21 will result in the potential for improved instream water quality as
22 a result of the remining operation. The secretary may not grant a
23 variance where he or she determines that degradation of the
24 instream water quality will result from the remining operation.

25 (f) (1) It is declared to be the public policy of this state
26 that any interpretation and implementation of West Virginia's

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

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

20 (3) The secretary shall propose rules for legislative approval
21 in accordance with the provisions of article three, chapter
22 twenty-nine-a of this code that are necessary to implement the
23 provisions of this section.

(NOTE: The purpose of this bill is to establish a procedure by

which the Department of Environmental Protection is to measure compliance with the biologic component of the narrative water quality standard.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.)