

**H. B. 4518**

(By Delegates Hall, Barker, Ferro and Hunt)  
[By Request of the Department of Environmental  
Protection]  
[Introduced February 14, 2012; referred to the  
Committee on the Judiciary.]

A BILL to amend and reenact §22-11-7b of the Code of West Virginia, 1931, as amended, relating to establishing a procedure to determine compliance with the biologic component of the narrative water quality standard.

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

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

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

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

(a) All authority to promulgate rules and implement water quality standards vested in the Environmental Quality Board is hereby transferred from the Environmental Quality Board to the

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

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

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

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

1 variance where he or she determines that degradation of the  
2 instream water quality will result from the remaining operation.

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

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

24 (3) The secretary shall propose rules for legislative approval

1 in accordance with the provisions of article three, chapter twenty-  
2 nine-a of this code that are necessary to implement the provisions  
3 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.