

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 **Senate Bill No. 562**

5 (SENATORS KESSLER (MR. PRESIDENT), BEACH, D. FACEMIRE, FANNING, HALL,  
6 HELMICK, PREZIOSO, PLYMALE AND KLEMPA, *original sponsors*)

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8 [Passed March 10, 2012; in effect from passage.]  
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10  
11 AN ACT 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 that  
16 narrative water quality rules cannot be less protective than  
17 current requirements.

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

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

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

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

1 (a) All authority to promulgate rules and implement water quality  
2 standards is vested in the Secretary of the Department of  
3 Environmental Protection.

4 (b) All meetings with the secretary or any employee of the  
5 department and any interested party which are convened for the  
6 purpose of making a decision or deliberating toward a decision as  
7 to the form and substance of the rule governing water quality  
8 standards or variances thereto shall be held in accordance with the  
9 provisions of article nine-a, chapter six of this code. When the  
10 secretary is considering the form and substance of the rules  
11 governing water quality standards, the following are not meetings  
12 pursuant to article nine-a, chapter six of this code: (i)  
13 Consultations between the department's employees or its  
14 consultants, contractors or agents; (ii) consultations with other  
15 state or federal agencies and the department's employees or its  
16 consultants, contractors or agents; or (iii) consultations between  
17 the secretary, the department's employees or its consultants,  
18 contractors or agents with any interested party for the purpose of  
19 collecting facts and explaining state and federal requirements  
20 relating to a site specific change or variance.

21 (c) In order to carry out the purposes of this chapter, the  
22 secretary shall promulgate legislative rules in accordance with the  
23 provisions of article three, chapter twenty-nine-a of this code  
24 setting standards of water quality applicable to both the surface  
25 waters and groundwaters of this state. Standards of quality with  
26 respect to surface waters shall protect the public health and

1 welfare, wildlife, fish and aquatic life and the present and  
2 prospective future uses of the water for domestic, agricultural,  
3 industrial, recreational, scenic and other legitimate beneficial  
4 uses thereof. The water quality standards of the secretary may not  
5 specify the design of equipment, type of construction or particular  
6 method which a person shall use to reduce the discharge of a  
7 pollutant.

8           (d) The secretary shall establish the antidegradation  
9 implementation procedures as required by 40 C. F. R. 131.12(a)  
10 which apply to regulated activities that have the potential to  
11 affect water quality. The secretary shall propose for legislative  
12 approval, pursuant to article three, chapter twenty-nine-a of the  
13 code, legislative rules to establish implementation procedures  
14 which include specifics of the review depending upon the existing  
15 uses of the water body segment that would be affected, the level of  
16 protection or "tier" assigned to the applicable water body segment,  
17 the nature of the activity and the extent to which existing water  
18 quality would be degraded. Any final classification determination  
19 of a water as a Tier 2.5 water (Water of Special Concern) does not  
20 become effective until that determination is approved by the  
21 Legislature through the legislative rule-making process as provided  
22 in article three, chapter twenty-nine-a of the code.

23           (e) All remaining variances shall be applied for and considered  
24 by the secretary and any variance granted shall be consistent with  
25 33 U. S. C. Section 1311(p) of the Federal Water Control Act. At  
26 a minimum, when considering an application for a remaining variance

1 the secretary shall consider the data and information submitted by  
2 the applicant for the variance; and comments received at a public  
3 comment period and public hearing. The secretary may not grant a  
4 variance without requiring the applicant to improve the instream  
5 water quality as much as is reasonably possible by applying best  
6 available technology economically achievable using best  
7 professional judgment. Any such requirement will be included as a  
8 permit condition. The secretary may not grant a variance without  
9 a demonstration by the applicant that the coal remining operation  
10 will result in the potential for improved instream water quality as  
11 a result of the remining operation. The secretary may not grant a  
12 variance where he or she determines that degradation of the  
13 instream water quality will result from the remining operation.

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

1 accordance with the provisions of article three, chapter  
2 twenty-nine-a of this code that implement the provisions of this  
3 subsection. Rules promulgated pursuant to this subsection may not  
4 establish measurements for biologic components of West Virginia's  
5 narrative water quality standards that would establish standards  
6 less protective than requirements that exist at the time of  
7 enactment of the amendments to this subsection by the Legislature  
8 during the 2012 regular session.