

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

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

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

21 (d) The secretary shall establish the antidegradation
22 implementation procedures as required by 40 C.F.R. 131.12(a) which
23 apply to regulated activities that have the potential to affect
24 water quality. The secretary shall propose for legislative

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

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

1 will result in the potential for improved instream water quality as
2 a result of the remining operation. The secretary may not grant a
3 variance where he or she determines that degradation of the
4 instream water quality will result from the remining operation.

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

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

1 where fish are present.

2 (3) The secretary shall propose rules for legislative approval
3 in accordance with the provisions of article three, chapter
4 twenty-nine-a of this code that are necessary to implement the
5 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.