

ENGROSSED  
COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 562**

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

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[Originating in the Committee on Natural Resources;  
reported February 16, 2012.]

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

*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 anti-degradation procedures; procedure to determine compliance with the biologic component of the narrative water quality standard.**

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

17       (b) All meetings with the secretary or any employee of  
18 the department and any interested party which are convened  
19 for the purpose of making a decision or deliberating toward  
20 a decision as to the form and substance of the rule governing  
21 water quality standards or variances thereto shall be held in  
22 accordance with the provisions of article nine-a, chapter six  
23 of this code. When the secretary is considering the form and  
24 substance of the ~~rule~~ rules governing water quality stan-  
25 dards, the following are not meetings pursuant to article  
26 nine-a, chapter six of this code: (i) Consultations between the  
27 department's employees or its consultants, contractors or  
28 agents; (ii) consultations with other state or federal agencies  
29 and the department's employees or its consultants, contrac-  
30 tors or agents; or (iii) consultations between the secretary,  
31 the department's employees or its consultants, contractors or  
32 agents with any interested party for the purpose of collecting  
33 facts and explaining state and federal requirements relating  
34 to a site specific change or variance.

35       (c) In order to carry out the purposes of this chapter, the  
36 secretary shall promulgate legislative rules in accordance  
37 with the provisions of article three, chapter twenty-nine-a of  
38 this code setting standards of water quality applicable to

39 both the surface waters and groundwaters of this state.  
40 Standards of quality with respect to surface waters shall  
41 protect the public health and welfare, wildlife, fish and  
42 aquatic life and the present and prospective future uses of  
43 the water for domestic, agricultural, industrial, recreational,  
44 scenic and other legitimate beneficial uses thereof. The water  
45 quality standards of the secretary may not specify the design  
46 of equipment, type of construction or particular method  
47 which a person shall use to reduce the discharge of a pollut-  
48 ant.

49 (d) The secretary shall establish the antidegradation  
50 implementation procedures as required by 40 C. F. R.  
51 131.12(a) which apply to regulated activities that have the  
52 potential to affect water quality. The secretary shall propose  
53 for legislative approval, pursuant to article three, chapter  
54 twenty-nine-a of the code, legislative rules to establish  
55 implementation procedures which include specifics of the  
56 review depending upon the existing uses of the water body  
57 segment that would be affected, the level of protection or  
58 “tier” assigned to the applicable water body segment, the  
59 nature of the activity and the extent to which existing water  
60 quality would be degraded. Any final classification determi-

61 nation of a water as a Tier 2.5 water (Water of Special  
62 Concern) does not become effective until that determination  
63 is approved by the Legislature through the legislative rule-  
64 making process as provided for in article three, chapter  
65 twenty-nine-a of the code.

66 (e) All remaining variances shall be applied for and  
67 considered by the secretary and any variance granted shall  
68 be consistent with 33 U. S. C. Section 1311(p) of the Federal  
69 Water Control Act. At a minimum, when considering an  
70 application for a remaining variance the secretary shall  
71 consider the data and information submitted by the appli-  
72 cant for the variance; and comments received at a public  
73 comment period and public hearing. The secretary may not  
74 grant a variance without requiring the applicant to improve  
75 the instream water quality as much as is reasonably possible  
76 by applying best available technology economically achiev-  
77 able using best professional judgment. Any such requirement  
78 will be included as a permit condition. The secretary may not  
79 grant a variance without a demonstration by the applicant  
80 that the coal remaining operation will result in the potential  
81 for improved instream water quality as a result of the  
82 remaining operation. The secretary may not grant a variance

83 where he or she determines that degradation of the instream  
84 water quality will result from the remining operation.

85 (f) (1) It is declared to be the public policy of this state  
86 that any interpretation and implementation of West Vir-  
87 ginia's narrative water quality standards, which have been  
88 authorized by the Legislature in a promulgated administra-  
89 tive rule, is the responsibility of the department. It is further  
90 declared to be the public policy of this state that the depart-  
91 ment's interpretation of West Virginia's narrative water  
92 quality standards must fully comply with the statement of  
93 public policy set forth in section two of this article.

94 (2) Measuring compliance with the biologic component  
95 of West Virginia's narrative water quality standard requires  
96 evaluation of the holistic health of the aquatic ecosystem and  
97 a determination that the stream: (i) Supports a balanced  
98 aquatic community that is diverse in species composition; (ii)  
99 contains appropriate trophic levels of fish, in streams that  
100 have flows sufficient to support fish populations; and (iii) the  
101 aquatic community is composed of benthic invertebrate  
102 assemblages sufficient to perform the biological functions  
103 necessary to support fish communities within the assessed  
104 reach, or, if the assessed reach has insufficient flows to

105 support a fish community, in those downstream reaches  
106 where fish are present.

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

111 (g) The one-half mile zone requirement contained in  
112 §7.2.a.2, series two, title forty-seven of the West Virginia  
113 Code of State Rules, is not applicable to any stream segment  
114 upstream from the intake of a public water supply (Water  
115 Use Category A) if the affected water intake owner waives  
116 the benefit of the rule in a writing provided to the depart-  
117 ment. To remain effective, the waiver must be renewed by  
118 the downstream water intake owner for each permit renewal  
119 of an affected upstream discharger. Any waiver under this  
120 subsection may be revoked by the owner of an affected  
121 intake upon the provision of written notice to the depart-  
122 ment. Upon receipt of the notice of revocation, the depart-  
123 ment shall modify any upstream permit to impose require-  
124 ments in accordance with the one-half mile zone require-  
125 ment.