

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 562

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

[Passed March 10, 2012; in effect from passage.]

AN ACT 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 that narrative water quality rules cannot be less protective than current requirements.

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 is vested in the Secretary of the
3 Department of Environmental Protection.

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

22 (c) In order to carry out the purposes of this chapter, the
23 secretary shall promulgate legislative rules in accordance
24 with the provisions of article three, chapter twenty-nine-a of
25 this code setting standards of water quality applicable to
26 both the surface waters and groundwaters of this state.
27 Standards of quality with respect to surface waters shall
28 protect the public health and welfare, wildlife, fish and
29 aquatic life and the present and prospective future uses of
30 the water for domestic, agricultural, industrial, recreational,
31 scenic and other legitimate beneficial uses thereof. The water
32 quality standards of the secretary may not specify the design
33 of equipment, type of construction or particular method
34 which a person shall use to reduce the discharge of a pollut-
35 ant.

36 (d) The secretary shall establish the antidegradation
37 implementation procedures as required by 40 C. F. R.
38 131.12(a) which apply to regulated activities that have the

39 potential to affect water quality. The secretary shall propose
40 for legislative approval, pursuant to article three, chapter
41 twenty-nine-a of the code, legislative rules to establish
42 implementation procedures which include specifics of the
43 review depending upon the existing uses of the water body
44 segment that would be affected, the level of protection or
45 “tier” assigned to the applicable water body segment, the
46 nature of the activity and the extent to which existing water
47 quality would be degraded. Any final classification determi-
48 nation of a water as a Tier 2.5 water (Water of Special
49 Concern) does not become effective until that determination
50 is approved by the Legislature through the legislative rule-
51 making process as provided in article three, chapter
52 twenty-nine-a of the code.

53 (e) All remining variances shall be applied for and
54 considered by the secretary and any variance granted shall
55 be consistent with 33 U. S. C. Section 1311(p) of the Federal
56 Water Control Act. At a minimum, when considering an
57 application for a remining variance the secretary shall
58 consider the data and information submitted by the appli-
59 cant for the variance; and comments received at a public
60 comment period and public hearing. The secretary may not
61 grant a variance without requiring the applicant to improve
62 the instream water quality as much as is reasonably possible
63 by applying best available technology economically achiev-
64 able using best professional judgment. Any such requirement
65 will be included as a permit condition. The secretary may not
66 grant a variance without a demonstration by the applicant
67 that the coal remining operation will result in the potential
68 for improved instream water quality as a result of the
69 remining operation. The secretary may not grant a variance
70 where he or she determines that degradation of the instream
71 water quality will result from the remining operation.

72 (f) The secretary shall propose rules measuring compli-
73 ance with the biologic component of West Virginia’s narra-
74 tive water quality standard requires evaluation of the
75 holistic health of the aquatic ecosystem and a determination
76 that the stream: (i) Supports a balanced aquatic community

77 that is diverse in species composition; (ii) contains appropri-
78 ate trophic levels of fish, in streams that have flows suffi-
79 cient to support fish populations; and (iii) the aquatic
80 community is composed of benthic invertebrate assemblages
81 sufficient to perform the biological functions necessary to
82 support fish communities within the assessed reach, or, if the
83 assessed reach has insufficient flows to support a fish
84 community, in those downstream reaches where fish are
85 present. The secretary shall propose rules for legislative
86 approval in accordance with the provisions of article three,
87 chapter twenty-nine-a of this code that implement the
88 provisions of this subsection. Rules promulgated pursuant to
89 this subsection may not establish measurements for biologic
90 components of West Virginia's narrative water quality
91 standards that would establish standards less protective than
92 requirements that exist at the time of enactment of the
93 amendments to this subsection by the Legislature during the
94 2012 regular session.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman Senate Committee

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Chairman House Committee

Originated in the Senate.

In effect from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the
Day of, 2012.

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Governor