

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 2004**

4 (By Delegates J. Nelson, Howell, Statler, Walters, Foster, Zatezalo,  
5 B. White, Moffatt, Stansbury, Gearheart and Butler )  
6

7 (Originating in the House Committee on the Judiciary)

8 [January 30, 2015]  
9

10 A BILL to amend and reenact §22-5-20 of the Code of West Virginia, 1931, as amended, relating  
11 to the development of a state plan under Section 111(d) of the Clean Air Act; setting forth  
12 legislative findings; prohibiting submission of a state plan without authority; requiring the  
13 Department of Environmental Protection to study the feasibility of a state plan; requiring the  
14 Department of Environmental Protection to submit a report to the Legislature determining  
15 whether a state plan is feasible; allowing for the development of a proposed state plan;  
16 allowing for legislative review and consideration prior to submission of a state plan to the  
17 Environmental Protection Agency; and creating exceptions to the legal effect of the state  
18 plan.

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

20 That §22-5-20 of the Code of West Virginia, 1931, as amended, be amended and reenacted  
21 to read as follows:

22 **§22-5-20. ~~Regulating~~ Development of a state plan relating to carbon dioxide emissions from**  
23 **existing fossil fuel-fired electric generating units.**

1           (a) Legislative Findings-

2           (1) The United States Environmental Protection Agency has proposed a Federal Rule  
3 pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), to regulate carbon dioxide  
4 emissions from electric generating units.

5           (2) The Rule is expected to go into effect on or about June 30, 2015, and will require each  
6 state to submit a state plan pursuant to Section 111(d) that sets forth laws, policies and regulations  
7 that will be enacted by the State to meet the federal guidelines in the Rule.

8           (3) The creation of this state plan necessitates establishment and creation of law affecting  
9 the economy and energy policy of this State.

10          (4) The Environmental Protection Agency has stated that any state plan it ultimately approves  
11 shall become enforceable federal law upon that State.

12          (5) The State disputes the jurisdiction and purported binding nature asserted by the  
13 Environmental Protection Agency through this Rule, and reserves to itself those rights and  
14 responsibilities properly reserved to the State of West Virginia.

15          (6) Given the economic impact and potentially legally binding nature of the submission of  
16 a State Plan, there is a compelling state interest to require appropriate legislative review and passage  
17 of law prior to submission, if any, of a state plan pursuant to Section 111(d) of the Clean Air Act.

18          (b) Submission of a State Plan- Absent specific legislative enactment granting such powers  
19 or rulemaking authority, the Department of Environmental Protection or any other agency or officer  
20 of state government is not authorized to submit to the Environmental Protection Agency a state plan  
21 under this section, or otherwise pursuant to Section 111(d) of the Clean Air Act: *Provided, however,*  
22 the Department of Environmental Protection, in consultation with the Department of Environmental

1 Protection Advisory Council and other necessary and appropriate agencies and entities, may develop  
2 a proposed state plan in accordance with this section.

3 (c) Development of a Proposed State Plan- (1) The Department of Environmental Protection  
4 shall, no later than one hundred eighty days after a rule is finalized by the Environmental Protection  
5 Agency that requires the state to submit a state plan under Section 111(d) of the Clean Air Act, 42  
6 U.S.C. § 7411(d), submit to the Legislature a report regarding the feasibility of the state's compliance  
7 with the Section 111(d) Rule. The report must include a comprehensive analysis of the effect of the  
8 Section 111(d) Rule on the state, including, but not limited to, the need for legislative or other  
9 changes to state law, and the factors referenced in subsection (g) of this section. The report must  
10 make at least two feasibility determinations: (i) Whether the creation of a state plan is feasible based  
11 on the comprehensive analysis; and (ii) whether the creation of a state plan is feasible before the  
12 deadline to submit a state plan to Environmental Protection Agency under the Section 111(d) Rule,  
13 assuming no extensions of time are granted by Environmental Protection Agency. If the department  
14 determines that a state plan is or is not feasible under clause (i) of this subsection, the report must  
15 explain why. If the department determines that a state plan is not feasible under clause (ii) of this  
16 subsection, it shall explain how long it requires to create a state plan and then endeavor to submit  
17 such a state plan to the Legislature as soon as practicable.

18 (2) If the department determines that the creation of a state plan is feasible, it shall develop  
19 and submit the proposed state plan to the Legislature sitting in Regular Session, or in an extraordinary  
20 session convened for the purpose of consideration of the state plan, in sufficient time to allow for the  
21 consideration of the state plan prior to the deadline for submission to the Environmental Protection  
22 Agency.

1            (3) In addition to submitting the proposed state plan to the Legislature, the department shall  
2 publish the report and any proposed state plan on its website.

3            (d) If the department proposes a state plan to the Legislature in accordance with subsection  
4 (c) of this section, the department, in consultation with the Department of Environmental Protection  
5 Advisory Council, shall establish propose separate standards of performance for carbon dioxide  
6 emissions from existing coal-fired electric generating units in accordance with subsection ~~(b)~~ (e) of  
7 this section and from existing natural gas-fired electric generating units in accordance with subsection  
8 ~~(e)~~ (f) of this section. The standards of performance developed and proposed under any state plan to  
9 comply with Section 111 of the Clean Air Act should allow for greater flexibility and take into  
10 consideration the additional factors set forth in subsection ~~(d)~~ (g) of this section as a part of any state  
11 plan to achieve targeted reductions in greenhouse gas emissions which are equivalent or comparable  
12 to the goals and marks established by federal guidelines.

13            ~~(b)~~ (e) Standards of performance for existing coal-fired electric generating units. –  
14 Except as provided under subsection ~~(d)~~ (g) of this section, the standard of performance ~~established~~  
15 proposed for existing coal-fired electric generating units under subsection ~~(a)~~ (c) of this section shall  
16 may be based upon:

17            (1) The best system of emission reduction which, taking into account the cost of achieving the  
18 reduction and any nonair quality health and environmental impact and energy requirements, has been  
19 adequately demonstrated for coal-fired electric generating units that are subject to the standard of  
20 performance;

21            (2) Reductions in emissions of carbon dioxide that can reasonably be achieved through  
22 measures undertaken at each coal-fired electric generating unit; and

1 (3) Efficiency and other measures that can be undertaken at each coal-fired electric generating  
2 unit to reduce carbon dioxide emissions from the unit without switching from coal to other fuels or  
3 limiting the economic utilization of the unit. ~~and~~

4 ~~(4) Additional regulatory mechanisms that provide flexibility in complying with the standards,~~  
5 ~~including: (A) Emissions trading with credited reduction for any unit that was in operation January~~  
6 ~~1, 2011, or thereafter, and fleet wide averaging; (B) other alternative implementation measures that~~  
7 ~~are determined to further the interests of West Virginia and its citizens including state programs such~~  
8 ~~as clean energy programs that mandate reduced energy consumption resulting in avoided emissions,~~  
9 ~~emission reductions, or a reduction in the state's carbon dioxide intensity whereby the state shall~~  
10 ~~credit equally based on the output to the generators located in the state that are subject to carbon~~  
11 ~~dioxide performance standard rules under Section 11(d) of the Clean Air Act.~~

12 ~~(e)~~ **(f) Standards of performance for existing natural gas-fired electric generating units.**

13 – Except as provided in subsection ~~(d)~~ (g) of this section, the standard of performance ~~established~~  
14 proposed for existing gas-fired electric generating units under subsection ~~(a)~~ (c) of this section, ~~shall~~  
15 may be based upon:

16 (1) The best system of emission reduction which, taking into account the cost of achieving the  
17 reduction and any nonair quality health and environmental impact and energy requirements, has been  
18 adequately demonstrated for natural gas-fired electric generating units that are subject to the standard  
19 of performance;

20 (2) Reductions in emissions of carbon dioxide that can reasonably be achieved through  
21 measures at each natural gas-fired electric generating unit; and

22 (3) Efficiency and other measures that can be undertaken at the unit to reduce carbon dioxide

1 emissions from the unit without switching from natural gas to other lower-carbon fuels or limiting  
2 the economic utilization of the unit.

3 ~~(d)~~ (g) **Flexibility in establishing standards of performance.** – In developing a flexible  
4 state plan to achieve targeted reductions in greenhouse gas emissions, the department of  
5 ~~Environmental Protection~~ shall endeavor to establish an achievable standard of performance for any  
6 existing fossil fuel-fired electric generating unit, and examine whether less stringent performance  
7 standards or longer compliance schedules may be implemented or adopted for existing fossil  
8 fuel-fired electric generating units in comparison to the performance standards established for new,  
9 modified or reconstructed generating units, based on the following:

10 (1) Consumer impacts, including any disproportionate impacts of energy price increases on  
11 lower income populations;

12 (2) Nonair quality health and environmental impacts;

13 (3) Projected energy requirements;

14 (4) Market-based considerations in achieving performance standards;

15 (5) The costs of achieving emission reductions due to factors such as plant age, location or  
16 basic process design;

17 (6) Physical difficulties with or any apparent inability to feasibly implement certain emission  
18 reduction measures;

19 (7) The absolute cost of applying the performance standard to the unit;

20 (8) The expected remaining useful life of the unit;

21 (9) The impacts of closing the unit, including economic consequences such as expected job  
22 losses at the unit and throughout the state in fossil fuel production areas including areas of coal

1 production and natural gas production and the associated losses to the economy of those areas and  
2 the state, if the unit is unable to comply with the performance standard;

3 (10) Impacts on the reliability of the system; and

4 (11) Any other factors specific to the unit that make application of a modified or less stringent  
5 standard or a longer compliance schedule more reasonable.

6 ~~(c) **State plan requirement.**—The Department of Environmental Protection shall propose or~~  
7 ~~submit to the U.S. Environmental Protection Agency a state plan which includes achievable~~  
8 ~~performance standards for existing sources, and a combination of additional measures designed to~~  
9 ~~meet the U. S. Environmental Protection Agency’s guidelines, consistent with the considerations,~~  
10 ~~goals and parameters set forth in this section.~~

11 (h) **Legislative consideration of proposed state plan under Section 111(d) of the Clean**  
12 **Air Act.**— (1) If the department submits a proposed state plan to the Legislature under this section, the  
13 Legislature may by act, including presentment to the Governor, (i) authorize the department to submit  
14 the proposed state plan to the Environmental Protection Agency, (ii) authorize the department to  
15 submit the state plan with amendment, or (iii) not grant such rulemaking or other authority to the  
16 department for submission and implementation of the state plan.

17 (2) If the Legislature fails to enact or approve all or part of the proposed state plan, the  
18 department may propose a new or modified state plan to the Legislature in accordance with the  
19 requirements of this section.

20 (3) If the Environmental Protection Agency does not approve the state plan, in whole or in  
21 part, the department shall as soon as practicable propose a modified state plan to the Legislature in  
22 accordance with the requirements of this section

1            (I) Legal effect. – Any obligation created by this section and any state plan submitted to the  
2 Environmental Protection Act pursuant to this section shall have no legal effect if:

3            (1) the Environmental Protection Agency fails to issue, or withdraws, its federal rules or  
4 guidelines for reducing carbon dioxide emissions from existing fossil fuel-fired electrical generating  
5 units under 42 U.S.C. §7411(d); or,

6            (2) a court of competent jurisdiction invalidates the Environmental Protection Agency’s  
7 federal rules or guidelines issued to regulate emissions of carbon dioxide from existing fossil fuel-  
8 fired electrical generating units under 42 U.S.C. §7411(d).

9            (j) Effective date. -- All provisions of this section are effective immediately upon passage.