

COMMITTEE SUBSTITUTE

FOR

H. B. 2004

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(Originating in the House Committee on the Judiciary)

[January 30, 2015]

A BILL to amend and reenact §22-5-20 of the Code of West Virginia, 1931, as amended, relating to the development of a state plan under Section 111(d) of the Clean Air Act; setting forth legislative findings; prohibiting submission of a state plan without authority; requiring the Department of Environmental Protection to study the feasibility of a state plan; requiring the Department of Environmental Protection to submit a report to the Legislature

determining whether a state plan is feasible; allowing for the development of a proposed state plan; allowing for legislative review and consideration prior to submission of a state plan to the Environmental Protection Agency; and creating exceptions to the legal effect of the state plan.

Be it enacted by the Legislature of West Virginia:

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

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

1 (a) Legislative Findings-

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

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

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

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

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

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

26 (b) *Submission of a State Plan*- Absent specific legislative
27 enactment granting such powers or rulemaking authority, the
28 Department of Environmental Protection or any other agency or
29 officer of state government is not authorized to submit to the
30 Environmental Protection Agency a state plan under this section,

31 or otherwise pursuant to Section 111(d) of the Clean Air Act:
32 Provided, however, the Department of Environmental Protection,
33 in consultation with the Department of Environmental Protection
34 Advisory Council and other necessary and appropriate agencies
35 and entities, may develop a proposed state plan in accordance
36 with this section.

37 (c) Development of a Proposed State Plan- (1) The
38 Department of Environmental Protection shall, no later than one
39 hundred eighty days after a rule is finalized by the
40 Environmental Protection Agency that requires the state to
41 submit a state plan under Section 111(d) of the Clean Air Act, 42
42 U.S.C. § 7411(d), submit to the Legislature a report regarding
43 the feasibility of the state's compliance with the Section 111(d)
44 Rule. The report must include a comprehensive analysis of the
45 effect of the Section 111(d) Rule on the state, including, but not
46 limited to, the need for legislative or other changes to state law,
47 and the factors referenced in subsection (g) of this section. The
48 report must make at least two feasibility determinations: (I)
49 Whether the creation of a state plan is feasible based on the
50 comprehensive analysis; and (ii) whether the creation of a state

51 plan is feasible before the deadline to submit a state plan to
52 Environmental Protection Agency under the Section 111(d)
53 Rule, assuming no extensions of time are granted by
54 Environmental Protection Agency. If the department determines
55 that a state plan is or is not feasible under clause (I) of this
56 subsection, the report must explain why. If the department
57 determines that a state plan is not feasible under clause (ii) of
58 this subsection, it shall explain how long it requires to create a
59 state plan and then endeavor to submit such a state plan to the
60 Legislature as soon as practicable.

61 (2) If the department determines that the creation of a state
62 plan is feasible, it shall develop and submit the proposed state
63 plan to the Legislature sitting in Regular Session, or in an
64 extraordinary session convened for the purpose of consideration
65 of the state plan, in sufficient time to allow for the consideration
66 of the state plan prior to the deadline for submission to the
67 Environmental Protection Agency.

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

71 (d) If the department proposes a state plan to the Legislature
72 in accordance with subsection (c) of this section, the department
73 ~~, in consultation with the Department of Environmental~~
74 ~~Protection Advisory Council,~~ shall ~~establish~~ propose separate
75 standards of performance for carbon dioxide emissions from
76 existing coal-fired electric generating units in accordance with
77 subsection ~~(b)~~ (e) of this section and from existing natural
78 gas-fired electric generating units in accordance with subsection
79 ~~(c)~~ (f) of this section. The standards of performance developed
80 and proposed under any state plan to comply with Section 111 of
81 the Clean Air Act should allow for greater flexibility and take
82 into consideration the additional factors set forth in subsection
83 ~~(d)~~ (g) of this section as a part of any state plan to achieve
84 targeted reductions in greenhouse gas emissions which are
85 equivalent or comparable to the goals and marks established by
86 federal guidelines.

87 **~~(b)~~ (e) Standards of performance for existing coal-fired**
88 **electric generating units.** – Except as provided under
89 subsection ~~(d)~~ (g) of this section, the standard of performance
90 ~~established~~ proposed for existing coal-fired electric generating

91 units under subsection ~~(a)~~(c) of this section shall may be based
92 upon:

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

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

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

106 ~~(4) Additional regulatory mechanisms that provide flexibility~~
107 ~~in complying with the standards, including: (A) Emissions~~
108 ~~trading with credited reduction for any unit that was in operation~~
109 ~~January 1, 2011, or thereafter, and fleet wide averaging; (B)~~

110 ~~other alternative implementation measures that are determined~~
111 ~~to further the interests of West Virginia and its citizens including~~
112 ~~state programs such as clean energy programs that mandate~~
113 ~~reduced energy consumption resulting in avoided emissions,~~
114 ~~emission reductions, or a reduction in the state's carbon dioxide~~
115 ~~intensity whereby the state shall credit equally based on the~~
116 ~~output to the generators located in the state that are subject to~~
117 ~~carbon dioxide performance standard rules under Section 111(d)~~
118 ~~of the Clean Air Act.~~

119 ~~(e)~~ **(f) Standards of performance for existing natural**
120 **gas-fired electric generating units.** – Except as provided in
121 subsection ~~(d)~~ **(g)** of this section, the standard of performance
122 ~~established~~ **proposed** for existing gas-fired electric generating
123 units under subsection ~~(a)~~ **(c)** of this section, ~~shall~~ **may** be based
124 upon:

125 (1) The best system of emission reduction which, taking into
126 account the cost of achieving the reduction and any nonair
127 quality health and environmental impact and energy
128 requirements, has been adequately demonstrated for natural

129 gas-fired electric generating units that are subject to the standard
130 of performance;

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

134 (3) Efficiency and other measures that can be undertaken at
135 the unit to reduce carbon dioxide emissions from the unit
136 without switching from natural gas to other lower-carbon fuels
137 or limiting the economic utilization of the unit.

138 ~~(d)~~ (g) **Flexibility in establishing standards of**
139 **performance.** – In developing a flexible state plan to achieve
140 targeted reductions in greenhouse gas emissions, the department
141 ~~of Environmental Protection~~ shall endeavor to establish an
142 achievable standard of performance for any existing fossil
143 fuel-fired electric generating unit, and examine whether less
144 stringent performance standards or longer compliance schedules
145 may be implemented or adopted for existing fossil fuel-fired
146 electric generating units in comparison to the performance
147 standards established for new, modified or reconstructed
148 generating units, based on the following:

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

151 (2) Nonair quality health and environmental impacts;

152 (3) Projected energy requirements;

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

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

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

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

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

162 (9) The impacts of closing the unit, including economic
163 consequences such as expected job losses at the unit and
164 throughout the state in fossil fuel production areas including
165 areas of coal production and natural gas production and the
166 associated losses to the economy of those areas and the state, if

167 the unit is unable to comply with the performance standard;

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

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

172 ~~(e) **State plan requirement.**—The Department of~~
173 ~~Environmental Protection shall propose or submit to the U.S.~~
174 ~~Environmental Protection Agency a state plan which includes~~
175 ~~achievable performance standards for existing sources, and a~~
176 ~~combination of additional measures designed to meet the U. S.~~
177 ~~Environmental Protection Agency’s guidelines, consistent with~~
178 ~~the considerations, goals and parameters set forth in this section.~~

179 (h) **Legislative consideration of proposed state plan under**
180 **Section 111(d) of the Clean Air Act.**— (1) If the department
181 submits a proposed state plan to the Legislature under this
182 section, the Legislature may by act, including presentment to the
183 Governor, (I) authorize the department to submit the proposed
184 state plan to the Environmental Protection Agency, (ii) authorize
185 the department to submit the state plan with amendment, or (iii)
186 not grant such rulemaking or other authority to the department
187 for submission and implementation of the state plan.

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

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

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

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

203 (2) a court of competent jurisdiction invalidates the
204 Environmental Protection Agency’s federal rules or guidelines
205 issued to regulate emissions of carbon dioxide from existing
206 fossil fuel-fired electrical generating units under 42 U.S.C.
207 §7411(d).

208 (j) Effective date. — All provisions of this section are
209 effective immediately upon passage.

