

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

Senate Bill 691

BY SENATOR BOSO

[Originating in the Committee on the Judiciary;

reported on February 26, 2016]

1 A BILL to amend and reenact §22-5-20 of the Code of West Virginia, 1931, as amended, relating
2 to modifying certain air pollution standards; changing certain mandatory requirements to
3 permissive ones; and changing a meter-based standard to a mass-based standard.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 5. AIR POLLUTION CONTROL.

**§22-5-20. 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 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
11 approves 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
17 passage of law prior to submission, if any, of a state plan pursuant to Section 111(d) of the Clean
18 Air Act.

19 (b) *Submission of a state plan.* — Absent specific legislative enactment granting such
20 powers or rule-making authority, the Department of Environmental Protection or any other agency
21 or officer of state government is not authorized to submit to the Environmental Protection Agency
22 a state plan under this section, or otherwise pursuant to Section 111(d) of the Clean Air Act:
23 *Provided, That* the Department of Environmental Protection, in consultation with the Department
24 of Environmental Protection Advisory Council and other necessary and appropriate agencies and
25 entities, may develop a proposed state plan in accordance with this section.

26 (c) *Development of a Proposed State Plan.* — (1) The Department of Environmental
27 Protection shall, no later than one hundred eighty days after a rule is finalized by the
28 Environmental Protection Agency that requires the state to submit a state plan under Section
29 111(d) of the Clean Air Act, 42 U. S. C. §7411(d), submit to the Legislature a report regarding the
30 feasibility of the state's compliance with the Section 111(d) rule. The report must include a
31 comprehensive analysis of the effect of the Section 111(d) rule on the state, including, but not
32 limited to, the need for legislative or other changes to state law, and the factors referenced in
33 subsection (g) of this section. The report must make at least two feasibility determinations: (i)
34 Whether the creation of a state plan is feasible based on the comprehensive analysis; and (ii)
35 whether the creation of a state plan is feasible before the deadline to submit a state plan to
36 Environmental Protection Agency under the Section 111(d) rule, assuming no extensions of time
37 are granted by Environmental Protection Agency. If the department determines that a state plan
38 is or is not feasible under clause (i) of this subsection, the report must explain why. If the
39 department determines that a state plan is not feasible under clause (ii) of this subsection, it shall
40 explain how long it requires to create a state plan and then endeavor to submit such a state plan
41 to the Legislature as soon as practicable. Such state plan ~~shall~~ may be on a unit-specific
42 performance basis and ~~shall~~ may be based upon either a rate-based model or a ~~meter~~ mass-
43 based model.

44 (2) If the department determines that the creation of a state plan is feasible, it shall develop
45 and submit the proposed state plan to the Legislature sitting in regular session, or in an
46 extraordinary session convened for the purpose of consideration of the state plan, in sufficient
47 time to allow for the consideration of the state plan prior to the deadline for submission to the
48 Environmental Protection Agency.

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

51 (d) If the department proposes a state plan to the Legislature in accordance with
52 subsection (c) of this section, the department shall propose separate standards of performance
53 for carbon dioxide emissions from existing coal-fired electric generating units in accordance with
54 subsection (e) of this section and from existing natural gas-fired electric generating units in
55 accordance with subsection (f) of this section. The standards of performance developed and
56 proposed under any state plan to comply with Section 111 of the Clean Air Act should allow for
57 greater flexibility and take into consideration the additional factors set forth in subsection (g) of
58 this section as a part of any state plan to achieve targeted reductions in greenhouse gas
59 emissions which are equivalent or comparable to the goals and marks established by federal
60 guidelines.

61 (e) *Standards of performance for existing coal-fired electric generating units.* — Except as
62 provided under subsection (g) of this section, the standard of performance proposed for existing
63 coal-fired electric generating units under subsection (c) of this section may be based upon:

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

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

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

73 (f) *Standards of performance for existing natural gas-fired electric generating units.* —
74 Except as provided in subsection (g) of this section, the standard of performance proposed for
75 existing gas-fired electric generating units under subsection (c) of this section may be based upon:

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

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

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

85 (g) *Flexibility in establishing standards of performance.* — In developing a flexible state
86 plan to achieve targeted reductions in greenhouse gas emissions, the department shall endeavor
87 to establish an achievable standard of performance for any existing fossil fuel-fired electric
88 generating unit, and examine whether less stringent performance standards or longer compliance
89 schedules may be implemented or adopted for existing fossil fuel-fired electric generating units in
90 comparison to the performance standards established for new, modified or reconstructed
91 generating units, based on the following:

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

94 (2) Nonair quality health and environmental impacts;

95 (3) Projected energy requirements;

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

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

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

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

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

103 (9) The impacts of closing the unit, including economic consequences such as expected
104 job losses at the unit and throughout the state in fossil fuel production areas including areas of
105 coal production and natural gas production and the associated losses to the economy of those
106 areas and the state, if the unit is unable to comply with the performance standard;

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

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

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

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

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

122 (i) *Legal effect.* — Any obligation created by this section and any state plan submitted to
123 the Environmental Protection Act pursuant to this section shall have no legal effect if:

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

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

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

Strike-throughs indicate language that would be stricken from a heading or the present law,
and underscoring indicates new language that would be added.