


MEMORANDUM

To: President Jeff Kessler, Chair
Speaker Richard Thompson, Chair
Joint Committee on Government and Finance

cc: Jason Pizatella, Legislative Director
Keith Burdette, Cabinet Secretary, West Virginia Department of Commerce
Angel Moore, Deputy Secretary/General Counsel, West Virginia Department of
Commerce

From: Jeff Herholdt, Director 
West Virginia Division of Energy

Date: July 23, 2012

Re: Quarterly Report Ending June 30, 2012
Legal Challenges Potentially Impacting the Energy Industry

As mandated by West Virginia Code §5B-2F-2(s), the following information presents legal challenges with the potential to impact the state's energy industry. This submission has been summarized by the West Virginia Chamber of Commerce's Energy Committee. Future reports will be submitted on a quarterly basis.

**REPORT ON LITIGATION RELATED TO
ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA
SECOND QUARTER 2012
(Ending June 30, 2012)**

1. Fish and Wildlife Service Lists Snuffbox and Rayed Bean Mussels to Endangered Species List; Faces Lawsuit Seeking to Add Big Sandy Crayfish

On March 15, 2012, the United States Fish and Wildlife Service (“FWS”) officially added the Snuffbox Mussel (*Epioblasma triquetra*) and the Rayed Bean Mussel (*Villosa fabalis*) to the list of endangered species under the Endangered Species Act of 1973. The species are listed as endangered throughout their ranges. This listing was brought about in large part because of a lawsuit last year from the Portland, Oregon based Center for Biological Diversity, which sued the FWS in order to force the agency to make a formal listing decision with regard to 374 freshwater species from the Southeast United States. The FWS settled the lawsuit and agreed to make final listing determinations with regard to these species.

The Rayed Bean Mussel is a small mussel that prefers small headwater streams but is occasionally found in larger rivers. The mussel currently exists in only 31 streams throughout Michigan, Ohio, New York, Pennsylvania, Indiana, Tennessee and the Elk River in West Virginia. The mussel was determined to be completely absent from the Elk River and all of West Virginia in the 1990s, but was reintroduced in 2006.

The Snuffbox Mussel is a uniquely-shaped mussel that spends most of its life buried in river substrate. The snuffbox mussel is currently found in 79 streams throughout 15 states. In West Virginia, the snuffbox mussels are believed to exist in Middle Island Creek, McElroy Creek, Little Kanawha River, Elk River, and North Fork Hughes River. Kentucky streams include Tygart Creek, Kinniconick Creek, Licking River, Slate Creek, Middle Fork Kentucky River, Red Bird River, Red River, Rolling Fork Salt River, Green River, and Buck Creek.

These two mussel species are believed to have become endangered due to the destruction of their historic habitat from impoundments, river dredging and channelization, chemical spills, and water pollution associated with coal mining. The FWS also listed oil and gas production as a likely contributor to the species’ habitat destruction because of large

water withdrawals that can de-water mussel beds, increased sediment loads, and lower water quality.

Now that these species are listed as endangered, the FWS must develop a recovery plan outlining the management actions designed to achieve the recovery of these species. The agency has not determined the critical habitat for these mussel species because the information on the physical and biological features essential for the conservation of these species is not yet known.

The listing of these species is potentially important to the regulated community because both the Clean Water Act and Surface Mining Control and Reclamation Act (SMCRA), require coordination with the FWS to ensure that endangered species and their habitats are protected. In light of this new listing, the process for securing coal mining permits, water pollution discharge permits, or even oil and gas drilling permits in the watersheds where these species are believed to exist could become lengthier and complicated.

In other endangered species news, the Center for Biological Diversity recently filed a notice of intent to sue the FWS over the agency's failure to make a formal listing decision with regard to the Big Sandy Crayfish (*Cambarus veteranus*). The Big Sandy Crayfish was among the 374 species involved in the lawsuit and settlement with the FWS mentioned above, but the agency has not yet made a formal listing decision. The Big Sandy's historic range includes West Virginia, Kentucky, and Virginia. The notice of intent claims the crayfish's habitat has declined by 50 to 70 percent and "[t]he remaining habitat of the Big Sandy Crayfish is severely threatened by coal mining activities, interstate highway construction, and logging. The crayfish cannot survive in areas with impaired water quality and is threatened by pollution from coal fines, septic overflow, and other sources."

2. West Virginia Challenges U.S. EPA's Mercury and Air Toxics Standards

The State of West Virginia and other states, and numerous business and industry groups including the West Virginia Chamber of Commerce and West Virginia Coal Association have challenged U.S. EPA's Mercury and Air Toxics Standards (MATS) final rule that was published in the *Federal Register* on February 16, 2012 (77 Fed. Reg. 9304). These various petitions for review have been filed in the United States Court of Appeals for the District of Columbia Circuit.

The MATS final rule will require coal-fired power plants to reduce mercury emissions by 90% in four years. The MATS final rule and U.S. EPA's Cross-State Air Pollution Rule (CSAPR) are driving early retirements of many existing power plants and effectively discourage the construction of new coal-fired power plants. U.S. EPA's recently proposed Carbon Pollution Standard for New Power Plants (discussed later in this report), if finalized, will effectively prohibit construction of new coal-fired power plants through 2030. The D.C. Circuit heard oral argument on challenges to U.S. EPA's

CSAPR on April 13, 2012. A decision is expected in the CSAPR litigation before summer 2012.

The MATS final rule took effect on April 16, 2012. Existing sources generally have up to four years or until April 2016, if they need it, to comply with MATS. This includes the standard three years provided to all sources by the Clean Air Act, and an additional fourth year that U.S. EPA is “encouraging permitting authorities to make . . . broadly available for technology installations.” If more time is needed, U.S. EPA has issued an enforcement policy document that provides a pathway for reliability-critical units to obtain, on a case-by-case basis, a schedule with up to an additional fifth year to achieve compliance. Further, U.S. EPA states that if there are still “other situations where sources cannot come into compliance on a timely basis.... EPA will address individual noncompliance circumstances (if there are any) on a case-by-case basis, at the appropriate time, to determine the appropriate response and resolution.”

3. Anti-Mining Groups Sue Montana Official in Federal Court to Restrict New Surface Mining Permits

Two environmental groups (Sierra Club and the Montana Environmental Information Center) have sued the Montana Department of Environmental Quality (“MDEQ”) in federal court seeking to compel MDEQ to use water quality standards as the basis for “material damage” findings in surface mine permitting. The case implicates significant jurisdictional and programmatic issues that anti-mining groups previously pursued with limited success in the east.

The federal Surface Mining Control and Reclamation Act (“SMCRA”) is implemented by the Department of Interior’s Office of Surface Mining (“OSM”), but authorizes states to assume “exclusive authority” over the SMCRA program within their respective state borders. MDEQ or its predecessors have implemented an OSM-approved State program since 1980. In addition, MDEQ has entered into a “cooperative agreement” with OSM for the purposes of implementing SMCRA on federally-owned lands. *See* 30 U.S.C. §1273(c) (authorizing states with OSM-approved SMCRA plans to enter agreement “to provide for State regulation of surface coal mining . . . on Federal lands. . . .”) & 30 C.F.R. §926.30 (text of the agreement). SMCRA requires permitting authorities to prepare “cumulative hydrologic impact assessments” or “CHIAs” as part of their permit review process in order to ensure that proposed mine operations do not cause “material damage” to the hydrologic balance outside the mine site. 30 U.S.C. §§1257(b) & 1260(b)(3).

The Sierra Club argues that MDEQ has a federal obligation to implement both its OSM-approved program and its Cooperative Agreement in accordance with the provisions of the federal SMCRA and OSM’s federal SMCRA rules. It argues that MDEQ has

violated those obligations in the way it prepares CHIAs and determines that mines will not cause “material damage.”

The term “material damage” is not defined by SMCRA or its implementing rules, but the Sierra Club contends that the concept requires application of “objective” criteria, including “each Montana water quality standard.” Complaint, ¶37(b). It alleges further that the CHIAs previously prepared by MDEQ for federal land tracts and for permits to mine them did not properly account for water quality standards in their “material damage” determinations. In particular, it faults CHIAs prepared for ongoing or proposed operations by Westmoreland Coal, Western Energy, Spring Creek Coal, Decker Coal, Big Sky Coal and Bull Mountain Coal. It seeks an injunction to prevent the issuance of new permits or permit modifications at each specified site until MDEQ develops objective “material damage” criteria which incorporates State water quality standards. The Complaint alleges that many of the receiving streams already violate State water quality standards and suggests that new “material damage” determinations would require MDEQ to withhold future SMCRA permits.

The format of the lawsuit is a familiar one. It alleges that MDEQ has federal obligations under SMCRA to maintain its federally-approved program. It has to allege this because the 11th Amendment to the U.S. Constitution has been construed to prohibit most lawsuits against State agencies in federal court for violations of state law—states generally can be sued in federal court only for violations of federal law. Two similar attempts by anti-mining groups ultimately failed in the Third and Fourth Circuits. *See Pennsylvania Federation of Sportsmen’s Clubs, Inc. v. Hess*, 297 F.3d 310 (3rd Cir. 2002) & *Bragg v. W.Va. Coal Ass’n.*, 248 F.3d 275 (4th Cir. 2001).

In both of those cases, the Court ruled that a federally-approved state SMCRA program was state—not federal—law and, therefore, the 11th Amendment barred the action against the state agency. It appears that the Sierra Club hopes to rely on the State-OSM Cooperative Agreement to bypass these rulings, and will argued that MDEQ’s obligations under that Cooperative Agreement arise under federal, rather than state, law. However, the SMCRA provision authorizing such agreements provides only that states with federally-approved programs “may elect to enter into a cooperative agreement” with [OSM] to provide for State regulation of surface coal mining . . . on Federal Lands. . . .” Thus, the question will be whether elements of the Cooperative Agreement convert any of MDEQ’s State law obligations into federal obligations that do not implicate the 11th Amendment.

As for the substantive claims in the case, the Ohio Valley Environmental Coalition recently concluded years of generally unsuccessful litigation in the Fourth Circuit arguing that OSM was required to ensure that states use water quality standards adopted to comply with Clean Water Act requirements as a measure of material damage. *See OVEC v. Salazar*, 2012 WL 50635 (4th Cir. 2012).

4. Anti-Mining Groups Claim Conductivity Causes Violations of State Narrative Water Quality Standards

Experts for the Sierra Club recently testified in federal court in Huntington, West Virginia that conductivity from surface mining has a strong negative correlation with benthic macroinvertebrate score indices. The witnesses, who included Emily Bernhardt of Duke University, Margaret Palmer of the University of Maryland, and Ryan King of Baylor University, testified in support of a claim by the Sierra Club that the Corps of Engineers erred in issuing a “fill” permit under Section 404 of the Clean Water Act for an excess spoil valley fill to be constructed by Highland Mining Company in Logan County, West Virginia. They have been working on a paper entitled “How Many Mountains Can We Mine?” for the past two years. There are four versions of the paper. The first three (“How many mountains can we mine? Ecological thresholds for freshwater ecosystems of the Central Appalachians,” “How many mountains can we mine? Examining the cumulative impacts of surface coal mining on freshwater ecosystems of the Central Appalachians,” and “How many mountains can we mine? The effects of surface coal mining on water quality and biological diversity of Central Appalachian Rivers”) have never been published by peer reviewed journals. The fourth version (“How many mountains can we mine? Assessing the regional degradation of Central Appalachian rivers by surface coal mining”) has been submitted to the journal *Environmental Science and Technology* for approval and publication. None of the draft articles were admitted into evidence in the hearing because they were never available to the Corps’ decision makers, but the authors were permitted limited opportunity to testify about the conclusions of their work.

In each version of this paper, the authors have tried to correlate mining and/or conductivity levels to benthic macroinvertebrate index scores frequently used by states to measure compliance with “narrative” water quality standards. Several years ago, the authors downloaded from the WVDEP a database of water chemistry and benthic scores and set out to show the impacts of mining on benthic life. Those data, on average, show lower benthic index scores downstream of mines than in other areas. The potential causes have been the source of debate as mine operators suggest that a large part of the impacts are caused by repairable landscape level disturbance while mining opponents seek to blame in-stream levels of conductivity which can remain relatively high downstream of mines for years.

The authors themselves seem to disagree whether they have established a causal link between conductivity and benthic scores. They conceded that their work showed a substantial number of “exceptions” or “outliers,” i.e., streams with high conductivity and high benthic index scores. Midway through the trial they claimed that they had just downloaded a database of valley fill locations from WVDEP which, when coupled with the benthic index scores, suggests that the “outliers” are associated with streams that have small or no valley fills. Presumably, they did this in order to explain the outliers and to tie the effects to the activity permitted by the Corps—the discharge of fill material to the

lower benthic scores. They did not explain how similar conductivities below different types of sites (valley fill vs. no valley fill) could differentially affect benthic life or whether the disturbance above valley filled sites was typically larger than those upstream of ponds associated with smaller mines not having a valley fill.

Of note to the coal industry is the fact that the work of the Sierra Club experts shows that whatever the cause, benthic scores drop soon after relatively modest increases in any type of land disturbance and/or conductivity and then flatten out substantially—suggesting that after an initial drop in scores additional mining may have minimal additional impacts. In their challenge to the Highland permit, the Sierra Club claims that the Corps did not adequately consider the cumulative impacts of the mine under NEPA. In particular, much of its case focused on the condition of a nearby stream which the Corps used as the measuring point for considering downstream cumulative impacts. It noted that the WVDEP recently added the stream to the Clean Water Act’s “303(d)” list of waters for not achieving the State’s narrative standard as a result of “biological impairment.” Although WVDEP’s listing decision for the stream does not identify the cause of the “impairment,” the Sierra Club has suggested that it is conductivity from previous mining in the watershed, and that the Corps did not adequately consider the impact of additional conductivity from the new mine.

5. Sierra Club Launches “Beyond Natural Gas” Campaign

In 2002, Sierra Club launched its “Beyond Coal” campaign. The mission of the Beyond Coal campaign is, quite literally, to end the mining and burning of coal in the United States. In the decade since its launch, Sierra Club claims its Beyond Coal campaign has successfully prevented the opening of 160 new coal-fired power plants and retired 110 existing coal-fired units.

Earlier this month, Sierra Club officially launched a “Beyond Natural Gas” campaign. Through this campaign, Sierra Club seeks to prevent natural gas from filling the energy void that is emerging from the declining use of coal in the United States. Sierra Club no longer considers natural gas to be a desirable “bridge fuel,” but sees it as a dirty fossil fuel that must be “leapfrogged” in favor of wind, solar, and energy efficiency programs.

Sierra Club’s campaign against natural gas goes beyond its opposition to hydraulic fracturing. Rather, Sierra Club views every new gas well and every gas-fired power plant as a roadblock in America’s transition to renewable energy. In announcing the new campaign, Sierra Club’s Executive Director Michael Brune explained “As we push to retire coal plants, we’re going to work to make sure we’re not simultaneously switching to natural-gas infrastructure. *** [Sierra Club] is going to be preventing new gas plants from being built whenever we can.”¹ Sierra Club’s website makes clear that it is determined to lobby for stricter regulations on drilling operations, oppose permits for new gas-fired power plants, and resist the expansion of liquefied natural gas (LNG) export terminals.

While Sierra Club spoke favorably of America's natural gas boom only a few years ago, the organization has since reversed its position on natural gas. On its Beyond Natural Gas website, President of Sierra Club's Board of Directors, Ms. Robin Mann, writes:

Fossil fuels have no part in America's energy future – coal, oil and natural gas are literally poisoning us. The emergence of natural gas as a significant part of our energy mix is particularly frightening because it dangerously postpones investment in clean energy at a time when we should be doubling down on wind, solar and energy efficiency.

Similarly, on his personal blog, Sierra Club's Executive Director Michael Brune stated:

"It's time to stop thinking of natural gas as a "kinder, gentler" energy source. *** [A]s we phase out coal, we need to leapfrog over gas whenever possible in favor of truly clean energy. Instead of rushing to see how quickly we can extract natural gas, we should be focusing on how to be sure we are using less -- and safeguarding our health and environment in the meantime.

In conclusion, with the launch of its Beyond Natural Gas campaign, Sierra Club has given fair warning that the natural gas industry can expect the same wave of environmental lawsuits and regulatory challenges that has plagued America's coal industry for the last decade. Sierra Club is a well-funded and ideologically motivated organization that the natural gas industry will have no choice but to become intimately familiar with over the coming years.

6. Morgantown, WV Passes New Ordinance Regulating Oil and Gas Wells

Monongalia County (WV) Circuit Court Judge Susan Tucker in August last year ruled that Morgantown, West Virginia's Ordinance banning horizontal drilling and fracking within the City and within one mile of the City is preempted by state law. On July 3, 2012, the City of Morgantown approved new Planning and Zoning Code revisions which focus on what the City of Morgantown is calling the "Extractive Industry" and specifically targets "oil and gas extraction," and "Operators." The revisions adopted affect property rights and attempt to provide for the automatic expiration of surface operating rights under existing oil, and gas leases where no active drilling has commenced within seven years of annexation into the City. There are also setback, site plan review and approval, caretaker's residence, exhaust control, dust, landscaping, signage, storage, waste disposal, security, impoundment, secondary containment, gating, cleanup, maintenance, gas emission or burning, site restoration, off-street parking, and

fencing requirements that go well beyond requirements imposed by the horizontal drilling statute passed by the West Virginia Legislature last December. The process for getting Planning Commission review and approval as it relates to site plans are similarly proposed, with additional requirements for transportation route plans and in some cases transportation protection agreements, which include bonding requirements that vary per mile and road type. Emergency Action Response Plans, Water Supply Plans and Hazardous Materials Management Plans are also included as additional requirements to obtaining the necessary review and approval for these projects.

7. U.S. EPA Proposes the First National Greenhouse Gas Limits for New Power Plants

On March 27, 2012, U.S. EPA proposed the first national carbon dioxide (CO₂) standard for new power plants that the Agency says is intended to encourage investment in clean coal technologies. The proposed standard would regulate only CO₂ emissions, and not other constituent gases of the greenhouse gas. Specifically, U.S. EPA is proposing that new fossil-fuel-fired power plants meet an output-based standard of 1,000 pounds of CO₂ per megawatt-hour (lb CO₂/MWh gross). U.S. EPA expects that new natural gas combined cycle (NGCC) power plant units should be able to meet the proposed standard without add-on controls, whereas new coal-fired units would have to incorporate technology such as carbon capture and storage (CCS) to meet the standard. The problem is that CCS will not be commercially viable for years.

The proposed standard would apply to new power plants but not to existing power plants. Generally, new sources include “modifications” or “reconstructions” at existing facilities; however, EPA says it lacks adequate information to include “modifications” and “reconstructions”. Therefore, U.S. EPA is proposing that the new standard would not apply to “modifications” or “reconstructions”. An existing power plant makes a “modification” for purposes of new source performance standards if it undertakes a physical or operational change that increases the source’s maximum achievable hourly rate of emissions, but does not include pollution control projects, such as the installation of pollution control equipment or systems that power plants are expected to undertake to comply with the Cross-State Air Pollution Rule (CSAPR) and Mercury Air Toxics Standards (MATS). An existing facility undertakes a “reconstruction” if it replaces components to such an extent that the capital costs of the new equipment or components exceed 50 percent of what is believed to be the cost of a completely new facility. *Id.* at 16, 42-48.

The proposed rule would also grandfather approximately fifteen coal-fired units that as of March 27, 2012, have received their Clean Air Act permitting approval and that commence construction within twelve months of the date of publication of the proposed rule in the *Federal Register*. According to U.S. EPA, six of the fifteen grandfathered, coal-fired units have plans to implement CCS. *Id.* at 45. None of the fifteen grandfathered coal-fired units is located in West Virginia. Additionally, the proposed

standard would not apply to power plants located in non-continental areas, *e.g.*, Hawaii and the territories, due to the lack of pipeline quality natural gas in those areas. *Id.* at 35 & 71. Further, new units that do not burn fossil fuels, *e.g.*, units that burn only biomass, would also be exempt. *Id.* at 31.

Recognizing that CCS “would add considerably to the costs of a new coal-fired power plant,” U.S. EPA is proposing a 30-year averaging compliance option that would be applicable only to new coal-fired or pet coke-fired units. *Id.* at 34. Under the 30-year averaging compliance option, coal- and pet coke-fired sources could comply with the 1,000 lb CO₂/MWh standard on a 30-year average basis. Coal- and pet coke-fired units that use this compliance alternative would be required to meet an immediate performance standard of 1,800 lb CO₂/MWh (gross) on a 12-month annual average basis, which can be achieved by a “supercritical” efficiency level, during the period before installation of CCS. By no later than the beginning of the 11th year, the facility would be required to meet a reduced CO₂ emission limit of no more than 600 lb CO₂/MWh (gross) on a 12-month annual average basis for the remaining 20 years of the 30-year period, such that the weighted average CO₂ emissions rate from the facility over the 30-year time period would be equivalent to the proposed standard of performance of 1,000 lb CO₂/MWh. *Id.* at 14 & 32-33.

In other words, coal-fired sources that elect the 30-year averaging compliance option could choose to install CCS as part of the original project and could use some or all of the initial ten-year period to optimize the system, while coal-fired sources that choose to delay installation of CCS for up to ten years, could take advantage of advancements in the technology that could reduce costs and enhance performance. *Id.* at 33-40, 73-80. U.S. EPA seeks comment on the 30-year compliance option and on alternative mechanisms for establishing practicably enforceable short-term limits during the 30-year period. *Id.* at 33. U.S. EPA intends to review the availability and cost of CCS in eight years as part of its statutorily required review of the new source standards. *Id.* at 34.

U.S. EPA does not anticipate that the proposed rule will result in emissions reductions, monetized benefits, compliance costs, or energy, economic, or employment impacts. While the proposed rule would regulate CO₂ emissions, it is not expected to reduce emissions of greenhouse gases or other pollutants. *Id.* at 49 & 199. Because there are no emissions reductions, there are no monetized benefits, such as fewer adverse health effects or fewer extreme weather events. *Id.* at 201-202. U.S. EPA attributes the lack of emissions reductions, monetized benefits, compliance costs and other impacts to the increased availability and low price of natural gas. The Agency believes that the electric utility industry would choose to build new gas-fired power plants even in the absence of the proposal, and the Agency does not project any new coal-fired power plants without CCS to be built in the absence of the proposal. *Id.* at 199-200. For the same reasons, U.S. EPA does not believe that the proposed rule would have any impacts on the price of electricity, employment or labor markets. *Id.* at 201.

For benefits, U.S. EPA notes that the proposed rule will assure that emission rates from new coal and other fossil fuel-fired power plants will not exceed the level of the standard. *Id.* at 49 & 201. Although the proposed standard does not apply to existing power plants, U.S. EPA states it will “serve as a necessary predicate of the regulation of existing [power plants]” in future years. U.S. EPA characterizes the proposed rule as sending a “strong signal,” domestically and internationally. In the U.S., the Agency asserts that the proposed rule “encourages” what it sees as “the current trend towards cleaner generation” and says the proposal “can further stimulate investment in CCS and other clean coal technologies,” and internationally, may encourage less GHG-intensive forms of power generation. *Id.* at 48-49.

Quoting American Electric Power’s decision in 2011 to place on hold its CCS demonstration project at its Mountaineer Plant in West Virginia “because the State’s utility regulators would not approve CCS without a regulatory requirement to reduce CO₂,” U.S. EPA states that the proposed standard “would help create the regulatory certainty that CCS is the path forward for new coal-fired generation.” *Id.* at 26. U.S. EPA maintains that aligning the proposed standard with CSAPR and MATS provides regulatory certainty, while facilitating the electric utility industry’s investment decisions and informing its compliance decisions to meet all of its Clean Air Act obligations. *Id.* at 25. U.S. EPA explains it is focusing first on reducing CO₂ emissions from power plants because they comprise the largest category of stationary source of CO₂ emissions in the U.S. According to U.S. EPA, fossil fuel-fired power plants emit approximately 40 percent of all U.S. anthropogenic CO₂ emissions. *Id.* at 19 & 23-24.

U.S. EPA relies upon Section 111 of the Clean Air Act. That section requires U.S. EPA to publish a list of categories of stationary sources that in the judgment of the U.S. EPA Administrator cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare and to establish federal standards of performance for new sources within each category. CAA §111(b)(1)(A)-(B). The term “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements)...has been adequately demonstrated.” CAA §111(a)(1). Power plants have been listed as source categories that cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. The proposed standard is based upon the demonstrated performance of NGCC units that are currently in use throughout the country.

The proposed standard is in response to a settlement agreement U.S. EPA entered into with twelve states, including the District of Columbia, the City of New York, and environmental groups on December 23, 2010. Originally, U.S. EPA committed to issuing proposed regulations by July 26, 2011 and final regulations by May 26, 2012. In June 2011, the parties to the settlement agreement agreed to an extension of the deadline

for the proposal until September 2011. U.S. EPA has now promulgated the proposed rule but has not said when it intends to finalize the rule.