COMMITTEE SUBSTITUTE

FOR

H. B. 2004

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

(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.
(a) **Legislative Findings**—

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

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

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

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

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

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

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

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

(2) If the department determines that the creation of a state plan is feasible, it shall develop and submit the proposed state plan to the Legislature sitting in Regular Session, or in an extraordinary session convened for the purpose of consideration of the state plan, in sufficient time to allow for the consideration of the state plan prior to the deadline for submission to the Environmental Protection Agency.
(3) In addition to submitting the proposed state plan to the Legislature, the department shall publish the report and any proposed state plan on its website.

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

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

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

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

(4) Additional regulatory mechanisms that provide flexibility in complying with the standards, including: (A) Emissions trading with credited reduction for any unit that was in operation January 1, 2011, or thereafter, and fleet wide averaging; (B) other alternative implementation measures that are determined to further the interests of West Virginia and its citizens including state programs such as clean energy programs that mandate reduced energy consumption resulting in avoided emissions, emission reductions, or a reduction in the state’s carbon dioxide intensity whereby the state shall credit equally based on the output to the generators located in the state that are subject to carbon dioxide performance standard rules under Section 111(d) of the Clean Air Act.

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

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

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

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

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

1. Consumer impacts, including any disproportionate impacts of energy price increases on
   lower income populations;
2. Nonair quality health and environmental impacts;
3. Projected energy requirements;
4. Market-based considerations in achieving performance standards;
5. The costs of achieving emission reductions due to factors such as plant age, location or
   basic process design;
6. Physical difficulties with or any apparent inability to feasibly implement certain emission
   reduction measures;
7. The absolute cost of applying the performance standard to the unit;
8. The expected remaining useful life of the unit;
9. The impacts of closing the unit, including economic consequences such as expected job
   losses at the unit and throughout the state in fossil fuel production areas including areas of coal
production and natural gas production and the associated losses to the economy of those areas and the state, if the unit is unable to comply with the performance standard;

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

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

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

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

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

(3) If the Environmental Protection Agency does not approve the state plan, in whole or in part, the department shall as soon as practicable propose a modified state plan to the Legislature in accordance with the requirements of this section.
(I) **Legal effect.** – Any obligation created by this section and any state plan submitted to the Environmental Protection Act pursuant to this section shall have no legal effect if:

1. the Environmental Protection Agency fails to issue, or withdraws, its federal rules or guidelines for reducing carbon dioxide emissions from existing fossil fuel-fired electrical generating units under 42 U.S.C. §7411(d); or,
2. a court of competent jurisdiction invalidates the Environmental Protection Agency’s federal rules or guidelines issued to regulate emissions of carbon dioxide from existing fossil fuel-fired electrical generating units under 42 U.S.C. §7411(d).

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