

# **WEST VIRGINIA LEGISLATURE**

**2016 REGULAR SESSION**

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 691**

BY SENATOR BOSO, *original sponsor*

[Passed March 11, 2016; in effect from passage]

1 AN ACT 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 may be on a unit-specific performance  
42 basis and may be based upon either a rate-based model or a mass-based model.

43 (2) If the department determines that the creation of a state plan is feasible, it shall develop

44 and submit the proposed state plan to the Legislature sitting in regular session, or in an  
45 extraordinary session convened for the purpose of consideration of the state plan, in sufficient  
46 time to allow for the consideration of the state plan prior to the deadline for submission to the  
47 Environmental Protection Agency.

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

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

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

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

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

69 (3) Efficiency and other measures that can be undertaken at each coal-fired electric

70 generating unit to reduce carbon dioxide emissions from the unit without switching from coal to  
71 other fuels or limiting the economic utilization of the unit.

72 (f) *Standards of performance for existing natural gas-fired electric generating units.* —

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

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

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

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

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

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

93 (2) Nonair quality health and environmental impacts;

94 (3) Projected energy requirements;

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

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

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

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

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

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

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

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

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

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

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

121 (i) *Legal effect.* — Any obligation created by this section and any state plan submitted to

122 the Environmental Protection Act pursuant to this section shall have no legal effect if:

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

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

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