

# Transition Plans for Coal-Fired Power Plant Closings: Stability, Opportunity, & Community

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*I have witnessed them selling their life's accumulated possessions in yard sales. Their credit is being damaged beyond repair as they are forced to dependency on free lunch, food stamps, and other government programs in an attempt to get through another week.*<sup>1</sup>

—County Judge Albey Brock on the effect of coal-industry layoffs in Eastern Kentucky.

For generations, coal-fired power plants have provided employment and other economic resources to communities across the United States.<sup>2</sup> In turn, citizens and local governments have come to rely on the coal industry as the driving force of their local economies.<sup>3</sup> However, this stability has become increasingly threatened, and will continue to be, as the coal industry faces competition from natural gas power and increased regulation from the Environmental Protection Agency (“EPA”).<sup>4</sup> While the price superiority of natural gas over coal fluctuates,<sup>5</sup> the effects of competition from natural gas can be compounded by government regulations, causing

some to instead shutter and thereby also reduce demand for their supplying coal mines.<sup>6</sup>

Incidental to such closures and the reduced demand for coal are the economic hardships faced by communities that have grown economically dependent on the coal industry. In many cases, these communities have been left without any sort of replacement for the resources provided by the departed coal industry.<sup>7</sup> For example, in eastern Kentucky, dependence on the coal industry reverberates throughout the economy: economists estimate that one coal-mining job supports three-and-a-half other jobs in that region's economy.<sup>8</sup> More staggering is the fact that eastern Kentucky's economy is more dependent on the coal industry than Detroit is upon the auto industry.<sup>9</sup> The human toll that results from the shuttering of coal-fired power plants has been witnessed across the United States,<sup>10</sup> but as of yet, few organizations, members of Congress, or states have come forth with practical solutions capable of protecting the local economies of towns impacted by shuttered coal-fired power plants. The effect that a lack of transition planning may cause is not without precedent and worryingly resembles the steel mill closures and deindustrialization of the 1970s and early 1980s, which devastated communities that continue to struggle to recover.<sup>11</sup>

In a hope to avert the widespread recurrence of such post-industrial consequences, this Note will propose two solutions designed to work in tandem. The first solution amends the Energy Consumers Relief Act (“ECRA”) to provide (1) additional protection through cooperative interagency review of

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1. EPA's Regulatory Threat to Affordable, Reliable Energy: The Perspective of Coal Communities: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 113th Cong. (2013) (statement of Hon. Albey Brock) [hereinafter Brock Testimony], available at <http://docs.house.gov/meetings/IF/IF02/20131029/101440/HHRG-113-IF02-Wstate-BrockA-20131029.pdf>.
2. See generally Thomas Overton, *Replacing Coal in a Small Town*, POWER MAG. (Aug. 5, 2013), <http://www.powermag.com/replacing-coal-in-a-small-town/?pagenum=1>; S.B. 5769, 2013 Leg., Reg. Sess., at 1 (Wash. 2013).
3. See *id.*
4. Ben Wolfgang, *EPA's New Rules for Coal Accelerate Obama's Agenda on Climate Change*, WASH. TIMES (Sept. 19, 2013), <http://www.washingtontimes.com/news/2013/sep/19/epas-new-rules-for-coal-accelerate-obamas-agenda-o/?page=all>; INT'L ENERGY AGENCY, GAS TO COAL COMPETITION IN THE U.S. POWER SECTOR (2013), available at <http://www.iea.org/publications/insights/name,36919,en.html>.
5. Jeff McMahon, *Four Reasons Coal Declines Even as Natural Gas Prices Rise: ELA*, FORBES (Apr. 23, 2013), <http://www.forbes.com/sites/jeffmcmahon/2013/04/23/4-reasons-coal-declines-even-as-natural-gas-prices-rise-eia/>.

6. Moran Zhang, *King Coal Has Lost Crown to Natural Gas, Despite Price Decline Forecast*, INT'L BUS. TIMES (June 22, 2012), <http://www.ibtimes.com/king-coal-has-lost-crown-natural-gas-despite-price-decline-forecast-704008>.
7. See Brock Testimony, *supra* note 1.
8. *Id.*
9. *Id.*
10. See *id.*; H.R. REP. NO. 113-164, at 5 (2013), available at <http://beta.congress.gov/113/crpt/hrpt164/CRPT-113hrpt164.pdf>; Overton, *supra* note 2; S.B. 5769, 2013 Leg., Reg. Sess., at 1 (Wash. 2013); Brett Israel, *Coal's Slipping Grip: Death of a Georgia Coal Plant*, ENV'TL HEALTH NEWS (July 2, 2013), <http://www.environmentalhealthnews.org/ehs/news/2013/georgia-coal>.
11. See John Russo & Sherry Lee Linkon, Youngstown State Univ., *The Social Costs of Deindustrialization*, in MANUFACTURING A BETTER FUTURE FOR AMERICA 149 (2009); see also Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1764 (1993).

certain proposed EPA regulations and (2) flexible, ad hoc implementation of an economic transition plan for communities that are ultimately affected by coal-fired power plant closures due to regulations that come within ECRA<sup>12</sup> and this Note's suggested amendment. The second solution provides two routes for state-level action. The primary second solution calls for state legislation requiring transition plans for communities affected by coal-fired power plant closures, regardless of what precipitated the closure. The alternate state solution proposes qualifying coal-fired power plants be repowered as natural gas power plants.

Each solution is meant to provide a viable transition plan for citizens and local governments to offset the economic hardships host communities face from a coal-fired power plant closure. Each solution also encourages civic engagements to allow communities a degree of autonomy in determining and planning their future development. Most importantly, these solutions also further the discussion that workers and host communities need not become collateral damage to environmental interests.

With the viability of these solutions in mind, this Note does not intend to present solutions which choose between the coal, gas, and renewable and alternative energy industries; it only proposes there should be a transition plan set in place to protect communities that host a shuttering coal-fired power plant. Because the proposed federal amendment to ECRA would be unlikely to trigger federal action in many cases, and because not all states can be expected to adopt either of the alternate state solutions, these dual proposals are necessary to establish a fixed floor and flexible ceiling of protection for host communities. These are seemingly involved but ultimately straightforward and practical solutions that states and municipalities have already proved amenable to undertaking.<sup>13</sup>

To present these solutions, Part I portrays three communities to demonstrate the economic benefits provided by coal-fired power plants and how closures of such plants impair the ability of citizens to find employment or sources of income and local governments to raise revenues.<sup>14</sup> It also discusses the implications of recent EPA rules that tighten regulation over the coal industry but which, arguably, inadequately account for the latent economic impact these rules pose to coal-dependent communities and addresses the historical parallel of steel mill closures. Part II presents and analyzes various solution models that have, at least partially, attempted to address this problem. Part III proposes the dual federal- and state-level solutions discussed above. Part IV concludes that the proposed solutions will permit host communities to determine what their region, post-coal, should look like and, in doing so, foster civic engagement and community during what will be a momentous turning point into a new era for these coal-dependent communities.

12. H.R. 1582, 113th Cong. (1st Sess. 2013), available at <http://beta.congress.gov/bill/113th/house-bill/1582/text>.

13. Overton, *supra* note 2; S.B. 5769, 2013 Leg., Reg. Sess., at 1 (Wash. 2013).

14. Israel, *supra* note 10, at 1.

## I. Community, Dependence, and Introduction to the Need for Environmental and Protective Economic Legislation

Coal-fired power plants are both the heroes and villains of the communities which house them. Though plants pose national health concerns which bear most heavily on communities in close proximity to them,<sup>15</sup> they also supply financial resources which save these dependent communities from economic ruin.<sup>16</sup>

### A. Local Impacts of Coal-Fired Power Plant and Coal Mine Closures

*This is going to be a ghost town. All we're missing is the tumbleweeds.*

—Melissa DiNunno, local storeowner of Masontown, Pennsylvania, on the effect of the expected Hatfield plant closure.<sup>17</sup>

### I. Dunkirk, NY: Coal-Fired Power Plant Community

Like many of the more divisive coal-fired power plants, the Dunkirk plant is hosted by a small, rural community and was constructed in the 1950s.<sup>18</sup> Over time, Dunkirk's operations expanded, doubling its capabilities by 1960, and the plant made major upgrades to control its emissions in 1999.<sup>19</sup> By 2011, the Dunkirk plant had become integral to the local community and economy.<sup>20</sup> NRG Energy, Inc. ("NRG"), the plant's operator, paid taxes accounting for 18% of the city's budget and further paid \$4.1 million annually to the local school district as part of a payment in lieu of taxes program, accounting for 10% of the district's budget.<sup>21</sup> But in 2012, NRG announced it had lost \$73 million in 2011 and could no longer compete against cheaper gas alternatives,<sup>22</sup> and so decided to shutter the plant.<sup>23</sup>

Local community members and local and state officials responded quickly and engaged in negotiations and hearings

15. THE HEALTH & ENV'T ALLIANCE, THE UNPAID HEALTH BILL: HOW COAL POWER PLANTS MAKE US SICK (2013), available at [http://www.env-health.org/IMG/pdf/heal\\_report\\_the\\_unpaid\\_health\\_bill\\_how\\_coal\\_power\\_plants\\_make\\_us\\_sick\\_final.pdf](http://www.env-health.org/IMG/pdf/heal_report_the_unpaid_health_bill_how_coal_power_plants_make_us_sick_final.pdf).

16. Israel, *supra* note 10, at 3.

17. Gavan Gideon, *Closing of Power Plants Expected to Have Ripple Effect for Other Businesses in Union Township*, PITT. POST-GAZETTE (July 21, 2013, 4:00 AM), <http://www.post-gazette.com/business/businessnews/2013/07/21/Closing-of-power-plants-expected-to-have-ripple-effect-for-other-businesses-in-Union-Township/stories/201307210265>.

18. Press Release, NAACP, NAACP Report Reveals Disparate Impact of Coal-Fired Power Plants (Nov. 16 2012), available at <http://www.naacp.org/press/entry/naacp-report-reveals-disparate-impact-of-coal-fired-power-plants>.

19. Overton, *supra* note 2, at 1.

20. *See id.*

21. *Id.*

22. *Id.*

23. NRG Energy, Inc. 2012 Form 10-K, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/Archives/edgar/data/1013871/000101387113000003/a201210-k.htm> (last visited Feb. 19, 2015).

to avert tax increases, cuts to city services, and school district layoffs in addition to the job losses at the Dunkirk plant.<sup>24</sup> A crisis in Dunkirk was averted after Governor Andrew M. Cuomo announced an agreement to repower the Dunkirk plant to a natural gas facility.<sup>25</sup> While Dunkirk serves as a model for civic engagement and concerted political efforts between local, county, and state officials to achieve a practical solution, or a transition plan away from a shuttering coal-fired power plant, Dunkirk's experience has proven to be an exception.<sup>26</sup>

## 2. Eastern Kentucky: Coal-Mining Community

In Appalachia, Knott County, Kentucky has faced economic decline as more rigorous federal environmental regulations motivate utilities to close outdated coal-fired power plants rather than make the required modifications and continue to compete against natural gas.<sup>27</sup> Over the past decade, approximately 1000 coal mining jobs have been lost in the county alone, with many more lost throughout eastern Kentucky.<sup>28</sup> Citizens in eastern Kentucky, like those of many other coal-dependent regions throughout the United States, have come to widely believe that the federal government is waging a "War on Coal."<sup>29</sup> As Knott County Clerk Ken Gayheart stated: "That's the way the people in our county feel—the regulations have gotten so tough."<sup>30</sup>

Similarly, Bell County Judge Albey Brock testified before the U.S. House Subcommittee on Oversight and Investigations that he has been "on the front lines and in the trenches" as eastern Kentucky reports having lost 5725 coal mining jobs since 2011, a 41.9% employment decline,<sup>31</sup> with an additional 24,500 jobs related to the coal-industry also affected.<sup>32</sup> Knott County residents felt this impact firsthand: coal miners reported to work only to be informed that the mine was closing, effective immediately, because the company could not find buyers as utilities switched from coal to more affordable natural gas.<sup>33</sup> Knott County and eastern Kentucky represent the importance coal-fired power plants serve not only

in the communities they are located, but also in the communities from which their coal is drawn.

## 3. Central Georgia: Coal-Fired Power Plant Communities

Further south, Putnam, Chatham, and Coweta Counties in Georgia are reeling from the lost benefits and ever-present consequences of hosting coal-fired power plants. While the regional utility supplier, Georgia Power Company, was able to install new environmental controls to meet EPA's new pollution standards, it found compliance costs too expensive to upgrade all of its coal-fired power plants.<sup>34</sup> Here too, as in eastern Kentucky, residents and local community leaders feel alienated and victimized.<sup>35</sup> As elsewhere, this rural region depended on jobs and tax revenue that the shuttered plants brought.<sup>36</sup>

For example, in Putnam County, the Plant Branch coal-fired power plant operated by Georgia Power paid \$1 million in property taxes, accounting for 14% of Putnam County's revenue in 2012.<sup>37</sup> Tax increases will stem the loss to county coffers but may devastate communities with few economic resources besides coal-fired power plants, as per capita incomes within three miles of the shuttered coal-fired power plants range from a low of \$19,835 in Savannah to a high of \$25,834<sup>38</sup> in Putnam.<sup>39</sup> Indeed, these Georgia counties are emblematic of coal-fired power plant communities across the United States, which tend to have lower per capita incomes than their state's average.<sup>40</sup> These are vulnerable communities, dependent on coal-fired power plants that stabilized the local economy for over half a century while also deterring alternative forms of economic growth from entering the counties.<sup>41</sup> Despite the unmistakable importance of coal-fired power plants from a local economic perspective, it is equally clear that coal-fired power plant emissions are a nationwide health concern that harms the public interest and requires government regulation to curb.<sup>42</sup> However, in protecting the public health, the economic impact of EPA regulations has caused many coal-dependent communities to feel alienated and victimized, stoking fears of a "War on Coal" which obscures the environmental issues underlying the regulations and threatens continued environmental prog-

24. Overton, *supra* note 2.

25. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Dunkirk Power Plant to Be Repowered and Expanded to Cost Effectively Meet Reliability Needs, Restoring Payments to Local Government and Preserving Jobs (Dec. 15, 2013), available at <http://www.governor.ny.gov/press/12152013-dunkirk-power-plant>.

26. Timothy Lange, *Shutdown of 150th Coal Plant Reminder That So-Called "War on Coal" Must Not Be War on Coal Workers*, DAILY KOS (Oct. 13, 2013, 2:00 PM), <http://www.dailykos.com/story/2013/10/13/1245351/-Shutdown-of-150th-coal-plant-reminder-that-miners-and-related-workers-need-a-just-transition>.

27. Bill Estep & John Cheves, *Chapter 6: Coal Jobs Gone, Perhaps for Good*, LEXINGTON HERALD-LEADER (June 16, 2013), available at <http://www.kentucky.com/2013/06/16/2679110/in-eastern-kentucky-coal-mines.html>; see also *Power Plant Closures*, INSTITUTE ENERGY RES. (Oct. 9, 2014), <http://institute-forenergyresearch.org/topics/policy/power-plant-closures/>.

28. Estep & Cheves, *supra* note 27.

29. *Id.*

30. *Id.*

31. KY. DEP'T FOR ENERGY DEV. & INDEPENDENCE, KENTUCKY QUARTERLY COAL REPORT: APRIL TO JULY 2013 (2013), available at [http://energy.ky.gov/Documents/Kentucky\\_Quarterly\\_Coal\\_Report\\_2013Q2.pdf](http://energy.ky.gov/Documents/Kentucky_Quarterly_Coal_Report_2013Q2.pdf).

32. See Brock Testimony, *supra* note 1.

33. Estep & Cheves, *supra* note 27.

34. Press Release, Ga. Power, Branch Unit Closing Marks Symbolic Milestone (Sept. 30, 2013), available at <http://www.georgiapower.com/docs/about-us/news/branch-two-retires093013.pdf>.

35. See, e.g., Israel, *supra* note 10.

36. *Id.*

37. *Id.*; see also GA. POWER, PLANT BRANCH BROCHURE (n.d.).

38. *Putnam County, Georgia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/13/13237.html> (last updated Feb. 5, 2015).

39. Georgia's per capita income is \$25,182. *Georgia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/13000.html> (last updated Feb. 5, 2015).

40. See Press Release, NAACP, *supra* note 18; Israel, *supra* note 10.

41. See Israel, *supra* note 10.

42. For example, in The Warsaw Communiqué that was released during the 2013 International Coal and Climate Summit, the World Coal Association recognized international consensus on the need to reduce global greenhouse emissions and called on governments to set CO<sub>2</sub> standards for power plants. WORLD COAL ASS'N, THE WARSAW COMMUNIQUE (Nov. 18, 2013), available at [http://www.worldcoal.org/extract/wp-content/uploads/2013/12/141WCA\\_communique\\_A4\\_digital\\_v10.pdf](http://www.worldcoal.org/extract/wp-content/uploads/2013/12/141WCA_communique_A4_digital_v10.pdf).

ress as conservative politicians look to exploit these closings to help gain political support.<sup>43</sup>

## B. Economic Impact of EPA Regulations

In recent years, coal-fired power plants have identified increasingly tighter EPA regulation as, at least, a contributing factor to their decision to shutter.<sup>44</sup> Despite the contentious political treatment of this issue, it is unquestioned that EPA regulations, partly driven by the Obama Administration's environmental platform, have taken a bolder approach since 2011.<sup>45</sup> For instance, the Utility Maximum Achievable Control Technology ("MACT") Rule is estimated by EPA to cost up to \$9.6 billion annually continuing over decades and affect approximately 600 power plants.<sup>46</sup> An independent analysis estimated the Utility MACT Rule will be the most expensive regulation ever issued for power plants by EPA, and that total compliance costs could actually cost over \$100 billion.<sup>47</sup>

Compounding the effects of the Utility MACT Rule is the Boiler MACT Rule, which EPA estimates will incur new costs of \$1.4 billion to \$1.6 billion annually for the coal industry.<sup>48</sup> IHS Global Insight, a conservative think tank, estimates that every \$1 billion spent in complying with these regulations will put 16,000 jobs at risk and reduce U.S. gross domestic product by as much as \$1.2 billion.<sup>49</sup> EPA itself estimates that each individually affected sector may experience job losses as high as 4100 or job gains reaching 8500 due to pollution abatement regulations.<sup>50</sup> With regard to the

Boiler MACT Rule, Rick Wilson of Acacia Environmental Group posits that he does not believe "there will be a single company [in West Virginia] who burns coal in a boiler who will continue to burn coal" by three years after the time of the compliance date and that the Boiler MACT Rule will have a "major financial impact" at small plants like the plant belonging to one of his clients.<sup>51</sup>

As of July 2013, 294 coal-fired electric-generating units have announced they were closing due, at least in part, to EPA policies.<sup>52</sup> However, though coal-fired power plant operators consider market conditions in addition to compliance costs in their decisionmaking, regulations can nonetheless tip an operator's decision to shutter rather than continue to compete against natural gas.<sup>53</sup> For instance, FirstEnergy President James Lash conceded that, though two of his company's plants were driven out partly by natural market forces, "the specter of compliance was still a factor in closing rather than letting natural market forces play out."<sup>54</sup> For FirstEnergy then, like others around the country, continued operation became an irrational business venture.<sup>55</sup> Elsewhere, in Illinois, falling wholesale power prices, compounded by new EPA regulations, caused Midwest Generation to close its remaining coal-fired power plants in the state, costing nearly 900 jobs.<sup>56</sup> With federal regulations having nationwide effects on a local scale, the need for dual federal and state solutions to offset and account for these effects becomes apparent.

## C. Historical Parallel: 1970s Steel Mill Closings and Deindustrialization

The modern events of coal-fired power plant closings have a historical parallel with the steel mill closings and deindustrialization witnessed in the United States in the 1970s. Then, as now, blue collar industrial jobs, which provided wages and other benefits like health insurance and pensions, began to disappear as the industry's framework became unprofitable.<sup>57</sup> Indeed, coal-fired power plants that close today, such as Georgia Power, are forced to do so because of the unprofitability of the venture.<sup>58</sup> Then, as now, there was a sudden increase in the frequency of steel mill closings leading to job losses, relocations, and forced early retirements.<sup>59</sup> Moreover,

43. See Gideon, *supra* note 17; see also MEDIA MATTERS FOR AM., STUDY: HOW MEDIA ADVANCED CONSERVATIVES' MISLEADING WAR ON COAL NARRATIVE (Dec. 9, 2014), <http://mediamatters.org/research/2014/12/09/study-how-media-advanced-conservatives-mislead/201806>; Nate Cohn, *Why Democrats Have Little to Lose in Taking on the Coal Industry*, N.Y. TIMES (June 6, 2014), <http://www.nytimes.com/2014/06/03/upshot/why-democrats-have-little-to-lose-in-taking-on-the-coal-industry.html?abt=0002&cabg=1>.

44. AM. COAL FOR CLEAN COAL ELEC., COAL UNIT SHUTDOWNS (June 20, 2013), available at <http://www.americaspower.org/sites/default/files/Coal%20Unit%20Retirements%20June%2020%202013.pdf>.

45. Gabriel Nelson, *Southern Co. Sees Price Tag of at Least \$13B for New EPA Rules*, N.Y. TIMES (Aug. 5, 2011), <http://www.nytimes.com/gwire/2011/08/05/05greenwire-southern-co-sees-price-tag-of-at-least-13b-for-32850.html>; see also Coral Davenport, *EPA Staff Struggling to Create Pollution Rule*, N.Y. TIMES (Feb. 4, 2014), <http://www.nytimes.com/2014/02/05/us/epa-staff-struggling-to-create-rule-limiting-carbon-emissions.html>; Felicity Barringer, *For New Generation of Power Plants, a New Emission Rule From the EPA*, N.Y. TIMES (Mar. 27, 2012), <http://www.nytimes.com/2012/03/28/science/earth/epa-sets-greenhouse-emission-limits-on-new-power-plants.html>.

46. 40 C.F.R. §§ 63.603, 63.759 (2014).

47. NERA, AN ECONOMIC IMPACT ANALYSIS OF EPA'S MERCURY AND AIR TOXICS STANDARDS RULE 6 (Mar. 1, 2012), available at [http://www.nera.com/nera-files/PUB\\_MATS\\_Rule\\_0312.pdf](http://www.nera.com/nera-files/PUB_MATS_Rule_0312.pdf); *The Energy Consumers Relief Act (H.R. 1582)*, ENERGY & COM. COMMITTEE (Apr. 17, 2013), <http://energycommerce.house.gov/fact-sheet/energy-consumers-relief-act-hr-1582>.

48. National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 78 Fed. Reg. 7,138 (Jan. 31, 2013).

49. IHS GLOBAL INSIGHT & COUNCIL OF INDUS. BOILER OWNERS, THE ECONOMIC IMPACT OF PROPOSED EPA BOILER/PROCESS HEATER MACT RULE ON INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL BOILER AND PROCESS HEATER OPERATORS (Aug. 5, 2010), available at [http://www.cibo.org/pubs/boilermact\\_jobsstudy.pdf](http://www.cibo.org/pubs/boilermact_jobsstudy.pdf).

50. U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT RESULTS FOR THE RECONSIDERATION FINAL RULE FOR NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL

BOILERS AND PROCESS HEATERS AT MAJOR SOURCES (Dec. 9, 2012), available at <http://epa.gov/airquality/combo/docs/boilerreconfinalria121220.pdf>.

51. Pam Kasey, *Companies Burning Coal in Boilers Challenged by EPA*, 27 ST. J. 7, 19 (Feb. 2013), available at <http://www.statejournal.com/story/21137832/companies-burning-coal-in-boilers-challenged-by-new-epa-rules>.

52. H.R. REP. NO. 113-164, at 5 (2013), available at <http://beta.congress.gov/113/crpt/hrpt164/CRPT-113hrpt164.pdf>.

53. See Scott Beveridge, *Hatfield, Mitchell Power Plants to Close as Scheduled*, OBSERVER-REP. (Oct. 3, 2013), [http://www.observer-reporter.com/article/20131003/NEWS01/131009827/-1/news#.Un2AU\\_mL130](http://www.observer-reporter.com/article/20131003/NEWS01/131009827/-1/news#.Un2AU_mL130).

54. *Id.*

55. *Id.*

56. See Steve Daniels, *Midwest Generation Files Chapter 11*, CRAIN'S CHI. BUS. (Dec. 17, 2012), <http://www.chicagobusiness.com/article/20121217/NEWS11/121219833/midwest-generation-files-chapter-11> (describing Midwest Generation's filing for bankruptcy, affecting 845 jobs).

57. Ansley, *supra* note 11, at 1764.

58. H.R. REP. NO. 113-164, at 5 (2013), available at <http://beta.congress.gov/113/crpt/hrpt164/CRPT-113hrpt164.pdf>.

59. Estep & Cheves, *supra* note 27.

though closings had gradually occurred for years, it was the “number and size of closing, as well as their frequency”<sup>60</sup> which so shocked steel mill communities.<sup>61</sup> Most strikingly, entire regions of the country whose economic and cultural personalities had become entwined with their local steel mill could do nothing but watch as owners shuttered and left.<sup>62</sup> As a result, many communities affected by steel mill closings in the late 1970s and early 1980s continue to struggle to rebound from job losses and neighborhood decay.<sup>63</sup>

Indeed, a recent Massachusetts Institute of Technology (“MIT”) study<sup>64</sup> labeled cities like modern Flint, Michigan, and Youngstown, Ohio as “forgotten cities,” because the formerly steel-dependent cities have a per capita income under 35,000 and suffer from what has been labeled as the “Five Pillars of Dominance” (i.e., industry, infrastructure, in-migration, institutions, and identity) and the “Five Slides of Decline” (i.e., shock, slippage, self-destruction, stigmatization, and shame).<sup>65</sup> Applying the MIT framework to coal-fired power plant communities is useful to understand that these communities are at risk of becoming the next generation of forgotten cities for two reasons.

First, coal-fired power plant communities typically *already* suffer from per capita incomes below \$35,000.<sup>66</sup> Second, coal-fired power plant communities can be said to be in the “shock” phase of decline, with a clear risk of self-destruction, stigmatization, and shame given the increasingly controversial use of coal-power and the noticeable effects of pollution left from decades of coal-fired power plants. Moreover, like the so called “forgotten cities” of the Steel Era, modern communities faced with a shuttering coal-fired power plant face similar obstacles mapped out by MIT: “a lack of civic engagement and institutions, inadequate governing capacity, and a negative collective mindset” which prevent cooperative planning for future progress.<sup>67</sup> Local governments of Coweta and Putnam Counties, as County Judge Brock indicated, lack the governing capacity to successfully navigate the transition away from coal-dependency, instead they revert to a game of catch-up, and ensure lost property taxes are somehow recouped.<sup>68</sup> Further, communities dependent on coal-fired power plants lack the institutions which can make up for the lost industry and lack a form of civic engagement that strives for solutions rather than lamenting the shuttering.<sup>69</sup>

The “forgotten cities” of Flint and Youngstown maintained a similar dependence on their respective industries,

though on a larger scale, as coal-dependent communities maintain today.<sup>70</sup> For host communities like Coweta County to avoid a similar fate, it is vital that protective economic legislation like the proposed dual solutions in Part III be considered, or else they too may become forgotten.

## II. Recent Government Solutions Regarding Shuttered Coal-Fired Power Plants

*[T]ransition assistance’ in the past has often meant little more than a funeral for workers and communities. . . .*<sup>71</sup>

—Joe Uehlein, former director of the  
AFL-CIO Center for Strategic Campaigns.

As the economic viability of coal power and the political attitude towards it changes, both the federal government and states have attempted to either stem the decline of coal or plan for, or in some cases even order, a “post-coal energy profile”<sup>72</sup> that attends to the needs of affected communities. Although recent solutions, particularly those from Congress, are complicated by competing economic and environmental interests, each of the solutions discussed in this section achieve, at least indirectly, a clearer program to protect workers from the shuttering of coal-fired power plants. Vitality, each solution succeeds in overcoming the notion that workers and host communities must become collateral damage to environmental interests.<sup>73</sup>

### A. Federal and State Solutions: Converging Goals and Diverging Routes

This section discusses the experiences and solutions presented by the Mohave Generation Station in California, Washington’s State Senate Bill 5769, Massachusetts’s Bill H.2957, and the Dunkirk Power Plant approach in New York. Although all four of these state solutions responded to similar issues—the announced closing or state ordered closure of a coal-fired power plant—the responses varied widely and serve to define the proper focus and scope of the proposed state solutions and establish the need to avoid a single and inflexible state solution that ignores the different political leanings and responsiveness to this issue. Further, this section discusses the Stop the War on Coal Act and the ECRA to illustrate Congress’s present assessment of coal’s decline, which will serve as the foundation to the proposed federal solution which further refines this succession of proposed legislation.

60. Ansley, *supra* note 11, at 1764.

61. *Id.*

62. Russo & Linkon, *supra* note 11.

63. *Id.*

64. LORLENE HOYT & ANDRÉ LEROUX, VOICES FROM FORGOTTEN CITIES: INNOVATIVE REVITALIZATION COALITIONS IN AMERICA’S OLDER SMALL CITIES (2007), available at [http://www.lorlenehoyt.com/yahoo\\_site\\_admin/assets/docs/Hoyt\\_Leroux\\_FC.40110153.pdf](http://www.lorlenehoyt.com/yahoo_site_admin/assets/docs/Hoyt_Leroux_FC.40110153.pdf).

65. *Id.*

66. Press Release, NAACP, *supra* note 18.

67. HOYT & LEROUX, *supra* note 64, at 14.

68. See Brock Testimony, *supra* note 1.

69. See Joe Uehlein, *Will Workers Be Left Behind in a Green Transition?*, NATION (May 18, 2009), <http://www.thenation.com/article/will-workers-be-left-behind-green-transition>.

70. HOYT & LEROUX, *supra* note 64.

71. Uehlein, *supra* note 69.

72. An energy profile is a state or country’s production and consumption of various energy sources, including petroleum, natural gas, coal, nuclear power, and renewable and alternative fuels. See generally U.S. STATES: STATE PROFILES AND ENERGY ESTIMATES, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/state/> (last visited Mar. 1, 2014).

73. Lange, *supra* note 26 (“Given that coal communities have always been the first casualties of our use of this resource, subsidizing our demand for cheap energy with damage to their health and environment, they deserve not to be victimized again.”).

## I. Mohave Generation Station—Pollution Credits as Renewable Energy Fund

After the Mohave Generating Station coal-powered plant shuttered, the California Public Utilities Commission (“CPUC”) approved a “Just Transition Plan” (“Mohave Model”) wherein revenue from the sale of pollution credits accrued by Southern California Edison (“SCE”), the plant’s operator, was placed into an escrow account.<sup>74</sup> From the escrow account, the funds were redirected for use by Navajo and Hopi tribes for renewable energy projects.<sup>75</sup> While Mohave Generating Station was shuttered in 2005, it was not until 2013, following litigation by the operator against the legality of credits earned by the ratepayer being transferred away from the ratepayer, and after nearly a decade of public protests and hearings, that the solution of pollution credits as a renewable energy fund was reached.<sup>76</sup>

The Mohave Model’s solution, which is essentially a “revolving fund” to pay development deposits for renewable projects,<sup>77</sup> arose only after the concerted approval by the Navajo and Hopi tribes, a state senator, and CPUC.<sup>78</sup> Impressively, CPUC determined the criteria by which projects could qualify for disbursement from SCE. This was done by ensuring that the projects would protect environmental interests but only if the Navajo and Hopi communities would also benefit from the projects.<sup>79</sup> First, CPUC required that only renewable and alternative power projects are eligible.<sup>80</sup> Second, CPUC required that the project pay a lease, rent, or royalty to the tribes or that a tribe or a government agency thereof (e.g., a utility) possess at least a 50% ownership interest in the project.<sup>81</sup> Most importantly, though these funds are held by SCE, civic engagement drives the program because Navajo and Hopi tribes are able to directly access these funds to bring in qualifying projects.<sup>82</sup> SCE’s selections are ultimately counted towards its compliance with California’s Renewable Portfolio Standard Program, cleverly balancing the interests of the host communities, environmental protection, and the private utility provider.<sup>83</sup>

There are three benefits to the Mohave Model. First, the Mohave Model is open-ended in that it allows for tar-

geted funds to be dispensed so long as the projects fit criteria designed to ensure the community is benefitted.<sup>84</sup> This provides an opportunity for civic engagement and local responsibility, while also ensuring that, due to the disbursement’s targeted nature, the funds will be dispensed to develop sustainable energy infrastructure. Second, the opportunity—indeed, the requirement—for civic engagement and local responsibility is a vital element that is common to all potentially viable model solutions discussed in this section. Rather than prompting sentiments of alienation discussed above, the Mohave Model is carried out from within the community itself, allowing the community to determine its growth, and therefore, its future. Third, the Mohave Model balances the competing goals of protective economic legislation and environmental regulation. Rather than protect the local economy by continuing to operate the coal-fired power plant, and therefore stunt environmental regulation, the Mohave Model reconciles the interests by creating temporary and permanent jobs and steady economic growth, as the community dispenses its funds to build a renewable energy infrastructure.

Despite these benefits, there are also three significant drawbacks to the Mohave Model. First, the Mohave Model will be difficult to replicate through legislation. The Mohave Model arose as a grassroots response to imminent economic loss and benefited from the assistance of the Grand Canyon Trust, the Sierra Club, Senator Harry Reid, and a sympathetic CPUC.<sup>85</sup> Such cooperation between the community and the government, as well as a favorable state agency stance, will be difficult to replicate by broad legislation. Second, the Mohave Model is vulnerable to corporate decisions regarding accrued pollution credits. The plant operator in this instance, SCE, had accrued a backlog of pollution credits that it had yet to redeem.<sup>86</sup> Legislation may deter operators from accumulating pollution credits in the first place, rendering the Mohave Model ineffective. Third, pollution credits and, therefore, the benefits of the Mohave Model vary from plant to plant, and so the Mohave Model will necessarily produce disparate results from community to community.<sup>87</sup> Nonetheless, the Mohave Model illustrates a transition plan that fosters community involvement and economic growth in an intuitive, although not easily replicable, manner.

74. See *In re S. Cal. Edison Co.*, 2013 WL 652434, at \*41 (Cal. P.U.C. Feb. 13, 2013).

75. *Id.* at \*2.

76. See *id.* at \*\*41–44.

77. See *id.* CPUC had previously ordered SCE to create an account to accumulate revenues from the sale of all sulfur credits created by the closure of the Mohave Generation Station. From this fund, SCE was ordered in 2013 to disburse these funds to soliciting projects in accordance with the above eligibility criteria.

78. *In Pursuit of Economic Justice: The Just Transition Coalition*, GRAND CANYON TRUST (Nov. 2, 2014), [http://www.grandcanyontrust.org/plateau/energy\\_actions.php](http://www.grandcanyontrust.org/plateau/energy_actions.php).

79. See *S. Cal. Edison Co.*, 2013 WL 652434 at \*1.

80. *Id.* at \*23.

81. *Id.*

82. *Id.*

83. In 2002 California imposed standards to increase procurement from eligible renewable energy resources with which SCE, as an investor-owned utility, was to comply. *California Renewables Portfolio Standard*, CAL. PUB. UTILS. COMMISSION, <http://www.cpuc.ca.gov/PUC/energy/Renewables/> (last visited Mar. 1, 2014).

84. See *S. Cal. Edison Co.*, 2013 WL 652434 at \*1.

85. Press Release, U.S. Senator Harry Reid, Reid Works to Promote Renewable Energy, Create Jobs (Dec. 17, 2007), available at [http://www.reid.senate.gov/press\\_releases/reid-works-to-promote-renewable-energy-create-jobs#.UxU-UcPmwKVo](http://www.reid.senate.gov/press_releases/reid-works-to-promote-renewable-energy-create-jobs#.UxU-UcPmwKVo); *In Pursuit of Economic Justice: The Just Transition Coalition*, *supra* note 78.

86. *S. Cal. Edison Co.*, 2013 WL 652434 at \*\*11–12.

87. It is therefore conceivable that, hypothetically, though Community A lost 500 jobs at Plant A while Community B lost 250 jobs at Plant B, Community B may receive a larger credit trust fund by a fortuitous circumstance that Plant B neglected to redeem its pollution credits while Plant A redeemed it annually, leaving nothing but the most recent years pollution credits available to the credit trust fund. Such a disparate result, and indeed the transfer of a negligible trust fund to Community A despite its relatively larger loss, weighs heavily against the Mohave Model as a viable solution.

## 2. Washington State's Senate Bill 5769

Far different in scope from the Mohave Model is Washington State's Senate Bill 5769 ("WA Model").<sup>88</sup> The WA Model requires a shuttering coal-fired power plant to undergo a fourteen-year retiring process accompanied by a \$55 million transition fund to be invested in the local community to help it transition away from dependence on the plant.<sup>89</sup> This fund is derived from a memorandum agreement reached by the governor and the owner of a qualifying facility (i.e., a coal-fired baseload facility that emitted more than one million tons of greenhouse gases in any year prior to 2008) wherein the facility owner must agree to provide, through tax exemptions, \$30 million to the affected community for economic development and energy efficiency and \$25 million between 2012 and 2023 for energy technologies with the potential to create energy, economic development, or other environmental benefits.<sup>90</sup> Additionally, the WA Model creates the Community Economic Revitalization Board,<sup>91</sup> comprised of twenty members appointed by the governor, and requires it, along with the Public Works Board,<sup>92</sup> to solicit and give priority consideration to projects that attract new industrial and commercial projects to areas affected by the closure of a qualifying coal-fired power plant.<sup>93</sup>

The WA Model has three primary benefits over the Mohave Model. First, because the WA Model resulted from mounting environmental and community pressure on a state government, the WA Model is an example of protective economic legislation that aggressively accounts for the interests of the affected communities.<sup>94</sup> Further, unlike the Mohave Model, it accounts for local interests in economic growth and stability without favoring any one industry, instead flexibly leaving open the opportunity for a wide array of industries to bid and helping Washington communities find the proposal with the best economic and community fit.<sup>95</sup> Second, the required fourteen-year gradual decommissioning of the

plant requires operator, community, and local government involvement and affords ample time to develop a subsequent transition process. Third, the WA Model entrusts a total sum of \$55 million through tax exemptions for a transition fund that can only be used for expenditures by individuals mentioned by the facility-owner in the memorandum agreement.<sup>96</sup> These individuals must include members representing the county economic development council, local elected officials, facility employees, and the facility owner.<sup>97</sup> This allows for predictability, achieves the MIT Study's goal of facilitating civic engagement,<sup>98</sup> and further assists with preparation for life after a shuttered coal-fired power plant.<sup>99</sup> Moreover, because the fund is used to solicit and review transition proposals that will attract new industrial and commercial activities into the area, the fund does not finitely tie the achievable economic growth the community can achieve to the lump sum.<sup>100</sup>

Despite the WA Model's benefits, it suffers from two potentially significant drawbacks. First, even though the sum is to be deducted through tax exemptions, the WA Model effectively requires qualifying facility owners to close the plant and provide \$55 million through 2023.<sup>101</sup> This may prove too controversial to propose in other states due to the Model's perceived antioal stance. Second, assigning a list of individuals able to approve expenditures to each closing coal-fired power plant may be counterintuitive as the WA Model is ambiguous on how exactly these individuals are to interact with the Public Works Board and Community Economic Revitalization Board.<sup>102</sup> Compared to a single, permanent committee, ad hoc committees will be inexperienced and unable to develop an institutional memory for how to navigate general issues that a permanent committee would accrue with experience.<sup>103</sup>

## 3. Massachusetts's H.R. 2935

A more practical solution than the Mohave and Washington Models is found in Massachusetts's Bill H.2935 ("MA Model"), which as of February 2015 has been discharged to the Committee on House Rules following a favorable report by the Joint Committee on Telecommunications, Utilities and Energy.<sup>104</sup> The MA Model requires the commissioner of the Department of Energy Resources to adopt a plan for replacing *all* use of coal energy resource in Massachusetts

88. S.B. 5769, 2011 Leg., Reg. Sess., at 1 (2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5769-S2.SL.pdf>.

89. See *id.* at 12.

90. *Id.*

91. The Community Economic Revitalization Board provides funding to local governments and federally recognized tribes for public infrastructure that supports private business growth and expansion. *Community Economic Revitalization Board (CERB)*, WASH. DEP'T OF COM., <http://www.commerce.wa.gov/commissions/CommunityEconomicRevitalizationBoard/Pages/default.aspx> (last visited Oct. 30, 2014).

92. The Public Works Board was created to provide financial and technical assistance for public health, safety, and environmental infrastructure that supports community and economic vitality. *Mission*, WASH. PUB. WORKS BOARD, <http://www.pwb.wa.gov/public-works-board/Pages/default.aspx> (last visited Oct. 30, 2014).

93. WASH. STATE LEGISLATURE, FINAL BILL REPORT SB 5769, 62d Cong., 1st Sess., at 4–5 (2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/5769-S2.E%20SBR%20FBR%2011.pdf>.

94. Press Release, Sierra Club, Agreement Reached to Retire Only Coal-Fired Power Plant in Washington: Public Health Protections, Community Investment are Cornerstones of Landmark Agreement (Mar. 7, 2011), available at [http://action.sierraclub.org/site/MessageViewer?em\\_id=198802.0](http://action.sierraclub.org/site/MessageViewer?em_id=198802.0).

95. S.B. 5769, 2011 Leg., Reg. Sess., at 1 (2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5769-S2.SL.pdf>.

96. See *id.* at 12–13.

97. *Id.* at 13.

98. See HOYT & LEROUX, *supra* note 64, at 47.

99. S.B. 5769, 2011 Leg., Reg. Sess., at 12 (2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5769-S2.SL.pdf>.

100. See *id.* at 18.

101. *Id.*

102. See *id.* at 13, 16.

103. U.N. HIGH COMM'R FOR HUMAN RIGHTS, STRENGTHENING THE HUMAN RIGHTS TREATY BODIES ¶ 2.3.4 (June 26, 2012) ("When there is no standing national drafting mechanism that can retain institutional memory and capacity, technical cooperation activities do not tend to build progressively stronger capacity over time.")

104. See H.R. 2935, 188th Gen. Ct. (Mass. 2013), available at <https://malegislature.gov/Bills/188/House/H2935>.

by 2020, including a plan for the orderly retirement of all coal-fired power plants and their subsequent replacement with clean energy alternatives.<sup>105</sup> To implement this plan, the commissioner is to create several assessments.<sup>106</sup> One such assessment analyzes the potential for reuse of each coal-fired power plant site for alternatives that emit few or no greenhouse gases or other regulated air pollutants, including electric generation and non-generation alternatives.<sup>107</sup> Another requires the commissioner to focus on such measures that minimize economic impacts on host communities.<sup>108</sup> The MA Model establishes a Community Transitioning Fund for the purpose of mitigating the economic impact of the retirement of coal-fired power plants on the employees of such facilities and on the municipality where the plant is located.<sup>109</sup> Impressively, the MA Model makes clear that the legislation is to be guided by the public interest by expressly requiring that all funds be disbursed to mitigate these economic impacts.<sup>110</sup>

The MA Model is notable for its thoroughness and the fact that it calls for all coal-fired power plant closings to be accompanied by a transition plan to establish alternative energy infrastructure and expressly accounts for “host communities.”<sup>111</sup> However, as a solution, it is unwieldy because it established Community Transitioning Funds only after a government-mandated withdrawal from the use of coal-energy in Massachusetts.<sup>112</sup> While Massachusetts may see fit to transition away from coal energy on a state-wide level, Congressional legislation mandating such a deliberate transition would likely, in the late Senator Robert Byrd’s own estimation, never pass muster in Congress.<sup>113</sup> As such, while the MA Model is an instance of protective economic legislation that balances the interests of environmental regulation, the MA Model cannot, as written, be broadly applied throughout the United States to achieve consistent results.

#### 4. Stop the War on Coal Act (H.R. 3409)

The Stop the War on Coal Act, H.R. 3409, was passed by the U.S. House of Representatives on September 21, 2012, but was never passed by the U.S. Senate after it was referred to the Senate Environment and Public Works Committee.<sup>114</sup> H.R. 3409’s proponents highlighted the bill’s purpose to allow time to “responsibly undertake an open, transpar-

ent rulemaking that fairly accounts for job and economic impacts.”<sup>115</sup> To prevent EPA from pursuing whatever policy it wishes,<sup>116</sup> the bill packaged several acts, two of which bear mention. Title II, the Energy Tax Prevention Act, would have permanently prevented EPA from ever implementing carbon cap-and-tax regimes to reduce greenhouse emissions.<sup>117</sup> In addition, title III, the Transparency in Regulatory Analysis of Impacts to the Nation Act, would have required an interagency committee to analyze the cumulative economic impacts of costly environmental regulations to better understand how these policies affect jobs.<sup>118</sup>

Partisan rhetoric surrounded discussion in Congress with Republican Wyoming Senator John Barrasso alleging that the recent regulations of “Obama’s heavy-handed EPA” were “designed to end coal.”<sup>119</sup> Unsurprisingly, the bill died in the Democrat-controlled Senate without a vote. Qualms with the bill were summarized by Democratic Staff from the House Committee on Energy and Commerce, which reported that title II “legislatively repeals the scientific finding by EPA that greenhouse gases endanger [the] public health.”<sup>120</sup> The proposed federal solution discussed below will avoid similarly stringent pitfalls and instead shifts focus away from the coal industry to avoid such partisan divisiveness.<sup>121</sup>

Nonetheless, title III’s requirement of an interagency committee to analyze the cumulative economic impacts of certain environmental regulations is noteworthy for its breadth and the fact that it brings greater accountability for the economic effects of regulations affecting coal-fired power plant communities by shifting final power away from EPA and onto elected representatives.<sup>122</sup> This directly assuages concerns of alienation and victimization relayed by community members of Masontown, Pennsylvania, and Coweta County, Georgia, feelings which stoke the “War on Coal” rhetoric.<sup>123</sup>

However, under analysis, titles II and III are examples of protective economic legislation that do not reconcile the competing interests of protecting the local communities with that of permitting environmental regulation over coal. Further, the intent of title III, though ostensibly drafted to protect American energy prices and jobs, is belied by the title of the entire bill—“Stop the War on Coal Act.” Unlike the Mohave, WA, and MA Models, the Stop the War on Coal Act by its name alone appears to favor the coal industry and so misdirects focus away from protecting communities.

105. *Id.* § 2.

106. *Id.* § 2(i)-(v).

107. *Id.* § 2(ii).

108. *Id.* § 2(iii).

109. *Id.* § 3.11K.

110. *Id.*

111. *Id.* § 2(ii)-(iii).

112. *See id.* §§ 2, 11K.

113. Press Release, U.S. Senator Robert C. Byrd, Coal Must Embrace the Future (Dec. 3, 2009), available at <http://e360.yale.edu/images/digest/byrd-coal.pdf>; Senator Robert C. Byrd, *Coal Must Embrace the Future*, HUFFINGTON POST GREEN (Dec. 18, 2009), available at [http://www.huffingtonpost.com/sen-rob-ert-byrd/coal-must-embrace-the-fut\\_b\\_380078.html](http://www.huffingtonpost.com/sen-rob-ert-byrd/coal-must-embrace-the-fut_b_380078.html) (arguing that “no deliberate effort to do away with the coal industry could ever succeed in [Congress] because there is no available alternative energy supply that could immediately supplant the use of coal for base load power generation in America.”).

114. *Tracking the United States Congress*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/hr3409/> (last visited Nov. 2, 2014).

115. 158 CONG. REC. H6196-01 (daily ed. 2012) (statement of Rep. Doc Hastings).

116. 158 CONG. REC. E16224-02 (daily ed. 2012) (statement of Hon. Shelley Moore Capito).

117. *The Stop the War on Coal Act*, ENERGY & COM. COMMITTEE (Sept. 20, 2012), <http://energycommerce.house.gov/fact-sheet/stop-war-coal-act-hr-3409>.

118. *Id.*

119. 158 CONG. REC. S4314-06-07 (daily ed. June 20, 2012) (statement of Sen. John Barrasso).

120. COMM. ON ENERGY & COMMERCE, DEMOCRATIC STAFF, DETAILED SUMMARY OF H.R. 3409 (Sept. 2012), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Fact-Sheet-HR-3409-Detailed-2012-9-18.pdf>.

121. *Id.* (noting that title II also prohibits EPA from requiring CO<sub>2</sub> reductions in the plane, boat, train, and large construction equipment industries and repeals California’s power to regulate CO<sub>2</sub> pollution from motor vehicles).

122. *See* 158 CONG. REC. E1624-02 (daily ed. Sept. 21, 2012) (statement of Hon. Shelley Moore Capito).

123. Gideon, *supra* note 17; Israel, *supra* note 10.

Protecting the coal industry is not seen in other models and strips the bill of its viability, despite its beneficial aspects, which are refined by the proposed federal solution.

## 5. ECRA

Subsequent to the Stop the War on Coal Act, the House of Representatives passed ECRA in September 2013, which as of February 2015 has been received in the Senate and referred to the Committee on Environment and Public Works.<sup>124</sup> ECRA requires heightened transparency and interagency scrutiny of EPA regulations that EPA estimates will cost more than \$1 billion.<sup>125</sup> To accomplish this transparency, ECRA provides that EPA may not promulgate an energy-related rule costing more than \$1 billion unless (1) EPA first submits a report to Congress detailing the proposed regulation's purpose as well as certain cost, benefit, energy price, and job impacts; and (2) the Secretary of Energy, working with the Federal Energy Regulatory Commission, the Administrator of the Energy Information Administration, the Secretary of Commerce, and the Small Business Administration, determines the regulation will not deleteriously impact consumer energy cost, employment, and economic growth.<sup>126</sup> However, if the Secretary of Energy, in consultation with other relevant agencies, determines the rule would cause significant adverse effects to the economy, it may send the proposed regulation back to the EPA for redrawing.<sup>127</sup>

These two facets of ECRA provide two benefits. First, it is an instance of high-profile protective economic legislation that can both lessen feelings of victimization in communities, thereby reducing "War on Coal" rhetoric, and prods EPA to exercise greater care before enacting regulations EPA finds to have particularly high compliance costs. Second, by prohibiting EPA from finalizing a rule that "would cause significant adverse effects to the economy," local economic interests would necessarily be protected by federal legislation.<sup>128</sup>

However, ECRA, like the Stop the War on Coal Act, is incomplete protective economic regulation that would seriously impair EPA's discretion over rulemaking. Indeed, similar to the Stop the War on Coal Act, ECRA's provisions only go toward preventing EPA from implementing regulations that might be too expensive for energy industries to comply with, and so appear to only obstruct EPA from implementing costly regulations.<sup>129</sup> As such, it does not block regulations; those that satisfy ECRA's standards may nonetheless result in closures.<sup>130</sup> Because ECRA fails to provide any further protection for communities once regulations are passed in compliance with its terms, ECRA is vulnerable to attacks that

it is a "veiled assault"<sup>131</sup> aimed at hindering the EPA's regulatory goals, rather than actively promoting the interests of consumers and communities impacted by EPA regulations. Due to a lack of any further provisions, such as a transition plan committee or fund, ECRA appears to be reactionary, like its predecessor, and tuned to protect the coal industry rather than coal-dependent communities.

The above models can be synthesized into several beneficial elements. The state solutions are beneficial in (1) establishing a source for transition funds, (2) establishing a route for postcoal transition, and (3) involving the local government and community into this route. Further, the state solutions provide for stability by replacing or planning to replace property tax bases and by substituting permanent jobs for those lost to a coal-fired power plants closure. Federally, the two discussed approaches produce another beneficial element—interagency review of EPA regulations that might adversely affect jobs. However, the two federal approaches are significant in showing what a proposed solution intended to protect host communities should *not* do, namely (1) broadly restrict EPA's regulatory capacity and (2) inculcate discussion of the proposal and the proposal itself with industry favoritism and accusatory partisan rhetoric. In short, the models inform the proposed solutions on how to achieve the goal of protecting host communities without distraction on matters, such as preservation of the coal industry or reigning in regulation, which should be considered ancillary to this goal.

## III. Proposed Solutions

From these above solutions and from the circumstances of host communities, solutions to coal-fired power plant shut downs must reconcile the environmental interests of the state or county with the economic interests of local communities affected by such shut downs. Insensitivity to either concern will leave legislation proposals unviable. Therefore, this Note will propose a federal solution and alternate state solutions.

### A. Federal Solution: Amending the Energy Consumers Relief Act

As discussed, ECRA fails to fully account for the interests of communities affected by coal-fired power plant shut downs and is politically contentious for permitting the Secretary of Energy to maintain what is essentially a veto power over EPA.<sup>132</sup> Two amendments are therefore in order. One amendment modifies ECRA to require interagency review power that is collaborative rather than domineering in nature, and a second adds a provision requiring the federal government and state actors to form a transition plan for communities where (1) a closing coal-fired power plant reason for closing was primarily attributed by the facility-owner to an EPA regulation, which (2) was estimated to cost at least \$1 billion

124. H.R. 1582, 113th Cong. (1st Sess. 2013), available at <http://beta.congress.gov/bill/113th/house-bill/1582/text>.

125. 159 CONG. REC. H5242-01 (daily ed. July 31, 2013) (statement of Rep. Ed Whitfield).

126. *Id.*; H.R. 1582, 113th Cong. (1st Sess. 2013), available at <http://beta.congress.gov/bill/113th/house-bill/1582/text>.

127. H.R. 1582, 113th Cong. (1st Sess. 2013), available at <http://beta.congress.gov/bill/113th/house-bill/1582/text>.

128. *Id.*

129. *See id.*

130. *See id.*

131. 159 CONG. REC. H5243 (daily ed. July 31, 2013) (statement of Rep. Henry Waxman).

132. *Id.*

in compliance, but (3) was nonetheless approved following interagency review.

Given the present political climate where the notion of a war on coal is widely felt,<sup>133</sup> the first proposed amendment to ECRA requires that passage of EPA regulations estimated by EPA to cost at least \$1 billion in compliance costs be coordinated between EPA, the Department of Energy, the Department of Commerce, and the Department of Labor. Such regulations will only be permitted upon majority approval that a proposed regulation's costs cannot clearly be expected to impose adverse jobs costs upon local economies.<sup>134</sup> Only where job losses can clearly be expected should the agencies then collaborate to mitigate the regulation's impact on jobs. If job losses can still clearly be expected, following revision and reassessment, then the EPA may proceed with the regulation.

As a matter of policy, this coordination serves to obviate criticisms that regulations having such impacts amount to rigid environmental protectionism without adequate consideration of economic factors by requiring analysis from various agency perspectives. In doing so, this provides authority to these agencies, which EPA must accommodate, thereby reconciling the competing interests of environmental and economic protection where adverse job costs can clearly be estimated. For purposes of feasibility, unlike the Stop the War on Coal Act and the original ECRA, this balance is achieved only where adverse job costs are a separate factor to be considered *in addition to* ECRA's present threshold of \$1 billion in compliance costs. Consequently, this revision refocuses ECRA onto communities, rather than the coal industry, and without recourse to rigid and politically divisive mechanisms, which would undercut EPA's authority to pass environmental regulations.

Similar concerns justify a second amendment. Specifically, this second amendment is a provision that requires creating a transition plan for host communities facing the shutdown of a coal-fired power plant. Transition plans would be required if the shutdown was estimated to be the result of over \$1 billion in compliance costs, but not expected to have clear job costs or costs that could not be avoided despite earlier attempts to revise the action's adverse economic effects through interagency review. The operator of a shuttering coal-fired power plant may submit a report to the Department of Commerce's Bureau of Economic Analysis discussing economic factor(s) (i.e., competition or compliance costs) which the operator considered in deciding to close and identifying which, if any, was the primary reason. If an EPA regulation meeting the above criteria is cited as the primary reason, and is confirmed by the Bureau of Economic Analysis as being rational and plausible based on review of the operator's reasoning, local market conditions, and plant performance history and rev-

enue trends, then a transition plan must be formulated for the host community.

This provision is necessary because agency estimates generally, including EPA's, are not always reliable.<sup>135</sup> But, more importantly, this amendment is not meant to increase transparency, but rather is meant to offset job losses and reinforce to affected communities that they are not simply collateral damage to environmental progress. Likewise, the amendment ensures that communities with such a unique dependence on coal will not have to face decades of instability and economic recovery like that which continues to plague the "forgotten cities" of steel deindustrialization.

Substantively, the transition plan will propose the creation of a transition board, the "Local Response Team," tasked with soliciting proposals for economic redevelopment of the host community, with priority given to projects that introduce renewable or alternative energy infrastructure. Further, giving priority to projects that introduce renewable or alternative energy infrastructure recognizes the laudable goal of the Mohave Model to reconcile community interests with environmental protection, but recognizes that such a fixed approach may not be in the best interests or even feasible for every community across the country. Therefore, although preference may be given to those projects advancing alternative or renewable energy infrastructure, the absolute priority remains to secure a transition plan which best accounts for the economic interests of the host community.

In further recognition of this absolute priority and flexibility, and in accord with all of the state-level model solutions, the Local Response Team accounts for local interests through its composition of local community leaders. Specifically, the Local Response Team is to be comprised of local labor leaders, local elected officials (state and federal), and members from relevant state agencies (e.g., Washington's Public Works Board) appointed by the state governor. Further assistance will be provided as needed by the U.S. Small Business Administration and Economic Development Administration, agencies with experience in designing initiatives for sustainable growth and economic development and with the built-in budget to secure loans and grants for qualifying businesses and projects.<sup>136</sup> The Local Response Team's composition ensures that, despite ECRA being federal legislation, community cooperation and civic engagement by civilians, bureaucrats, and state and federal politicians is maintained. As the MIT study demonstrated, this type of engagement is vital. Further, by excluding influence from EPA at this stage, the purpose of the amendment provisions is crystallized as not to inflexibly push for even further environmental progress in the face of a coal-fired power plant closure, but instead to achieve economic growth through environmental

133. See generally Gideon, *supra* note 17.

134. VA. DEP'T OF ENVTL. QUALITY, FINAL MITIGATION BAKING INSTRUMENT TEMPLATE 5-7 (Feb. 5, 2010), available at <http://www.deq.virginia.gov/Programs/Water/WetlandsStreams/Mitigation.aspx> (establishing an Interagency Review Team consisting of a combination of eleven federal and state agencies, including EPA, which oversees the establishment, use, and operation of a Mitigation Bank to replace the biological, chemical, and physical functions of wetland resources to compensate for unavoidable wetland losses).

135. For instance, the EPA originally estimated 4,700 megawatts of coal-fired generation would be forced to retire as a result of the Utility MACT Rule, yet soon after its enactment 44,000 megawatts had been or were to be retired. 159 CONG. REC. H5242-01 (daily ed. July 31, 2013) (statement of Rep. Ed Whitfield).

136. *About EDA*, U.S. ECON. DEV. ADMIN., <http://www.eda.gov/about/#mission> (last visited Nov. 3, 2014); *Loans & Grants*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/category/navigation-structure/loans-grants> (last visited Nov. 3, 2014).

progress only if the community deems it to be preferable to other alternative projects that focus on, for example, retail shopping malls or other industrial development, rather than sustainable energy to replace the energy lost from the shuttered coal-fired power plant.

Finally, while it is true that a plant operator will have no incentive not to identify EPA regulation as the primary reason for its closure, this identification will be subject to scrutiny and corroboration by the Bureau of Economic Analysis. Further, it is preferable to host communities that the trigger for the formation of a transition plan err on the side of plausibility rather than on the certainty of a plant operators identification of EPA regulations as the primary factor in its decision to close. At this stage, what is crucial is that a coal-fired power plant has closed and a community now faces an uncertain future; so long as the operator's report stakes out a plausible and corroborated connection between the cited EPA regulation(s) and the decision to close, that is, and should be, sufficient to trigger a transition plan.

### **B. Primary State Solution: Ten-Year State and Facility Owner-Funded Transition Plans**

However, the ECRA amendments are only half of an effective plan because they do not trigger unless an operator attributes its closing to an EPA regulation estimated to cost \$1 billion in compliance, and so does not account for other EPA regulations and closures as a result of natural market forces. A state-level solution boosts the effectiveness of the ECRA amendment and ensures that all communities affected by a coal-fired power plant closing, regardless of the reasons for the closing, are adequately protected.

Substantively, there are three requirements for the solution: (1) there must be a creation of a seven-member board to form once *any* coal-fired power plant not subject to the ECRA amendments announces its closing, (2) there must be the establishment of an Affected Community Transition Fund<sup>137</sup> for the board to use, and (3) the Affected Community Transition Fund must solicit proposals for post-closing transition plans, which may be adopted if they (a) create permanent jobs to at least partially offset the number lost from the coal-fired plant<sup>138</sup> and (b) are approved by the board and by the county, counties, or township(s) of the affected community.<sup>139</sup> The board will consist of governor-appointed members from the state's relevant energy and labor depart-

ments and from the state agency responsible for economic infrastructure (e.g., Washington's Public Works Board), the local state legislator of the affected community, the local town councilman of the affected community, an employee of the closing coal-fired power plant elected by his employees to represent their interests, and the owner or appointee of the facility-owner. This cross-section requires civic engagement by employees of the closing coal-fired power plant and places their chosen representative on an equal footing with other members of the state government, providing a platform to ensure employee interests are used to shape the community's fate. Further, in states with multiple coal-fired power plants subject to closures, a distinct board accounting for the local members will be created but the governor-appointed members will be permanent fixtures on each board to provide subsequent affected communities the benefit of a degree of institutional memory.

This approach takes cues from the state-level model solutions and blends them. For instance, part 3(a)'s requirement stems from the Mohave Model, but rather than require that only renewable and alternative energy projects be eligible, 3(a) makes eligible only those projects that the board determines will provide permanent employment. Focus on permanent growth was a facet missing from the WA Model<sup>140</sup> which also serves to avoid the WA Model's and the Mohave Model's potentially divisive focus on renewable and alternative energy. The goal is to promote, without assigning priority among project types like the WA Model, the affected communities' economic interests because, in losing its coal-fired power plant, environmental protection interests have already been achieved; now the economic interests must follow suit to protect these communities as they brace for a local economic landscape without the coal-fired power plant on which they had grown dependent. Further, requiring a priority for renewable energy is likely a redundant provision anyhow because having lost production on the electrical grid from the closing coal-fired power plant, the state, and the board, therefore, will act rationally through the governor-appointed energy department member to account for that loss.

### **C. Alternate State Solution: Repowering Coal-Fired Power Plants to Natural Gas**

While passing state legislation to affect a transition plan through intuitive state and local government boards is preferable, many states may feel dissuaded by the involved and long-term approach of such solution. A third solution is a more logistically conservative attempt to accommodate such sentiments by providing a fixed transition plan for state legislatures to pursue and takes its cue from New York's experience with the NRG Dunkirk Power Plant.

The Repowering to Natural Gas Solution ("RNG") would require, and if available, be subsidized through ratepayers,

137. To enable aggressive solicitation and to encourage proposals, the fund will amount to no less than \$55 million (as per the WA Model and to avoid issues of uncertainty as seen in the Mohave Model) and will be sourced from the state's budget and/or from the suspension of tax exemptions given to the operator of the closing coal-fired power plant or, where available, from the transfer of accrued energy credits from the operator to the fund. The state will have discretion on which sourcing route(s) to pursue.

138. To meet the goals of economic stability and job creation without overly limiting the scope of proposals which may be considered and thereby sacrificing the goal of community discretion to choose a preferred proposal, the number of permanent jobs anticipated to be created should be at least 25% of that lost due to the coal-fired power plant's closing.

139. Because an affected "community" may transcend town and county barriers, the proper voting pool must be set by the board and approved by the state governor.

140. See generally S.B. 5769, 2011 Leg., Reg. Sess., at 1 (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5769-S2.SL.pdf>.

repowering a shuttering coal-fired power plants to natural gas if (1) the retrofit is approved by host county or township referendum; (2) the closing coal-fired power plant is state-owned or is owned by a willing energy company that agrees to convert the plant and continue operations as a natural gas plant; and (3) the closing of the coal-fired power plant will, in the municipality's estimation, result in a loss of reliability on the grid due to lost energy. The state governor will determine whether a referendum is to be held by the county or the township and will depend on the extent of the coal-fired power plant's employment, so as to best reflect what amounts to the effected host community. The latter provision regarding estimated reliability impacts to the electric grid is an optional clause.

The RNG solution permits local governments to maintain property tax bases, transfer coal-related jobs to permanent natural gas production jobs, create temporary jobs, and ensures stability on the electrical grid.<sup>141</sup> Moreover, while the cost to repower depends on the site, and requires consultation with a specialized firm to determine, costs are kept down by use of already existing infrastructure and the ability to pass on costs to ratepayers.<sup>142</sup> Repowering to natural gas therefore serves as an economic bandage of sorts to preserve the status quo.

The RNG solution provides four benefits. First, in requiring approval by the host community, it ensures, albeit in a narrower context than the second solution, that local residents are involved in the political process and given the platform to make their voices matter. For example, should the community wish to rid itself of power plants altogether or pressure local politicians for alternate action, it will have the opportunity to do so. Second, the RNG solution is industry-neutral because, although it would convert coal-fired power plants to natural gas plants, it does not mandate the repowering or shuttering of any privately owned plant without that operator's willing consent. As such, because the RNG solution is essentially an opt-in for plants that would shutter anyhow, the RNG solution may be a tenable and politically safe solution for states that typically oppose regulation of the coal industry.<sup>143</sup> Third, the optional third clause demonstrates greater political neutrality and restraint by demonstrating

that the legislature's motivation is, by necessity, guided by concerns for grid reliability in the municipality served by the closing coal-fired power plant. This casts the RNG solution as precautionary energy legislation rather than either protective economic legislation or aggressive environmental regulation, again making it easier to survive even the most hostile of political climates. Finally, once enacted, the RNG solution provides a fixed and predictable route, which some states may desire over the more free-roaming nature of ad hoc boards and long-term phase-outs. Of course, the drawback of the RNG solution is that, to appease more averse political climates so that *some* shade of transition plan legislation is enacted, it requires the continuation of a region's dependence on fossil fuels and vaults a less vigorous defense of the economic interests of host communities compared to the alternate state solution.

#### IV. Conclusion

To better protect communities affected by closing coal-fired power plants, legislation at the federal and state level must be passed that dispenses with political and partisan rhetoric. To avoid the recurrence of the forgotten cities of steel deindustrialization and foster economic growth for communities that have both been harmed by the pollution from coal-fired power plants<sup>144</sup> but have also become dependent on these plants,<sup>145</sup> the need for this legislation is demonstrated. As such, the proposed solutions for two ECRA amendments in conjunction with either a long-term transition plan or the regeneration of a coal-fired power plant to natural gas works to not only balance, but reconcile the competing interests of environmental and economic protection and independence. Together, the proposed solutions eliminate a problem before the communities become yet another casualty of government inaction. More importantly, they enable stability and foster community involvement at a vital crossroads for coal-dependent communities. The proposed solutions therefore empower host communities to plan for their own futures, shoulder responsibilities of its own choosing, and shape the local economic landscape after the departure of a coal-fired power plant in a manner which best suits their own needs.

141. *Repowering Existing Coal Plants*, THERMOENERGY CORP., <http://www.thermoenergy.com/clean-combustion/repowering-existing-coal-plants> (last visited Apr. 2, 2014); see also Press Release, Governor Andrew M. Cuomo, *supra* note 25.

142. See F.J. BIKIEWICZ ET AL., BABCOCK & WILCOX, NATURAL GAS CONVERSIONS OF EXISTING COAL-FIRED BOILERS 1-4 (2010), available at <http://www.babcock.com/library/Documents/MS-14.pdf>.

143. For instance, the decision in 2013 to repower a plant in rural upstate Dunkirk, New York, was met with widespread approval from the community and local and state governments. See Overton, *supra* note 2; Press Release, Governor Andrew M. Cuomo, *supra* note 25; but see Ratepayers, Elected Officials, Environmental Groups File Lawsuit Over Power Plant Conversions, EARTH JUSTICE (Dec. 19, 2013), <http://earthjustice.org/news/press/2013/ratepayers-elected-officials-environmental-groups-file-lawsuit-over-power-plant-conversions>.

144. See THE HEALTH & ENV'T ALLIANCE, *supra* note 15.

145. See generally Overton, *supra* note 2, for a discussion of a community's dependence on a coal-fired power plant.