

COLLATERAL DAMAGE: THE IMPACT OF OBAMA-ERA REGULATIONS ON THE EASTERN KENTUCKY COALFIELDS

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I. INTRODUCTION

The Southeastern counties of the Commonwealth of Kentucky are some of the most naturally beautiful and historically isolated areas in the Eastern United States. They are also some of the most economically depressed counties in the nation, with high rates of drug addiction, unemployment, and reliance upon government benefits. President Lyndon Johnson famously visited Martin County, Kentucky, in 1964 as part of his efforts to gain support for his newly-announced “War on Poverty”.¹ At the time of President Johnson’s visit, this coal-mining county had a poverty rate of over 60 percent.²

The fact that Eastern Kentucky was a launching point for the War on Poverty is appropriate based on the abject poverty that faced much of the population in the 1960s, and even to the present day. The great tragedy of Eastern Kentucky, however, is that it historically contained some of the greatest mineral wealth of any area in the United States. For more than a century, billions of dollars of coal have been mined, processed, and transported out of the Eastern Kentucky coalfields. Even today,

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¹ *Kentucky County that Gave War on Poverty a Face Still Struggles* (National Public Radio Jan. 8, 2014).

² *Id.*

billions of dollars of coal remain untouched under the rolling hills of Kentucky's Eastern counties. For reasons discussed herein, the rich mineral deposits have not created widespread wealth for the region's inhabitants. Over the last few decades, however, coal has infused the region with hundreds of millions of dollars in annual wages and taxes and has employed tens of thousands in the mines, transportation, and support industries.

These gains have been jeopardized, as Eastern Kentucky has become ground zero in a new "war" waged by the federal government, the so-called "War on Coal".³ During his campaign in 2008, then-Senator Barack Obama professed a strong belief in the need to increase federal regulation of carbon-emitting industries such as electric utilities. The steadily mined dark black mineral seams in the Eastern Kentucky coalfields were set directly in the crosshairs of federal agencies. The conflict between the Obama administration and those who sought to prevent the decline of the coal industry and its customers became the highly-politicized War on Coal.

It appears that this new "war has been much more successful in hitting its target than LBJ's crusade against poverty. The coalfield's greatest industry has been staggered by a series of federal enactments that make mining more difficult and cause the largest consumers of Eastern Kentucky coal to begin transitioning to alternate energy sources. As a new administration takes office and takes aim at reversing Obama-era policies, it is appropriate to: (1) discuss the Obama-era policies that contributed to the rapid industry decline during the past decade; (2) quantify the industry losses suffered in the Eastern Kentucky coalfields in the past two decades; and (3) discuss steps that can be taken to avoid another such downturn in the future. Before doing so, it is appropriate to briefly review the history of coal and its impact on Eastern Kentucky.

³ Osofsky and Peel, *Energy Partisanship*, 65 Emory L.J. 695 (2016).

II. EASTERN KENTUCKY COAL PRODUCTION, EMPLOYMENT AND ECONOMIC IMPACT PRE-2008

A. Brief History & Overview

Coal has been commercially mined in small quantities in Kentucky since the early 1800s. Since 1879, the Commonwealth of Kentucky has produced coal in excess of one million tons per year.⁴ Eastern Kentucky coal experienced a massive increase in production between 1910 and 1925, fueled by the extension of railroad branch lines into the area.⁵

The Eastern Kentucky coalfields provided much of the energy behind America's rise as an industrial superpower. The bituminous coal mined in Eastern Kentucky was a primary energy source for Midwestern cities such as Pittsburgh, Chicago, and Cincinnati. Eastern Kentucky coal deposits were used to power steam locomotives and in iron and steel mills throughout the Midwest.⁶ Coal from the operations of U.S. Coal and Coke in Lynch (Harlan) County, were used in U.S. Steel's mills in Gary, Indiana.⁷ Throughout the first three decades of the 20th century, Appalachian coal accounted for nearly 80 percent of national production.⁸

The rise of Eastern Kentucky coal created a substantial amount of wealth. Unfortunately, from the beginning, the wealth was not centered in the coalfields themselves. Business interests from outside the area had the capital to purchase vast swaths of territory from the people of Appalachia, including Eastern Kentucky.⁹ Outside business interests had little incentive or desire to purchase the property itself but wanted only to obtain

⁴ Kentucky Energy and Environment Cabinet Department for Energy Development and Independence, *Kentucky Coal Facts*, 16th Ed. (2016) at 6 (hereinafter *Ky. Coal Facts 16th Ed.*).

⁵ Ronald D. Eller, *Miners, Millhands and Mountaineers, Industrialization of the Appalachian South, 1880–1930*, UNIV. OF TENN. PRESS, KNOXVILLE 1982 at 140.

⁶ *Ky. Coal Facts 16th Ed.*, *supra* note 4.

⁷ Eller, *supra* note 3, at 147.

⁸ *Id.* at 128.

⁹ *Id.* at 141–48.

rights in the minerals; purchasing the entire property would have subjected the investors to greater tax liability.¹⁰

In order to most effectively obtain the needed rights in the property, without incurring undue liability, companies entered into either “short form” or “broad form” deeds with local landowners, which conveyed the owners’ interests in the minerals underlying their land.¹¹ The “broad form” deed would prove to be extremely detrimental to the landowners, as it conveyed a bundle of rights that the often uneducated and illiterate landowners could hardly grasp:

The broad form deeds passed to the coal companies title to all coal, oil and gas and all “mineral and metallic substances and all combinations of the same.” They authorized the grantees to excavate for minerals, to build roads and structures on the land and *to use the surface for any purpose “convenient and necessary”* to the company and its successors in title. Their wordy covenants passed to the coal men the right to utilize as mining props the timber growing on the land, to divert and pollute the water and to cover the surface with toxic mining refuse. The landowner’s estate was made perpetually “servient” to the superior or “dominant” rights of the owner of the minerals.¹²

In addition, the broad form deeds contained clauses that absolved the mining company for any damages the landowner suffered either “directly or indirectly” from the mining operations.¹³

During the late 19th and early-20th centuries, local landowners were giving away these rights for a few dollars an

¹⁰ DAVIS, WENDY B., *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905–66, 913 (2002).

¹¹ CAUDILL, HARRY M., *Night Comes to the Cumberlands* at 74 (1963).

¹² *Id.* (emphasis added).

¹³ *Id.*

acre, at best.¹⁴ For example, in 1890, a Pike County landowner signed a lease giving the coal mining company rights for 999 years for the price of one dollar per acre, plus two dollars per acre for use of the surface.¹⁵ Other studies have indicated that mineral rights were sold for as low as twenty-five or fifty cents an acre.¹⁶

Of course, this minimal price per acre did little to provide any long-term economic stability for the landowner or local economy. For example, the landowner often signed away rights to recover damages from mining operations if damages occurred to the surface property.¹⁷ As mining operations improved and expanded in Eastern Kentucky during the 1920s, an operator could recover anywhere from 5,000 to 20,000 tons of coal per acre.¹⁸ This resulted in a massive profit for the operator, no portion of which would be returned to the landowner.

The devastating effects of these deeds were felt for generations, as subsequent heirs and purchasers of the property were subject to the restrictions therein. Often, these deeds would frustrate the ability of the surface owner to utilize the surface of the land itself. For example, in *McIntire v. Marion Coal Co.*, the high court of Kentucky found that the plain terms of a deed allowed the coal company to build structures upon the land, and that the company could “by showing the necessity or convenience thereof, use and occupy the whole surface of the land in question even to excluding the plaintiff and taking his house and garden.”¹⁹

In the 1956 case of *Buchanan v. Watson*, Kentucky’s highest court was faced with a situation where mineral rights in a tract of land had been conveyed in 1903; the original conveyance included broad language regarding the right to

¹⁴ Davis, *supra* note 10 at 912–13 (listing incidents).

¹⁵ *Id.*

¹⁶ ELLER, *supra* note 5, at 56; CAUDILL, *supra* note 11, at 75.

¹⁷ ELLER, *supra* note 5.

¹⁸ CAUDILL, *supra* note 11, at 75.

¹⁹ *McIntire v. Marion Coal Co.*, 227 S.W. 298, 300 (Ky. 1921) (the court did indicate that taking the house and garden “would have to be after satisfaction or adjudged compensation for such improvements.”).

remove the minerals.²⁰ Due to the conditions of the land, the only way for the coal operator to remove the coal was by using the “strip and auger method.” The surface owner objected, arguing that such removal was not contemplated at the time of the original conveyance and that such a method of removal would “destroy the surface and timber of a substantial area.”²¹ The court ruled that, despite the uncontroverted evidence that the strip and auger method would result in the destruction of the surface, the owner of the mineral estate had a right to utilize “the only feasible process of extracting the coal.”²²

According to the *Buchanan* court, “the paramount purpose of the conveyance was to enable the grantee, or his successor in title, to remove the coal from under the surface of this land. The value of the land lay under the surface, not on it.”²³ In determining that the surface owner was not entitled to recover for damages to the surface, the court found “[t]he owner of the mineral has the paramount right to the use of the surface in the prosecution of its business for any purpose of necessity or convenience, unless this power is exercised oppressively, arbitrarily, wantonly, or maliciously.”²⁴ The *Buchanan* decision was not an outlier; indeed, courts in Kentucky consistently issued rulings that favored the mineral owner over the owner of the surface rights.²⁵ The rules enunciated in *Buchanan* would remain the law of the land until they were scaled back by the Kentucky Supreme Court in 1987²⁶ and 1993.²⁷

²⁰ *Buchanan v. Watson*, 290 S.W.2d 40, 41 (Ky. 1956), *overruled by* *Akers v. Baldwin*, 736 S.W.2d 294, 306 (Ky. 1987), *and* *Ward v. Harding*, 860 S.W.2d 280, 287 (Ky. 1993).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 43.

²⁴ *Id.*

²⁵ *See e.g.* *Case v. Elk Horn Coal Corp.*, 276 S.W. 573 (Ky. 1925) (rejecting most of surface owner's claim for damages from mineral owner's decision to clear a strip of timber for an electric transmission line); *United Carbon Co. v. Webb*, 137 S.W.2d 733, 734 (Ky. 1940) (finding that, per terms of deed, surface owner could not recover damages for mineral owner's actions of building roads and ditches, laying above-ground pipelines, ruining agricultural purposes of surface by depositing waste thereon).

²⁶ *Akers v. Baldwin*, 736 S.W.2d 294, 306 (Ky. 1987) (noting that the rule announced in *Buchanan* was “detrimental to the public interest” and was overruled

The effect of the broad form deed and decisions such as *Buchanan* was that the wealth from these early years of coal production was, for the most part, removed from Eastern Kentucky.²⁸ Left behind were surface lands that were often physically scarred or economically worthless due to the fact that they were subservient to the mineral estate. Some native individuals were able to become very wealthy from the coal industry, such as John C.C. Mayo of Johnson County. Mayo became extremely wealthy through accumulating leases or land totaling between 500,000 and 700,000 acres, and was known as Eastern Kentucky's "first millionaire."²⁹

Men like Mayo were an anomaly. The best money that most Eastern Kentuckians could make was through working in the mines. During the early 1900s, Eastern Kentucky farm laborers could hope to make between fifty and seventy-five cents a day; miners, on the other hand, could make between two and four dollars a day.³⁰ At the height of the coal boom during the early 1900s, nearly 65 percent of the miners in Eastern Kentucky and southwest Virginia lived in the nearly 500 company towns or "camps" in the region. The number of coal "camps" was significantly higher than the number of incorporated towns.³¹ Most of these camps were tightly controlled by the coal companies. While some of them were described as "model towns" that provided a life much more comfortable than anywhere else in

insofar as it permitted mineral owners to damage the surface without paying damages, with the exception of "where the conveyance expressly sets out the methods of mining that may be employed and a waiver of damages from the use of such methods.").

²⁷ *Ward v. Harding*, 860 S.W.2d 280, 287 (Ky. 1993) (noting that *Buchanan* was overruled to the extent that it created a presumption that conveyance by broad form deed included a right to surface mining.).

²⁸ JAMES C. KLOTTER, *KENTUCKY: PORTRAIT IN PARADOX 1900–1950* at 27. (1996).

²⁹ *Id.*

³⁰ *Id.* at 28.

³¹ ELLER at 162. ELLER, *supra* note 5, at 162; *Coal Camp Documentary Project*, UNIVERSITY OF KENTUCKY, <https://appalachianprojects.as.uky.edu/coal-camps> [<https://perma.cc/7SZL-TTF6>].

the region,³² many of them did little to impart significant long-term economic benefit upon the miners or their families.³³

Mining was hard, dangerous work, but there was little other work in the region. As laws, attitudes, and safety standards improved, coal mining provided the region's best and largest source of employment. Even by the end of the 1920s, miners could make \$4.00 for an eight-hour workday. They began to accumulate small savings, purchase items like the Model-T Fords, and enjoy the movie theaters, poolrooms, and restaurants being built in and around the camps.³⁴ Even during the "good years" of the coal boom, however, and into the 1930s, the region was occasionally beset with labor unrest and violence as unions and companies clashed over unionization, wages, and safety.³⁵

As a result of the expansion of railroads and the influx of cash, local communities surrounding the mining camps saw increased population and connection with the outside world. However, while there was benefit from the general trade that came along with the coal boom, the lack of strong, independent political leadership at all levels of government prevented the local communities from instituting many beneficial policies that would have been detrimental to the coal operators.³⁶ For example, the coal severance tax, which provided a per-ton tax on coal removed from the land, with a portion returned to the local county governments, was not instituted until 1972.³⁷

The coal severance tax currently provides a tax of 4.5 percent on the sale price of every ton of coal mined in Kentucky.³⁸ For example, if a ton of coal sells for \$50, then the tax revenue is \$2.25. The coal severance tax is split among multiple state budgetary programs, including the General Fund, Local Government Economic Assistance Fund and the Local

³² KLOTTER, *supra* note 28, at 29

³³ *See generally* CAUDILL, *supra* note 11, at 142. (describing the changing of conditions upon the arrival of coal companies).

³⁴ *Id.* at 142.

³⁵ *See generally* CAUDILL, *supra* note 11, at 188–205 (explaining easing tensions between miners and coal companies).

³⁶ CAUDILL, *supra* note 11, at 124.

³⁷ *Ky. Coal Facts* (2016), *supra* note 4, at 12.

³⁸ KY. REV. STAT. ANN. § 143.020 (West 1978).

Government Economic Development Fund.³⁹ Unfortunately, for the first twenty years of its existence, by some estimates, only 7.6 percent of the \$2.7 billion in severance taxes went back to coal counties.⁴⁰ This unfortunate statistic represents another instance of wealth being transferred out of the coalfields, rather than being reinvested in the region.

From the 1930s through the 1990s, the region was subject to a boom-and-bust economic cycle. The mines flourished during the demand for wartime coal in the 1940s, which peaked employment in Eastern Kentucky to 66,410 miners in 1948 and contracted again thereafter.⁴¹ From the 1940s through the 1970s, the rising demand for coal for electric generation caused an increase in production.⁴² Kentucky produced over 100 million tons of coal in 1967, the first time the state had hit that benchmark; Kentucky became the nation's leading coal-producing state in 1971, a title it would retain until it was displaced in 1988.⁴³

From peak employment of over 66,000 in 1948, the number of miners in Eastern Kentucky steadily dropped, with occasional increases based on “booms” in the market. Snapshots of the market during ten-year intervals show the changes in the market since 1956:

³⁹ See Ky. Rev. Stat. 42.450–42.495; See KY. REV. STAT. ANN. 42.450–42.495 (West 1972); *Coal Development Branch*, KENTUCKY DEPARTMENT FOR LOCAL GOVERNMENT (July 2016), <https://kydlgweb.ky.gov/StateGrants/Coal.cfm> [https://perma.cc/P6K7-65VM], last viewed

⁴⁰ Bailey, Jason, *Investing in a Future for Appalachian Kentucky: The Coal Severance Tax*, KENTUCKY CENTER FOR ECONOMIC POLICY (Apr. 2013), p.22 (Apr. 21, 2013), <http://www.kypolicy.us/sites/kcep/files/Coal%20Severance%20Presentation.pdf> [https://perma.cc/X4GT-XK44].

⁴¹ *Ky. Coal Facts* 16th Ed., *supra* note 4, at 8–9.

⁴² *Id.* at 8.

⁴³ *Id.* at 11–12.

TABLE 1
Commonwealth of Kentucky State Totals ⁴⁴

Year	Miners – State Total	Production – State Total in millions of tons	Productivity (tons per miner/hour)
1956	34,971	75.9 million	Not available
1966	21,159	93.2 million	Not available
1976	41,470	142.6 million	1.86* (1977 figure)
1986	34,455	165.6 million	2.45
1996	18,826	152.4 million	3.80
2006	17,959	125 million	3.13
2016	6,371	42.5 million	2.84* (2015 figure)

A review of the table notes that between 1976 and 2006, there was a significant loss of mining jobs, but a concurrent increase in tonnage and a near doubling of productivity. During the time frame from 1950 until 1995, coal mining productivity nationwide increased at an average annual rate of approximately 4 percent, with Appalachian surface and underground productivity increasing at an average annual rate of approximately 2 percent.⁴⁵

The increased productivity and mechanization of Eastern Kentucky mines led to the steady decline of mine employment, and the steady increase in production during the period from the 1950s to the 1990s. Quite simply, fewer miners were needed to extract more coal.

⁴⁴ Information gathered from the annual Kentucky Coal Facts publication. There are some minor discrepancies between certain information maintained by the U.S. Department of Energy, and information published in Kentucky Coal Facts. For sake of consistency, and as none of the discrepancies are statistically significant, numbers published in the Kentucky Coal Facts will be used throughout the table.

⁴⁵ Darmstadter, *Productivity Change in U.S. Coal Mining Discussion*, Paper 97-40, 1, S-1 (1997).

B. Eastern Kentucky Coal in 1996 & 2006

Before examining the recent problems faced by the coal industry, it is useful to get a slightly more in-depth snapshot of the coal industry over the past twenty years. To that end, an examination of the industry in 1996 and 2006 is warranted. As previously discussed, numerous factors contributed to coal profits being funneled out of Eastern Kentucky. By the late twentieth century, coal remained the single most important industry to the Eastern Kentucky economy. Wages, coal severance taxes, and indirect employment in support industries provided hundreds of millions of dollars to local economies.

In 1996, Eastern Kentucky produced 117 million tons of coal, and directly employed over 15,000 miners.⁴⁶ By far the largest consumer of Eastern Kentucky coal in 1996 were electric utilities, which consumed 75 percent of the coal produced in the Eastern Kentucky coalfields.⁴⁷ This coal was shipped to 118 power plants in 22 states.⁴⁸ Coal companies paid \$116 million in coal severance taxes on \$2.6 billion of coal mined from Eastern Kentucky counties.⁴⁹ Approximately 95.7% of Kentucky's electricity was generated from coal and, in 1996, average electricity costs were 4.1 cents per kilowatt hour.⁵⁰ Coal sales to foreign countries and states brought in \$3.1 billion to the state economy.⁵¹

The importance of the industry to the Eastern Kentucky economy is readily apparent by reviewing the wages paid to miners. In 1996, Eastern Kentucky miners received \$610 million in direct wages.⁵² On average, coal miners were paid approximately \$40,000.00 a year, which was double the state's

⁴⁶ Kentucky Energy and Environment Cabinet Department for Energy Development and Independence, *Kentucky Coal Facts*, 5th Ed. (1997–1998) at 9–12 (hereinafter *Ky. Coal Facts 5th Ed.*).

⁴⁷ *Id.* at 20.

⁴⁸ *Id.* at 21.

⁴⁹ *Id.* at 17.

⁵⁰ *Id.* at 1.

⁵¹ *Id.* at 17.

⁵² *Id.* at 14.

average per capita income.⁵³ As shown by Table 2, in the ten largest coal-producing counties in Eastern Kentucky, this represented a huge portion of the wages paid to workers within the counties.

TABLE 2
Employment and Wages - 1996⁵⁴

<u>County</u> <u>[EKY Rank]</u>	<u>Number of</u> <u>Miners</u>	<u>Miners as %</u> <u>of Labor</u> <u>Force</u>	<u>% of Total</u> <u>County</u> <u>Wages</u>
Pike [1]	4,649	17%	34%
Martin [2]	1,049	31%	62%
Harlan [3]	1,373	15%	32%
Perry [4]	938	8.3%	16%
Leslie [5]	1,307	31%	60%
Knott [6]	1,339	23%	56%
Floyd [7]	786	5.5%	11%
Breathitt [8]	218	5%	15%
Bell [9]	907	9%	17%
Johnson [10]	232	2.3%	6%

Table 2 does not reflect wages paid to workers in “indirect” coal jobs such as transportation and support industries; there were approximately 60,000 such “indirect” coal jobs in the Commonwealth of Kentucky in 1996.⁵⁵

By 2006, the industry had suffered some losses in employment and production. Eastern Kentucky produced approximately 64 million tons of coal, compared to 117 million in 1996.⁵⁶ By 2006, Eastern Kentucky coal was even more reliant on

⁵³ *Id.* at 15.

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 1.

⁵⁶ Kentucky Energy and Environment Cabinet Department for Energy Development and Independence, *Kentucky Coal Facts*, 10th Ed., (2007–08) at 9 (hereinafter *Ky. Coal Facts 10th Ed.*).

electric utilities, with 87 percent of Eastern Kentucky coal being delivered to coal-fired power plants.⁵⁷ The industry had also lost approximately 800 mining jobs over the course of ten years, a loss of five percent of the mining workforce since 1996.⁵⁸ Average annual wages had risen to approximately \$57,000.00 per year.⁵⁹ However, wages had increased to \$826 million, with coal severance receipts of \$166 million on \$3.7 billion of extracted coal.⁶⁰ Table 3 reflects 2006 employment and wages in the same ten counties previously shown in Table 2.

TABLE 3
Employment and Wages – 2006⁶¹

<u>County</u> <u>[1996</u> <u>EKY</u> <u>Rank]</u>	<u>Number</u> <u>of</u> <u>Miners</u>	<u>Miners</u> <u>as % of</u> <u>Labor</u> <u>Force</u>	<u>% of</u> <u>Total</u> <u>County</u> <u>Wages</u>	<u>Loss/Gain</u> <u>Since 1996</u>
Pike [1]	4,305	17%	30%	-344 (-7%)
Martin [2]	617	17%	40%	-432 (-41%)
Harlan [3]	1,318	13%	31%	-55 (-4%)
Perry [4]	1,746	15%	24%	+ 808 (+86%)
Leslie [5]	532	14%	45%	- 775 (-60%)
Knott [6]	1,408	21%	60%	+ 69 (+5%)
Floyd [7]	986	6.5%	13%	+ 200 (+25%)
Breathitt [8]	175	3%	12%	-43 (-20%)
Bell [9]	1,038	11%	18%	+131 (+14%)
Johnson	158	1.6	4%	- 74 (-32%)

⁵⁷ *Id.* at 19.

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 14–16.

⁶¹ *Id.* at 12.

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Despite the production drop from 1996 levels and the slight loss of employment, coal was still a billion-dollar industry in Eastern Kentucky, providing huge portions of county wages. Table 3 shows that there were changes in county-level employment, with some counties losing jobs as mines closed, and others gaining jobs as new facilities were opened, or production increased. It is worth noting that a large portion of the job loss from the 1970s to the 1990s, (see Table 1) was attributable to mechanization, and the fact that productivity (tons/miner/hour) had doubled from 1.71 tons per hour in 1977, to 3.68 tons per hour in 1996.⁶² Productivity actually decreased from 3.68 tons per hour in 1996 to 2.78 tons per hour in 2006.⁶³ Therefore, job losses between 1996 and 2006 more closely reflected a slight drop in overall coal production rather than increased mechanization.

C. Summary of Economic Impact Through 2006

From the coal boom of the early 1900s through 2006, the Eastern Kentucky coal industry was subject to fluctuations based on general economic conditions. Employment steadily decreased after peaking in the late 1940s, as increased mechanization eliminated the need for many mining jobs. The industry was, nonetheless, the region's largest source of non-governmental funds, and by far the largest supplier of high paying jobs for people who lacked a college degree. Coal severance taxes provided a pivotal part of the tax base for Eastern Kentucky counties, who mostly lacked other large-scale industries to fill the local coffers.

In sum, coal was still king in Eastern Kentucky, but it was about to face an existential threat from outside its borders.

⁶² *Id.* at 11.

⁶³ *Id.*

III. REGULATORY AND POLICY CHANGES DURING THE OBAMA ADMINISTRATION

In 2008, then-candidate Barack Obama infamously stated, “if somebody wants to build a coal power plant, they can. It’s just that it will bankrupt them because they are going to be charged a huge sum for all that greenhouse gas that’s being emitted.”⁶⁴ During the eight years of his presidency, changes in federal environmental and energy policy resulted in a dramatic shift in the energy industry. Per industry sources, hundreds of coal-fired electric generation units are being retired or converted to another energy source due to Obama-era policies.⁶⁵ These units represent approximately a quarter of coal-fired power generating capacity.⁶⁶ To determine why coal-fired plants and mining operations were so devastated by Obama-era regulations, several key enactments are discussed briefly below.⁶⁷

A. Mercury and Air Toxics Standards (“MATS”)

As amended in 1990, the Clean Air Act (“CAA”) imposed many requirements on fossil-fuel-fired power plants. This included a requirement that the Environmental Protection Agency (“EPA”) regulate “hazardous air pollutants.”⁶⁸ Notably, the amendments allowed the EPA to regulate hazardous air

⁶⁴ Glenn Kessler, *The repeated claim that Obama “vowed” to bankrupt coal plants*, Washington Post Fact Checker (Oct. 8, 2014) (citing interview conducted by San Francisco Chronicle in January 2008), https://www.washingtonpost.com/news/fact-checker/wp/2014/10/08/the-repeated-claim-that-obama-vowed-to-bankrupt-coal-plants/?utm_term=.cf5c73d7db48 [<https://perma.cc/GD6P-T66Y>] (last viewed Apr. 10, 2017).

⁶⁵ American Coalition for Clean Coal Electricity (“ACCCE”), *Retirement of Coal-Fired Electric Generating Units* (Feb. 25, 2017), <http://www.americaspower.org/wp-content/uploads/2017/03/Coal-Unit-Retirements-February-25-2017.pdf> [<https://perma.cc/4KA7-FQCZ>]; see also J.C. Reindl, *25 Michigan Coal Plants Are Set to Retire by 2020*, Detroit Free Press, Oct. 10, 2015.

⁶⁶ ACCCE, *supra* note 65.

⁶⁷ Much has been written on the specifics of each of these rules, and an in-depth discussion of each is beyond the purview of the present writing. Where appropriate, citations to more focused studies of particular acts will be provided.

⁶⁸ See 42 U.S.C. § 7412.

pollutants only if “appropriate and necessary” after study of the issue.⁶⁹

In 2012, the EPA issued the Mercury and Air Toxics Standards Rule (“MATS”), finding that regulation was “appropriate and necessary” because “(1) power plants’ emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions.”⁷⁰ The EPA determined that the regulation was “necessary” because the imposition of the Act’s other requirements did not eliminate these risks.”⁷¹ In imposing the rule, the EPA “concluded that costs should not be considered.”⁷² The EPA placed a compliance deadline in early 2015.

The costs, which the EPA expressly stated that it was not considering, were estimated to be \$9.6 billion per year, while benefits were approximately \$4 million to \$6 million per year.⁷³ The Supreme Court noted that the costs, therefore, were “between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions.”⁷⁴ The Supreme Court struck down the MATS rule in 2015, finding that the EPA was unreasonable to “read an instruction...to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost.”⁷⁵

Unfortunately, the victory over the EPA in 2015 came after the compliance deadline set forth in the MATS Rule, so many power plants had already expended funds to come into compliance with the Rule and had moved, or made plans to move, away from coal. Coal was a casualty of these changes because the standards made natural gas a more attractive alternative for generating electricity.⁷⁶

⁶⁹ 42 U.S.C.A. § 7412(n)(1)(A).

⁷⁰ *Michigan v. EPA*, 135 S. Ct. 2699, 2705 (2015).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 2705–06.

⁷⁴ *Id.* at 2706.

⁷⁵ *Id.* at 2708.

⁷⁶ See Davies & Luman, *The Role of Natural Gas in the Clean Power Plan*, 49 J. Marshall L. Rev. 325, 352 (2016).

B. Ozone NAAQS Revisions

Another provision of the Clean Air Act called for the promulgation of rules known as the National Ambient Air Quality Standards (“NAAQS”).⁷⁷ The NAAQS have become progressively more stringent, and in 2012, the EPA issued its list of areas designated as “nonattainment.” Such a designation requires states to develop a “state implementation plan (“SIP”) specifying how emissions will be reduced in order to meet the NAAQS.”⁷⁸ The EPA knew that NAAQS and the subsequent SIPs would allow them to “impose controls on existing power plants”, which were considered to be significant sources of emissions.⁷⁹ The EPA estimates that costs of compliance will run into the billions.⁸⁰ Along with the MATS Rule, the NAAQS revisions imposed significant costs on coal-fired plants, and encouraged movement away from coal.

C. Clean Water Act Permitting

The Clean Water Act (“CWA”) regulates the discharge of pollutants into the waters of the United States.⁸¹ Among other things, the CWA requires a permitting process for the discharge of fill materials or pollutants that are known as Section 402 and Section 404 permits, respectively.⁸² Pursuant to 33 U.S.C. § 1311, it is required that “every [Section 402] permit contain (1) effluent limitations that reflect the pollution reduction available by using technologically practicable controls, and (2) any more stringent

⁷⁷ See 42 U.S.C.A. § 7409.

⁷⁸ See Arnold Reitz, *The National Ambient Air Quality Standards for Ozone*, 6 Ariz. J. Env'tl. L. & Pol'y 421, 426 (2015).

⁷⁹ See *Id.* at 441.

⁸⁰ *Id.*

⁸¹ The Clean Water Act, 33 U.S.C.A. § 1251–1388 (1987).

⁸² The Clean Water Act, § 1342 (describing the permit application process for a pollutant discharge elimination system); The Clean Water Act § 1344 (describing the permit application process for dredge and fill material).

pollutant release limitations necessary for the waterway receiving the pollutant to meet water quality standards.”⁸³

In 2009, the EPA, the Department of the Interior, and the U.S. Army Corps of Engineers entered into a “memorandum of understanding” entitled “Implementing the Interagency Action Plan on Appalachian Surface Coal Mining.”⁸⁴ The purpose of the memorandum of understanding was to increase the ability of the EPA to “screen” and “discuss” applications for certain mining permits submitted to the Corps of Engineers.⁸⁵ This enhanced coordination effort was expressly and directly aimed at the Appalachian region, with the primary impact being felt in West Virginia and Kentucky, where surface coal mining is a standard practice.⁸⁶ In addition to the memorandum of understanding, the EPA also promulgated a final guidance document in 2011, which, *inter alia*, “recommends that states impose more stringent conditions for issuing certain Clean Water Act permits.”⁸⁷

The states of West Virginia and Kentucky, along with coal and trade association plaintiffs, sued in the U.S. District Court for the District of Columbia challenging both the enhanced coordination effort and final guidance. The states were successful at the trial court level, as the district court found that the EPA had “overstepped its statutory authority” under the CWA and the Surface Mining Control and Reclamation Act.⁸⁸ However, the EPA successfully appealed the case to the U.S. Court of Appeals for the District of Columbia Circuit, which overturned the lower court decision and found that the federal agencies were acting within their authority in both the enhanced coordination effort and the final guidance document.⁸⁹

⁸³ See *Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993).

⁸⁴ See *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 246 (D.C. Cir. 2014).

⁸⁵ *Id.*

⁸⁶ EPA, *Memorandum of Understanding, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining*, EPA 1 (2009), <https://www.epa.gov/sc-mining/june-2009-memorandum-understanding-among-army-department-interior-and-epa-implementing> [https://perma.cc/B8PU-DBTK] (last viewed, Apr. 21, 2017).

⁸⁷ *McCarthy*, 758 F.3d at 246.

⁸⁸ *Nat’l Mining Ass’n v. Jackson*, 880 F. Supp. 2d 119, 142 (D.C. Dist. 2012).

⁸⁹ See *McCarthy*, 758 F.3d at 246.

In June 2015, the EPA promulgated the final rule entitled “Clean Water Rule: Definition of Waters of the United States.”⁹⁰ The new definition provided by this rule expanded the definition of bodies of water that can be regulated as a “water of the United States.”⁹¹ A wide range of industries, including both the mining and power sectors, lobbied unsuccessfully against the implementation of this rule, which simply added another weapon to the federal government’s arsenal.⁹²

C. SMCRA Permitting & Enforcement

The Surface Mining Control and Reclamation Act (“SMCRA”) requires those who are engaged in surface coal mining to comply with certain permitting requirements and environmental protection standards.⁹³ The Office of Surface Mining Reclamation and Enforcement (“OSM”) in the Department of the Interior, is charged with overseeing implementation of SMCRA.⁹⁴

SMCRA and OSM have a great deal of impact on surface mining operations in the Eastern Kentucky coalfields. One of the most important changes made in the Obama era was the proposal of a revised stream buffer zone rule, titled the “Stream Protection Rule.”⁹⁵ The Stream Protection Rule retains a 100-foot buffer between mines and waterways and includes other provisions regarding establishment of water quality standards, increasing the scope of land area to be considered during permitting, and

⁹⁰ Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054 (June 29, 2015).

⁹¹ Ashleigh Allione, *The Battle Over U.S. Water: Why the Clean Water Rule “Flows” Within the Bounds of Supreme Court Precedent*, 66 Am. U.L. Rev. 145 (2016).

⁹² JENNY HOPKINSON, Obama’s Water War, POLITICO (May 27, 2015), <http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319> [<https://perma.cc/L28Y-KB8Y>], May 27, 2015 (last viewed Apr. 22, 2017).

⁹³ See 30 U.S.C.A. § 1202.

⁹⁴ Beck, *supra* at 640. Robert E. Beck, *Water and Coal Mining in Appalachia: Applying the Surface Mining Control and Reclamation Act of 1977 and the Clean Water Act*, 106 W. VA. L. REV. 629, 641 (2004).

⁹⁵ Stream Protection Rule, 80 Fed. Reg. 44,436 (July 27, 2015) (to be codified at 30 C.F.R. pt. 700).

redefining terms such as “material damage” to hydrologic balance and “approximate original contour.”⁹⁶

The Stream Protection Rule is particularly relevant to surface mining areas in West Virginia and Eastern Kentucky, as the topography is replete with streams that would be covered by the rule. According to experts, the rule “would have effectively made mountaintop removal uneconomical.”⁹⁷ According to a congressional report, the rule would have a minimum of \$52 million in annual compliance costs for the coal industry, with approximately 46 percent of this cost to be borne by Appalachian mining operations.⁹⁸

D. Clean Power Plan

The Clean Power Plan was issued by the EPA in August of 2015.⁹⁹ The Clean Power Plan represents a massive shift in regulatory authority of the energy industry by giving the EPA unprecedented authority over the nation’s energy sector. The Clean Power Plan seeks to “reduce carbon dioxide [] emissions from fossil fuel-fired power plants by more than 32% nationwide by 2030.”¹⁰⁰

Coal-fired power plants are a clear target of the Clean Power Plan, as they are required to “install new or upgraded technologies to improve their heat rates”, while another section seeks to require deployment of “low or zero-carbon emitting generating resources”, which directly shifts generation away from coal.¹⁰¹ As noted earlier, in 2006 nearly 90 percent of Eastern Kentucky coal was directed to electric utilities, making the Clean

⁹⁶ *Id.*

⁹⁷ Hiroko Tabuchi, *Republicans Move to Block Rule on Coal Mining Near Streams*, N.Y.TIMES (Feb 2, 2017), https://www.nytimes.com/2017/02/02/business/energy-environment/senate-coal-regulations.html?_r=0.

⁹⁸ Specialist in Res. and Env’tl. Policy, Cong. Research Serv., *The Office of Surface Mining’s Stream Protection Rule: An Overview* (2017).

⁹⁹ William S. Scherman & Jason J. Fleischer, *The Environmental Protection Agency and the Clean Power Plan: A Paradigm Shift in Energy Regulation Away from Energy Regulators*, 36 ENERGY L. J. 355 (2015).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 364.

Power Plan an existential threat to the primary market for Eastern Kentucky coal.

IV. REPERCUSSIONS OF OBAMA-ERA ON THE EASTERN KENTUCKY COAL INDUSTRY

The Obama Administration introduced a wide range of heightened standards and regulations on both the coal industry and electric utilities; though there are detractors who believe the administration did not go far enough.¹⁰² The cost of compliance on these changes runs into the tens of billions of dollars, and the economic impact goes far beyond the actual costs of coming into compliance with the letter of the law. The fragile economy of Eastern Kentucky, so heavily reliant upon the coal industry, reflects the result of overreaching federal policy.¹⁰³

A. Production, Employment & Economic Impact

The policies discussed above had an immediate and devastating impact on the Eastern Kentucky coal industry. In 2016, Eastern Kentucky produced only 16.6 million tons of coal, whereas in 2008 it had produced 91 million tons.¹⁰⁴ In 2008, the Eastern Kentucky coalfields employed over 14,000 miners; by the end of 2016, that number had dropped to less than 4,000.¹⁰⁵ County-by-county figures for Eastern Kentucky in 2016 are not yet available, but the figures from 2015 paint a dark picture for the Eastern Kentucky labor force:

¹⁰² Howard A. Latin, *Climate Change Regulation and EPA Disincentives*, 45 ENVTL. L. 19 (2015)

¹⁰³ There are, of course, other factors that have played into the decline of coal production and use during the past decade, including the rise of natural gas as an energy source. The author posits that the rise of natural gas is not completely the result of free market forces, but was heavily influenced by the crushing federal regulations on the coal industry and the need for energy producers to find another source.

¹⁰⁴ Ky. Energy and Env't Cabinet, Ky. Quarterly Coal Report Oct. to Dec. 2016 5 (2017).

¹⁰⁵ *Id.* at 4.

TABLE 4
Eastern Kentucky Coal Jobs 2015¹⁰⁶

County [EKY Rank]	Number of Miners	Miners as % of Labor Force	Job Loss Since 2006
Pike [1]	1,591	7%	-2,714 (-63%)
Martin [2]	401	13%	-216 (-35%)
Harlan [3]	867	10%	-451 (-34%)
Perry [4]	966	9%	-780 (-45%)
Leslie [5]	245	7%	-287 (-54%)
Knott [6]	252	4.5%	- 1,156 (-82%)
Floyd [7]	432	3%	-554 (-56%)
Breathitt [8]	48	0.9%	-127 (-72%)
Bell [9]	376	4%	-662 (-64%)
Johnson [10]	51	0.6%	-107 (-71%)

In 2006, wages and coal severance taxes brought over \$1 billion to the coal-producing counties of Eastern Kentucky; estimates for 2016 are that amounts will be well-below \$500 million.¹⁰⁷

The precipitous drop in production and employment is unprecedented in the history of the Eastern Kentucky coalfields. Coal production fell by over 80 percent in Eastern Kentucky between 2006 and the end of 2016; likewise, employment dropped by over 70 percent. As noted on Table 1, prior drops in employment were still normally accompanied by a rise in production; this was a natural impact of increased mechanization of the coal industry. The prior production drop between 1996 and 2006 was accompanied by a small drop in employment as well. At

¹⁰⁶ *Ky. Coal Facts 10th Ed.*, *supra* note 56, at 31.

¹⁰⁷ *Ky. Coal Facts 10th Ed.*, *supra* note 56, at 34–35. Final figures for 2016 are not yet available, and estimates must be extrapolated using numbers available from the reporting covering year ending December 31, 2015.

no time have ten-year production and employment figures both dropped so dramatically.

The economic impact on the region has been devastating, as thousands of skilled workers are unable to find work in the coal industry, and local economies and governments have been deprived of hundreds of millions of dollars of annual revenue.

B. Political Fallout

The devastating effects of the “War on Coal” have contributed to the dramatic shift in voting patterns in the coal fields. From 1964 until 2004, Kentucky’s popular vote was aligned with the ultimate winner in each presidential election. The state voted seven times for victorious Republicans (Nixon twice, Reagan twice, George H.W. Bush once, George W. Bush twice) and voted three times for victorious Democrats (Carter once, Bill Clinton twice). This trend ended in 2008 and 2012, when the state voted overwhelmingly against Barack Obama.

When incumbent President Bill Clinton won the electoral votes from the state of Kentucky in 1996, the last Democrat to do so, he scored a narrow victory over Senator Bob Dole (45–44 percent). Clinton was carried to victory by extremely strong showings in the Eastern Kentucky coalfields, winning the popular vote in nine of the ten largest coal producing counties, and by double-digit margins in seven out of ten counties.¹⁰⁸ The results are shown in the table below.

¹⁰⁸ *1996 Primary and General Election Results*, KY STATE BOARD OF ELECTIONS, http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/1990-1999/1996/96Gen_president.txt (last visited Mar. 29, 2017) (percentages are approximate, and vote totals for third party candidate Ross Perot are not shown).

TABLE 5
 Presidential Election Results in Top 10 Eastern Kentucky
 Coal Producing Counties in 1996¹⁰⁹

<u>County [EKY Rank]</u>	<u>Clinton %</u>	<u>Dole %</u>	<u>Actual Total Vote Margin for Clinton</u>
Pike [1]	60%	30%	+6,966
Martin [2]	47%	38%	+ 195
Harlan [3]	58%	33%	+ 2,537
Perry [4]	58%	33%	+2,633
Leslie [5]	35%	56%	- 830
Knott [6]	73%	18%	+ 3,641
Floyd [7]	67%	22%	+ 6,516
Breathitt [8]	67%	23%	+ 2,048
Bell [9]	50%	39%	+ 1,141
Johnson [10]	43%	42%	+ 86

President Clinton won these Eastern Kentucky counties by a total of approximately 25,000 votes. His margin in the state as a whole was only 13,000; therefore his margins in Eastern Kentucky were essential to his victory.

When Hillary Clinton ran for President in 2016, the results were radically different, President Trump carried the state by 30 points, and Hillary Clinton lost in every one of these ten counties by a minimum of 40 percent points.¹¹⁰

¹⁰⁹ *Id.*; *Ky. Coal Facts 5th Ed.*, *supra* note 46, at 9. Though the rank of these counties has changed over the past twenty years, for the sake of comparison, these ten counties will be examined throughout the remainder of this discussion.

¹¹⁰ *2016 General Election Results*, KY STATE BOARD OF ELECTIONS, <http://elect.ky.gov/results/2010-2019/Documents/2016%20General%20Election%20Results.pdf> (last visited Mar. 29, 2017) (percentages are approximate, and vote totals for third party candidates are not included).

TABLE 6
Presidential Election Results in 2016¹¹¹

<u>County [1996 EKY Rank]</u>	<u>Clinton %</u>	<u>Trump %</u>	<u>Loss in Dem Vote</u>
Pike [1]	17%	80%	- 43%
Martin [2]	9%	89%	- 38%
Harlan [3]	13%	85%	- 45%
Perry [4]	20%	77%	- 38%
Leslie [5]	9%	89%	- 26%
Knott [6]	21%	76%	- 51%
Floyd [7]	24%	72%	- 43%
Breathitt [8]	27%	70%	- 40%
Bell [9]	18%	80%	- 32%
Johnson [10]	13%	84%	- 30%

This followed two election cycles in 2008 and 2012 in which President Barack Obama suffered extremely heavy losses in the coalfields as well.¹¹² The anger toward “establishment” Democrats in Washington D.C. was further evidenced by the fact that

¹¹¹ *Id.*

¹¹² 2008 General Election Results, KY STATE BOARD OF ELECTIONS, <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2000-2009/2008/General%20Election/STATEwide%20by%20candidate%20by%20county%20gen%202008.txt> (last visited Mar. 29, 2017) (percentages are approximate, and vote totals for third party candidates are not included); 2012 General Election Results, KY STATE BOARD OF ELECTIONS, <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2012/2012genresults.pdf> (last visited Mar. 29, 2017) (percentages are approximate, and vote totals for third party candidates are not included). *Id.*

Hillary Clinton was handily defeated in the Democratic primary in Kentucky's coal country by "outsider" candidate Bernie Sanders, as shown below.

TABLE 7
2016 Democratic Presidential Primary¹¹³

<u>County [1996 EKY Rank]</u>	<u>Clinton %</u>	<u>Sanders %</u>
Pike [1]	26%	54%
Martin [2]	31%	57%
Harlan [3]	26%	63%
Perry [4]	30%	60%
Leslie [5]	44%	53%
Knott [6]	31%	59%
Floyd [7]	32%	54%
Breathitt [8]	34%	52%
Bell [9]	45%	46%
Johnson [10]	33%	56%

Hillary Clinton won the state of Kentucky by less than 2,000 votes.¹¹⁴ The razor-thin margin was largely due to her lackluster vote totals in the Eastern coalfields.¹¹⁵

¹¹³ 2016 Primary Election Results, KY STATE BOARD OF ELECTIONS, <http://elect.ky.gov/results/2010-2019/Documents/2016%20primary%20election%20results.pdf> (last visited Mar. 29, 2017) (percentages are approximate, and vote totals for third party candidates are not included).
Id.

In 1996, Kentucky's Congressional delegation had one Republican senator, Mitch McConnell, and one Democratic senator, former Governor Wendell Ford.¹¹⁶ The Eastern Kentucky coal counties have been, at all times relevant, represented by Republican Representative Hal Rogers.¹¹⁷ When Senator McConnell ran for reelection in 1996, facing future two-term Governor Steven Beshear, he won the state by a total of 55 percent to 43 percent.¹¹⁸ Senator McConnell lost, however, in six of the ten largest coal-producing counties in Eastern Kentucky.¹¹⁹

TABLE 8
1996 Senate Election¹²⁰

<u>County</u> <u>[EKY Rank]</u>	<u>McConnell %</u>	<u>Beshear %</u>	<u>Actual Vote</u> <u>Margin for</u> <u>McConnell</u>
Pike [1]	41%	59%	- 3,681
Martin [2]	63%	37%	+ 908
Harlan [3]	44%	56%	- 998
Perry [4]	45%	55%	- 885
Leslie [5]	69%	31%	+ 1,389
Knott [6]	27%	73%	- 2,494

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ United States congressional delegations from Kentucky, WIKIPEDIA (Apr. 12, 2017),

https://en.wikipedia.org/wiki/United_States_congressional_delegations_from_Kentucky#References [<https://perma.cc/Z9QF-84VF>].

¹¹⁷ *Id.*

¹¹⁸ *1996 Primary and General Election Results*, KY STATE BOARD OF ELECTIONS, http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/1990-1999/1996/96Gen_ussenate1.txt (last visited Mar. 29, 2017) (Percentages are approximate, and vote totals for third party candidates are not shown).

¹¹⁹ *Id.*

¹²⁰ *Id.*

Floyd [7]	34%	66%	- 4,114
Breathitt [8]	32%	68%	- 1,570
Bell [9]	56%	44%	+ 892
Johnson [10]	60%	40%	+ 1,363

While Senator McConnell won four out of these ten counties, he ultimately lost these coal-producing counties by approximately 9,000 votes.¹²¹

When Senator McConnell ran for reelection in 2014, a race that was initially considered to be a competitive race, he defeated sitting Secretary of State Alison Grimes 56 percent to 41 percent.¹²² While the statewide margin was within two percentage points of his victory over Beshear in 1996, Senator McConnell greatly increased his share of the Eastern Kentucky coalfield vote.

TABLE 9
2014 Senate Election¹²³

<u>County</u> <u>[1996</u> <u>EKY</u> <u>Rank]</u>	<u>McConnell</u> <u>%</u>	<u>Grimes</u> <u>%</u>	<u>Actual Vote</u> <u>Margin for</u> <u>McConnell</u>	<u>Loss in</u> <u>DEM %</u> <u>of Vote</u> <u>from</u> <u>1996</u>
Pike [1]	63%	35%	+ 5,309	- 25%

¹²¹ *Id.*

¹²² 2014 General Election Results, KY STATE BOARD OF ELECTIONS, <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2014/2014%20General%20Election%20Results.pdf> (last viewed Mar. 29, 2017) (percentages are approximate, and vote totals for third party candidates are not included).

¹²³ Compare 2014 General Election Results, *supra* note 121; with 1996 Primary and General Election Results, *supra* note 117 (statistics are from the Kentucky Secretary of State. Percentages are approximate, third-party candidate percentages not shown).

Martin [2]	74%	22%	+ 2,152	- 15%
Harlan [3]	72%	25%	+ 4,252	- 31%
Perry [4]	64%	32%	+ 3,081	- 23%
Leslie [5]	82%	16%	+ 2,829	- 15%
Knott [6]	59%	38%	+ 917	- 35%
Floyd [7]	53%	44%	+ 1,180	- 22%
Breathitt [8]	52%	44%	+ 368	- 24%
Bell [9]	70%	27%	+ 3,551	- 17%
Johnson [10]	69%	27%	+ 3,456	- 13%

The 2014 election was McConnell's sixth statewide election and was the first time in his career he had carried Breathitt, Floyd, Pike and Knott counties.¹²⁴ After losing these coal counties by a combined 9,000 votes in 1996, Senator McConnell won the counties by over 27,000 votes in 2014.

In 1996, the Democratic party controlled both houses of the Kentucky General Assembly.¹²⁵ The Democrats held a twenty-one to seventeen advantage in the Senate, and a dominant sixty-three to thirty-seven advantage in the House of Representatives.¹²⁶ The Republicans took control of the closely-

¹²⁴ Sam Youngman, *McConnell trounces Grimes, winning sixth term and change to lead U.S. Senate*, LEXINGTON HERALD-LEADER (Nov. 4, 2014), <http://www.kentucky.com/news/politics-government/election/article44520651.html> [https://perma.cc/JY2L-WGLX]. last viewed

¹²⁵ 1996 Ky. Acts A-1-A-4.

¹²⁶ *Id.*

divided State Senate a few years later,¹²⁷ but the House would prove to be more elusive. In 2016, for the first time in nearly 100 years, the Republicans took control of the Kentucky House of Representatives.¹²⁸ The race was a landslide victory for the GOP, who went from being in the minority to having a sixty-four to thirty-six majority in the House.¹²⁹ By 2016, the GOP's Senate majority had increased to a twenty-seven to eleven majority.¹³⁰

A large portion of the seventeen-seat pickup in the GOP wave came from Democrats being defeated in House districts with strong ties to the coal industry.¹³¹ As illustrated in Table 10, Democrats lost races in ten coal-producing districts in Eastern and Western Kentucky.¹³² The Democrats unseated in these races had more than 120 combined years of service in the House of Representatives.¹³³

¹²⁷ Patrick Crowley, *GOP Exults After Taking Senate Rule*, Cincinnati Enquirer (Aug. 24, 1999), http://enquirer.com/editions/1999/08/24/loc_gop_exults_after.html [https://perma.cc/5QTG-MQLN].

¹²⁸ Jack Brammer & Linda Blackford, *Republicans take the Kentucky House after 95 years of Democratic control*, HERALD-LEADER (Nov. 8, 2016), <http://www.kentucky.com/news/politics-government/article113464563.html> [https://perma.cc/5T8B-JE45].

¹²⁹ *House Members*, KENTUCKY LEGISLATURE, <http://www.lrc.ky.gov/house/hsemembers.htm> (last visited Apr. 19, 2017) [https://perma.cc/A9X9-ZPKQ].

¹³⁰ *Senate Members*, KENTUCKY LEGISLATURE, <http://www.lrc.ky.gov/senate/senmembers.htm> (last visited Apr. 19, 2017) [https://perma.cc/ZS9M-LT76].

¹³¹ *2016 General Election Results*, KY STATE BOARD OF ELECTIONS, <http://elect.ky.gov/results/2010-2019/Documents/2016%20General%20Election%20Results.pdf> 29-55 (last visited Mar. 29, 2017).

¹³² *See id.*

¹³³ See Kentucky state House election results, HERALD-LEADER (Nov. 1, 2016), <http://www.kentucky.com/news/politics-government/election/article111778822.html> [https://perma.cc/8PCT-QF6E].

TABLE 10
Coal County Losses for Democrats in 2016¹³⁴

House District	Coal Counties	Years of Service
11	Daviess, Henderson (*WKY)	10 years
13	Daviess (*WKY)	10 years
14	Daviess, Ohio (*WKY)	14 years
15	Hopkins, Muhlenberg (*WKY)	20 years
84	Harlan, Perry	8 years
91	Breathitt	2 years
92	Knott, Magoffin, Pike	6 years
95	Floyd, Pike	32 years
97	Morgan, Johnson	26 years
98	Boyd, Greenup	Less than 1

One would be hard-pressed to make the case that the representatives on this list were supporters of the War on Coal, but their party affiliation was fatal to their reelection hopes during the Trump wave of 2016. This was, perhaps, the clearest indication of the political fallout from the War on Coal.

V. THE FUTURE OF COAL AND EASTERN KENTUCKY

With coal at its lowest point in a century, mining jobs being extremely scarce, and local government coffers drained of vital funding, one might say that there is nowhere to go but up for Eastern Kentucky. If the last ten years have taught anything, it is that without significant changes, Eastern Kentucky will remain perched in a precarious position.

¹³⁴ I'm really not sure where/ how to get these numbers. The librarians suggested multiple local papers covering the elections for a long string cite.

The rapid and disastrous downturn for the coal industry in Eastern Kentucky during the Obama presidency reflects the dangers inherent in federal environmental policy-making. The laudable goal of environmental preservation too often obscures the very real and immediate impact such regulations have on both industries and individuals. The policies discussed in Section IV, *supra*, stripped an already economically-distressed region of thousands of jobs, and billions of dollars in wages and tax revenues.

As of the time of this writing, the Trump Administration has signaled its intention to rollback much of the Obama regulatory package that damaged the coal industry; specific proposals are discussed *infra*. However, it may be too late to undo much of the damage. During a 2015 interview with Bill Maher, the then-Administrator of the Environmental Protection Agency, Gina McCarthy, stated the very real fact that litigation against the EPA was often a case of too-little-too-late, because even if the EPA does not win the suit, “most of [the regulated companies] are already in compliance, investments have been made.”¹³⁵ Therefore, even the change in administrations, without more widespread systemic change to federal regulatory authority and structure, may not be enough to cause significant decision making changes for the energy sector.

The difficult reality of the situation facing electric utility operators is shown by the fact that since 2012, at least nine coal-fired plants in Kentucky have been retired, partially retired, idled, or converted to natural gas-fueled units.¹³⁶ Even though President Trump’s agenda seems to significantly improve the short-term outlook for coal-fired electricity generation, many decision-makers in the energy sector are nonetheless moving

¹³⁵ Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule*, The Hill (Jun. 29, 2015, 10:38 A.M. EDT), <http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule> [<https://perma.cc/C47N-9B22>].

¹³⁶ *Ky. Coal Facts 16th Ed.*, *supra* note 4, at 60; *see also* Rhonda Miller, Owensboro to End Coal-Fired Power After 117 Years, WKUFM (Mar. 20, 2017), <http://wkyufm.org/post/owensboro-end-coal-fired-power-after-117-years#stream/0> [<https://perma.cc/G9ZQ-JEJ6>]; *see also* ACCCE, *supra* note 64.

away from coal. In the heart of the Western Kentucky coalfields, the Elmer Smith generating station in Owensboro received nearly one million tons of Kentucky coal in 2015.¹³⁷ However, after 117 years of burning coal, the utility announced in 2017 that it would be completely phasing out coal by the year 2023.¹³⁸ The utility's two coal-burning units were built in 1964 and 1974, respectively, and the utility was facing a minimum of \$37 million to meet environmental standards.¹³⁹ Utilities are faced with mounting costs to meet current environmental standards and concerns over environmental standards being heightened in the future.¹⁴⁰ Given this regulatory and economic climate, many decision-makers are seeing the writing on the wall and choosing to switch to an alternate energy source instead of upgrading or commissioning new coal-burning units.¹⁴¹

The fate of Eastern Kentucky could certainly be shared by other regions who rely upon fossil fuel extraction or, for that matter, any other industry that fell out of favor with environmental regulators. The policies suggested herein, therefore, apply to any region that has an abundance of fossil fuels or other natural resources. Because of the wide net cast by current federal environmental policy, it is important to address not only what changes can be made to help Eastern Kentucky in the immediacy, but to address the systemic issues with federal environmental regulation threatening other regions or industries in the future.

Over the last century, Eastern Kentucky coal has created untold wealth and prosperity. As documented in Section III, *supra*, too much of this wealth and prosperity has permanently left the region. The author posits that a rollback of the unduly onerous Obama-Era regulations will have a yet-to-be-determine positive short-term impact on the local economy, but that without

¹³⁷ *Ky. Coal Facts 16th Ed.*, *supra* note 4, at 54.

¹³⁸ Miller, *supra* note 134.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

further action, such repeals will be no more than a temporary salve for a severe problem.

The early days of the Trump Administration have given many in Eastern Kentucky hope that better days are ahead for the coal industry. While there is cause for optimism, the election of a President who has professed to be a “friend of coal” will not eliminate all difficulties facing the region. There are challenges posed from the increased use of natural gas, cheap coal from Wyoming, and the decreasing number of readily-accessible and economically viable coal seams in Eastern Kentucky.¹⁴² The “green movement” and the desire of its adherents to increase the use of renewable energy is a major policy threat to Eastern Kentucky. Moreover, should there be a breakthrough in affordable and consistent renewable energy, coal will be an immediate casualty.

Regional leadership must be able to effectively prepare a long-term plan that recognizes both the free market and regulatory challenges likely to face the coal industry in the future. These challenges are shared by other areas that draw economic benefit from natural resource extraction. Policymakers at the national, state and local levels should have four main goals when considering environmental and energy policy going forward: (1) avoiding undue interference in the free market by cutting back onerous regulations; (2) retaining and attracting capital in regions that extract natural resources; (3) diversification of local economies and workforces; and, (4) responsible land use and planning.

The easiest step to take is the rollback of the crippling changes made during the Obama administration. Republican-controlled Washington is beginning to do just that. In February 2017, the House and Senate used the Congressional Review Act to overrule the “Stream Protection Act.”¹⁴³ On February 28, 2017,

¹⁴² *Ky. Coal Facts 16th Ed.*, *supra* note 4, at 38; (estimating that there are still 7.4 billion tons of coal in Eastern Kentucky in seams that are greater than twenty-eight inches, the current standard to be considered minable).

¹⁴³ 5 U.S.C. § 801 *et seq.*; Office of Surface Mining Reclamation and Enforcement, *Stream Protection Rule*, U.S. DEPT. OF THE INTERIOR (last modified Mar. 27, 2017),

President Trump signed an Executive Order that seeks to reverse the Obama Administration's "Waters of the United States" rule.¹⁴⁴ On March 28, 2017, President Trump signed an executive order requiring the EPA to reverse course on the Clean Power Plan.¹⁴⁵

Statutory changes are necessary to prevent the sort of damage that occurred during the Obama Administration from being repeated in the future. One such change would be an aggressive implementation of the Regulations from the Executive in Need of Scrutiny Act, which would require Congress to approve any regulations with more than \$100 million in costs.¹⁴⁶ Congress should also assure that agencies are required to zealously examine and consider costs when promulgating regulations, in order to avoid the absurd results reached by the EPA in connection with the MATS Rule.¹⁴⁷ Another, and more drastic approach, would be to utilize the Article V convention process set forth in the United States Constitution to propose constitutional amendments to limit federal administrative or regulatory power.¹⁴⁸

Efforts must be made to diversify local economies and train the local workforce in areas other than coal mining. According to the Kentucky State Data Center, the Eastern Kentucky coalfield counties are projected to continue to steadily lose population in coming years.¹⁴⁹ Anecdotally speaking, from the author's personal experience as a bankruptcy practitioner in

<https://www.osmre.gov/programs/rcm/streamprotectionrule.shtm> [https://perma.cc/3HJ4-45PT].

¹⁴⁴ Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Feb. 28, 2017).

¹⁴⁵ Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

¹⁴⁶ H. Sterling Burnett, *Slowing the Regulatory Onslaught*, Washington Times (Jan. 24, 2017), <http://www.washingtontimes.com/news/2017/jan/24/reins-act-will-slow-the-regulatory-onslaught/> [https://perma.cc/4X8H-BWXB].

¹⁴⁷ See *Michigan v. EPA*, 135 S. Ct. 2,699, 2,705 (2015).

¹⁴⁸ See generally John Malcolm, *Consideration of a Convention to Propose Amendments Under Article V of the U.S. Constitution*, THE HERITAGE FOUNDATION (Feb. 19, 2016), <http://www.heritage.org/the-constitution/report/consideration-convention-propose-amendments-under-article-v-the-us> [https://perma.cc/3RJ8-ZPLP].).

¹⁴⁹ See Matt Ruther, Tom Sawyer, & Sarah Ehresman, *Projections of Populations and Households: State of Kentucky, Kentucky Counties and Area Development Districts 2015-2040*, UNIVERSITY OF LOUISVILLE (2016), <http://www.ksdc.louisville.edu/wp-content/uploads/2016/10/projection-report-v16.pdf> [https://perma.cc/ZLL5-P4YY].

Pike County, many of those who are leaving the region are younger families who were once employed in the mines or support industries, or other young people who are unable to find work in the region. Many of these families are relocating to Central Kentucky or Louisville where there are more opportunities in the manufacturing sector. Projects such as the Shaping Our Appalachian Region initiative have shown promise in creating an economic vision for the coalfields, one that will hopefully help retain and attract young working families to the region.¹⁵⁰

It is also pivotal that coal severance money be retained in coal counties and effectively managed to maximize the goals of growing and diversifying the Eastern Kentucky economy. Federal efforts such as the Revitalizing the Economy of Coal Communities by Leveraging Local Activities and Investing More Act promoted by Congressman Rogers and Senator McConnell may hold promise as well.¹⁵¹ Finally, though this article has sought to point out the inherent problems with Obama-era federal regulation, the preservation of natural resources is a highly worthy goal. The hills of Eastern Kentucky are a unique and beautiful area, and it is vital that the landscape is protected from wanton and undue destruction. However, federal and state regulatory environmental policy must be balanced with the need for affordable and reliable energy, and the importance of the coal industry for the economic stability of the people of Eastern Kentucky.

VI. CONCLUSION

The “War on Coal” fought during the Obama presidency had a devastating impact on an economically vulnerable region. The failure of federal regulators to adequately consider the

¹⁵⁰ See generally *Blueprint for Economic Growth*, SOAR, <http://www.soar-ky.org/blueprint> (last visited Mar. 23, 2017) [<https://perma.cc/FC5G-VYAX>].

¹⁵¹ Bill Estep, McConnell Signs on As Sponsor of \$1 Billion Proposal to Help Coal Areas, *Lexington Herald-Leader* (Mar. 27, 2017 5:57 P.M.), <http://www.kentucky.com/news/state/article141094433.html> [<https://perma.cc/MV9U-VQFQ>].

economic destruction being wrought upon the coal industry and the inhabitants of the region should serve as a stark warning to all, and result in meaningful changes to prevent its future recurrence.

