WEST VIRGINIA DIVISION OF ENERGY

MEMORANDUM

To: President Jeff Kessler, Chair
Speaker Tim Miley, Chair
Joint Committee on Government and Finance

cc: Jason Pizatella, Deputy Chief of Staff
Keith Burdette, Cabinet Secretary, West Virginia Department of Commerce
Joshua Jarrell, Deputy Secretary/General Counsel, West Virginia Department of Commerce

From: Jeff Herholdt, Director
West Virginia Division of Energy

Date: October 3, 2013

Re: Quarterly Report Ending, September 30, 2013
Legal Challenges Potentially Impacting the Energy Industry

As mandated by West Virginia Code §5B-2F-2(s), the following information presents legal challenges with the potential to impact the state's energy industry. This submission was prepared by David Flannery, Steptoe & Johnson PLLC. Reports are submitted on a quarterly basis.

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REPORT ON LITIGATION RELATED TO

ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA

THIRD QUARTER 2013

1. 4th Circuit Court of Appeals Rejects Plaintiffs Common Law Claims

On September 4, 2013, the U.S. Court of Appeals for the Fourth Circuit rejected plaintiffs' common law trespass claims and affirmed that "the district court was correct to hold that creating drill waste pits was reasonably necessary for recovery of natural gas and did not impose a substantial burden on the Whiteman's surface property, that creation of the pits was consistent with Chesapeake's rights under its lease, was a practice common to natural gas wells in West Virginia, and consistent with requirements of applicable rules and regulations for the protection of the environment." Whiteman v. Chesapeake Appalachia, L.L.C., 12-1790, 2013 WL 4734969 (4th Cir. 2013).

The substantive legal issue before the Court on appeal was "whether Chesapeake's permanent disposal of drill waste upon the Whiteman's surface property is "reasonably necessary" for the extraction of minerals." Whiteman v. Chesapeake Appalachia, L.L.C., 12-1790, 2013 WL 4734969 (4th Cir. 2013). The Court applied the "reasonably necessary" test from *Buffalo Mining Co. v. Martin,* 165 W.Va. 10, 267 S.E.2d 721 (1980) when it affirmed the decision of the district court:

> [W]here implied as opposed to express rights are sought, the test of what is reasonable and necessary becomes more exacting, since the mineral owner is seeking a right that he claims not by virtue of any express language in the mineral severance deed, but by necessary implication as a correlative to those rights expressed in the deed. In order for such a claim to be successful, *it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner. Buffalo Mining,* 267 S.E.2d at 725–26 (emphasis added).

Whiteman v. Chesapeake Appalachia, L.L.C., 12-1790, 2013 WL 4734969 (4th Cir. 2013).

2. The 3rd Circuit Court of Appeals Rules that The Clean Air Act Preempts Tort Law

On August 20, 2013, the U.S. Court of Appeals for the 3rd Circuit in Bell et al. v. Cheswick Generating Station, GenOn Power Midwest, L.P. Case: 12-4216 answered a question of first impression: "whether the Clean Air Act preempts state law tort claims brought by private property owners against a source of pollution located within the state?" In this case, Plaintiffs filed claims under state tort law against the GenOn's Cheswick Generating Station, a 570-megawatt coal-fired electrical generation facility in Springdale, Pennsylvania for allegations of

ash and contaminants settling on their residential property (located within a mile of the plant). The Appeals Court held that "(b)ased on the plain language of the Clean Air Act and controlling Supreme Court precedent, we conclude that such source state common law actions are not preempted." Thus, claimants may bring a common law action against a source of air pollution, if the claim is based upon the tort law of the state within which the source is located.

This decision was based upon the U.S. Supreme Court precedent found in Intl. Paper Co. v. Ouellette, 479 U.S. 481, 483 (1987). The question presented by Intl. Paper Co. v. Ouellette was "whether the [Clean Water] Act pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." Intl. Paper Co. v. Ouellette, 479 U.S. 481, 483 (1987). The U.S. Supreme Court held that: (1) Clean Water Act preempted Vermont nuisance law to extent that that law sought to impose liability on New York point source, but (2) Act did not bar aggrieved individuals in Vermont from bringing nuisance claim pursuant to law of source state of New York. Intl. Paper Co. v. Ouellette, 479 U.S. 481 (1987).

The Supreme Court of Appeals of West Virginia has previously applied the Intl. Paper Co. v. Ouellette decision to the Clean Air Act in Ashland Oil, Inc. v. Kaufman, 384 S.E.2d 173 (W. Va. 1989). The Supreme Court of Appeals of West Virginia held that Intl. Paper Co. v. Ouellette "requires the application of the statutory or common law of the source state to an interstate pollution dispute when the pollutants in question are regulated by the Clean Air Act. However, the procedural law of West Virginia shall be followed when the issues are being litigated in this State's courts."Ashland Oil, Inc. v. Kaufman, 384 S.E.2d 173, 180 (W. Va. 1989). Thus under Ashland Oil, Inc. v. Kaufman if the source of pollution is an out of state source, claimants may bring a common law action in West Virginia where the damages are alleged to have occurred, but the West Virginia court would be obligated to apply the procedural law of West Virginia.

Thus, it appears, at least in the 3rd Circuit, that while the Clean Air Act does preempt the tort law of a state other than the state hosting the source, it does not preempt the application of the tort law of the state in which the source is located.