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: January 15, 2014

Re: Quarterly Report Ending, December 31, 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

FOURTH QUARTER 2013

1. U.S. Supreme Court Agrees to Review USEPA Greenhouse Gas Permitting

The U.S. Supreme Court on Tuesday, October 15, 2013 agreed to hear the challenge to the U.S. Environmental Protection Agency regulations concerning greenhouse gases. Petitioners, to include industry groups and various states, expressed concern about the merits of the EPA decision to regulate mobile and stationary sources for greenhouse gases. Six of the petitions were accepted as follows: Utility Air Regulatory Group v. EPA, 12-1146; American Chemistry Council v. EPA, 12-1248; Energy-Intensive Manufacturers v. EPA, 12-1254; Southeastern Legal Foundation v. EPA, 12-1268; Texas v. EPA, 12-1269; and Chamber of Commerce v. EPA, 12-1272.. The issue the Court will hear concerns the EPA determination "that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouses gases." The Supreme Court review follows a United States Court of Appeals for the District of Columbia Circuit ruling of last year that rejected the challenges.

2. West Virginia Chicken Farmer Defeats EPA in Federal Lawsuit over Clean Water Act Permit

On October 23, 2013, Lois Alt, owner of Eight is Enough Farm in Hardy County, West Virginia, won summary judgment in the U.S. District Court for the Northern District of West Virginia against the United States Environmental Protection Agency ("EPA" or "Agency") and a number of environmental groups. Ms. Alt filed suit seeking declaratory judgment after EPA issued an Order for Compliance demanding that she apply for a National Pollution Discharge Elimination System ("NPDES") permit for litter and manure washed from her farm by rain or face civil penalties. Ms. Alt asserted that any drainage from her property caused by rain was subject to a statutory exemption in the Clean Water Act ("CWA") that excludes "agricultural stormwater discharges" from the CWA definition of a point source. Ms. Alt was joined in her lawsuit by the West Virginia Farm Bureau and the American Farm Bureau.

After Ms. Alt filed her lawsuit, EPA withdrew its Order and moved the Court to dismiss the action as moot. Judge John Preston Bailey denied EPA's motion, stating in his Order that this controversy persisted despite EPA's withdrawal and that this issue could potentially affect thousands of farmers.

Subsequently, EPA asserted that the agricultural stormwater runoff exemption applied only in extremely limited circumstances. The Agency argued that discharge or runoff from "production areas" in CAFOs requires a permit. In fact, CAFOs are specifically identified as point sources in the CWA. In this case, all of Ms. Alt's production areas (animal enclosures, feed storage,

litter/manure storage) were under roof, but some manure and litter materials made their way into the farm's outdoor areas during transportation, clean-up and from ventilation fans. Precipitation then carried some of these materials to a creek approximately 200 yards away. EPA argued that because these materials originated in the production areas of a CAFO, they were not eligible for the exemption. The Court rejected this argument.

The Court held that, "because neither the Act nor EPA's implementing regulations has defined "agricultural stormwater discharges" within the context of CAFO farmyard runoff, it falls to this Court to interpret this statutory term." The Court went on to state then when using plain English and common sense, that Ms. Alt's operations (a chicken farm) were un-deniably "agricultural." The Court reasoned further that the runoff at issue was caused solely by precipitation and was therefore "stormwater." Based on this analysis the Court declared, "that litter and manure which is washed from a farmyard into navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirement of the Clean Water Act."

EPA has indicated that it will appeal this decision.

3. Federal Judge Mandates USEPA Set Schedule for Final Rule-Making Regarding Coal Ash Residue

A federal court has ordered EPA to set a deadline for finalizing federal coal ash regulations. Pursuant to the court order, EPA has 60 days to set a schedule for the final publication of regulations concerning how we will treat coal ash residue in this country. The order was the result of a lawsuit filed by a coalition of environmental groups against the agency for what they say is the agency's failure to finalize federal coal ash rules.

The environmental groups claim EPA has a "mandatory duty" to review and revise its waste regulations every three years under the Resource Conservation and Recovery Act (RCRA). These waste regulations include a review of the manner in which coal ash is regulated, including its handling and disposal.

In 2010, EPA proposed two options to regulate coal ash: One that would regulate it as a hazardous waste under Subtitle C of RCRA; and one that would regulate it as non-hazardous waste, under Subtitle D of RCRA. EPA further held a series of public hearings across the nation and received approximately 450,000 comments in response to its initial rule-making, but has not taken further action since that time.

While this decision doesn't specify which option EPA should adopt or the exact time frame for a final rule to be adopted, it does set the stage for a final decision to be made by EPA regarding the future of how coal fly-ash will be regulated.

4. Environmentalist Groups Sue EPA over Kentucky's Selenium Standard

In a case that could have implications for West Virginia, the Sierra Club, Appalachian Voices, Kentuckians for the Commonwealth and Kentucky Waterways Alliance have filed a complaint in the U.S. District Court in Louisville against EPA seeking to bar Kentucky from putting a newly approved Selenium standard in place.

In its decision document issued on November 15, 2013, the EPA disapproved a revision to the Kentucky acute water quality criterion for Selenium, but approved the revisions to the chronic water quality criterion. The revisions would require analysis of fish tissue if the Selenium levels in water column testing are above 5 μg/L.

Environmentalist groups claim that the criteria only measure Selenium concentrations in fish tissue, "they wrongly exempt fishless streams and fail to protect aquatic life such as salamanders, crayfish and insects." Plaintiffs' Complaint, p. 13. The case is entitled *Kentucky Waterways Alliance, et al. v. McCarthy, et al.*, in the U.S. District Court for the Western District of Kentucky.

5. Federal Court Finds Coal Company Liable for Selenium Discharges

In an opinion issued December 19, 2013, Judge Chambers for this U.S. District Court for the Southern District of West Virginia denied defendant Fola Coal Company, LLC (Fola) and granted environmental plaintiffs' motion for partial summary judgment against Fola, and for declaratory relief as to liability for violating the Federal Water Pollution Control Act (Clean Water Act) and the Surface Mining Control and Reclamation Act (SMCRA) for discharging excessive amounts of selenium into the waters of West Virginia, but held in abeyance plaintiffs' claims as to the number of violations and for injunctive relief and civil penalties.

The Clean Water Act was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" by prohibiting the discharge of pollutants without permits in to navigable waters of the United States. By delegation from U.S. Environmental Protection Agency, the State of West Virginia establishes water quality standards and issues permits to point sources to ensure water quality standard achievement. West Virginia's water quality standards for aquatic life protection limit selenium discharges to an acute limitation of 20 μg/L or a chronic limitation of 5 μg/L.

Fola holds WV/NPDES (water permits) and mining permits for its facilities. These WV/NPDES permits place discharge limits on certain pollutants, but do not specifically limit selenium discharges. However, all coal WV/NPDES permits incorporate by reference W. Va. Code R. § 47-30-5.1.f, which states in part "discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards." Plaintiffs allege that the violation of the selenium water quality standard is enforceable under the citizens' suit provision of the Clean Water Act.

In addition to the CWA, coal mining operations must comply with SMCRA, which requires a permit for surface mining operations. Like the CWA, the State of West Virginia has a delegated SMCRA program. West Virginia regulations require permittees to comply with all applicable performance standards, including the requirement that "[d]ischarge from areas disturbed by

surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards." W. Va. Code R. §38-2-14.5.b. Plaintiffs allege that violation of the selenium water quality standard is a violation of SMCRA and its permits. This allegation assumes that the selenium water quality standard is an enforceable performance standard, and therefore, discharges in violation of the selenium water quality standard are enforceable. Plaintiffs also claim that Fola violated SMCRA and its permits for failure to install, operate, and maintain adequate selenium treatment facilities.

Fola unsuccessfully argued that plaintiffs lack standing to bring suit, that the WV/NPDES permits effectively "shield" it from liability because selenium is not a pollutant whose discharge is limited by the terms of the permit, and that the State water quality standards were invalidly promulgated. The Court rejected Fola's arguments and found Fola liable on all six counts. However, held "[t]he Court is not in a position at this time to decide how many violations of the CWA and SMCRA have occurred or to impose any specific relief, including the injunctive relief requested by Plaintiffs." The Court will leave resolution of those issues to a subsequent time. The case is *Ohio Valley Environmental Coalition, Inc. v. Fola Coal Co., LLC*, slip copy (S.D. W.Va. Dec. 19, 2013).