




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: April 8, 2014

Re: Quarterly Report Ending, March 31, 2014
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.

**REPORT ON LITIGATION RELATED TO
ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA**

FIRST QUARTER 2014

1. EPA Challenged over Kentucky's Selenium Standard

In a case which has implications for the West Virginia coal industry, 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 the Environmental Protection Agency 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.

The 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.

2. 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 g/l or a chronic limitation of 5 g/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).

3. 21 States Challenge EPA’s Authority to Set TMDLs for Chesapeake Bay Watershed Under CWA

Attorneys general in twenty-one states, including Texas, Kentucky and West Virginia, filed an amicus brief in the Third Circuit in support of the American Farm Bureau Federations’ challenge to the EPA’s cleanup plan affecting the Chesapeake Bay Watershed. The states and other groups opposing the plan allege that this plan “marks the beginning of the end of meaningful state participation in water pollution regulation.” The states allege that the EPA’s action has side-stepped the intent of the Clean Water Act, which is to involve states in the decision-making process when nonpoint source runoff is regulated.

The appeal stems from a decision by the District Court for the Middle District of Pennsylvania in September, upholding the EPA’s 2010 limits on total maximum daily loads (TMDLs). The EPA’s TMDLs impose caps on nitrogen, phosphorus, and sediment loadings for waters throughout the 64,000 square-mile Chesapeake Bay watershed. The district court held that the CWA term “total maximum daily load” is ambiguous and, therefore, allows the EPA to set detailed “allocations” setting pollution caps for sources throughout a watershed, including farms, builders and towns. The district court also upheld the EPA’s demand for “reasonable assurances” that the caps will be achieved by a certain time without regard to cost, feasibility or whether the water quality goals are even achievable.

In the amicus brief, the states claim that the EPA used the Chesapeake Bay TMDL to “micromanage sources of pollution that by tradition - and by statute - have been beyond EPA’s reach.” Although this action only affects the Chesapeake Bay watershed, the states worry of the far-reaching implications for states across the country if this decision stands. The states argue that the “EPA can create incentives for states to control nonpoint sources, but it cannot mandate how states choose to do so.” By overstepping as it has, the states claim that the EPA has “unlawfully usurped States’ traditional authority over land-use management decisions” and exceeded the “statutory limitations on EPA authority.”

4. EPA Ordered by Court to Finalize Regulation of Coal Ash

A federal court has ordered the EPA to take final action on the EPA’s 2010 proposed revision of regulations related to coal combustion residuals (CCRs) by December 19, 2014.. *See Appalachian Voices, et al. v. McCarthy*, __ F.Supp.2d __, 2013 WL 5797633, *1 fn3 (D.D.C 2013). The Court granted plaintiffs’ motions for summary judgment, ruling in October that the EPA had failed to complete the RCRA subtitle D mandate that coal combustion residual regulations must be reviewed every three years and revised if necessary, but the Court reserved ruling upon a specific deadline until now. *Id.* at *15.