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: July 14, 2014

Re: Quarterly Report Ending,
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.

Capitol Complex • Building 6, Room 620 • Charleston, West Virginia 25305-0311
Toll Free: (800) 982-3386 • (304) 558-2234 • Fax: (304) 558-0362 • **www.energywv.org**

REPORT ON LITIGATION RELATED TO

ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA

SECOND QUARTER 2014

1. EPA Mercury Rule Upheld

A federal appeals court on April 15, 2014 upheld the nation's first-ever national standards requiring power plants to cut emissions of mercury and other hazardous air pollution. The EPA rules require coal utilities to cut at least 90% of their emissions of mercury and require the installation of scrubber technology to reduce mercury emissions.

A divided three-judge panel of the United States Court of Appeals for the District of Columbia Circuit concluded the rule was "appropriate and necessary" – the standard set forth in the Clean Air Act – based on a study of emissions' hazards to public health and rejected several legal attacks raised by challengers. The court's majority ruled the EPA acted reasonably in issuing the rules.

The agency's approach in crafting the rules "is entitled to deference and must by upheld," according to the decision for a majority of three-judge panel written mostly by Judge Judith Rogers.

Several states and energy trade-groups, argued that EPA did not properly consider costs in drafting the standards, which apply to about 1,400 coal- and oil-fired generating units at 600 power plants.

"For EPA to focus its 'appropriate and necessary' determination on factors relating to public health hazards, and not industry's objections that emission controls are costly, properly puts the horse before the cart," Rogers wrote.

Judge Brett Kavanaugh dissented from those portions of the opinion regarding EPA's duty to consider costs. "In my view, it is unreasonable for EPA to exclude consideration of costs in determining whether it is 'appropriate' to impose significant new regulations on electric utilities," Kavanaugh wrote citing the anticipated costs of compliance to the electric utility industry estimated to be $9 billion dollars a year.

The rules are scheduled to take effect in April 2015. In anticipation of the rule going into effect, power companies have announced plans to close nearly two dozen units at nine coal-fired power plants producing a total of 5.4 gigawatts of coal-fired capacity, according to the Energy Information Administration (EIA).

The case is White Stallion Energy Ctr. LLC v. EPA, 12-1100, U.S. Court of Appeals for the District of Columbia Circuit (Washington).

2. Court Rules December 19, 2014 Deadline for Proposing Coal Ash Rules Should Not Be Subject to Delay by the Parties

On April 24, 2014, the United States District Court for the District of Columbia rejected a proposed settlement agreement in litigation between several environmental groups and the EPA over EPA's review of a proposed rule to classify coal ash as a hazardous waste. According to the judge, the proposed settlement agreement in *Appalachian Voices et al. v. McCarthy*, while fair and reasonable in all other aspects, was not in the public's interest because it would allow both EPA and the parties to extend the deadline for EPA final action without any oversight by the court.

The case – filed in 2012 by a number of plaintiffs – involved allegations that EPA had failed to meet requirements of the Resource Conservation and Recovery Act (RCRA) to timely review and revise regulations concerning coal ash – which includes fly ash, bottom ash, slag and flue gas emission control waste. The court agreed with plaintiffs' allegations that EPA had failed to perform a nondiscretionary duty under the statute. In granting plaintiffs' motion for summary judgment, the court required the parties to file supplemental briefs regarding an appropriate deadline for EPA to fulfill its statutory obligation. The parties put forth a proposed consent decree that would have required EPA to sign for publication in the Federal Register a notice of final action regarding EPA's proposed revisions to the RCRA coal ash regulations by December 19, 2014. However, the proposed agreement included language that EPA and the plaintiffs could extend that deadline by written stipulation, without requiring judicial approval. Citing language from a similar provision in another case, the court held that without judicial involvement and approval of any additional extensions of time, the parties could conceivably continue to extend deadlines "for any reason or for no reason at all" and that the public interest in the regulations would be left unprotected. The court ordered the parties to submit a revised consent decree that would require court approval of any extensions of EPA's deadline, noting that such an agreement would be promptly approved when submitted.

Following submittal of the revised consent decree, which resolved the sole remaining issue in this litigation, the Court approved it on May 2, 2014.

3. The D.C. Circuit Court Rejects EPA Guidance on Source Aggregation

ON May 30, 2014, the D.C. Circuit Court of Appeals ruled upon a petition filed by an industry coalition which objected to the manner in which USEPA intended to implement the 6th Circuit Court of Appeals ruling in *Summit Petroleum Corp. v. EPA* in 2012 which found the agency's policy regarding whether multiple sources of air emissions should be aggregated for purposes of permitting was inconsistent with the plain meaning of the statutory language contained in the Clean Air Act.

Specifically, 6th Circuit stated that USEPA could no longer consider the functional interrelationship between two sources in determining whether the sources are located "contiguous" and "adjacent" to one another thus requiring that they be aggregated as one source. Rather, the court emphasized that the language of the Clean Air Act was unambiguous and that USEPA was required to use the plain meaning of the terms contiguous and adjacent. The court

held that EPA couldn't aggregate certain pollution sources -- in that case, natural gas wells and a refinery -- that were not geographically adjacent into a single stationary source for permitting under the Clean Air Act.

While USEPA decided not to appeal the court's decision, in December 2012 it issued a guidance document to its regional offices giving instruction on how each would address the issue of source aggregation. The guidance essentially stated that while USEPA could no longer consider functional "interrelationships" within the 6th Circuit in establishing "major sources" that require permits that specify emission limits, monitoring mandates and other requirements, outside the states contained with the 6th Circuit, USEPA dictated that there would be no change in policy and as a result created a situation where different aggregation standards and analysis would apply in the states of Michigan, Ohio, Kentucky and Tennessee, all states encompassed within the 6th Circuit's jurisdiction, and the remainder of the nation.

The petition challenging the USEPA policy argued that the document put companies outside the 6th Circuit at a competitive disadvantage because they face more stringent permitting requirements.

The D.C. Circuit Court of Appeals agreed and held USEPA cannot treat pollution sources in one region differently from those in others because of an adversarial court ruling. "We find no merit in EPA's arguments," Senior Judge Harry Edwards wrote. "The *Summit* Directive creates a standard that gives facilities located in the Sixth Circuit a competitive advantage. It therefore causes competitive injury to Petitioner's members located outside the Sixth Circuit."

Further, Edwards wrote on behalf of the unanimous three-judge panel that the memo is "plainly contrary to EPA's own regulations, which require EPA to maintain national uniformity in measures implementing" the Clean Air Act.

EPA contended the coalition lacked standing, meaning it failed to show how it was directly harmed by the guidance memo. Further, the agency said the challengers failed to raise a concrete issue and that the Clean Air Act didn't require EPA to act uniformly across the country in its permitting program.

"The question before us is whether EPA's decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under Chevron. We conclude that it is." Slip op at 27.

"We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA's current approach, nor as free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by "anyway" sources." Slip op at 28.

Opinion of Breyer, with whom Ginsburg, Sotomayor and Kagan join, concurring in part and dissenting in part. Rather than exempting certain air pollutants like greenhouse gas

emissions from the statute, it makes more sense to read into the statute an exemption for certain sources that were never intended to be subject to PSD.

Opinion of Alito, with whom Thomas joins, comments that *Massachusetts v. EPA* was wrongly decided at the time, and these cases further expose the flaw with that decision.

4. Federal District Court Addresses "Permit Shield"

On March 31, 2014, the federal District Court for the Southern District of West Virginia addressed the provision of the federal Clean Water Act (CWA), dischargers are shielded from liability if they are complying with the terms of their discharge (NPDES) permits.

Earlier Judge Robert C. Chambers found that coal operators must comply with *all* water quality standards, even for pollutants not regulated in the permit through numeric effluent limits. Under this ruling, coal operators can be subject to CWA citizen suits for discharges of selenium, for example, even though WVDEP opted not to explicitly limit selenium in the permit after being made aware of its presence through permit application data and discharge reports.

Judge Chambers expanded this rationale in his March 31, 2014 decision to address two more common permitting scenarios. First, the Court found that a coal operator's selenium discharges can violate the boilerplate permit condition requiring compliance with applicable water quality standards, even when the operator's permit contains "monitor and report only" requirements for selenium. The opinion goes on to state that WVDEP lacks authority to place such "report only" limits in coal NPDES permits.

Judge Chambers also found that WVDEP has authority to "temporarily suspend the requirement that permit holders comply with selenium limits" to provide an operator time to achieve compliance. An operator with a selenium compliance schedule, therefore, cannot be found liable for violating selenium water quality standards while the compliance schedule is in effect.

5. West Virginia Supreme Court Addresses Conductivity

On May 30, 2014, the West Virginia Supreme Court ruled in a 3-2 decision that the West Virginia Environmental Quality Board ("EQB") acted arbitrarily and without sufficient basis when it issued an order instructing the West Virginia Department of Environmental Protection ("WVDEP") to place effluent limits in a National Pollution Discharge Elimination System ("NPDES") water discharge permit for a proposed 150-acre surface coal mine expansion.

The Supreme Court ruled that there is not "adequate agreement in the scientific community" that conductivity, sulfate, and total dissolved solids ("TDS") cause harm to aquatic life and violate West Virginia's narrative water quality standards. Patriot Mining Company (the permit holder) and WVDEP (the agency that issued the NPDES permit) both argued before the EQB that there is a large degree of scientific uncertainty surrounding the effect of conductivity, TDS, and sulfate on the health of aquatic life. The Supreme Court found that the Board

"disregard[ed] this meaningful evidence" and therefore acted arbitrarily and without sufficient basis.

On June 4, 2014, Judge Chambers of the federal District Court for the Southern District of West Virginia issued a decision finding that two mining companies violated West Virginia's narrative water quality standards by discharging elevated levels of conductivity and sulfate into streams. Judge Chambers found there was "overwhelming scientific evidence" that the discharges of elevated conductivity and sulfate from the mining operations "cause or materially contribute to significant adverse impact to the biological components of the aquatic ecosystems," as evidenced by low WVSCI scores in the receiving streams.

6. U.S. Supreme Court Denys Review of EPA Authority to Veto Mining Permit

The United States Supreme Court in an order denying certiorari effectively affirmed the EPA's authority to exercise its "Veto" power to revoke or modify an issued permit. The U.S. Supreme Court in Mingo Logan Coal v. EPA Appeal No. 13-599 on March 25, 2014 denied the appeal filed by Mingo-Logan Coal Company (a subsidiary of Arch Coal Company). Mingo Logan Coal sought review of the decision by the United States Court of Appeals for the District Court of Columbia Circuit issued on April 23, 2013 in Mingo Logan Coal Company v. United States Environmental Protection Agency. Appeal No. 12-5150.

The Circuit Court of Appeals held that the Clean Water Act in Section 404(c) granted the U.S. EPA the authority to "veto" any permit which approved a defined area as a "disposal site" if the EPA determines "that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas." The Circuit Court of Appeals also confirmed that the EPA could exercise its authority after the permit had been issued by the U.S. Corps of Engineers.