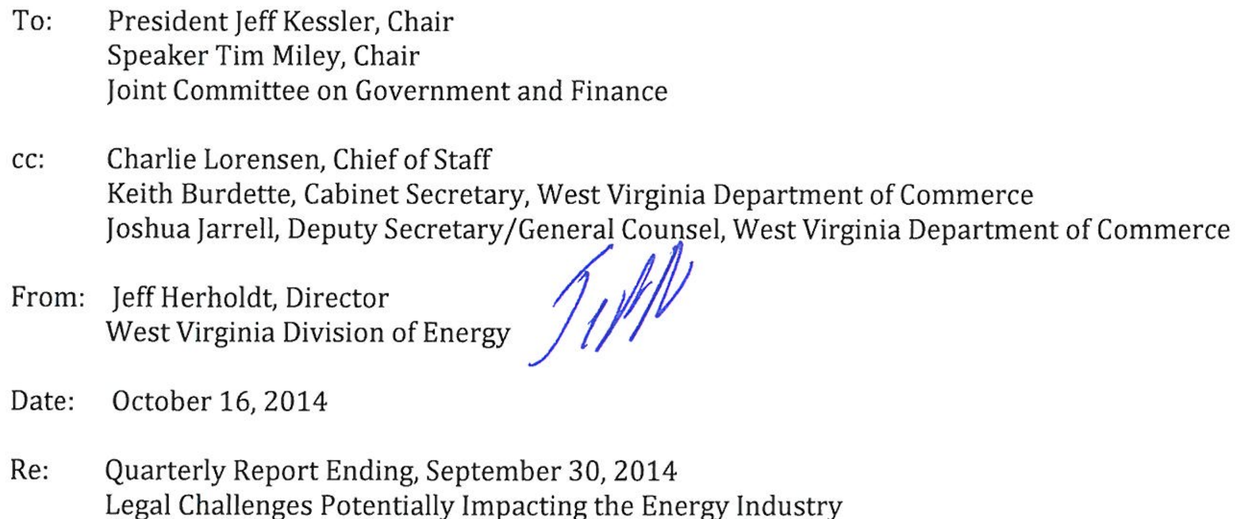
MEMORANDUM



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

cc: Charlie Lorensen, 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 16, 2014

Re: Quarterly Report Ending, September 30, 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.

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REPORT ON LITIGATION RELATED TO

ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA

THIRD QUARTER 2014

1. Murray Energy Challenges Proposed Clean Power Plan

The first entity to challenge EPA'S proposed Clean Power Plan rule proposed on June 2, 2014, was Murray Energy Corporation, which filed a petition for extraordinary writ with the D.C. Court of Appeals on June 18. *See Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir.). The proposed rules would require existing power plants to reduce their carbon dioxide emissions 30% from 2005 levels by the year 2030. Murray's petition claims that the proposed rulemaking is illegal because EPA has exceeded its authority by issuing the rule under §111(d). The petition states that the Clean Air Act prohibits EPA from regulation under §111(d) since emissions from existing coal-fired power plants are already regulated under §112 of the Act and therefore cannot be regulated under §111(d).

On June 25, nine states joined together in support of the Murray suit, filing an amicus brief with the D.C. court. The attorneys general—spearheaded by West Virginia Attorney General Patrick Morrisey—bolstered Murray's arguments that EPA's proposed rule is illegal and violates "specific prohibitions" found in the Clean Air Act. The amicus brief further explains that EPA is relying on a drafting error to insert ambiguity into §111(d) where none exists.

It is unusual for a proposed rule to be challenged before being finalized, but in this case, Murray has cited "extraordinary circumstances".

2. NPDES Permit Shield Requires Disclosure Requirements

On July 14, 2014, the Fourth Circuit ruled that the Clean Water Act's ("CWA") permit shield defense was unavailable to a permit holder who failed to comply with the permitting authority's applicable disclosure requirements. *See SAMS v. A&G Coal*, No. 13-2050. The question presented to the Court was whether A & G could assert a "permit shield" defense for discharges of selenium "when it failed to disclose the presence of this pollutant during the permit application process."

The Court found that A&G failed to comply with the applicable disclosure requirements. First, the NPDES permit application instructions "unequivocally" required submission selenium sampling as a part of the permit application. Second, the application asked

whether A&G believed selenium was present or absent. A&G did not submit selenium sampling and did not check either the "present" or "absent" box.

Accordingly, the Court held that the permit shield was not available.

3. DC Circuit Reverses NMA v. Jackson

On July 11, 2014, the United States Courts of Appeals for the District of Columbia Circuit reversed a lower court ruling that invalidated two actions by the Corps and EPA.

In an effort to more tightly regulate surface mining in Appalachia, EPA and the Corps of Engineers agreed in 2009 to an "Enhanced Coordination Process" for EPA involvement in reviewing permits for valley fills issued under Section 404 of the Clean Water Act. In 2011, EPA issued a "Final Guidance" document regarding the 402 NPDES permitting process. The Final Guidance essentially directed West Virginia and Kentucky state permitting authorities to assess the potential for elevated conductivity in proposed Section 402 permits.

West Virginia and Kentucky challenged both the ECP and Final Guidance leading to the lower court's' ruling involving the ECP and the Final Guidance. *See NMA v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011) (invalidating ECP); 880 F. Supp. 2d 119 (D.D.C. 2012) (invalidating Final Guidance).

In reversing the lower court's decision, the D.C. Circuit first addressed the Enhanced Coordination Process ("ECP"). It found that nothing in the Clean Water Act prohibits the Corps and EPA from "coordinating" their activities. It further found that the ECP was not a "legislative rule" illegally promulgated without public notice and comment, but was instead a "procedural rule" that did not alter the rights or interests of any party.

The Court next addressed EPA's "Final Guidance" document. It found that the guidance "is not a final agency action subject to pre-enforcement review" and declined to rule on the legality of the Final Guidance at this time. In reaching this result, the Court relied heavily on statements by the EPA suggesting that the Final Guidance is of no binding legal effect and that it may be ignored by the States.

4. U.S. District Court Affirms 404 Permit

On August 18, 2014, the U.S. District Court for the Southern District of West Virginia issued an order rejecting claims by several organizations that had challenged the 404 dredge and fill permit issued by the Corps to Raven Crest in 2012. The Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Sierra Club challenged that permit, claiming that the Corps had violated the

Clean Water Act and NEPA by not considering a series of studies allegedly linking mining to adverse health impacts.

Regarding NEPA, the district court held that the Corps' decision not to consider studies associating general surface mining to health issues was not "arbitrary and capricious." Specifically, the Corps had determined that the scope of its NEPA review was limited to effects from the specific § 404 dredge and fill discharges that it was authorizing. The health studies, on the other hand, related to surface mining as a whole.

The district court likewise held that the Corps did not violate the Clean Water Act by deciding not to consider the health studies. The Court noted that the scope of the Corps' Clean Water Act review was also limited to the effects from discharges of dredged or fill material, and again focused on the fact that none of the health studies identified any alleged adverse health effects from those discrete discharges.