

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

FOURTH QUARTER 2015

1. West Virginia Challenges The Clean Power Plan

On October 23, 2015, the Clean Power Plan was published in the Federal Register. This official act triggered the rush to the U.S. Court of Appeals for the D.C. Circuit to challenge the rule. One of the first appeals filed was a multi-state appeal led by West Virginia. This appeal includes 24 states¹ who assert, “the final rule is in excess of the agency’s statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law.” Numerous other appeals have also been filed.

The Motion for Stay filed by West Virginia references the affidavits by the States that demonstrate they will suffer irreparable injury, absent a stay, through mandatory legislative changes and significant expenditures of state monies to study and develop responses to the plan outline.

[1] West Virginia, Texas, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.

2. USEPA Enjoined From Enforcing New WOTUS Rule

Following an earlier decision by a federal district court in North Dakota to stay the effectiveness of USEPA’s new rules re-defining the “waters of the United States” in thirteen states – the United States Circuit Court of Appeals for the Sixth Circuit on October 9, 2015, issued a stay effective nationwide, blocking implementation of the rule by USEPA and the Army Corps of Engineers. The rule which would have potentially expanded the federal government’s jurisdiction over previously unrecognized waters and wetlands now must await a final decision by the court before it can become effective.

In explaining its decision, a split court pushed aside substantial jurisdictional questions before it and stated, “A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new rule and whether they will survive legal testing.”

The case brought together under a single umbrella a series of substantive challenges to the rule by different industry groups and eighteen states.

In a boost to those looking to challenge the rule, the court indicated that “[P]etitioners have demonstrated a substantial possibility of success on the merits of their claims,” stating that USEPA’s new guidelines for determining whether water is subject to federal control — based

mostly on the water's distance and connection to larger water bodies — is “at odds” with prior Supreme Court rulings.

Before it can determine whether a permanent injunction against implementation of the rule is required, it must first address the issue of jurisdiction which has been challenged by the government, environmental groups and others who argued that the district courts have jurisdiction to resolve this issue, not the courts of appeal. The court will consider this jurisdictional issue and if it finds the case is properly before it, will determine whether the definition of WOTUS proposed by the federal government is consistent with the Clean Water Act and whether USEPA acted arbitrarily in the development of the rule.

3. EPA Rejects NPDES Takeover Petition

In 2015, the Sierra Club and other groups challenged to EPA's failure to respond to a petition requesting that EPA rescind the NPDES program in West Virginia. As part of that challenge the Sierra Club filed an action in the Fourth Circuit Court of Appeals challenging EPA's failure to respond to its petition in West Virginia.

On September 23, 2015 EPA responded to the petition in WV, largely rejecting it. On September 24, 2015, EPA then filed a brief with the Fourth Circuit arguing that EPA has now reasonably responded to the petition, thereby mooting a claim that it had failed to act and addressing claims that its failure to act constituted an unreasonable constructive rejection of the petition. EPA's brief notes that while it has generally rejected the rescission petition, it has deferred action in two areas: claims that WVDEP has improperly permitted selenium discharges; and charges that WVDEP unlawfully fails to take enforcement action against violations at mining operations.