WEST VIRGINIA DIVISION OF ENERGY

MEMORANDUM

To: President Bill Cole, Chair
Speaker Tim Armstead, 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: July 10, 2015

Re: Quarterly Report Ending, June 30, 2015
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

SECOND QUARTER 2015

1. US Supreme Court Remands EPA's Mercury Rule

On June 28, 2015, the U.S. Supreme Court filed its 5-4 ruling on the challenge to US EPA Mercury Air Toxics (MATS) rule. *Michigan, et al. v. Environmental Protection Agency, et al., No. 14-46*. http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf. In short the decision reverses and remands the lower court, Court of Appeals of the D.C. Circuit, decision determining it erred in deciding EPA was not required to consider costs when developing the MATS rule. What actual relief this action provides to the power industry that is well on its way to meeting the final compliance date of April 2016 is very fact specific to each affected plant and its owner. Also, the rule has not been vacated; it remains until further ruling by the lower court.

Many power plants have already shutdown in direct response to the MATS rule that was initially promulgated in 2012, after the announced 2000 study that concluded that regulation of coal and oil fired power plants was "appropriate and necessary." Three years into the development of a compliance strategy for the MATS rule with only months to go before the compliance deadline, leaves little left to manage.

The majority opinion written by Justice Scalia can be read to open a renewed discussion on what deference is appropriate for an administrative agency to assert it deserves. The majority determined "EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a factor relevant to the appropriateness of regulating power plants." The majority reminds the reader that, "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." P. 6. "EPA strayed far beyond those bounds when it read 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants." P. 6. The majority opinion recounts its previous decision on agency deference, *Chevron v. NRDC*, 467 U.S. 837 (1984), that "allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." P. 9.

But it is Justice Thomas' concurrence that sharpens the issue, "I write separately to note that its request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes." P. 1. "What EPA claims for itself here is not the power to make political judgments in implementing Congress' policies, nor even the power to make tradeoffs between competing policy goals set by Congress... It is the power to decide – without any particular fidelity to the text – which policy goals EPA wishes to pursue." P. 4.

The minority opinion written by Justice Kagan observes that with regard to the *Chevron* guidance, ". . .our decision here properly rests on something the majority thinks irrelevant: an understanding of the full regulatory process relating to power plants and of EPA's reasons for considering costs only after making its initial "appropriate and necessary" finding." P. 9. Noteworthy is the fact that the "Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate those emissions do even more damage to human health, it would still deem the regulation appropriate." See Tr of Oral Arg. 70.

This ruling may result in significant impact on environmental policy as it is being advanced by EPA.

2. OVEC, WV Highlands Conservancy and Sierra Club

On May 5, 2015 Federal District Court Judge Robert C. Chambers issued a Memorandum Opinion and Order in this case.

In this case the WV DEP issued a permit to the defendant authorizing discharges from its coal mining facilities. The permit pursuant to WV CSR 47-30-5.1.f. required that the defendant's discharges not only comply with all applicable numerical limitations but also comply with the State's narrative water quality standards. In 2015, the WV Legislature amended the regulation, thereby relieving the defendant from the obligation for its discharge to comply with the State's narrative water quality standards. The defendant's discharges were still required to comply with all numerical standards. The plaintiffs alleged that the defendant's discharges violated the narrative water quality standards and thus violated its permits.

The Court concluded because the Legislative Amendment had not been submitted or approved by the EPA as an amendment to the approved "state program" the prior regulation remained in effect as a valid term and condition of the defendant's permit. Even if EPA approved, the permit term would remain in effect until the WV DEP using the major modification requirements amended the defendant's specific permit. Because, the permit included compliance with the state's narrative water quality standards as a separate term, it was enforceable although the NPDES permit did not include a specific limitation for "conductivity" or its ionic pollutants. Conductivity serves as a reasonable "proxy" for ionic pollutants which do impair streams or violate water quality standards. The plaintiffs do not need to show impact to fish to maintain their action as they intend to show impairment of the streams therefore there is a genuine issue of material fact upon which summary judgment cannot be granted. The Court also concluded that the plaintiffs had standing to bring the action because their individual members suffered injuries to their "aesthetic and recreational values" and as the organizations' goals embraced the protection of their members values, the organizations could proceed without the individual plaintiffs.