




## 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: October 2, 2015

Re: Quarterly Report Ending, September 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.

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

**THIRD QUARTER 2015**

**1. EPA Clean Power Plan Challenged**

On August 3, 2015, President Obama and EPA Administrator McCarthy released the agency's *Clean Power Plan*, regulations designed to significantly reduce CO<sub>2</sub> emissions from power plants, as well as promoting low-emitting power sources and energy efficiency. .

The final rule regulates existing fossil-fueled electric steam generating units and natural gas-fired combined cycle generating units under Section 111(d) of the Clean Air Act. Additionally, the rulemaking establishes Carbon Pollution Standards for new, modified, and reconstructed power plants under Section 111(b). Finally, the EPA proposed a Federal Implementation Plan (FIP) and model trading rules as a "backstop," should the plans developed by states fail to meet required emission reductions.

The Clean Power Plan would reduce CO<sub>2</sub> emissions from the power sector nationally by 32% from 2005 levels by 2030—more strenuous than the 30% reductions called for in EPA's proposed rule. The manner in which EPA calculated the state-specific reductions changed significantly in the final rule, with the agency foregoing the use of energy efficiency as the fourth "building block" to compute each state's CO<sub>2</sub> emission targets. (However, see the discussion below about incentives for energy-efficiency measures.) The EPA, therefore, modified and relied on its first three original "building blocks"—improvements in coal-fueled power plants' heat-rates, an increase in natural gas usage, and added use of renewables technologies—potentially resulting in more stringent reductions for states choosing to utilize those options than would have been required under the original proposal.

Further, the final regulations adjusted the emission cuts set out in the proposed rule for some states. According to EPA's State-Specific Fact Sheets West Virginia must cut its CO<sub>2</sub> emissions by 29% from 2012 levels on a mass-based computation, a more challenging constraint than the reductions found in the proposed rule. West Virginia's reductions would be even greater—37%—on a rate-based calculation. (EPA's State-Specific Fact Sheets use a 2012 CO<sub>2</sub> emission baseline, rather than the 2005 baseline the agency uses for national emission reductions.)

In the final rule, the EPA designed these two types of plans from which states must choose:

- an emission-standards plan requiring "all affected power plants within the state to meet their required emission performance rates or state-specific rated based or mass-based goal", or

- a state-measures plan allowing a combination of actions, including renewable energy standards and programs to enhance residential energy efficiency. This second alternative must include federally-enforceable standards that would kick in if the state plan does not achieve the mandated cuts in CO<sub>2</sub> emissions.

States also have the option of joining in multi-state plans, including emissions trading, or they could initiate in-state trading.

States must meet specified, interim emission reductions by 2022, two years later than required in the proposed rule. However, the EPA added a provision to the final rule creating a “reliability safety valve” that would allow states to petition the agency for extraordinary relief from the required emission reductions if an “affected power plant must provide reliability-critical generation.”

Each state (except Alaska and Hawaii) must submit a final plan to EPA no later than September 6, 2016. Alternatively, a state may file an interim plan by this date and request an extension; provided, the final state plan must be submitted by September 6, 2018.

The EPA also proposed a Federal Plan and model trading rules in the final Clean Power Plan, designed to realize the same emission reductions. The agency will impose the Federal Plan in states that do not submit an approved State Implementation Plan to carry out these regulations. EPA will accept comments on the proposed Federal Plan and model trading rules for 90 days after these proposed regulations are published in the *Federal Register*. The agency intends to finalize these proposed rules next summer.

Within moments after President Obama concluded his remarks at the White House on August 3, the West Virginia Attorney General was joined by several other state attorneys general in committing to move forward immediately with litigation challenging the Clean Power Plan. Additionally, numerous members of Congress reiterated their pledge to block the imposition of these regulations. On the other side, supporters of the rules have enlisted to support their full implementation.

## **2. Judicial Rulings On Waters of the US Rule**

The final Clean Water Rule redefining “Waters of the United States” was scheduled to go into effect August 28, 2015. There have been several suits challenging the rule filed since the rule was finalized. Among those actions include a consolidate action before the 6<sup>th</sup> Circuit Court of Appeals in Ohio by Murray Energy Company and others.

Among the activity occurring in August included a ruling by Judge Irene Keeley in the Northern District of West Virginia regarding a separate complaint filed by Murray Energy Corporation in her court challenging the effectiveness of the WOTUS rule. Judge Keeley ruled that the court would not extend jurisdiction to hear Murray’s challenge because of the existing consolidated cases before the Court of Appeals in Ohio. Specifically, citing precedent from other cases decided by the 4<sup>th</sup> Circuit Court of Appeals, within which West Virginia sits, she found that ruling on the current request for stay would frustrate “the congressional goal of

ensuring prompt resolution of challenges to EPA's actions. The jurisdictional scheme, which provides for consolidation of all such challenges in a single court of appeals, favors one decision on the merits. By avoiding consolidation in a single circuit court, that scheme would be undermined by, as another court has referred to it, a 'patchwork quilt' of district court rulings." *Murray Energy Corp v. EPA, et al.* 1:15 CV 110 (August 26, 2015). She thus dismissed the action and any pending motions.

However, Judge Erickson Chief District Judge, District of North Dakota, came to a completely different conclusion when thirteen states, including the states of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming and the New Mexico Environment Department and the New Mexico State Engineer (collectively "the States") filed a complaint against the Agencies, the EPA Administrator in her official capacity, and the Assistant Secretary of the Army (Civil Works) in her official capacity and filed a motion for a preliminary injunction.

Judge Erickson found he had jurisdiction in view of the expansiveness of the EPA action. "If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act. It is difficult to imagine any action the EPA might take in the promulgation of a rule that is not either definitional or regulatory. This view of §1369(b)(1)(F)'s grant of jurisdiction would run precisely contrary to Congress' intent in drafting the court of appeals jurisdictional provision as recognized in the Supreme Court in *National Cotton Council of America v. U.S. E.P.A.* The relationship between issuing or denying a permit and the Rule at issue is tangential to issuance or denial of a permit—a classic red herring. Under these circumstances, original jurisdiction lies in this court and not the court of appeals." *State of North Dakota, et al v. USEPA et al.* 3:15 cv 59 (August 27, 2015).

Judge Erickson granted a preliminary injunction of Clean Water Rule applicable to the states of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico based on his analysis of "the Dataphase factors, the court weighs (1) the threat of irreparable harm to the movant; (2) the balance of harms; (3) the movant's likelihood of success on the merits; and (4) the public interest."

Notably Judge Erickson found:

- *The standard of arbitrary and capricious is met because the Agencies have failed to establish a "rational connection between the facts found" and the Rule as it will be promulgated. The Rule also arbitrarily establishes the distances from a navigable water that are subject to regulation.*
- *Once again, the court has reviewed all of the information available to it and is unable to determine the scientific basis for the 4,000 feet standard. Based on the evidence in the record, the distance from the high water mark bears no connection to the relevant scientific data purported to support this because any water that is 4,001 feet away from the high water mark cannot be considered "similarly situated" for purposes of 33 C.F.R. § 328.3(a)(8). While a "bright line" test is not in itself arbitrary, the Rule must be supported by some evidence why a 4,000 foot standard is scientifically*

*supportable. the record before the court, it appears that the standard is the right standard because the Agencies say it is. Under these circumstances the Rule setting the 4,000 feet standard is likely arbitrary and capricious.*

- *The States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule.*
- The definition of “neighboring” under the final rule is not likely a logical outgrowth of its definition in the proposed rule. The final rule greatly expanded the definition of “neighboring” such that an interested person would not recognize the promulgated Rule as a logical outgrowth of the proposed rule.
- The States here have demonstrated that they will face irreparable harm in the absence of a preliminary injunction. It is within the purview of the traditional powers of the States to maintain their “traditional and primary power over land and water use.” Once the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act.
- On balance, the harms favor the States. The risk of irreparable harm to the States is both imminent and likely. More importantly delaying the Rule will cause the Agencies no appreciable harm. Delaying implementation to allow a full and final resolution on the merits is in the best interests of the public.
- The States have established that the Dataphase factors weigh in favor of injunctive relief. Their motion for a preliminary injunction, enjoining Fed. Reg. 37,054-127, jointly promulgated by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, is **GRANTED**.

However, the Obama Administration has announced that it will continue to enforce the ruling in all but the 13 states that requested the injunction. Thus the rule will be applicable in West Virginia unless and until a new action is filed and the matter is re-argued. This is possible as the action before Judge Keeley was dismissed without prejudice. Copies of the decisions are available at <http://www.ag.nd.gov/NewsReleases/2015/WOTUSOrder9-4-15.pdf> and <http://www.lawandenvironment.com/wp-content/uploads/sites/5/2015/08/Murry-v.-McCarthy.pdf>.