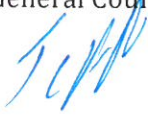




MEMORANDUM

To: President Bill Cole, Chair
Speaker Tim Armstead, Chair
Joint Committee on Government and Finance

cc: Christopher Stadleman, 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 20, 2016

Re: Quarterly Report Ending, September 30, 2016
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 2016

1. Fourth Circuit Rejects Health Claims in Mining Permit Appeal

In a decision dated July 8, 2016 (Case. No. 14-2129), the United States Court of Appeals for the Fourth Circuit upheld the Army Corps of Engineers' issuance of a Clean Water Act §404 permit to Raven Crest Contracting, LLC.

The litigation involved a claim by the Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Sierra Club 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.

The groups appealed a district court order rejecting the claims to the Fourth Circuit, raising the same claims under NEPA and the Clean Water Act.

With respect to NEPA, the Fourth Circuit held that the health studies used by the anti-mining groups only relate to surface mining as a whole. Thus, the court found that “the Corps properly limited its NEPA review to only those environmental impacts associated with the specific discharge of fill material authorized at the Boone North Mine.”

The court likewise held that the Corps did not violate the Clean Water Act for the reason that the scope of the Corps' Clean Water Act review is also limited to the effects from discharges of dredged or fill material, and “do[es] not ... create an obligation for the Corps to study the effects of activities beyond the proposed discharge itself.”

2. West Virginia County Court Rules That Mine Operator Is Not Required To Prevent Subsidence Damage To Commercial Gas Lines Where Operator Has The Right To Subside But Has Duty To Compensate For Damages

By Order of August 5, 2016, the Circuit Court of Marshall County, WV ruled that West Virginia's surface mining rules do not require underground mine operators to take steps—or pay pipeline operators to take steps—in advance of mining to prevent damage to overlying pipelines where the miner has the common law right to subside the surface, *Texas Eastern Transmission v. WVDEP and McElroy Coal Company*, Case No. 09-CAP-1K. The Court also held, however, that state law requires mine operators to compensate owners of commercial structures for subsidence damage, even where the miner possesses the right to subside without liability via severance deed waiver.

The Circuit Court affirmed the Surface Mine Board on both issues. First, the Court ruled that the plain language of West Virginia's surface mining rules require subsidence control plans in permits

to describe the measures to be taken to either mitigate subsidence damages to pipelines prior to mining or to remedy subsidence damage, but do not require both.

The Court then considered the mine operator's argument that it was under no duty to compensate the gas companies for damage to commercial gas lines because the WVDEP rule on which that duty rested was impermissibly more stringent than its federal counterpart. In rejecting this argument, the court sided with the pipeline operator's contention that the West Virginia rule cannot be more stringent than federal law because the applicable federal regulation required repair only "to the extent required under state law." This recognition of state law in the federal rule, reasoned the Court, meant that the federal program contemplates that state law can impose requirements not mandated by the federal program without being considered "more stringent" than the federal program.