



## MEMORANDUM

To: President Mitch Carmichael, Chair  
Speaker Tim Armstead, Chair  
Joint Committee on Government and Finance

cc: Mike Hall, Chief of Staff  
Woody Thrasher, Cabinet Secretary, West Virginia Department of Commerce  
Joshua Jarrell, Deputy Secretary/General Counsel, West Virginia Department of Commerce

From: West Virginia Office of Energy

Date: January 10, 2018

Re: Quarterly Report Ending December 31, 2017  
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**

**FOURTH QUARTER 2017**

**1. EPA Ends It's "Sue And Settle" Practice**

On October 16, 2017, U.S. Environmental Protection Agency Administrator Scott Pruitt issued a directive to stop the agency's historical "sue and settle" policy. Citing the need to be open and transparent, the new directive requires EPA, among other things, to implement a series of procedures, including:

- publish online any notices of intent to sue EPA;
- publish any complaints or petitions for review in regard to an environmental law, regulation, or rule in which EPA is a defendant;
- provide direct notice to any states and/or regulated entities affected by potential settlements or consent decrees;
- publish online a searchable list of consent decrees and settlement agreements that govern EPA actions;
- forbid the practice of entering into any consent decrees with terms that would exceed the authority of the court to have entered an order containing those terms;
- exclude attorney's fees and litigation costs when settling with those suing EPA;
- provide sufficient time to conduct any required rulemaking, take and consider public comment; and
- publish settlements for 30-day public comment, and provide a public hearing on a proposed consent decree or settlement when requested.

See: <https://www.epa.gov/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle>

## **2. West Virginia Supreme Court Addresses SMCRA Citizen Suits**

On October 5, 2017, in the case of State of West Virginia, etc. v. McGraw et al. Case No. 17-0148, the West Virginia Supreme Court ruled that the Wyoming County Circuit Court impermissibly substituted its own judgment for that of the West Virginia Department of Environmental Protection (“DEP”) regarding alleged mining-related contamination of residential water supplies.

The case involves the appeal from an order of the Wyoming County Circuit Court which ordered DEP to require the permittee to provide the residents with replacement water after ruling that citizens living near mines “have an indisputable right to water replacement if there is evidence that the permitted mine contaminated their groundwater.” Even though DEP had previously determined that there was not an appropriate basis for such action, DEP followed the Court’s directive and issued a water replacement order to the permittee. The permittee appealed the water replacement order to the Surface Mine Board where the Board concluded that it lacked authority to overrule a Circuit Court order.

The permittee challenged the Circuit Court order in the Supreme Court of Appeals. The Supreme Court ruled unanimously in favor of the permittee, finding that the Circuit Court exceeded its authority for the reason that DEP has a non-discretionary duty to order water replacement only when DEP finds that a permitted mining operation is causing contamination which in this case had not occurred.