



MEMORANDUM

To: President Mitch Carmichael, Chair
Speaker Roger Hanshaw, Chair
Joint Committee on Government and Finance

cc: Mike Hall, Chief of Staff
W. Clayton Burch, Acting Cabinet Secretary, West Virginia Department of Commerce
Wesley White, Legal Counsel, West Virginia Department of Commerce
Michael Graney, Executive Director, West Virginia Development Office

From: West Virginia Office of Energy

Date: October 15, 2018

Re: Quarterly Report Ending September 30, 2018
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 2018

1. Pipeline Litigation

The 4th Circuit Court of Appeals has issued several recent orders addressing environmentalist's objections to natural gas pipeline projects.

With respect to the Mountain Valley Pipeline project, the 4th Circuit issued an order on July 17, 2018 [*Sierra Club v. US Forest Service*, No. 17-2399], which directed both the Forest Service and BLM to further explain their determinations were appropriate, but the Court stopped short of finding those agency determinations to be wrong.

In the same case, on September 17, 2018, the 4th Circuit denied a request by environmental groups to halt construction of the project pending review by the Forest Service and BLM of their approvals.

However, on October 2, 2018, the 4th Circuit vacated a permit for the project issued by the Corps of Engineers for the project for the reason that the Corps had substituted a West Virginia condition for the permit with a federal one.

2. Fayette County Denied Zoning Authority

In another case involving the Mountain Valley Pipeline [*Mountain Valley Pipeline v. Wender et. Al*, No. 2:17-cv-4377], a federal district court of the Southern District of West Virginia has issued an order denying the authority of Fayette County to use its zoning authority to prevent the construction of a compressor station.

The Court's ruling concluded that the Natural Gas Act, as applied to Mountain Valley Pipeline, pre-empted such zoning activity. The Court also concluded that Mountain Valley Pipeline is entitled to a permanent injunction prohibiting the county from enforcing the zoning code as applied to FERC – approved activities in connection with the proposed compressor station.

3. Settling Ponds Should Not Be Considered a "Point Source"

In a decision rendered on September 12, 2018 [*Sierra Club v. Virginia Electric*, No. 17-1895], the 4th Circuit Court of Appeals overturned a lower court decision and held that coal ash ponds were not subject to the federal Clean Water Act.

The ruling determined that because arsenic from coal ash migrated from the coal ash ponds “directly into the groundwater and, from there, directly into the surface water” the ponds did not fall under the definition of a “point source” and therefore were not subject to the Clean Water Act.

Even though the ash ponds involved are located in Virginia, the case establishes an important precedent for West Virginia, since the 4th Circuit has jurisdiction for cases arising out of West Virginia.