WEST VIRGINIA
OFFICE OF
ENERGY

# MEMORANDUM

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

cc: Mike Hall, Chief of Staff
C. Edward Gaunch, 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: January 14, 2019

Re: Quarterly Report Ending December 31, 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 Amy Smith, Steptoe & Johnson PLLC. Reports are submitted on a quarterly basis.

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**FOURTH QUARTER 2018**
**REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE**
**PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)**

On October 2, 2018, the Fourth Circuit entered an Order in *Sierra Club v. United States Army Corps of Engineers*, 905 F.3d 285 (4th Cir. 2018) (*per curiam*), vacating the Corps' verification of the Mountain Valley Pipeline's compliance with the Clean Water Act Nationwide Permit 12 ("NWP 12"), rather than an individual permit. The Court concluded that the Corps lacked authority to substitute the "dry cut" requirement "in lieu of" West Virginia's 72-hour temporal restriction. Thereafter, on November 27, 2018, the Court issued an opinion that applied *de novo* review to the Corps' decision reasoning that the reinstated verification did not warrant deference under either *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court held that the Corps' lacked statutory authority to substitute its own Special Condition 6 in "lieu of" a different Special Condition C imposed by West Virginia as part of its certification of NWP 12. The Court further held that if West Virginia desires to waive Special Condition A, it must do so through the proper notice-and-comment procedures laid out in Section 1341(a)(1) of the Clean Water Act. Because the Corps' verification and reinstated verification ignored this requirement and impermissibly found that Mountain Valley Pipeline complied with all terms and conditions of NWP 12, they were both vacated in their entirety. *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018).

On October 10, 2018, The Fourth Circuit entered an Order in *Sierra Club v. United States Forest Service*, 739 Fed. App'x 185 (4th Cir. 2018) (mem.), which clarified that the Court's prior opinion in *Sierra Club v. United States Forest Service*, 897 F.3d 582 (4th Cir. 2018), does not vacate the portion of the Bureau of Land Management's Record of Decision authorizing a right of way and temporary use permits for Mountain Valley Pipeline to cross the Weston and Gauley Bridge Turnpike Trail. The prior opinion vacated decisions of the Forest Service and Bureau of Land Management and remanded the actions for further agency proceedings, concluding that the Bureau of Land Management failed to acknowledge its obligations under the Mineral Leasing Act in deciding to grant Mountain Valley Pipeline a right of way through federal land for construction and operation of a pipeline, and that aspects of the Forest Service's decision to amend the Jefferson National Forest Land Resource Management Plan to accommodate Mountain Valley Pipeline's right of way and pipeline construction failed to comply with the National Environmental Policy Act and the National Forest Management Act.

On December 13, 2018, the Fourth Circuit issued an opinion in *Cowpasture River Preservation Association v. Forest Service*, 911 F.3d 150 (4th Cir. 2018). In that case, the Court concluded that the Forest Service's decisions in issuing a Special Use Permit and Record of Decision authorizing the Atlantic Coast Pipeline, LLC to construct a pipeline through parts of the George Washington and Monongahela National Forests and granting a right of way across the Appalachian National Scenic Trail violate the National Forest Management Act and the National Environmental Policy Act. The Court further held that the Forest Service lacked statutory authority pursuant to the Mineral Leasing Act to grant a pipeline right of way across the Appalachian National Scenic Trail. Similar to *Sierra Club v. United States Forest Service*, which is discussed above, the action was vacated and remanded for further agency action.

On November 8, 2018, the Southern District of West Virginia entered a Judgment Order in *Mountain Valley Pipeline, LLC v. Wender*, Civil Action No. 2:17-cv-04377 (S.D. W. Va. Nov. 8, 2018), which among other things declared that the Fayette County Unified Development Code (2009) (the "Fayette Zoning Code") is preempted by the Natural Gas Act as a result of the issuance of a FERC certificate of public convenience and necessity to Mountain Valley Pipeline authorizing the construction and operation of the Stallworth Compressor Station as part of Mountain Valley Pipeline's project. The Court further issued a permanent injunction enjoining the Commission from taking any action seeking to enforce the Fayette Zoning Code within the FERC jurisdictional Area and from taking any other action that would affect the construction or operation of the Stallworth Compressor Station as authorized by FERC. (ECF No. 37). The Judgment Order was entered pursuant to the Court's Memorandum Opinion and Order in *Mountain Valley Pipeline, LLC v. Wender*, 337 F. Supp. 3d 656 (S.D. W. Va. 2018), which held that Mountain Valley Pipeline was entitled to a permanent injunction preventing the Fayette County Commissioners from enforcing the Fayette Zoning Code insofar as it applies to Mountain Valley Pipeline's FERC-approved activities in connection with the Stallworth Compressor Station.

On December 10, 2018, the Northern District of West Virginia entered an Order Setting Deadline for Plaintiff's Amended Complaint in *EQT Production Co. v. Caperton*, No. 1:18-cv-72 (N.D. W. Va. Dec. 10, 2018), which requires the plaintiff to file any motion to amend its complaint no later than January 11, 2019. The original complaint, which is subject to a pending motion to dismiss for failure to state a claim, seeks declaratory relief in relevant part as follows: (1) entry of an Order declaring that the Flat Rate Statute's permit-prohibition provision, as applied to preexisting flat-rate leases, violates the Contract Clause of the United States Constitution; (2) entry of an Order declaring that the Flat-Rate Statute's at-the-wellhead royalty provision, which is in force until May 31, 2018, violates the Contract Clause and the Due Process Clause of the Fourteenth Amendment as applied to preexisting flat-rate leases; and (3) entry of an Order declaring that SB 360's unaffiliated-sale-without-deduction royalty provision, as applied to preexisting flat-rate leases, violates the Contract Clause and the Due Process Clause of the Fourteenth Amendment.