



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, Deputy Secretary, West Virginia Department of Commerce
Michael Graney, Executive Director, West Virginia Development Office

From: West Virginia Office of Energy

Date: October 15, 2019

Re: Quarterly Report Ending September 30, 2019
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.

THIRD QUARTER 2019
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On July 26, 2019, the Fourth Circuit issued an opinion vacating and remanding a 2018 biological opinion (“BiOp”) and incidental take statement (“ITS”) issued by the United States Fish and Wildlife Service pursuant to the Endangered Species Act (“ESA”) in connection with the proposed Atlantic Coast Pipeline (“ACP”) project. *Def. of Wildlife v. U.S. Dep’t of the Interior*, 931 F.3d 339 (4th Cir. July 26, 2019). The Court held that FWS’s 2018 BiOp and ITS arbitrarily found that ACP construction will not jeopardize the rusty patched bumble bee or the clubshell and failed to create enforceable take limits for the Indiana bat and Madison Cave Isopod. *Id.* at 366.

The Court concluded:

We cannot ignore that it took FWS a mere 19 days to issue the 2018 BiOp and ITS after FERC resumed formal consultation with the agency following our first decision in this matter. In fast-tracking its decisions, the agency appears to have lost sight of its mandate under the ESA: “to protect and conserve endangered and threatened species and their habitats.” This mandate has “priority over the ‘primary missions’ of federal agencies.” We hope that, upon remand, FWS will consider any further action it takes with this mandate in mind.

Id. at 365–66 (citations omitted).

On August 12, 2019, the Southern District of West Virginia dismissed a complaint for declaratory and injunctive relief to stop Republic Energy, LLC from conducting surface coal mining operations at the Eagle No. 2 Surface Mine in Raleigh County. *Coal River Mountain Watch v. Republic Energy, LLC*, No. 5:18cv01449, 2019 WL 3798219 (S.D. W. Va. Aug. 12, 2019). The plaintiffs alleged that Republic was operating on an invalid mining permit in violation of the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. § 1201, *et seq.*, and West Virginia’s Surface Coal Mining and Reclamation Act (“WVSCMRA”), W. Va. Code § 22-3-1, *et seq.*, because no coal mining activities had occurred within three years of the permit’s issuance. *Id.* at *1. The Court

concluded that pursuant to 30 U.S.C. § 1270(a)(1) it lacked subject matter jurisdiction because the essence of the complaint was that the permit was issued (or extended) in violation of the statute. The Court reasoned in part that the provision was specifically worded to prevent operators from being sued for perceived permit defects. *Id.* at *8–9.