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

From: West Virginia Office of Energy

Date: July 23, 2020

Re: Quarterly Report Ending June 30, 2020
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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SECOND QUARTER 2020
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On June 3, 2020, the United States District Court for the Southern District of West Virginia denied a motion to dismiss a suit brought by four environmental groups who alleged that the Red Fox Surface Mine, located in southern West Virginia, was letting more selenium get into local waterways than is allowed under its National Pollution Discharge Elimination System and Surface Mining Control and Reclamation Act permits. *Ohio Valley Envtl. Coal. v. Bluestone Coal Corp.*, No. 1:19-cv-00576, 2020 WL 2949782 (S.D. W. Va. June 3, 2020). Bluestone Coal Corporation argued that its 2016 consent decree with the U.S. Environmental Protection Agency and the U.S. Department of Justice precluded the claims because they interfered with existing terms of the consent decree. *Id.* In denying the dismissal, the Court found that the environmental groups had adequately alleged that provisions of the consent decree cannot ensure compliance with selenium limits imposed on mines and the provisions were not created to do such since the limit did not exist at the time. *Id.*

On June 8, 2020, the Supreme Court of Appeals of West Virginia issued an opinion affirming a lower court's determination that an unrecorded assignment of leasehold interests to U.S. Exploration, LLC did not defeat a subsequent modification and surrender of those same interests. *U.S. Expl., LLC v. Griffin Producing Co.*, No. 18-0847, 2020 WL 316344 (W. Va. June 8, 2020). In its opinion, the Court concluded that the modification and surrender were not "conveyances" or "sales of interest in real estate" and thus were not subject to the recording statute, West Virginia Code § 40-1-9. *Id.* The Court further held that while Griffin did not have constructive notice of the assignment because the assignment had not yet been recorded at the time

of the modification and surrender, it did have actual notice because of previous verbal conversations discussing the assignment. *Id.*

On June 15, 2020, the United States Supreme Court issued an opinion addressing the validity of a portion of a permit related to a 604-mile natural gas pipeline extending from West Virginia to North Carolina. *United States Forest Serv. v. Cowpasture River Pres. Ass'n,* 140 S.Ct. 1837 (2020). At issue was the portion of the permit issued by the United States Forest Service that granted a right-of-way to place a 0.1 mile segment pipe approximately 600 feet below the Appalachian National Scenic Trail in the George Washington National Forest. The Court determined that the Department of the Interior's decision to assign responsibility over the Appalachian Trail to the National Park Service did not transform the land over which the Trail passes into land within the National Park System. *Id.* Therefore, the Court reversed the decision of the Fourth Circuit Court of Appeals, which had previously vacated the permit, and held that the Forest Service had the authority to issue the permit. *Id.*[1]

[1] It should be noted that on July 5, 2020, project developers Dominion Energy and Duke Energy announced the cancelation of the Atlantic Coast Pipeline due to ongoing delays and increasing cost uncertainty. *See Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline* (July 5, 2020) https://news.dominionenergy.com/ 2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipe line.