



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: October 6, 2020

Re: Quarterly Report Ending September 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.

THIRD QUARTER 2020
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On July 6, 2020, the Supreme Court of the United States issued a memorandum opinion staying in part the impact of a Montana federal judge’s decision to void Nationwide Permit 12, a nationwide permit that is used in thousands of oil and gas infrastructure projects as an alternative to a more intensive and slower review process under the Clean Water Act pending resolution of a petition for writ of certiorari. *U.S. Army Corps of Eng’rs v. N. Plains Res. Council*, No. 19A1053, 2020 WL 3637662 (U.S. July 6, 2020). The Supreme Court’s order stayed the Montana federal judge’s decision, except as it applies to the Keystone XL pipeline. *Id.* Several states and groups, including the Office of the West Virginia Attorney General, filed amicus briefs supporting the applicants’ attempt to block the Montana federal judge’s decision from going into effect during the appeals process.

On July 23, 2020, the United States Court of Appeals for the Second Circuit vacated the United States District Court for the Northern District of New York’s grant of partial summary judgment, holding that MPM Silicones LLC (“MPM”) claims for recovery of remediation costs is time-barred under 42 U.S.C. § 9613(g)(2). *MPM Silicones, LLC v. Union Carbide Corp.*, 966 F.3d 200 (2d Cir. 2020). The case was brought by MPM to recover remediation costs it incurred after purchasing a facility located in Sistersville, West Virginia, that was contaminated with polychlorinated biphenyls (“PCBs”) from Union Carbide. *Id.* The United States District Court for the Northern District of New York granted partial summary judgment and dismissed MPM’s claims for remediation costs reasoning that the claims were time-barred. *Id.* On appeal, the Second Circuit noted that the timeliness of cost recovery suits is governed by different standards, depending on whether the costs were incurred in “remedial action” or in “removal action.” *Id.*

The Court determined that the district court relied on invalid reasoning to conclude that MPM's claim for costs of remediation efforts is time-barred. *Id.*

On July 27, 2020, the United States District Court for the Southern District of West Virginia granted partial summary judgment to four environmental groups in their suit seeking to hold Bluestone Coal Corporation accountable for violations of its National Pollution Discharge Elimination System and Surface Mining Control and Reclamation Act ("SMCRA") permits at its Red Fox Surface Mine. *Ohio Valley Env't Coal. v. Bluestone Coal Corp.*, No. 1:19-cv-00576, 2020 WL 4284804 (S.D. W. Va. July 27, 2020). The Court held that there is no genuine issue of material fact that defendant is liable for 3,033 days of violations of the Clean Water Act ("CWA") as well as 138 violations of its SMCRA permit. *Id.* at 7. The Court further noted that whether Bluestone should be assessed civil penalties under the CWA and whether Bluestone should be enjoined to compel compliance with the CWA and SMCRA are remaining contested issues of fact and law. *Id.*