



MEMORANDUM

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

cc: Brian Abraham, Chief of Staff
Ann Urling – Deputy 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: January 13, 2021

Re: Quarterly Report Ending December 31, 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.

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

On November 12, 2020, the Supreme Court of Appeals of West Virginia issued an opinion affirming a circuit court's grant of summary judgment on claims for declaratory judgment regarding the priority between a top lease and base lease covering the same subject property. *EQT Production Co. v. Antero Resources Corp.*, 851 S.E.2d 94 (W. Va. 2020). On appeal, the Court held that where multiple leases, such as an oil and gas base lease and a top lease, exist on the same property, the provisions of the West Virginia Recording Act, West Virginia Code §§ 40-1-8 to -9 (2019), govern which lease has priority. *Id.* Here, the Court concluded that Antero Resources Corporation's ("Antero") top lease had priority over EQT Production Company's ("EQT") base lease because Antero recorded before EQT. *Id.*

On November 13, 2020, the United States District Court for the Southern District of West Virginia entered an order denying a motion to dismiss a suit filed by the Sierra Club and other environmental groups, which alleged that the West Virginia Department of Environmental Protection and its secretary violated the Surface Mining Control and Reclamation Act by hiding financial problems of a reclamation fund run by the department. *Ohio Valley Env't Coal v. Caperton*, No. 3:20-0470, 2020 WL 6703129 (November 13, 2020). In its decision, the Court determined that the groups could sue the state agency for putting their environmental protection interests at risk by failing to inform federal regulators of significant changes to the state's ability to implement plans for coal mine reclamations, and the state agency cannot claim immunity from the suit. *Id.*

On November 17, 2020, the United States Court of Appeals for the Fourth Circuit vacated the Environmental Protection Agency's ("EPA") rejection of a small refinery's bid for an

exemption from certain renewable fuel standard program requirements as part of the Clean Air Act. *Ergon-West Virginia, Inc. v. United States Env't. Prot. Agency*, 980 F.3d 403 (4th Cir. 2020). In vacating the EPA's decision, the Fourth Circuit determined that the refinery established that the EPA's denial of an exemption from certain Clean Air Act standards was arbitrary and capricious. *Id.*

On November 18, 2020, the United States Court of Appeals for the Fourth Circuit denied a request by environmental groups to stay the biological opinion and incidental take statement issued for Mountain Valley Pipeline LLC's 303-mile pipeline through West Virginia and Virginia while the Court continues to weigh legal challenges to the project's environmental reviews. *Appalachian Voices v. U.S. Department of the Interior*, No. 20-2159, Doc. 46 (4th Cir. 2020).

On November 18, 2020, the Supreme Court of Appeals of West Virginia issued an opinion affirming the judgment of the Circuit Court of Tyler County, holding that no implied right to pool exists in West Virginia absent language in an oil and gas lease showing that the parties contemplated the right to pool. *Ascent Resources – Marcellus, LLC, v. Huffman*, No. 19-0347, 2020 WL 7222893 (W. Va. 2020). On appeal, the Court agreed with the circuit court that the disputed lease was unambiguous and contained no language indicated that the parties contemplated pooling or unitization when they negotiated and executed the lease. *Id.* The Court further noted that the lease permitted production from the mineral estate for four decades from the shallow well without the need for pooling or unitization. *Id.*

On December 1, 2020, the United States Court of Appeals for the Fourth Circuit entered an order granting a stay requested by environmental groups to halt stream and other water crossings permitted under a Clean Water Act permit issued by the U.S. Army Corps of Engineers, which allowed construction of a natural gas pipeline to be governed by the Army Corps' 2017 nationwide

permit referred to as NWP 12. *Sierra Club v. United States Army Corps of Engineers*, 981 F.3d 251 (4th Cir. 2020). By operating under the more general NWP 12, Mountain Valley Pipeline would not have to undertake the time-consuming individual Clean Water Act permitting process tailored to specific projects. *Id.* In its decision, the Fourth Circuit concluded that the verification issued in the permitting process was likely issued in contravention of applicable law because the Army Corps impermissibly incorporated into NWP 12 a modified permit condition from the West Virginia Department of Environmental Protection. *Id.*

On December 1, 2020, the United States Court of Appeals for the Fourth Circuit vacated the United States District Court for the Northern District of West Virginia's grant of summary judgment in favor of a lessor who brought an action against a lessee in West Virginia state court for damages and a declaratory judgment that the disputed lease failed to satisfy West Virginia's requirements for allocating post-production costs to lessors in an oil and gas lease. *Young v. Equinor USA Onshore Properties, Inc.*, 982 F.3d 201 (4th Cir. 2020). In granting summary judgment, the United States District Court for the Northern District of West Virginia determined that the lease failed to properly provide for the method of calculating post-production costs. *Id.* However, on appeal, the Fourth Circuit affirmed that the work-back or netback method is an appropriate method for calculating a wellhead price on which to pay gas royalties at the wellhead in West Virginia and ultimately held that the lessee is entitled to deduct post-production costs in calculating royalties under the plaintiff royalty owners' oil and gas lease. *Id.*