



MEMORANDUM

To: President Craig Blair, Chair
Speaker Roger Hanshaw, Chair
Joint Committee on Government and Finance

cc: Brian Abraham, Chief of Staff
Ann Urling – Deputy Chief of Staff
Todd Hooker, Deputy Executive Director, West Virginia Economic Development
Mitch Carmichael, Cabinet Secretary, West Virginia Economic Development

From: West Virginia Office of Energy

Date: July 15, 2021

Re: Quarterly Report Ending June 30, 2021
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.

SECOND QUARTER 2021
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On May 12, 2021, the United States District Court for the Northern District of West Virginia granted partial summary judgment in favor of the plaintiffs on their breach of contract claims alleging underpayment of royalties on various oil and gas leases. *Corder v. Antero Res. Corp.*, No. 1:18-cv-30, 2021 WL 1912383 (N.D. W. Va. May 12, 2021), *appeal filed*, No. 21-1215 (4th Cir. June 24, 2021). In granting partial summary judgment to the royalty owners, the court held among other things that six of the leases at issue were governed by standards laid out by the West Virginia Supreme Court of Appeals in *Wellman v. Energy Resources Inc.* 557 S.E.2d 254 (W. Va. 2001) and *Tawney v. Columbia Natural Resources LLC.*, 633 S.E.2d 22 (W. Va. 2001). 2021 WL 1912383, at *14. The court further held that a market enhancement clause did not meet the heightened specificity required to permit post-production deductions under West Virginia law. *Id.* The court, however, held that based on the record it could not determine whether *Leggett v. EQT Production Co.*, 800 S.E.2d 850 (W. Va. 2017) or the 2018 amendment to West Virginia Code § 22-6-8(d) governed Antero's royalty obligations under one flat rate lease. 2021 WL 1912383, at *13.

On May 17, 2021, the United States Supreme Court held that the Fourth Circuit wrongly limited its review of an order that sent the City of Baltimore's (the "City") climate-related infrastructure damages to state court. *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021). In the underlying action, the City sued various energy companies in Maryland state court alleging that the companies concealed the environmental impacts of the fossil fuels they promoted. *Id.* The companies removed the case to federal court based on the federal officer removal statute, among other grounds. *Id.* Though the Supreme Court did not specifically address

whether climate tort suits against energy companies belong in federal court, it determined that the ordinary meaning of the statutory language in 28 U.S.C. § 1447(d) allows appellate review of a lower court's entire remand order when a party appeals the order on federal officer removal and civil rights grounds. *Id.* Thus, the matter was remanded to the Fourth Circuit for further review on the issue of the appropriate court in which the case should be heard. *Id.*

On June 29, 2021, the United States Supreme Court issued an opinion which held that states cannot use sovereign immunity to prevent gas pipelines from being built on state-owned land. *PennEast Pipeline Co., LLC v. New Jersey et al.*, No. 19-1039, slip op. (U.S. June 29, 2021). In the underlying action, PennEast Pipeline Company ("PennEast") sought to condemn parcels of land in which either New Jersey or the New Jersey Conservation Foundation asserted a property interest. *Id.* New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds. *Id.* The Supreme Court ultimately determined that the federal government can give pipeline companies the authority to condemn necessary rights-of-way on state land as well as private land. The Court reasoned that states surrendered their Eleventh Amendment immunity from the exercise of federal eminent domain power when they ratified the Constitution. *Id.*