



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: October 15, 2021

Re: Quarterly Report Ending September 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.

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

On August 26, 2021, the Circuit Court of Ritchie County, West Virginia held that amendments to West Virginia Code § 22-6-8, which prohibit deducting post-production costs from royalty payments, do not apply retroactively to wells permitted before the law went into effect in May 2018. *Williams v. EQT Corp.*, No. 20-C-23 (Ritchie Cnty. W. Va. Aug. 26, 2021). Accordingly, the Court determined that the defendant, EQT Corporation acted lawfully when it deducted post-production costs when calculating payments for oil and gas produced from wells drilled before May 2018. *Id.* In the matter, the plaintiffs asserted that the 2018 changes to the statute made through Senate Bill 360 merely clarified the law that had been in effect since 1982 and thus controlled leases they entered into with EQT in 2011 and 2013. *Id.* Therefore, they argued that EQT was not permitted to deduct post-production costs from royalty payments. *Id.* The Court noted that the West Virginia Legislature “didn’t clearly demonstrate an intent to apply the statute retroactively,” so the amendments did not govern the EQT leases at issue. *Id.* at p. 11.

On September 15, 2021, the United States Court of Appeals for the District of Columbia Circuit directed parties to a matter challenging the Mountain Valley Pipeline project in West Virginia and Virginia to submit supplemental briefs addressing the application of *PenEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), in which the United States Supreme Court recently held that the federal government has the ability to give developers eminent domain power over state lands. *Bohon v. Fed. Energy Regul. Comm’n*, No. 1:20-cv-00006 (D.C. Cir. Sept. 15, 2021). In *Bohon*, which was held in abeyance pending the decision in *PenEast Pipeline*, the landowners have alleged that The Federal Energy Regulatory Commission (“FERC”) was given too much power by Congress and that the delegation of eminent domain powers was unconstitutional. *Id.*