WEST VIRGINIA DIVISION OF ENERGY

MEMORANDUM

To: President Bill Cole, Chair
Speaker Tim Armstead, Chair
Joint Committee on Government and Finance

cc: Charlie Lorensen, Chief of Staff
Keith Burdette, Cabinet Secretary, West Virginia Department of Commerce
Joshua Jarrell, Deputy Secretary/General Counsel, West Virginia Department of Commerce

From: Jeff Herholdt, Director
West Virginia Division of Energy

Date: April 7, 2016

Re: Quarterly Report Ending, March 31, 2016
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 David Flannery, Steptoe & Johnson PLLC. Reports are submitted on a quarterly basis.

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REPORT ON LITIGATION RELATED TO

ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA

FIRST QUARTER 2016

1. Clean Power Plan Stayed

On February 9, 2016 the U.S. Supreme Court weighed in on the pending litigation of the Clean Power Plan before the U.S. Court of Appeals for the District of Columbia. The U.S. Supreme Court's order was a brief one paragraph which reads, "The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationery Sources: Electric Utility Generating Units, " 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petitions, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application."

The standard for seeking a stay of the U.S. Supreme Court calls for a determination of: likelihood of success on the merits; irreparable harm, and balance of the equities and public interest. Based upon the briefs submitted, the entire court reviewed the matter. The implication is that 5 out of 9 Justices believe their review of an appeal to the Clean Power Plan rule would likely result in success on the merits by the petitioner challengers. Significantly, Justice Scalia, who voted with the majority, died subsequent to the issuance of the order granting the stay.

The merit of the Clean Power Plan will be argued before the D.C. Circuit on June 2, 2016.

2. Litigation of Groundwater Issues as it Relates to the Clean Water Act

In response to a citizen suit filed under the Clean Water Act ("CWA") by several environmental groups, and in a case which has implications for West Virginia, Duke Energy Carolinas LLC ("Duke Energy") has filed a motion for certification for interlocutory appeal, asking the United States Court of Appeals for the Fourth Circuit to decide how the CWA addresses aspects of groundwater pollution.

The suit alleges that Duke Energy continues to violate the CWA by unlawfully discharging toxic metals and other pollutants at its Buck Steam Station coal-fired electricity generating plant, which has allegedly leading to the contamination of groundwater. Duke Energy's interlocutory appeal is asking that the Fourth Circuit adopt the majority view of the First, Fifth, and Seventh Circuits in holding that the CWA does not cover discharges to groundwater, even when those discharges migrate to surface waters via hydrological connection. This appeal arises from an October ruling

from the United States District Court for the Middle District of North Carolina that the CWA has jurisdiction over the percolation of pollutants from the Buck Steam Station's ash pond to surface water through hydrologically connected groundwater.

While this is a matter of first impression before the Fourth Circuit (of which West Virginia is a part), this issue is being litigated more and more frequently across the country. One of the more prominent cases on this issue is *Hawai'i Wildlife Fund v. County of Maui*, a 2014 case out the District of Hawaii. An environmental group brought suit against a wastewater reclamation facility, asking the court to consider groundwater as a conduit for the introduction of pollutants into navigable waters. *See Hawai'i Wildlife Fund v. Cnty. of Maui*, 24 F.Supp. 3d 980 (D. Haw. 2014). The court opined that "[t]here is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits under the Clean Water Act. When either type of waterway is a conduit through which pollutants reach the ocean, then there has been an addition of [a] pollutant to navigable waters." *Id.* at 994. This issue, known as the "conduit theory," is currently on appeal before the Ninth Circuit.

If the Fourth Circuit were to disagree with Duke Energy and the majority view, groundwater would be considered within the jurisdiction of the CWA, a departure from past interpretations. This case is *Yadkin Riverkeeper Inc. et al. v. Duke Energy Carolinas LLC*, case number 1:14-cv-00754.

3. Sixth Circuit Decides It Can Hear Clean Water Rule Challenges

In another federal case with implications for West Virginia, the EPA and the Army Corps of Engineers ("Agencies") narrowly prevailed in their arguments that jurisdiction to review the Clean Water Rule ("Rule") lies with the Circuit Court of Appeals and not the District Courts. In a 2-1 decision issued on February 27, 2016, the Sixth Circuit ruled that while the plain language of the Clean Water Act ("Act") may not make it clear, precedent required that they find that the court has jurisdiction to review the consolidated challenges to the Act.

The Rule, issued on June 29, 2015, purports to clarify the scope of "waters of the United States" following confusion as a result of pronouncements by the Supreme Court on the topic in *United States* v. *Riverside Bayview Homes, Rapanos* v. *United States,* and *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*. Thirty-one states as well as various trade groups and civic organizations ("Petitioners") have sued to stop the rule in various federal district courts. Because the Clean Water Act doesn't establish a clear and exclusive path for judicial review the way that other federal environmental acts do, there was uncertainty over whether the district courts were the proper courts to hear the challenges. As a result, many of the Petitioners also filed protective appeals with circuit courts of appeals, which were consolidated before the Sixth Circuit. The Petitioners then filed motions to dismiss their own appeals based on their argument that the appellate court lacks jurisdiction leading to the Court's ruling on February 27, 2016.

Nineteen trade associations, including the American Petroleum Institute, National Association of Manufacturers, National Mining Association, American Forest & Paper Association, and National Association of Home Builders, have petitioned the Sixth Circuit Court of Appeals to rehear the Clean Water Rule en banc, meaning, with a full panel, as opposed to the three-judge panel that issued last week's decision. See http://www.environmentalessentials.com/sixth-circuit-decides-it-can-hear-clean-water-rule-challenges/.

4. Federal Court Voids Severance Deed Waiver

In *Schoene v. McElroy Coal Co.*, 2016 WL 397636 (N.D. W.Va. January 29, 2016), Judge John Preston Bailey held that an express waiver of damage for subsidence does not insulate McElroy Coal Company from a common law claim for damages caused by longwall mining. The court determined that longwall mining was not contemplated at the time of the severance deed in Marshall County, West Virginia and, therefore, liability for longwall-induced damage was not extinguished by the severance deed.

The deed in question included the following grant of the coal mining rights:

"Together with all the rights and privileges necessary and useful in the mining and removing of the said coal, including the right of mining the same without leaving any support for the overlying stratas and without liability for any injury which may result to the surface from the breaking of said strata...."

McElroy has submitted a request that the court reconsider its decision or allow McElroy to take an immediate appeal to the Fourth Circuit Court of Appeals.