



MEMORANDUM

To: President Mitch Carmichael, Chair
Speaker Tim Armstead, Chair
Joint Committee on Government and Finance

cc: Nick Casey, Chief of Staff
Woody Thrasher, Cabinet Secretary, West Virginia Department of Commerce
Joshua Jarrell, Deputy Secretary/General Counsel, West Virginia Department of Commerce

From: West Virginia Division of Energy

Date: April 17, 2017

Re: Quarterly Report Ending March 31, 2017
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.

**REPORT ON LITIGATION RELATED TO
ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA**

FIRST QUARTER 2017

1. EPA Ordered to Assess Job Losses

On January 11, 2017, the federal district court for the Northern District of West Virginia (*Murray Energy v. McCarthy*, Civil Action No. 5:14-CV-39) found that EPA's response issued an injunction requiring EPA to make detailed reports regarding potential job losses as required by Section 321(a) of the federal Clean Air Act.

According to the district court:

EPA does not get to decide whether compliance with § 321(a) is good policy, or would lead to too many difficulties for the agency. EPA can recommend amendments to Congress if it feels strongly enough, but EPA's clear reticence to comply coupled with 8 years of refusal to comply—even in the face of Congressional and public pressure—with the Clean Air Act justifies an injunction detailed enough to ensure compliance. It is time for the EPA to recognize that Congress makes the law, and EPA must not only enforce the law, it must obey it.

2. “Waters of the United States” to be Considered by U.S. Supreme Court

On January 13, 2017, the United States Supreme Court (*National Association of Manufacturers v. Department of Defense*, No. 16-299) granted a petition for *certiorari* to decide which court – the federal district or circuit courts – have the authority to adjudicate disputes over a regulation defining a key term of the Clean Water Act (CWA).

Challenges to the regulation are currently pending in various district courts and circuit courts across the nation. Parties in the various cases were ordered to brief the merits of the challenge.

3. The Fourth Circuit's Decision in OVEC v. Fola Coal Company Rejects Industry Position on Permit Shield

On January 4, 2017, the United States Court of Appeals for the Fourth Circuit issued a decision upholding a decision from the United States District Court for the Southern District of West Virginia in which it determined that Fola Coal Company, LLC (“Fola”) violated the “narrative” water quality standards of its National Pollutant Discharge Elimination System (“NPDES”) permit by discharging elevated dissolved solids that significantly adversely impacted the chemical,

physical, hydrologic, or biological components of the receiving stream's aquatic ecosystems. *See* Ohio Valley Environmental Coalition v. Fola Coal Co., LLC, No. 16-1024 (4th Cir. 2017).

In upholding the District Court's decision, the Fourth Circuit opined that the narrative portion of the NPDES permit in question was a separate obligation from the permit's numeric effluent limits, and that the permittee must comply with the narrative requirement even if it was in compliance with the numerical limits. The Fourth Circuit rejected the argument that W.Va. Code §22-11-6(2) provided a shield from liability if the permittee can establish compliance with established effluent limits. The Court opined that any shield from liability applied only from the date of enactment in 2013 and was not intended to apply retroactively to permits issued prior to enactment. Because the permit involved was issued in 2009, the permittee was found to be subject to this narrative criterion separate and independently from the permit's numeric effluent limits. Significantly, the Court noted that to be effective, the 2013 change would need to be approved by USEPA.