REPORT ON LITIGATION RELATED TO

ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA

SECOND QUARTER 2017

1. EPA Announcement of Review of the Clean Power Plan.

As expected, EPA announced on April 4, 2017, its intent to review the Clean Power Plan (CPP) consistent with President Trump's Executive Order on Energy Independence. The announcement also notes EPA will review the Legal Memorandum that accompanied the CPP.

The announcement provides the legal basis upon which Administrator Pruitt will proceed,

> "As part of the review of the CPP that EPA is initiating today, EPA will be reviewing compliance dates that were set in the CPP. Under the Supreme Court's stay of the CPP, states and other interested parties have not been required nor expected to work towards meeting the compliance dates set in the CPP."
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> "The authority to reconsider prior decisions exists in part because EPA's interpretations of statutes is administers "are not carved in stone" but must be evaluated "on a continuing basis," *Chevron v. NRDC*, 467 US 837, 857-58 (1984). This is true when – as is the case here - review is undertaken "in response to . . . a change in administrations." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 US 967, 981 (2005). Importantly, such a revised decision need not be based upon a change of facts or circumstances. Rather, a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations*." National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 and 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-5; quoting *State Farm*, 463 U.S. at 59 (Renquist, J., concurring in part and dissenting in part))."

In related action, the D.C. Circuit Court of Appeals has held in abeyance litigation challenging the CPP.

2. Litigation Involving Oil and Gas Methane Rules Held in Abeyance.

On May 18, 2017, the U.S. Court of Appeals for the District of Columbia granted the request by the Trump administration to delay lawsuits involving the regulation of methane emissions from the oil and gas sector. *American Petroleum Institute (API) et al v. EPA et al,* (No. 13-1108).

3. Fourth Circuit Refuses to Order EPA to Conduct Coal Jobs Analysis.

Litigation has been pending in the Northern District of West Virginia brought by Murray Energy against USEPA in which Murray has sought to enjoin further rulemaking by EPA related to the implementation of the Clean Power Plan until EPA assessed the impacts of its Clean Air Act programs on the coal and energy-producing industries. Murray argued that §321(a) of the Clean Air Act imposed a nondiscretionary duty on EPA to conduct the studies.

In October 2016, District Court Judge Bailey ruled in Murray's favor and ordered EPA to conduct an analysis in accordance with a rigid schedule. He rejected arguments that previous studies EPA prepared for different purposes were sufficient to discharge this obligation.

On appeal, however, the Fourth Circuit reversed the lower court's order. In a June 24, 2017 order, the Fourth Circuit (Case No. 17-1170) ruled that §321(a) vests EPA with discretion as to the scope and timing of the studies required by the Clean Air Act. The appeals court ruled that this discretion deprived the lower court of jurisdiction to entertain a case.