WEST VIRGINIA OFFICE OF ENERGY

MEMORANDUM

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

cc: Mike Hall, Chief of Staff
W. Clayton Burch, Acting Cabinet Secretary, West Virginia Department of Commerce
Wesley White, Legal Counsel, West Virginia Department of Commerce

From: West Virginia Office of Energy

Date: July 9, 2018

Re: Quarterly Report Ending June 30, 2018
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

SECOND QUARTER 2018

1. D.C. Circuit Continues the Stay of the Federal Clean Power Plan.

On June 26, 2018, in the case of (West Virginia et al. v. EPA, etc., Case No. 15-1363), the D.C. Circuit agreed to continue the current stay of litigation involving challenges to the federal Clean Power Plan by an additional 60 days. Two of the judges on the Court, however, filed statements with the order expressing reluctance to grant any additional extensions of litigation stay.

2. Implementation of the Federal Water of the United States Rule Stayed.

On June 11, 2018, the State of West Virginia and 10 other states were successful in their request for a preliminary injunction barring implementation of the federal Waters of the United States rule. In an order issued by the U.S. District Court of the Southern District of Georgia (Georgia et al v. Pruitt, et al., Case No. 2: 15-cv-79), Judge Wood ruled that the states involved had proven that they were likely to succeed on the merits, balance of harms, and public interest tests and had satisfied the test related to the threat of irreparable injury. Accordingly, the Court enjoined EPA and the Corps of Engineers from enforcing the rule in 11 states, including West Virginia.

3. EPA No Longer Required to Get Involved in West Virginia Water Pollution Program.

On June 20, 2018, the 4th Circuit Court of Appeals reversed a decision by Chief U.S. District Judge Robert C. Chambers that had directed increased EPA involvement in the West Virginia program that requires the setting of pollution control limits to reflect total maximum daily load (TMDL) requirements.

The 4th Circuit found that West Virginia is making good faith efforts to comply with the law and has a credible plan in concert with EPA to produce the required TMDLs. Accordingly, the 4th Circuit reversed the District Court action.

4. EPA Ordered to Act on West Virginia Interstate Air Quality Obligations.

On June 12, 2018, the United States District Court for the Southern District of New York, entered an order (New York, et al. v. Pruitt, et al., Case No. 18-cv-406) directing EPA to: (a) "sign and disseminate a notice by June 29, 2018 of a proposed action fully addressing the obligations under the Good Neighbor Provision for the 2008 ozone NAAQS for Illinois, Michigan, Pennsylvania, Virginia, and West Virginia"; and (b) "promulgate by December 6, 2018 a final action fully addressing the obligations under the Good Neighbor Provision for the 2008 ozone NAAQS for Illinois, Michigan, Pennsylvania, Virginia, and West Virginia."

This litigation is the result of a finding by EPA on July 13, 2015, that West Virginia and certain other states had failed to submit a required plan under the federal Clean Air Act, which triggered an EPA obligation to issue a federal plan.

On June 29, 2018, EPA proposed a rule in which it determined that its Cross State Air Pollution Rule Update (CSAPR) when fully implemented would be sufficient to resolve West Virginia's remaining obligations related to the 2008 ozone NAAQS. Comment will now be taken on that proposal as EPA proceeds with its obligation to issue a final rule by the December 6, 2018 deadline imposed by the Court.

5. Gas Pipelines Stayed by 4th Circuit.

On May 16, 2018, the 4th Circuit Court of Appeals issued an order which vacated the Incidental Take Statement of the Fish and Wildlife Service which allowed development of the Atlantic Coast Pipeline. Sierra Club et al. v. Department of the Interior, et al., Case No. 18-1082. In its brief order, the Court stated that "the limits set by the agency are so indeterminate that they undermine the Incidental Take Statement's enforcement and monitoring function under the Endangered Species Act."

On June 21, 2018, the 4th Circuit also issued an order which stayed the Corps of Engineers permits related to the Mountain Valley Pipeline. Sierra Club, et.al v. Corps of Engineers, et al., Case No. 18-1173. The Court's order was specifically directed at the Corps verification of Nationwide Permit 12 for the pipeline. The stay is issued pending resolution of the underlying petition for review.

6. West Virginia Supreme Court Addresses Questions Related to Long Wall Mining.

On April 12, 2018, the West Virginia Supreme Court of Appeals addressed four questions related to long wall mining that had been certified by the United States Court of Appeals for the Fourth Circuit. McElroy Coal Company v. Schoene, et. al., Case No. 17-0641.

With respect to the first question, the Court ruled that a landowners waiver of "any" surface support was sufficient to waive what would otherwise have been the landowners common law right to subjacent support for the surface. The Court went on to conclude that a waiver which allowed the right to mine coal without leaving any support for the overlaying strata was sufficient to prohibit common law claims related to claims arising out of long wall mining.

Regarding the second question, the Court ruled that even though a common law claim may be waived, if the surface lands and residence of a landowner have been materially damaged from subsidence resulting from underground mining, the surface owner is limited to remedies provided for in CSR 38-2-16.2.c. to 38-2-16.2.c.2.

In addressing the third question, the Court considered that if a surface owner proves injury resulting from a violation of a rule, order, or permit, the surface owner can receive monetary compensation pursuant to W. Va. Code §22-3-25(f), including compensation for annoyance and inconvenience.

On the final question, the Court determined that it is the surface owner who has the authority to elect (under CSR 38-2-16.2.c and 16.2.c.2) whether the coal operator will correct material damage or compensate the owner for the diminution of value.