



## MEMORANDUM

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

cc: Christopher Stadleman, 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: July 12, 2016

Re: Quarterly Report Ending, June 30, 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.

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

**SECOND QUARTER 2016**

**1. U.S. Supreme Court Speaks to Clean Water Act and Agency Implementation**

On May 31, 2016, the U.S. Supreme Court of Appeals issued the opinion in *United States Army Corps of Engineers v. Hawkes Co., Inc, et al.* (No. 15-290). This is a unanimous opinion which is noteworthy since the Court is thought to be of an evenly split philosophy of conservatives and liberals and therefore incapable of unanimity.

The tangible result of the opinion is that one may seek judicial review of a U.S. Army Corps of Engineers' approved jurisdictional determination of areas saturated with water (i.e., mudflats, sandflats, wetlands, sloughs, prairie potholes, we meadows, and playa lakes) as meeting the definition of waters of the United States and therefore trigger permitting and enforcement authorities.

Beyond the Courts holding the opinion contains several comments and observations that may have a bearing on future cases to come before the Court. These include:

New WOTUS Definition is Stayed. Chief Justice Roberts wrote the opinion and reminds the reader that "In 2015, the Corps adopted a new rule modifying the definition of the scope of waters covered by the Clean Water Act in light of scientific research and decisions of this Court interpreting the Act. . . . that rule is currently stayed nationwide, pending resolution of claims that the rule is arbitrary, capricious, and contrary to law." This statement communicates the Court's acknowledgement that there likely is more to come before it concerning the Clean Water Act.

Regulated Community Has Difficulty in Knowing Scope of CWA. "It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does." This characteristic of complexity in implementation of the CWA is not favored by the Court.

Costs and Time are an Important Part of the Regulatory Program "Corps officials signaled that the permitting process would be very expensive and take years to complete." "As Corps officials indicated in their discussions with respondents, the permitting process can be arduous, expensive, and long." "The permitting process adds nothing to the JD." Significant monetary expense and the passage of time with no obvious benefit are not favored by the Court.

Safe Harbor. The Court references "legal consequences" and the ability of the property owner to know of the pragmatic impacts of an approved jurisdictional determination, whether negative or affirmative. The Court favors the regulated person having a clear understanding of the government's opinion of the applicability of the CWA to their operations and therefore the potential legal consequences.

Judicial Review and Due Process. “As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of “serious criminal and civil penalties.” This statement is self-explanatory.

CWA Scope. “But as the Corps acknowledges, the Clean Water Act makes no reference to standalone jurisdictional determinations, *ibid.*, so there is little basis for inferring anything from it concerning the reviewability of such distinct final agency action.” The Court signals that inferred interpretations of the statute warrant little weight when due process is at risk.

Concurrences are offered by the Justices.

Kennedy, Thomas and Alito provide that “the Act’s reach is “notoriously unclear” with references to the Agency’s assertion of “unfettered discretion” ; “ominous reach would again be unchecked”; “due process”, and “troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” These words are repeated in other opinions of the Court relative to environmental statutes and will likely be used again.

Justice Kagan’s concurrence references finality of agency decisions and safe harbors.

Justice Ginsburg emphasizes the finality of the jurisdictional determination and appropriate review and cautions against the Court’s too heavy a reliance on the MOA between the USCOE and USEPA.

## **2. Clean Power Plan Oral Arguments Delayed**

Oral argument on challenges to EPA’s Clean Power Plan, pending in the Circuit Court for the District of Columbia, had been scheduled for June 2, 2016. However, on May 16, the D.C. Circuit on its own motion moved the oral argument date to September 27, 2016. In addition, the case will no longer be heard before the original three-judge panel assigned to it, but instead will be heard by the entire D.C. Circuit Court. The order notes that Chief Judge Garland, who has been nominated by President Obama to serve on the U.S. Supreme Court, did not participate in the decision. The order does not affect the previous “stay” of the rule entered by the Court, but its practical effect is that a decision in this case seems unlikely prior to the General Election this fall.