



MEMORANDUM

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

cc: Mike Hall, 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 Office of Energy

Date: April 16, 2018

Re: Quarterly Report Ending March 31, 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.

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

FIRST QUARTER 2018

1. Waters of the United States.

On January 22, 2018, in the case in *National Association of Manufacturers v. Department of Defense*, Case No. 16-299, the U.S. Supreme Court decided a case related to defining the “waters of the United States” (“WOTUS”).

In its opinion the Court concluded that the WOTUS rule was not the kind of action that could be reviewed by an appellate court. The Court ruled instead that any such challenge must be filed in a district court. Requiring such challenges to be filed in district courts has the obvious effect of keeping the issues local and minimizing the potential for forum shopping.

2. Employment Effects of the Clean Power Plan.

On January 8, 2018, the U.S. Supreme Court declined to hear an appeal filed by Murray Energy Corp. that challenged the decision of the U.S. Court of Appeals for the Fourth Circuit that the Clean Air Act does not authorize lawsuits against the U.S. Environmental Protection Agency for its failure to consider employment impacts of administering or enforcing the Act.

Murray Energy had previously sued EPA in federal district court in West Virginia asserted that EPA had failed to comply with Clean Air Act requirements involving the study of potential job losses that might result from the implementation of the Clean Power Plan. The district court held that EPA had a mandatory duty to conduct such a study and that the reports it produced earlier did not fulfill that obligation.

EPA appealed that decision to the Fourth Circuit, which sided with EPA and reversed the district court decision.

Murray Energy then filed a petition for appeal of the Fourth Circuit’s decision to the U.S. Supreme Court, which resulted in the January 11, 2018 decision.