



MEMORANDUM

To: President Mitch Carmichael, Chair
Speaker Roger Hanshaw, Chair
Joint Committee on Government and Finance

cc: Mike Hall, Chief of Staff
C. Edward Gaunch, Cabinet Secretary, West Virginia Department of Commerce
Wesley White, Deputy Secretary, West Virginia Department of Commerce
Michael Graney, Executive Director, West Virginia Development Office

From: West Virginia Office of Energy

Date: April 8, 2019

Re: Quarterly Report Ending March 31, 2019
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 Amy Smith, Steptoe & Johnson PLLC. Reports are submitted on a quarterly basis.

FIRST QUARTER 2019
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On January 14, 2019, the Fourth Circuit issued an opinion denying a petition to review certification of the Virginia State Water Control Board that it had reasonable assurance that activities related to the construction of a natural gas pipeline would not degrade the state's water resources. *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746 (4th Cir. 2019). The Court concluded that the Board's certification pursuant to Section 401 of the Clean Water Act related to upland areas (the "Section 401 Upland Certification") was not arbitrary and capricious. *Id.* at 750. The Court held that the decision to reopen the comment period did not render the state agencies' Section 401 Upland Certification arbitrary and capricious. *Id.* at 754. The Court also held that the state agencies' decision not to conduct a combined effect analysis did not render their issuance of a Section 401 Upland Certification arbitrary and capricious. *Id.* The Court further found that the state agencies' reasonable assurance determination was not arbitrary and capricious simply because they relied on existing Virginia water quality standards and regulations to effectively address concerns regarding water quality deterioration. *Id.* at 756. Finally, the Court found that the state agencies' treatment of karst terrain was not arbitrary or capricious because of conditions imposed on the Section 401 Upland Certification. *Id.* at 758.

On February 5, 2019, the Fourth Circuit issued an opinion affirming district court orders granting preliminary injunctive relief to Mountain Valley Pipeline ("MVP") and allowing MVP immediate possession to easements that it indisputably has the substantive right to take by eminent domain. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 209 (4th Cir. 2019). The Court held that its prior decision in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004), squarely foreclosed the landowners' argument that the district courts lacked authority to grant immediate possession in a Natural Gas Act condemnation. *Id.* at 215. The Court further held that the district courts did not abuse their discretion in applying the four-pronged test for a preliminary injunction. *Id.* at 216. *See also Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353 (4th Cir. 2019) (holding district court properly granted summary judgment in favor of MVP and did not abuse its discretion in granting MVP's motion for preliminary injunction in condemnation proceeding under the Natural Gas Act).

On February 25, 2019, the Fourth Circuit issued an order denying rehearing and rehearing *en banc* in *Cowpasture River Preservation Association v. Forest Service*, 911 F.3d 150 (4th Cir. 2018), *reh'g denied*, No. 18-1144 (4th Cir. Feb. 25, 2019). As previously reported, in that case the Court concluded that the Forest Service's decisions in issuing a Special Use Permit and Record of Decision authorizing the Atlantic Coast Pipeline, LLC to construct a pipeline through parts of the George Washington and Monongahela National Forests and granting a right of way across the Appalachian National Scenic Trail violate the National Forest Management Act and the National Environmental Policy Act. The Court further held that the Forest Service lacked statutory authority pursuant to the Mineral Leasing Act to grant a pipeline right of way across the Appalachian National Scenic Trail. The action was vacated and remanded for further agency action.

On January 31, 2019, an amended complaint was filed in *EQT Production Co. v. Caperton*, No. 1:18-cv-72 (N.D. W. Va. Jan. 31, 2019). The amended complaint seeks declaratory relief in relevant part as follows: (1) entry of an Order declaring that the original and currently operative Flat Rate Statute's permit-prohibition provision, as applied to preexisting flat-rate leases, violates the United States Constitution's Contract Clause and the Due Process Clause of the Fourteenth Amendment; (2) entry of an Order declaring that the original Flat-Rate Statute's at-the-wellhead royalty provision, which is in force until May 31, 2018 and continues to be enforced against EQT with respect to permits issued pursuant to that law, violates the Contract Clause and the Due Process Clause of the Fourteenth Amendment as applied to preexisting flat-rate leases; and (3) entry of an Order declaring that the currently operative Flat-Rate Statute's unaffiliated-sale-without-deduction royalty provision as applied to preexisting flat-rate leases, violates the Contract Clause and the Due Process Clause of the Fourteenth Amendment. On February 19, 2019, the Court entered an Order Granting Motion to Stay Briefing Schedule and Ruling on Defendant's Motion to Dismiss, which stayed the deadline for the defendant to file any motion to dismiss the amended complaint and requires EQT to file a status report no later than July 19, 2019.