



Week of September 10, 2017

● [U.S. High Court Asked to Review WV Justice's Role in Gas Royalties Case](#)

"The U.S. Supreme Court is being asked to review West Virginia Supreme Court Justice Beth Walker's participation in a high-stakes natural gas royalty case that could have had significant financial implications for energy companies in which her husband owned stock."

Why this is important: On May 26, 2017, the West Virginia Supreme Court issued a decision that allowed lessees producing natural gas under a "fixed rate royalty" lease for which at least a one-eighth royalty was being paid pursuant to W. Va. Code 22-6-8 to deduct reasonable post production expenses in the royalty calculation. This decision was unusual in that it was made as the result of a motion for rehearing and reversed the Supreme Court's prior opinion on this subject after Justice Beth Walker replaced Justice Brent Benjamin, who authored the Court's original decision. Recently, the plaintiffs who lost this decision on rehearing filed a petition for a writ of certiorari with the U. S. Supreme Court claiming that Justice Walker was required to recuse herself from hearing the West Virginia appeal because she had an irreconcilable conflict of interest due to her husband's ownership of publicly traded oil and gas company stocks while the appeal was ongoing. The acceptance of a writ of certiorari by the U.S. Supreme Court is voluntary and typically only about 1 percent of all such writs are granted. Due to the intensely factual nature of the subject matter of this request for certiorari and the low rate of acceptance, it is highly unlikely this petition will even be heard by the U.S. Supreme Court. --- [William M. Herlihy](#)

● [WVU Report: Increased Coal Production Lifts Business Index](#)

"An increase in the Mountain State Business Index has been attributed mostly to increased coal production, according to economists at West Virginia University."

Why this is important: Thanks mainly to increased coal production, West Virginia's business index rose 0.3 percent over July and 2.0 percent over August 2016, although coal growth slowed since spring. The director of the WVU Bureau of Business and Economic Research is "confident that West Virginia's economy remains firmly in recovery territory and should post moderate growth over the next several months." Northern West Virginia coal production growth was driven by higher coal-fired power plant utilization, while southern coal mining output increased due to more robust export demand for both metallurgical and thermal coal. --- [John C. \(Max\) Wilkinson](#)

● [Trump's FERC Nominees Assure Senators They Won't Prop Up Coal](#)

"President Trump's nominees to serve on the Federal Energy Regulatory Commission stressed that they would adhere to the commission's basic duties of approving and regulating the interstate transmission of electricity, natural gas, and oil, without favoring one energy source over another."

Why this is important: The statements of the FERC nominees are important in at least two interrelated respects. First, in

committing not to favor any one fuel source, the prospective commissioners are steering clear of influences that desire an emphasis on climate change considerations, which should largely be the province of the EPA. Second, at least indirectly, the FERC nominees are staking out a general position opposed to fuel-source subsidies, which are particularly topical for those seeking to boost nuclear and coal-fired power generation. In both respects, this would be good news for consumers of electric power who otherwise would ultimately bear the cost of implementing policies and decisions that artificially support any particular source of fuel. --- [Derrick Price Williamson](#)

● [West Virginia Reevaluates MVP; Another WQC Shot Down](#)

"In yet another sign of the growing challenges natural gas pipelines face at the state level, the West Virginia Department of Environmental Protection has thrown out Mountain Valley Pipeline's Section 401 water quality certification and plans to reevaluate the project's application."

Why this is important: The decision by the West Virginia Department of Environmental Protection ("WVDEP") to reverse its approval of Mountain Valley Pipeline's Section 401 water quality certification in favor of reevaluating that certification represents the second time in as many months environmental groups have successfully targeted a state's Section 401 water quality certification to derail or at least slow down regulatory approval of a major interstate pipeline project subject to the jurisdiction of the Federal Energy Regulatory Commission. We reported in our August 24, 2017 edition of *Currents*, Constitution Pipeline's project was at least slowed by a Second Circuit Court of Appeals decision "recognizing that the Clean Water Act effectively provides states with a veto power over local water projects that violate that state's water quality standards." Now that the WVDEP has withdrawn its Section 401 water quality certification subject to reevaluation, environmental groups will be emboldened to increase their efforts to scrutinize Section 401 water quality certification applications as a pinch point to obstruct the orderly approval of interstate pipeline projects. The proponents of any pipeline project requiring a Section 401 water quality certification (which is all of them) will be well served to give increased attention to that process, including enlisting grassroots and political support for these projects at the state regulatory level. --- [Mark D. Clark](#)

● [Can Denver Cut Its Greenhouse-Gas Emissions by 80 Percent? It Will Take 100 Percent Renewable Energy](#)

"Denver floated strategies for meeting its big climate change goal, including pushing Xcel Energy to supply electricity only from renewable sources before 2030. If these strategies are adopted, Denver would join Aspen, Boulder, Nederland and Pueblo among the more than 35 U.S. cities committed to using only renewable energy."

Why this is important: Denver's ambitious goal of receiving electricity only from renewable sources by 2030 will require commercial buildings and 200,000 of the city's households to heat with a fuel other than natural gas. The city's 1 percent annual growth will further complicate the effort due to increased populace and travel requiring additional offsets. Denver's utility currently generates 46 percent of its power from coal and 25 percent from natural gas, but has requested permission from Colorado's Public Utilities Commission to reduce those percentages to 23 percent and 22 percent respectively by 2026. The coal/gas capacity decrease is to be made up by 40 percent wind, 14 percent solar and 1 percent hydro. --- [John C. \(Max\) Wilkinson](#)

● [Environmental Groups, Senator Challenge \\$225M Exxon Deal](#)

"New Jersey's \$225 million settlement with Exxon Mobil short-changed the public, four environmental organizations and a Democratic state senator told an appeals court Monday, adding they should be allowed to push for more cash."

Why this is important: Most courts are going to be reluctant to overturn the trial court's decision that certain persons or groups didn't have standing to challenge a settlement that was reached many years ago, after a month-long trial. The environmentalists are essentially asking to re-litigate the issues, which could backfire if Exxon has good liability defenses, or the clean-up is less than the settlement amount. The fact that Exxon didn't pay what the state was asking to cover remediation costs is no surprise, as any good plaintiff, state or private citizen, is going to greatly inflate its damage estimate. Allowing the reopening of the case will set a bad precedent for settlements, and make them more difficult to negotiate. --- [David L. Yaussy](#)

● [Power Plant Rule Repeal Announcement Likely This Fall: EPA](#)

"Federal officials expect to finalize their review of the Obama administration's climate rule for power plants this fall, the Environmental Protection Agency said Thursday in a court filing."

Why this is important: The final version of the Clean Power Plan ("CPP") would require the national electricity sector to cut its carbon emissions by 32 percent by 2030. This will be done by creating a shift from coal-fired power generation while also curbing a rush to replace the lost generation with natural gas. A hidden, but not unintentional, purpose of the CPP is to create a regulatory framework where states with significant coal and natural gas generation would be forced to purchase carbon/emission credits from states without such generation in order to comply with the CPP. This review of the CPP is necessary given the tremendous effect it will have upon the national electricity sector, steam coal producers, natural gas producers, as well as state governments. --- [Nicholas S. Preservati](#)

● [DRBC Takes a Step Toward Banning Fracking in Northeast Pa.](#)

"Commissioners from three states including Pennsylvania, New York and Delaware, approved a resolution that could lead to a fracking ban in the Delaware River watershed. New Jersey abstained and the federal representative from the Army Corps of Engineers voted no, which elicited a round of boos."

Why this is important: While this is just a resolution to start the rulemaking process in 2017, it clearly seems to be the beginning of the end for drilling in Wayne and Pike Counties in Pennsylvania. The fact Pennsylvania voted in favor of a resolution containing language calling for "prohibitions related to the production of natural gas utilizing horizontal drilling and hydraulic fracturing within the Basin," should be troubling to any oil and natural gas operator in the state and clearly shows Governor Wolf's "clothing." --- [James D. Elliott](#)

● [The Environmental Protection Agency May See Its Staffing Fall to 14,428 - The Lowest Level Since the Reagan Administration](#)

"The EPA employs about 14,880 people, but administration officials made clear this spring that they intended to reduce those numbers in several ways. The agency also has been under a hiring freeze. And in June, the EPA said it planned to offer buyouts and early retirement packages to more than 1,200 people by early September."

Why this is important: The anticipated cuts at the EPA are the result of this administration following through on its campaign promise to streamline the bloated agency. The staff cuts are the result of approximately 50 EPA programs that have been, or soon will be, eliminated by the new administration. --- [Kelly G. Pawlowski](#)

● [Doddridge County, West Virginia Case Called a Boost for Surface Owners in Marcellus Gas Region](#)

"Two Doddridge County residents have won a court ruling and a jury verdict that advocates for surface owners' rights say provide a boost in the ongoing struggle over the impacts of the Marcellus Shale gas-drilling boom in Northern West Virginia."

Why this is important: Horizontal wells account for nearly 90 percent of all natural gas currently produced in West Virginia. Horizontal well laterals generally extend between 5,000 and 9,000 feet and, in nearly every case, beyond the surface tract upon which the well pad is constructed. While the West Virginia Legislature has recognized and embraced the technological advances that enable horizontal drilling, and the common law permits a mineral interest owner or lessee to do what is reasonably necessary to develop the mineral estate, surface owners continue to contest the right to use a surface estate to develop adjoining mineral estates. While it remains to be seen if EQT will appeal the decision, substantially similar issues are currently pending before the West Virginia Supreme Court. Depending on those results, the jury verdict could establish a baseline for damages in future related cases. --- [Matthew P. Heiskell](#)

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