Earl Ray Tomblin
Governor

WEST VIRGINIA DIVISION OF ENERGY

Jeff Herholdt
Director

MEMORANDUM

To: Acting President Jeff Kessler, Chair
Speaker Richard Thompson, Chair
Joint Committee on Government and Finance

cc: Jason Pizatella, Legislative Director
Keith Burdette, Cabinet Secretary, West Virginia Department of Commerce
Angel Moore, Deputy Secretary/General Counsel, West Virginia Department of Commerce

From: Jeff Herholdt, Director
West Virginia Division of Energy

Date: July 13, 2011

Re: Quarterly Report Ending June 30, 2011
Legal Challenges Potentially Impacting the Energy Industry

As mandated by SB 518, the following information presents legal challenges with the potential to impact the state's energy industry. This initial submission has been summarized by the West Virginia Chamber of Commerce's Energy Committee. Future reports will be submitted on a quarterly basis.

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REPORT ON LITIGATION RELATED TO
ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA
QUARTER ENDING JUNE 30, 2011

1. Supreme Court Rules CAA Trumps Federal Common Law Carbon Dioxide Emissions Abatement for Power Plants

The US Supreme Court on June 20, 2011, issued a slip opinion in the climate change nuisance case AEP v. Connecticut, which was argued April 19, 2011. A prior case, Massachusetts v. EPA, 549 US 497, had held that the Clean Air Act (CAA) authorizes regulation of greenhouse gasses and that EPA had misread the statute in denying a petition to establish greenhouse gas emission limits for new motor vehicles. In response to that case, EPA subsequently initiated a rulemaking process to establish New Source Performance Standards for greenhouse gas emissions from new, modified, and existing fossil fired power plants.

In the case at bar, which was commenced prior to EPA's recent rulemaking proposal, two groups of plaintiffs filed separate complaints in a Federal District Court against the same five major electric power companies. One group of plaintiffs included eight States and New York City; the second joined three nonprofit land trusts. According to the complaint, the defendants are the nation's largest emitters of carbon dioxide. Plaintiff alleged that, by contributing to global warming, the defendants' emissions substantially and unreasonably interfered with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. All plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.

The District Court dismissed both suits as presenting nonjusticiable political questions, but the Second Circuit reversed. On the threshold questions, the Circuit held that the suits were not barred by the political question doctrine and that the plaintiffs had adequately alleged Article III standing. On the merits, the court held that the plaintiffs had stated a claim under the "federal common law of nuisance," relying on the Supreme Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry, see, *e.g.*, *Illinois* v. *Milwaukee*, 406 U. S. 91, 93 *(Milwaukee I)*. The Federal District Court also held that the CAA did not "displace" federal common law.

In AEP V. Connecticut, the Supreme Court holds that the Second Circuit's exercise of jurisdiction is appropriate. More importantly, the Court holds that the CAA and the EPA action that the CAA authorizes displace any federal common-law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants.

The Court reasons:

> If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See §7607(b)(1).The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. There is no room for a parallel track.

The Court adds that the prescribed decision making framework of the CAA is another reason to avoid setting standards by judicial decree under Federal tort law.

A door remains slightly open for further action based on the fact that the plaintiffs also sought relief under state nuisance law. The Supreme Court notes that the Second Circuit decision did not reach those claims because it held that federal common law governed. Accordingly, the Court says that the availability of a state lawsuit depends on the preemptive effect of the federal Act, adding that "[b]ecause none of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law, the matter is left for consideration on remand."

The Court in its decision June 20 remands the case to the Second Circuit "for further proceedings consistent with this opinion."

2. EPA Proposed Emission Standards for Hazardous Air Pollutants from Fossil Fuel-Fired Power Plants

On May 3, 2011, EPA published a proposed rule to establish national emission standards for hazardous air pollutants (NESHAP) from fossil fuel-fired electric utility steam generating units (EGUs). The agency is receiving public comments on the proposed rule until August 4, 2011, and will likely release a final rule by November of this year.

The primary justification for the proposed emission standards is EPA's concern over mercury. Fossil fuel-fired EGUs are currently the largest source of anthropogenic (man-made) mercury in the United States, and also contribute a large portion of other hazardous air pollutants (HAPs) of concern. In December of 2000, EPA concluded a study which showed how mercury circulates in the environment once it is released into the air. Based on this 2000 study, EPA determined that bioaccumulation of mercury represented a continuing human health risk, especially to developing children, and placed EGUs on the list of source categories that can be subject to HAP regulations.

EPA reversed course in 2005, however, and determined that it was neither appropriate nor necessary to regulate HAPs from fossil fuel-fired EGUs and removed them from the source category list. The rationale was that the 2000 study lacked a proper foundation and that new information undermined the study's findings. Environmental groups, States, and Indian tribes successfully challenged EPA's 2005 decision to remove EGUs from the source category list, and the D.C. Circuit Court vacated EPA's 2005 de-listing decision. In 2008, additional lawsuits by environmental groups and public health organizations challenged EPA's continued failure to promulgate standards for HAPs from fossil fuel-fired EGUs. EPA settled this lawsuit by promising to propose emission standards for EGUs by March of 2011 and a notice of final rulemaking by November of the same year.

The standards EPA has proposed for existing EGUs are Maximum Achievable Control Technology (MACT) standards, which are calculated by looking at the best performing 12 percent of all currently existing EGUs. If EPA promulgates final emission standards in a few months, EGUs would have three years to come into compliance with the new standards.

While EPA estimates that its proposed emission standards will reduce mercury emissions from EGUs by 79 percent in 2015 and significantly reduce various other hazardous air pollutants, these improvements do not come without a cost. "EPA projects that approximately 9.9 GW of coal-fired generation (roughly 3 percent of all coal-fired capacity and 1% of total generation capacity in 2015) may be removed from operation by 2015." Additionally, it is estimated that these new emission standards will increase electricity prices in the continental U.S. by 3.7 percent when the rules take effect in 2015.

3. Morgantown City Council Votes to Ban Fracking

In a six to one vote, the Morgantown, West Virginia, City Council passed an ordinance banning hydraulic fracturing within a one mile radius of its city limits. The ban, which was passed during the June 21 regular City Council meeting, prohibits any operations using horizontal drilling and fracking to operate within the city limits or within one mile of the city limits. The decision has raised both support and criticism from the community, industry, and the City Council itself.

The ordinance's passage has sparked a legal debate and a law suit. Northeast Natural Energy, a company operating two Marcellus gas wells in the Morgantown area, filed suit in Monongalia County Circuit Court on June 24. The complaint requests a temporary injunction prohibiting the ordinance from taking effect. *See* http://www.thedaonline.com/news/fracking-ban-questioned-in-county-court-1.2418458. Also included in the lawsuit is Enrout Properties, LLC, a company that owns the mineral rights to the land Northeast is drilling on. Among other things, the complaint alleges that the ordinance illegally bans activity outside of the city limits. Monongalia County Circuit Judge Russell Clawges denied the injunction request.

The West Virginia Constitution states that any municipal ordinance or charter "shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted." W. Va. Const. art. 6, §39(a). Therefore, if it is found that the ordinance conflicts with sections of the West Virginia Code, it could be deemed unconstitutional and, therefore, unenforceable. In addition to concerns of constitutionality, the ordinance raises concerns about conflicts with mineral owners' rights.

4. EPA Issues Draft Guidance to Identify Waters Protected by the Clean Water Act

On April 27, 2011 the United States Environmental Protection Agency (USEPA) and the United States Army Corps of Engineers (Corps) issued its long awaited guidance for determining whether a particular "water" is protected by the Clean Water Act. Following the United States Supreme Court decision in *Rapanos v. United States & Carabell v. United States* there has been increased uncertainty regarding the interpretation of whether a waterbody meets the definition of "waters of the United States" and is subject to regulation under the Clean Water Act. This Draft Guidance on Identifying Waters Protected by the Clean Water Act is designed to reduce the uncertainty.

The draft guidance is available at
http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters_guidesum.cfm