Joe Manchin III
Governor

Kelley Goes
Secretary, WV Department of Commerce

WEST VIRGINIA DIVISION OF
ENERGY

Jeff Herholdt
Director

MEMORANDUM

To: President Earl Ray Tomblin, Chair
Speaker Richard Thompson, Chair
Joint Committee on Government and Finance

cc: Jim Pitrolo, Legislative & Policy Director
Kelley Goes, Cabinet Secretary, West Virginia Department of Commerce

From: Jeff Herholdt, Director
West Virginia Division of Energy

Date: October 6, 2010

Re: Quarterly Report Ending September 30, 2010
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.

Summary of Federal, State and One County Case
Potentially Impacting the Energy Industry

Over 330 West Virginia related cases have been reported from both the state level and the federal appellate court levels that in some fashion involve the energy industry or its impacts on existing case law. The majority of these cases are routine cases and controversies where parties have approached the courts to determine resolution or approval of settlements. Some of these cases only reference previous rulings that involved the energy industry. Only a few of these cases touch upon new issues that warrant review to determine whether there are any state legislative actions that should be considered. Based upon limited research only one county level case is included. There may be additional county level cases that warrant consideration.

1. WVDEP Use of Extended Compliance Schedules for NPDES Permit Effluent Limits.

Sierra Club and Ansted Historic Preservation Council, Inc. v. Powelton Coal Company, LLC,. 2010 WL 454929 (Feb. 3, 2010 S.D.W.Va.)

Plaintiff-environmental groups brought a Clean Water Act ("CWA") citizen suit against Powellton Coal Co., LLC ("Powellton") for violations of three NPDES permits issued for its Bridgefork Mine complex in Fayette County. In order to initiate a CWA citizen suit, a party must provide the mine operator and DEP a notice of intent to sue ("NOI") at least 60 days prior to filing the action. After Plaintiffs issued the NOI—but before they filed suit—Powellton voluntarily entered into a consent order with the West Virginia Department of Environmental Protection ("DEP") to address violations of its NPDES permits. After Plaintiffs filed their suit, Powellton moved to dismiss on the grounds that the violations which were the subject of the suit had already been addressed by the DEP Consent Order.

The Court found that the Consent Order did not preclude the citizen suit because of the "realistic prospect" that Powellton would continue violating its NPDES permit, and due to the fact that the violations enumerated in Plaintiffs' complaint were more extensive than those encompassed by the DEP Consent Order. The Court also rejected Powellton's argument that modification orders, issued by DEP to extend report-only requirements for aluminum, absolved it of liability for aluminum violations. The Court ruled that DEP did not follow the proper public notice procedure for a major modification of an NDPES permit necessary to modify Powellton's compliance schedule. The Court denied the parties' motions for summary judgment pertaining to whether violations were ongoing and reserved ruling until after evidentiary hearings. In September, the parties entered into a settlement agreement that required Powellton to reduce its discharges of aluminum, iron, and other pollutants into tributaries of the Gauley River. As part of the settlement, Powellton also agreed to pay $134,000 in federal fines and to donate $1.2 million to the WVU College of Law for the establishment of a legal clinic aimed at environmental advocacy.

Judge Copenhaver's ruling highlights two issues for DEP moving forward as the State's primary environmental enforcement body. First, this is only one in a number of decisions to emphasize the importance of complying with federal requirements where major modifications (including extending a compliance schedule) to permits are involved. Second, DEP and the

regulated party must craft consent agreements with an eye towards potential federal enforcement actions. Efforts should be made to ensure that the agreements are sufficiently inclusive, expansive, and stringent so as to ensure that additional actions by either EPA or citizen-groups are precluded. These precautionary measures will prevent mine operators from facing enforcement actions at both the state and federal level and will preserve DEP's role as the primary CWA enforcement body for the State's mining industry.

2. Example of New Land Use Disputes Related to Pipeline. *EQT Gathering Equity, LLC, v. Fountain Place, LLC*, Civil Action No. 2:09-0069., March 5, 2010. 2010 WL 816824 (S.D.W.Va.)

Servient tenement owner was required to pay for the dominant tenement owner to bury its pipeline since the work was being done solely for the benefit of the servient tenement owner. The dominant tenement owner had a pipeline along a road that the servient tenement owner intended to use to allow for the building of a cell phone tower on the servient tenement owner's land. Although the language creating the easement required the dominant tenement owner to move the pipeline if it interfered with the servient tenement owner's use of the land, there was no provision as to who should pay for the work. Since the servient tenement owner wished to upset what had been the status quo for some time and because the only benefit would be for the servient tenement owner, the servient tenement owner had to pay for the dominant tenement owner to bury the pipeline.

3. Lack of Treatment Solution for Selenium Proves Ongoing Problem for Coal Industry.

Federal District Court Judge Robert C. Chambers has issued a number of rulings in 2010 relevant to the coal industry's compliance with water quality standards for selenium. Two subsidiaries of Patriot Coal Corporation ("Patriot")—Hobet Mining, LLC ("Hobet") and Apogee Mining, LLC ("Apogee")—were the subject of three separate citizen suits filed by the Ohio Valley Environmental Coalition ("OVEC") for violations of final effluent limits for selenium: Civil Action No.s 3:07-0413, 3:08-0088, and 3:09-1167.

A. *OVEC v. Hobet*, 702 F. Supp. 2d 644 (S.D.W.Va. 2010)

Hobet moved to dismiss Civil Action No. 3:09-1167, arguing that OVEC failed to meet the redressability prong of the standing requirements. OVEC based its standing on the harm to its aesthetic and recreational interests in the Berry Branch and Mud Creek area, into which Hobet's operations discharged. Hobet pointed out that bringing its operations into compliance, or even ceasing discharges altogether, would still not lower the levels of selenium sufficient to meet federal water quality standards. Judge Chambers found that Plaintiffs did not have to show that granting them the relief requested would alleviate all of their concerns. Rather, a ruling in their favor would be sufficient to redress their injuries by reducing the amount of selenium in the water, thereby reducing their emotional distress.

B. *OVEC v. Hobet*, 2010 WL 2739990 (S.D.W.Va. 2010)

In a separate decision issued in July, Judge Chambers addressed Hobet's remaining arguments in favor of dismissing Civil Action No. 3:09-1167. Similar to *Powellton*, Hobet argued that an ongoing enforcement action by DEP mooted Plaintiffs' claims for selenium violations. Like Judge Copenhaver, Judge Chambers refused to defer to DEP's enforcement action, finding a realistic prospect of continued violations. Judge Chambers relied, in part, on the lack of any identifiable solution to the selenium problem for his finding that violations would likely continue.

C. *OVEC v. Apogee*, Civil Action No. 3:07-0413

In August, three days of hearings were held on Apogee's motion to modify a court-approved consent decree entered into by the parties and on Plaintiffs motion to hold Apogee in contempt for failing to meet deadlines established in the consent decree aimed at bringing Apogee's operations into compliance with selenium limits. On September 1, Judge Chambers granted Plaintiffs motion to hold Apogee in contempt and denied Apogee's motion to modify the consent decree. The judge ordered Patriot to install the Fluidized Bed Reactor treatment system — which uses bugs that eat the selenium — within 2 1/2 years at its Ruffner site and also to install treatment within 2 years and 8 months at its Hobet 22 Mine along the Boone-Lincoln County line. Judge Chambers also ordered the company to post within two weeks a $45 million letter of credit that would ensure the treatment systems are installed. The judge also plans to appoint a special master to oversee the situation.

D. Additional Selenium Cases Awaiting Ruling

Final effluent limits for selenium were to take effect industry wide in April of 2010. During the last legislative session, the legislature authorized DEP to extend the "report only" compliance schedules until 2012—a tacit acknowledgment that no known solution to the selenium problem has yet been discovered. As the April 5 deadline approached, companies began requesting extensions from DEP until 2012. DEP proposed to grant some extensions and denied others. For those that DEP proposed to grant, EPA issued objections. Pursuant to the CWA and a 1982 Memorandum of Agreement between the State and EPA, DEP may not issue an NPDES permit over EPA's objection. EPA and DEP failed to resolve EPA's issues with the proposed permits. All of the miner operators who requested extensions obtained stays of the final limits from the Kanawha County Circuit Court and the Environmental Quality Board. The stays were necessary to prevent final limits from taking effect; the CWA contains an anti-backsliding provision which prohibits allowing effluent limits in an NPDES permit to be less stringent than previously issued final limits. The State Court and EQB stays did not stop environmental groups from suing various mining companies in federal court for alleged violations of selenium limits, which they claim became effective on April 5, despite the stays. Various operators moved for summary judgment on the basis of the stays. Judge Chambers has yet to rule on the validity of the stays.

Judge Chambers's rulings are cause for great concern in the coal industry. Judge Chambers has repeatedly demonstrated a willingness to disregard State enforcement actions in favor of allowing environmental groups to advance policy regarding progression towards

selenium compliance. This means operators receive no guarantees when they submit themselves willingly to enforcement by the State that they will not also be forced into federal court to answer for the same violations. Moreover, as evidenced by the September 1 ruling, the road to compliance with selenium limits will undoubtedly be expensive, and there remains the fact that no economically feasible technology has been identified that can effectively treat, on a large scale, the surges and flows necessary to bring the discharges of a large surface mine site into compliance with selenium water quality standards.

4. U.S. EPA Authority to Review U.S. COE Fill Permit.

Ohio Valley Environmental Coalition, et al. v. United States Army Corps of Engineers, et al. v. Independence Coal Company, et. al., Intervenor-Defendants, 2010 WL 1633315 (S.D.W.Va. April 22, 2010).

After nearly a decade of review, the U.S. Army Corps of Engineers issued a CWA § 404 fill permit to Mingo Logan Coal Company for its Spruce Mine in Logan County. The Corps issued the permit in 2007, and Plaintiffs immediately filed suit challenging the permit. In 2009, Mingo Logan moved for summary judgment as to all of the relevant issues based on Fourth Circuit's decision in *Ohio Valley Environmental Coalition, Inc. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir.2009). Prior to the Court's ruling, the EPA initiated proceedings under section 404(c) of the CWA to veto the permit, in spite of its previous approval of the permit under the Bush administration. The U.S. Department of Justice and the Corps moved to stay the case, on EPA's behalf, to prevent it from interfering with EPA's deliberative process. Judge Chambers granted the U.S.'s request to stay the case and has granted repeated stays since then. The stay order itself is not that important from a policy perspective. However, if EPA's willingness to exercise its rarely-used veto power (the Spruce veto is only the 13th since the CWA's passage) proves to be a trend, then this—coupled with the federal district court's repeated acquiescence to EPA's stay requests—could prove highly detrimental to obtaining CWA section 404 permits necessary for surface mining operations.

5. McDowell County Circuit Court Interpretation of the Deep Well and Shallow Well Statutory and Regulatory Programs. *Blue Eagle, LLC, et al. v. West Virginia Oil and Gas Conservation Commission, et al.,* Civil Action No. 08-CAP-171, McDowell Co. Cir. Ct.

McDowell Circuit Court Judge Murensky ruled on September 27, 2010, that wells drilled more than twenty feet into the Onondaga formation are "deep wells" under several oil and gas statutes (W.Va Code §§22C-8 and 22C-9), even though the wells are not completed in or below the Onondaga. This will present significant increased costs for the drilling regulatory program.