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

From: Jeff Herholdt, Director
West Virginia Division of Energy

Date: January 18, 2011

Re: Quarterly Report Ending December 31, 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.

Litigation Potentially Impacting the Energy Industry
(4th Quarter 2010 – Ending December 31, 2010)

I. COAL

A. Selenium

The legal actions most relevant to the coal industry as a whole during the last quarter involved appeals of selenium limits that were set to take effect in April of 2010. The Environmental Quality Board ("EQB") previously allowed the West Virginia Department of Environmental Protection ("WVDEP") to issue Amended Orders extending the date for compliance with final selenium limits by three years until April 5, 2010, at which point surface mine operators would have been required to meet final effluent limits for selenium of 4.7 ppb. Recognizing that no coal mining operation has yet been capable of consistently meeting final effluent limit of 4.7 ppb, many operators submitted modification applications to WVDEP prior to the April 5, 2010 deadline. Through these modification requests, the industry sought to extend the schedule for achieving compliance with final effluent limits until the July 1, 2012 deadline established by the West Virginia Legislature in W.Va. Code § 22-11-6 (2009).

WVDEP denied the requests of those operators it did not feel had taken adequate steps towards achieving compliance and proposed to grant the requests of those operators whose compliance efforts it deemed worthy of an extension. When WVDEP issued draft permit modifications, however, EPA issued a general objection and followed that with a specific objection to the permits. WVDEP may not issue an NPDES permit or modification over an EPA objection. Ultimately, WVDEP denied most, if not all, extension requests.

Upon receiving the denials of the extension requests many operators filed appeals with the EQB and were granted stays of the final limits until the EQB had an opportunity to decide the appeals on the merits. Many of those appeals are being resolved by WVDEP enforcement actions in Circuit Court. The EQB is scheduled to hear the remaining appeals in February. Complicating matters is that fact that environmental groups are currently pursuing citizen suits in federal court before Judge Chambers in spite of the ongoing state administrative proceedings. *See e.g., OVEC v. Independence Coal Co., LLC,* WVSD # 3:10-cv-00836. The cases pending before Judge Chambers against Apogee Coal Company, LLC and Hobet Mining, LLC were discussed in detail in the report for the third quarter. In October, Judge Chambers held Apogee and Hobet in contempt of their consent decree for failing to bring their discharges into compliance with the water quality standards and ordered them to post a $45 million letter of credit to ensure that the fluidized bed reactor treatment systems (a system that essentially uses bugs to eat the selenium) are installed at their operations. *See OVEC v. Apogee*, --F. Supp. 2d--, 2010 WL 3955828 (S.D.W.Va. Oct. 8, 2010). As explained in the previous report, the selenium problem has the potential to be highly costly to the industry as a whole.

B. Conductivity

The Environmental Quality Board held a hearing from December 14-17 in *Sierra Club v. DEP*, 10-34-EQB. Through this appeal, the Sierra Club is challenging a modification to an NPDES permit that expanded a surface mine in Monongahela County. The Sierra Club claims that DEP should have imposed limits on conductivity, sulfate and whole effluent toxicity(WET) because there was a reasonable potential in the absence of such limits that the discharges would violate West Virginia's "narrative" water quality standard. There are currently no numeric standards in West Virginia for conductivity or sulfate, but Sierra Club is requesting that the EQB impose limits of conductivity(300 uS/cm) and sulfate (50 mg/l), levels considered unachievable by any Appalachian surface mine without the use of highly expensive reverse osmosis technology.

Sierra Club produced witnesses who relied on EPA's Draft Conductivity Benchmark publication as well as their own academic research to argue that impacts to sensitive genera of fish and aquatic macroinvertebrates are significant enough at conductivity of 300 uS/cm to constitute a violation of the narrative standard. While Sierra Club's witnesses waivered on whether conductivity itself is causing harm to aquatic life, they testified that conductivity's presence is sufficiently correlated with aquatic harm to justify restricting in-stream conductivity to 300 uS/cm to enforce the narrative standard.

Beyond the scientific debate regarding the harm of conductivity at 300 uS/cm is the issue of whether EPA or West Virginia should define what is a violation of the state's narrative standard. On April 1, 2010, EPA issued guidance seemingly requiring states to to impose limits of 300 or 500 uS/cm in NPDES permits associated with coal mining permits in Central Appalachia to avoid violations of State-issued narrative water quality standards. In response, WVDEP issued guidance of its own in August 2010 rejecting the use of those "benchmark" values, noting that conductivity is a poor indicator of stream health.

C. DEP Must Obtain NPDES Permits for Reclamation Efforts

The Fourth Circuit recently held that DEP's status as a state agency did not exempt it from the CWA's permit scheme in connection with reclamation efforts at abandoned mine sites. *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159 (4th Cir. 2010). The Court also held that, because the CWA did not contain a causation requirement, the fact that DEP did not create the conditions necessitating reclamation did not excuse it from compliance. In sum, DEP's state law obligations to take over bond forfeiture sites and engage in reclamation efforts also invoke the CWA's obligations to obtain NPDES permits. The solution to this burden suggested by the Court was for West Virginia to petition Congress or the EPA to create exceptions to the CWA for states that move to ameliorate the problems private companies leave behind.

D. EPA's Veto Power

The EPA received its eleventh stay of proceedings on November 2, 2010 in *OVEC v. U.S. Army Corps of Engineers*, Civil Action Nos. 3:05-0784, 3:06-0438. *See* 2010 WL 4642023 (S.D.W.Va. Nov. 2, 2010). This case involves OVEC's (an environmental group) challenge to a CWA Section 404 dredge and fill permit issued to Mingo Logan Coal Company in connection with its Spruce No. 1 mine in Logan County. In July of 2009, Mingo Logan moved for summary judgment on a number of Plaintiffs' claims against the Corps of Engineers. In the interim, however, EPA initiated veto proceedings pursuant to CWA Section 404(c). Presumably upon urging from EPA, the Corps requested an extension of its deadline for filing a response to Mingo Logan's summary judgment in order to prevent a ruling before EPA had the chance to veto the permit. As he has done ten times previously, Judge Chambers granted the Government's extension request, thereby delaying any ruling on Mingo Logan's summary judgment motion, the grant of which was made a near certainty by the Fourth Circuit's decision in *OVEC v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). It appears as though EPA will be allowed to delay a ruling on Mingo Logan's motion until it has the opportunity to veto the permit, at which point Judge Chambers will likely dismiss the case as moot, and Mingo Logan will be forced to sue EPA. This will undoubtedly prove to be an uphill battle given that no 404 permittee has ever successfully challenged an EPA veto.

E. Miscellaneous

In *Wooten v. Coal Mine Safety Board of Appeals*, --S.E.2d--, 2010 WL 4394284 (Nov. 1, 2010), the West Virginia Supreme Court held that W.V.C.S.R. did not require the Office of Miners' Health, Safety and Training to have evidence of visible intoxication to decertify a miner who was involved in an accident. Rather, the OMHST was only required to prove the miner was under the influence of an intoxicant.

F. WVDEP sues U.S. EPA

In *Huffman et al v. United States Environmental Protection Agency et al*, United States District Court Southern District of West Virginia, civil docket # 2:10-cv-01189, plaintiff Randy C. Huffman, Cabinet Secretary of the West Virginia Department of Environmental Protection ("WVDEP"), and acting on behalf of the State of West Virginia filed a complaint on October 6, 2010 for declaratory and injunctive relief against United States Environmental Protection Agency ("EPA") and United States Army Corps of Engineers ("the Corps") seeking relief from a series of actions taken by EPA and the Corps that according to the complaint "unlawfully seek out and target surface coal mining in West Virginia and five other Appalachian states. With these actions, EPA and the Corps have demonstrated a brazen disrespect for the notice-and-comment rulemaking that forms the backbone of proper regulatory action by giving the States and interested parties an opportunity to comment upon proposed rules before implementation. Instead, the Defendants have acted unilaterally in reliance on questionable scientific literature,

much of which has not withstood proper review from the scientific community. Beginning as early as January 2009, EPA appeared impatient and anxious – "champing at the bit" – to take a stand against certain types of mining in select Appalachian states with utter disregard for the economic impact upon the people in those states. EPA's unjustified and unlawful actions have obstructed and delayed permitting processes under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., to such degree that, absent judicial intervention, they could sound the death knell for surface coal mining in West Virginia and five other Appalachian states."

West Virginia brought suit under Sections 702 and 706 of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 706, challenging the Enhanced Surface Coal Mining Pending Permit Coordination Procedures issued by EPA and the Corps on June 11, 2009 (the "ECP"), and the Detailed Guidance Memorandum issued by EPA on April 1, 2010 (the "Detailed Guidance"). The two documents became effective immediately upon their issuance and have been applied by EPA and the Corps to pending permit applications for West Virginia surface mining operations. According to the complaint "[t]hose agency actions were taken outside of formal rulemaking procedures and amount to de facto substantive rule changes in violation of the Administrative Procedures Act ("APA"), 5 U.S.C. § 500 et seq. The ECP and Detailed Guidance constitute final agency actions because they have been and continue to be used as standards by which EPA and the Corps make decisions regarding, comment on, and object to surface (and other) mining permits, including those permits affecting West Virginia."

The Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, Kentuckians for the Commonwealth, Inc., Southern Appalachian Mountain Stewards, Statewide Organizing for Community Empowerment, have moved the court to intervene in this matter. The judge has not ruled granted intervention as of January 10, 2011. The case is still being actively litigated at this time.

II. OIL & GAS

A. Mineral Exploration in State Parks

Cabot Oil and Gas Corporation v. Huffman, --S.E. 2d--, 2010 WL 4398151 (W.Va. 2010). In this matter, the Supreme Court of Appeals of West Virginia evaluated whether or not it was appropriate to permit oil and gas drilling at Chief Logan State Park, where the oil and gas rights had been withheld by a private party as part of the deed conveyance prior to the creation of the state park. The Court held that W. Va. Code 20-5-2(b)(8) which states "(b) The Director of the Division of Natural Resources shall: (8) Propose rules for legislative approval in accordance with the provisions of article three [29A-3-1 et seq.] chapter twenty-nine-a of this code to control the uses of parks:

Provided, That the director may not permit public hunting, except as otherwise provided in the section, the exploitation of minerals or the harvesting of timber for commercial purposes in any state park" "clearly does not apply to mineral not owned by the state. To apply it otherwise would deprive the mineral owners of their private property rights and would be blatantly unconstitutional." *Id.* Thus WVDEP was required to issue the appropriate permits to allow for oil and gas development in Chief Logan State Park.