



## Capital Eye

Volume 11, No. 2 ~ January 21, 2011

### Supreme Court Agrees – Election for Governor in 2011

By Gary Zuckett, [garyz@wvcag.org](mailto:garyz@wvcag.org)

As I walked from the Capitol on Tuesday afternoon, my cell phone rang and Hoppy Kercheval, host of the statewide Talkline radio show, asked if I could call into the afternoon show to comment on the WV Supreme Court's ruling. Hurrying back to the office to download and read the Court's 5-0 opinion supporting our petition, I found calls from television stations, statewide newspapers and the New York Times! To read the story, click on:

<http://thecaucus.blogs.nytimes.com/2011/01/18/wa-court-orders-special-governor-election/>

CAG is proud to have been the lead group to make sure that the citizens of our State have the right to elect their governor this year. The complete record of this court action can be accessed on the Supreme Court's web page at:

<http://www.state.wv.us/wvsca/Clerk/cases/WVCAG-v-Tomblin/index.html>. Scroll down and click on

"Opinion" to see the Ruling and "Mandate" to see the message they sent to acting Governor Tomblin ordering him "...**forthwith** to issue a proclamation to fix a time for a new statewide election..."

As this is being written, the Charleston Gazette's statehouse blog has Tomblin announcing an October 4<sup>th</sup> general election for governor and a bill to be introduced at the Legislature to schedule a special primary on West Virginia Day (June 20th). State law currently calls for the Democrats, Republicans and Mountain Parties to choose their candidates for this special election by party convention. Shocking as this may seem to us modern day voters; this was the norm for much of our State's history and would save the state \$3-4 million in primary election costs this year.

Changing election law in election years has always been touchy but with many of the legislative leaders (not to mention Secretary of State Tennant) running

for governor, it's going to be extremely challenging to broker an agreement for a special primary in this election. We just did it for last year's special Senate election but no one from the Legislature was running in that race.

**Action item:** Now is the time to make your voice heard if you want a primary election this year. Contact your legislators, the House Speaker and the Senate President. They have the ability to make it happen and will do it if they think the backlash from inaction will hurt them.

### Matching Donation Challenge!

A CAG member who wishes to remain anonymous challenges you to double your donations to our organization during this year's Legislative session! This generous individual will match your contribution of \$50 or more, up to \$3,000! So why not step up to the plate and let your donation double itself for a great cause? The money raised will go towards funding our lobbying efforts and legislative campaigns. Mark your check with the note "for challenge donation." Our first \$100 is already in – please consider your dollars well spent!

### Marcellus Shale Bills: What's in them (and what's not)? – Volume 1

By Julie Archer, [julie@wvcag.org](mailto:julie@wvcag.org)

Although no bills have been officially introduced, there will be at least two comprehensive proposals regulating Marcellus Shale for the Legislature to consider this session.

The first bill was prepared by the WV Department of Environmental Protection (DEP), and is a result of the agency's review of its oil and gas regulatory program. The DEP bill creates new language dealing with horizontal drilling, but also makes changes that affect conventional (shallow) drilling.

The second bill was prepared by legislative staff for Subcommittee A of the Joint Judiciary Committee. This bill would establish a new regulatory program for gas wells utilizing horizontal drilling and hydraulic fracturing.

What follows is a summary of how the bills attempt to address two major areas of concern for citizens and the environment.

### **Land Use and Surface Owners' Rights**

Both bills provide earlier notice to surface owners that the driller is coming. The DEP bill requires that for all wells, "prior to receiving a permit, the operator will provide notice to the surface owner at least seventy-two hours but no more than forty-five days prior to entering the surface tract to conduct any plat surveys." The DEP bill also requires the operator to provide notice to the surface owner two to seven days before any actual disturbance of land if the surface owner requests that notice as a part of his or her comments on the permit application. The DEP bill increases the current comment period from 15 days to 30 days for all well work.

The notice provisions in the Judiciary bill are better, but apply only to horizontal wells. The Judiciary bill would require that the operator give the surface owner at least fifteen days notice before entry for surveying, and as part of the notification, create a process to encourage the driller to work with the surface owner in planning where and how well sites and access roads will be built, reclaimed and maintained.

In addition to the enhanced notice provisions for horizontal wells, the Judiciary bill also increases the distance these wells must be from dwellings and water wells. Under the Judiciary bill, no horizontal well could be drilled within 1,000 feet of "any existing building or water well" without the written consent of the owner. The DEP bill continues the 200-foot setback requirement for all wells.

### **Water Quantity and Quality**

With regard to water withdrawals, both bills require that an application to drill a horizontal well include a "water management plan." The water management plan provisions are primarily reporting and record keeping requirements listing the details of planned water withdrawals for drilling and fracturing the well, including the type of water source, specific location of water withdrawals, volumes of water to be withdrawn, and anticipated months the withdrawals will occur. Water management plans must contain "a water resources protection plan" that "includes documentation of measures that will be taken to allow the State to manage the quantity of its waters

for present and future use and enjoyment and for the protection of the environment."

For surface waters, the DEP bill adds a provision that no oil or gas well can be nearer than 100 feet from any surface water of the state, while the Judiciary bill provides that "no well site may be prepared or well drilled" within 100 feet "from any watercourse, natural or artificial lake, pond or reservoir or within 100 feet of the boundary of a wetland or the boundary that affects the functions and values of a wetland." In addition, the Judiciary bill prohibits the use of horizontal drilling and hydraulic fracturing "within 2,500 feet of a surface water source, and within 1,000 feet of a groundwater source, that serves a public water system."

For groundwater protection, the Judiciary bill requires the DEP to inspect "each permitted well drilled in any formation using hydraulic fracturing or horizontal drilling, or both, during each phase of cementing, completing and altering." The Judiciary bill also requires the operator to conduct a pre-drilling test of the water supply, upon written request "by any landowner residing within 5,500 feet but farther than 2,500 feet of a proposed gas well using hydraulic fracturing." Testing parameters are expanded to include chemicals or chemical compounds commonly used in hydraulic fracturing.

Both bills contain new requirements for water supply replacement. The DEP bill retains existing language that requires the operator to replace damaged or lost groundwater or surface water supplies, and the "rebuttable presumption" that the well drilling is the cause of the damage or loss if the supply is within one thousand feet of the well. However, the bill contains new language requiring the operator to provide an emergency drinking water supply within twenty-four hours; provide temporary water supply within seventy-two hours; and begin activities to establish a permanent water supply, or submit a proposal for establishing a permanent supply, within thirty days. The total time allowed for establishing a permanent water supply may not exceed two years. It is not clear if these provisions cover public supplies, but they probably do.

The Judiciary bill requires the operator to replace groundwater or surface water supplies damaged by the drilling of horizontal wells. The Judiciary bill

establishes a “rebuttable presumption” for horizontal wells that the well drilling is the cause of the damage or loss if the supply is within 2,500 feet of the well. For horizontal drilling, the presumption covers the entire length of each horizontal well bore. These provisions apply to both public and private water supplies.

Look for more future updates for how these bills address (or do not address) other areas of concern!

**Note:** This article contains excerpts from a comparison of the bills prepared by Don Garvin, Legislative Coordinator for the WV Environmental Council. Both the comparison and the article were based on drafts of the bills and specific provisions mentioned may or may not be included when the bills are officially introduced.

## Week Two – Don’t Blink!

By Gary Zuckett, [garyz@wvcag.org](mailto:garyz@wvcag.org)

The Legislature is off to its usual tortoise-like beginning. This was demonstrated as I watched one bill reported from committee to the House floor during the 11 minute floor session. It’s a great bill and passed the House later in the week (as it did early in the 2010 session, only to die in Helmick’s Senate Finance Committee). See “House Unanimously Passes Ethics Reform.”

The Senate is still in chaos over the change in leadership – a situation made worse by the losing side’s interpretation of a footnote of the Supreme Court’s ruling. Footnote #7 on page 16 of the ruling (see link in article on ruling) states: “The senate president remains the senate president.” This obvious statement is being taken by the losers as a mandate for Tomblin to retake the podium in the Senate and do both jobs at once. This Bizarro World is being occupied by Senator Jenkins (D? Cabell) and the minority party who yesterday made a failed gambit to undo last week’s rule change. Senator McCabe’s op-ed in yesterday’s [Gazette](#) entitled “The Senate Acted Wisely” is a cooler assessment of the situation. Regardless, this issue may be headed to the State Supreme Court if the losers have their way. In the meantime, between this challenge to the legitimacy of any acts of the Senate and the jockeying for a leg-up in the governor’s race, don’t expect a lot of the people’s business to get done this session.

## House Unanimously Passes Ethics Reform

(Excerpted from an article by Alison Knezevich, *The Charleston Gazette*)

Public officials and candidates would have to reveal more details about their finances under a bill passed unanimously by the House of Delegates Wednesday.

The measure (HB2464), which now heads to the Senate, also would make lawmakers and high-ranking state officials wait a year to become lobbyists after leaving public office. Under the proposal, public officials and candidates would have to fill out more detailed financial disclosure statements.

For instance, they would have to describe their job duties and say whether they or their spouses serve on any business’s board of directors. They also would have to disclose their spouses’ financial interests, and name dependents who are older than 18.

Under the bill, the Ethics Commission would publish the names -- either in print or online -- of those who miss deadlines for filing disclosure statements.

Beginning in 2012, the Ethics Commission also would have to post online disclosure statements of legislators, statewide elected officials, and state Supreme Court justices, as well as candidates for those offices. The commission would have to post disclosure forms of all other officials “as resources are available.”

## Lawmakers Revisit State Public Records Law

(Excerpted from the Associated Press)

West Virginia lawmakers are looking at which records can be revealed under the Freedom of Information Act.

The House Judiciary Committee endorsed a measure Thursday [HB 2405] that would define what that law considers a public record. The bill says it’s any writing prepared or received by a public body, if its content or context relates to the public’s business.

The legislation responds to a 2009 state Supreme Court ruling. That decision went against FOIA requests by The Associated Press for a [former Chief Justice Spike Maynard's] e-mail correspondence.

## **Bad Week for Industry's Accident Report Card**

By Gary Zuckett, [garyz@wvcag.org](mailto:garyz@wvcag.org)

Two bloody reports were released this week covering fatal industrial "accidents" in the coal and chemical industries. MSHA briefed families on their determination of the cause of the Upper Big Branch mine disaster – company disregard of commonly used safety methods along with worn out equipment causing sparks that led to the explosion and death of 29 miners last year. As always, Ken Ward's [Coal Tattoo](#) shines light on this tragedy.

Last night at WV State University, the National Chemical Safety Board released its conclusions on the cause of the 2008 explosion and fire at Bayer Crop Science in Institute. The cause of the disaster that injured and killed workers and exposed the whole community to unknown toxic chemicals as the fires burned uncontrollably for hours? You guessed it: company disregard for commonly used safety methods and procedures when setting up brand-new equipment to process toxic pesticides. Again see *Gazette* coverage by Ward: <http://www.wvgazette.com/News/201101200604>

The hearing at Institute went on for nearly three hours last night and Maya Nye, spokesperson for People Concerned about MIC, gave a deserved dressing down to the company from her seat on the community panel. Even though Bayer Crop Science will be "phasing out" its production of MIC by 2012, workers must shut down the unit and restart it, a harrowing announcement at best. The most chilling comment, however, came near the end when a retired worker from the plant got up and expressed his concern about the lack of safety monitoring he assumes will occur during the restart of the MIC unit planned for later this year. This startup may be a good time for Kanawha Valley residents to plan for a vacation to visit distant relatives!

## **Efficiency Coalition Follows Success at PSC**

By Mike Harman and Robin Wilson

Energy Efficient West Virginia (EEWV) formed its roots at the WV Public Service Commission (PSC) in March, 2009 as Appalachian Power Company was calling for a 43% increase in rates. According to the Appalachian Regional Commission, the amount of energy that could be saved by West Virginia utilities was in the neighborhood of 20 to 30 percent of total energy sales. These figures are based on experience in a number of states with comprehensive programs and incentives to help residents as well as business and industrial customers save both energy and money.

Very capable legal representation was secured from Tom Rodd, then with Calwell Law Practice, and CAG filed a series of interventions over the next 15 months involving the two electric power giants. In each case, the PSC sided with CAG and ordered the companies to produce programs to help their customers achieve a modest level of energy savings. This is a historic first for our State - the first time electric utilities have had to put resources into encouraging their customers to save energy, not use more of it!

These start-up programs will be helpful, but much more could be done with a stronger public policy and greater public support. This is the mission of EEWV-- to promote energy efficiency in every way, through policy analysis, public education, grassroots organizing, and networking with businesses, academics, and public officials. In West Virginia the climate is ripe for moving this particular agenda forward. EEWV is now meeting regularly and on the road to a more efficient energy future. Stay tuned!

Based on the Appalachian Regional Commission report, and other indicators, West Virginia has major potential to save energy at a cost-effective rate of only one to three cents per kilowatt hour, compared to a cost of future generation capacity at over ten cents.

Lighting is still the "low-hanging fruit," meaning that residents and businesses can more easily and quickly save energy through lighting upgrades than from any other measure.

By Gary Zuckett, [garyz@wvcag.org](mailto:garyz@wvcag.org)

While the WV PSC has shown a positive interest in energy efficiency and demand-side management (EE/DSM), it is usually necessary to have strong enabling legislation that requires specific energy savings targets over time. West Virginia does not yet have such laws. Watch for updates on legislation in future articles.

AEP / Appalachian Power will be rolling out the [WV PSC's order for energy efficiency](#) in March. To summarize the order the four Energy Efficiency strategies (and contractors) will be:

1. SMART LIGHTING - Subsidized Compact fluorescent light bulbs. [Applied Proactive Technologies \(APT\)](#)
2. Home Energy Evaluations and Upgrades [Good Cents](#)
3. Commercial and Industrial Efficiency [Good Cents](#)
4. Low income home Weatherization with local Community Action Agencies.

EEWV would like to maximize the success of these programs. Please contact Robin Wilson at [robin@wvcag.org](mailto:robin@wvcag.org) to work in your neighborhood, business, church, or school in cooperation with the power company and their contractors. Energy Efficiency creates job, saves money, and helps our environment. Please get in touch and lend a hand!

## Date Set for BP Spill Presentation

Mark your calendars for February 17<sup>th</sup> as the date that Seneca 2 and WV-CAEF (our education fund) brings in Dahr Jamail to disclose the results of his 6 month investigation into the BP oil disaster. Set for 7pm at WV State in Institute Jamail will bring his award-winning journalism <http://dahrjamailiraq.com> to life with visuals and more. Considering WV is now in a drilling boom this is a timely lecture for us here.

Financial support is still needed to defray expenses of this event. Please contribute what you can to this joint effort. Since this is an educational activity, donations to WV Citizen Action Education Fund for this event will be fully tax deductible. To contribute, put a Dahr Jamail note on the check made out to WV-CAEF and send to: Seneca 2 c/o Marian Marian Keyes, 103 Walker Drive, Dunbar WV 25064

## ACA Repeal Draws Critics at Capitol

On Wednesday the U.S. House of Representatives voted to repeal the Affordable Care Act passed last year. This pandering to Tea Party types didn't go unnoticed here in West Virginia. Ahead of their vote, members from several groups including AFL-CIO; WV for Affordable Health Care; NASW-WV; WV Center on Budget & Policy along with Citizen Action held a press conference in support of the new health law. We were joined by two state lawmakers, Senator Dan Foster of Kanawha County and Senate Health and Human Resources Chairman Ron Stollings of Boone County. Both are doctors who support the ACA and detailed how it is already helping their patients to obtain insurance coverage that would have previously been denied.

My comments at the event: "Why do Republicans want to take away our newly-won health care rights? This new House leadership should instead be focusing on jobs and the economy, not adding to the deficit by voting to repeal the Affordable Care Act. Representatives Capito and McKinley have put party loyalty above the health and wellness of the citizens of West Virginia by voting to repeal. Representative Rahall on the other hand stood with us to protect consumers from the numerous abuses the ACA eliminated. We now call on Senator Manchin to stand firm with Senator Rockefeller to oppose this huge step backward! Enough said."

## We Get Letters: Your Feedback!

In response to an Action Alert we sent out this week regarding the West Virginia Supreme Court gubernatorial election decision, one CAG member had this to say: "Can't tell you guys how proud I am of CAG. Wish more people understood the import of this case. Hooray for WV (for a change) and Hooray for CAG!" Please always feel free to heap praise on us – but also feel free to stay in touch and let us know what your thoughts are on all the issues we are covering! Send your email comments to [bev@wvcag.org](mailto:bev@wvcag.org) or give us a call at 304-346-5891.

*Capital Eye is published by WV-Citizen Action, a nonprofit membership organization founded in 1974 and dedicated to increasing citizen participation in economic and political decision-making. Our members work for progressive changes in federal, state, and local policies by educating people about key public interest issues ranging from environmental protection and consumer rights to good government. Learn more about us at [www.wvcag.org](http://www.wvcag.org)*

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