

**Preliminary Performance Review**

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**Clean Coal Technology Council**

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**The Clean Coal Technology Council  
Never Commenced Operation But  
Could Still Provide a Valuable  
Service to West Virginia**



**May 2004  
PE 04-03-314**

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John Sylvia  
Director

May 16, 2004

The Honorable Edwin J. Bowman  
State Senate  
129 West Circle Drive  
Weirton, West Virginia 26062

The Honorable J.D. Beane  
House of Delegates  
Building 1, Room E-213  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Preliminary Performance Review of the *Clean Coal Technology Council*, which will be presented to the Joint Committee on Government Operations on Sunday, May 16, 2004. The issue covered herein is "The Clean Coal Technology Council Never Commenced Operation But Could Still Provide a Valuable Service to West Virginia."

Since the Council has not functioned, we transmitted a draft copy of the report to the Governor's Office on May 3, 2004. There is no agency response to this report.

Let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

JS/wsc

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*Joint Committee on Government and Finance*

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# Executive Summary

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## **Issue 1: The Clean Coal Technology Council Never Commenced Operation But Could Still Provide a Valuable Service to West Virginia.**

The Clean Coal Technology Council was created during the 2001 Legislative Session. According to West Virginia *Code* §5C-2-1(c), the purpose of the Council is to explore ways to:

*(1) Preserve fuel diversity and maintain reliable, low-cost sources of electric power; (2) Identify technologies for reducing the emissions from existing coal-fired electric generation; and (3) Identify new, cleaner coal-fired electric generation technologies that may be used to provide new generating capacity.*

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*Although the Council has not functioned, there is still a need for the Council to encourage clean coal technology.*

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According to West Virginia *Code*, the Council is to be composed of 3 Senate members, 3 House members, and 6 Gubernatorial appointees. Of the 6 Gubernatorial appointees, 4 are to be selected from lists submitted by industry. However, according to the Governor's Office, no appointments were made to the Council because the Governor never received the necessary lists from industry to make the appointments. Because no appointments were made to the Council, it never met nor designated a state agency to handle its administrative matters as specified by *Code* §5C-2-4.

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*If the Legislature decides to maintain the Council as recommended by the Legislative Auditor, there needs to be statutory changes to address the constitutional problems with the Council's current membership structure.*

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Although the Council has not functioned, there is still a need for the Council to encourage clean coal technology. Between 1980 and 1999, the U.S. Department of Energy contributed hundreds of millions of dollars into 31 clean coal technology programs. Furthermore, under the Bush administration, a number of additional projects are now being funded. Although, millions of federal dollars are being put into clean coal research, and despite the fact that West Virginia ranks second only to Wyoming in coal production, only one of the current eighteen federal projects are being conducted in West Virginia. Additionally, none of the previous 31 projects completed during the mid eighties and through the late nineties were conducted in West Virginia.

If the Legislature decides to maintain the Council as recommended by the Legislative Auditor, there needs to be statutory changes to address the constitutional problems with the Council's current membership structure. According to *Code*, the Council is to be comprised of both Gubernatorial appointees and Legislative members. According to a legal opinion obtained from the Legal Services division of the Legislative Auditor's Office, the composition of the Council is unconstitutional because it violates the separation of powers provisions of the State Constitution.

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## **Recommendation**

1. *The Legislative Auditor recommends that the Clean Coal Technology Council be continued and that the membership of the Council be reconstituted to address conflicts with the State Constitution.*



# Review Objective, Scope and Methodology

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This Preliminary Performance Review of the West Virginia Clean Coal Technology Council is required and authorized by the West Virginia Sunset Law §4-10-5 of the West Virginia Code, as amended.

## **Objective**

The objective of this review is to determine if the Council had initiated operations and the extent to which the Council is operating effectively and efficiently.

## **Scope**

The scope of this review covers the period of 2001 to present.

## **Methodology**

Information used in compiling this report was gathered from the West Virginia Governor's Office, the West Virginia Secretary of State's Office, and internet research of Federal Clean Coal initiatives. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS).



# Issue 1

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## **The Clean Coal Technology Council Never Commenced Operation But Could Still Provide a Valuable Service to West Virginia.**

The Clean Coal Technology Council was created during the 2001 Legislative Session. According to West Virginia *Code* §5C-2-1(c), the purpose of the Council is to explore ways to:

*(1) Preserve fuel diversity and maintain reliable, low-cost sources of electric power; (2) Identify technologies for reducing the emissions from existing coal-fired electric generation; and (3) Identify new, cleaner coal-fired electric generation technologies that may be used to provide new generating capacity.*

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*According to the Governor's Office, no appointments were made to the Council because the Governor never received the necessary lists from the industry to make the appointments.*

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According to West Virginia *Code*, the Council is to be composed of 3 Senate members, 3 House members, and 6 Gubernatorial appointees. Of the 6 Gubernatorial appointees, 4 are to be selected from lists submitted by industry. However, according to the Governor's Office, no appointments were made to the Council because the Governor never received the necessary lists from industry to make the appointments. Because no appointments were made to the Council, the Council never met nor designated a state agency to handle the administrative matters for the Council as specified by *Code* §5C-2-4. No general revenue funds were appropriated for the Council, and no special revenue method was established. **As a result of the lack of appointments by the Governor, the Council has never been in operation since its creation by the Legislature in 2001.**

## **Clean Coal Council Could Still Be Needed**

Although the Council has not functioned, there is still a need for the Council to encourage clean coal technology. West Virginia remains among the leading producers of coal in the country. According to the Alliance for Energy and Economic Growth,

*By 2025, EIA (Energy Information Administration) projects that the U.S. will need 34 percent more coal. Coal accounts for approximately one-third of primary energy production in the U.S. It is an abundant, domestic energy resource, with estimated recoverable reserves totaling 275 billion short tons, or a 250-year supply at current rates of use. Coal is used primarily to generate electricity, representing 50 percent of*

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*the U.S. electric generation mix. Coal-based power plants are expected to remain the key source of electricity through 2025.*

Additionally, natural gas prices are at near record highs. This could be contributing to the current national interest in clean coal technology. Clean Coal Technology has always been a program within the U.S. Department of Energy. Between 1980 and 1999, the Department of Energy contributed hundreds of millions of dollars into 31 clean coal technology programs. However, under President Bush, the Clean Coal Program has received additional attention and funding. From the President's Clear Skies Initiative, the following statement was made:

*With coal likely to remain one of the nation's lowest-cost electric power suppliers for the foreseeable future, President Bush has pledged a new commitment to even more advanced clean coal technologies. As the President said in presenting his National Energy Policy to the American public on May 17, 2001, "More than half of the electricity generated in America today comes from coal. If we weren't blessed with this natural resource, we would face even greater [energy] shortages and higher prices today. Yet, coal presents an environmental challenge. So our plan funds research into new, clean coal technologies."*

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*Although millions of federal dollars are being put into clean coal research, only one of the current eighteen federal projects are being conducted in West Virginia.*

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The Department of Energy's Office of Fossil Energy administers the President's Clean Coal Technology Programs. According to the Department of Energy:

*The Office of Fossil Energy is responsible for several high-priority Presidential initiatives including implementation of the Administration's \$2 billion, 10-year initiative to develop a new generation of environmentally sound clean coal technologies, the \$1 billion FutureGen project to develop a pollution-free plant to co-produce electricity and hydrogen, and the nation's Strategic Petroleum Reserve and Northeast Home Heating Oil Reserve, both key emergency response tools available to the President to protect Americans from energy supply disruptions.*

Although, millions of federal dollars are being put into clean coal research, and despite the fact that West Virginia ranks second only to Wyoming in coal production, only one of the current eighteen federal projects are being conducted in West Virginia. Additionally, none of the previous 31

projects completed during the mid eighties and through the late nineties were conducted in West Virginia. Table 1 shows the current projects by location, the federal funds contributed, and the amount of private funds contributed (contributed by the company).

<b>Table 1</b>		
<b>Current Department of Energy Clean Coal Projects</b>		
<b>Location</b>	<b>DOE Funds</b>	<b>Private Funds</b>
Fountain, Colorado	\$30,000,000	\$271,504,011
Torrey, New York	\$14,500,000	\$18,300,000
Vineyard, Utah	\$149,469,242	\$916,335,758
Underwood, North Dakota	\$11,000,000	\$11,000,000
Jacksonville, Florida	\$74,733,633	\$234,362,679
Trapp, Kentucky	\$78,086,357	\$353,846,225
Baldwin, Illinois	\$8,388,104	\$10,252,127
Big Stone City, South Dakota	\$6,490,585	\$6,862,703
Garden City, Kansas	\$2,796,326	\$3,085,349
Apollo Beach, Florida	\$905,013	\$1,476,601
Fairbanks, Alaska	\$23,818,000	\$23,818,000
King George Co., Virginia	\$7,224,000	\$12,357,734
Ghent, Kentucky	\$4,450,163	\$4,466,576
<b>Rainelle, West Virginia*</b>	<b>\$107,500,000</b>	<b>\$107,500,000</b>
Colstrip, Montana	\$43,125,000	\$62,575,000
Marquette, Michigan	\$24,768,312	\$24,768,312
Gillberton, Pennsylvania	\$100,000,000	\$512,000,000
To Be Decided	\$14,957,658	\$15,556,053
*Awarded January 8, 2003 to Western Greenbrier Co-Generation, LLC, the project is expected to last less than 2 years.		

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According to West Virginia *Code* §5C-2-5, the Council's responsibilities include developing clean coal pilot projects and seeking appropriate funding for those projects. The Council shall:

*Provide direction to the designated agency to study, develop and promulgate requests for proposals for pilot projects in West Virginia that will assist the council in evaluating technologies, assessing economics, evaluating the environmental benefits, seeking funds, evaluating the useful life of pilot projects and determining the importance of clean coal technologies to energy policy in West Virginia. Requests for proposals shall include an assessment of the potential for the use of financial and other incentives for potential respondents; Provide oversight to the designated agency in seeking public and private funding to support the activities of the council and the financing of pilot projects;*

*If the Legislature decides to maintain the Council as recommended by the Legislative Auditor, there needs to be statutory changes to address the constitutional problems with the Council's current membership structure.*

### **Current Council Membership is Unconstitutional**

If the Legislature decides to maintain the Council as recommended by the Legislative Auditor, there needs to be statutory changes to address the constitutional problems with the Council's current membership structure. According to *Code* §5C-2-3, the Council is to be comprised of 12 members:

- Three state senators to be appointed by the president of the Senate, with one being designated as co-chair;
- Three state delegates to be appointed by the speaker of the House, with one being designated as co-chair;
- Two members representing coal operators' viewpoint to be appointed by the governor from a list of three nominees for each position submitted by the major trade association which represents coal operators accounting for over one half of the coal produced in mines in this state in the year prior to the year in which the appointment is to be made;
- Two members representing coal miners' viewpoint to be appointed by the governor from a list of three nominees for each position submitted by the highest ranking official within the major employee organization representing coal miners; and
- Two members who have knowledge of and experience in the field of coal technology to be appointed by the governor.

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According to a legal opinion obtained from the Legal Services division of the Legislative Auditor's Office, the composition of the Council is unconstitutional because it violates the separation of powers provisions of the State Constitution. According to the Legal Services Division,

*In view of the fact that all of the Council members are public officers who have statutorily-prescribed job duties of an executive nature, and that the legislative members of the Council are essentially appointed by the Legislature, I conclude that under our Constitution and established case law, the provisions of WV Code §5C-2-3(b) directing that members of the Legislature also sit as members of the Council are in violation of the separation of powers provision found in Article V, §1 and the appointments provision found in Article VII, §8 of the West Virginia Constitution.*

If the Legislature chooses to continue the Clean Coal Technology Council, the composition of the Council would need to be re-established to eliminate the violation of separation of powers. The Legal Services Division further states:

*Should the Legislature choose to amend the provisions cited to cure the defects noted above, it should place the duty of nominating and appointing the Council members exclusively on the executive branch.*

*Should the Legislature choose to amend the provisions cited to cure the defects noted above, it should place the duty of nominating and appointing the Council members exclusively on the executive branch, with or without confirmation by the Senate, and should provide that any legislative members are non-voting members and serve only in an advisory capacity. Further, the mechanism for legislative oversight should be explicitly stated, conferring jurisdiction on a specific legislative committee which can report to the full Legislature before each regular session, recommending the enactment of any necessary changes in Code – clearly a proper exercise of power by the Legislature.*

## **Conclusion**

During the 2001 Legislative Session, the Legislature determined that there was a need for the Clean Coal Technology Council. There have been no new developments in coal technology, and there is currently significant interest in clean coal technologies. Furthermore, the Department of Energy is contributing significant matching grants for clean coal projects. Given the lack of projects taking place in West Virginia, a state agency charged with coordinating these activities to further garner federal funds could be useful. However, the Council's membership would need to be formulated differently

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than the current Council as laid forth in *Code* due to the unconstitutionality of the Council membership.

### **Recommendation**

1. *The Legislative Auditor recommends that the Clean Coal Technology Council be continued and that the membership of the Council be reconstituted to address conflicts with the State Constitution.*



# Appendix A: Transmittal Letter

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John Sylvia  
Director

May 3, 2004

Governor Bob Wise  
Governor's Office  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Governor Wise:

This is to transmit a draft copy of the Preliminary Performance Review of the West Virginia Clean Coal Technology Council. This report is scheduled to be presented during the May 16-18, 2004 interim meeting of the Joint Committee on Government Operations. We would like to schedule an exit conference to discuss any concerns you may have with the report as it affects your office. We would like to have the meeting on Wednesday, May 5, 2004 if this is convenient. Please notify us to schedule an exact time. If you would like to have a written response included in our report, we would need it by noon on Friday, May 7, 2004.

We also extend to you a personal invitation to attend the May interim meeting if you would like to respond verbally to the Joint Committee on Government Operations. We will inform you of the exact time and location of the meeting once the information becomes available.

We request that your personnel treat the draft report as confidential and that it not be disclosed to anyone not affiliated with your office. Thank you for your cooperation.

Sincerely,

Handwritten signature of John Sylvia in cursive script.  
John Sylvia

Enclosure

c: Mr. Alex Macia, Governor's Chief of Staff

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*Joint Committee on Government and Finance*

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