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July 16, 2012

Cathy Gatson
Kanawha County Circuit Clerk
111 Court Street
Charleston, WV 25301

Re: Webb et al. v. Clarke
Kanawha County Circuit Clerk
Administrative Appeal No.: _____

Dear Clerk Gatson:

Enclosed for filing are the following:

1. Administrative Appeal Docketing Statement;
2. Petition of Bo Webb, Rob Goodwin, Debbie Jarrell, and Amber Whittington for Judicial Review of the Final Order of the West Virginia Surface Mine Board;
3. Final Order issued by WV Surface Mine Board; and
4. Certificate of Service.

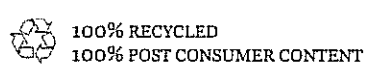
We have also enclosed a check to cover the filing fees. If you should have any questions, do not hesitate to contact me.

Respectfully,

Thomas A. Rist

Enclosures

cc: Joseph Jenkins, Esq.
Shane Harvey, Esq.
Fran Ryan, WV Surface Mine Board Clerk



Cathy Gatson
Re: Webb et al. v. Clarke
July 16, 2012
Page 2

Darrel McGraw, Esq.
Bo Webb
Rob Goodwin
Debra Jarrell
Amber Whittington

In the Circuit Court of Kanawha County

ADMINISTRATIVE APPEALS DOCKETING STATEMENT

Style of case (use from agency final order including case number): Bo Webb, et al. v. Tom Clarke, Director
Division of Mining and Reclamation, West Virginia Department of Environmental Protection, et al.
Agency: WV Surface Mine Board

TIMELINESS OF APPEAL

Date of entry of order appealed from: June 26, 2012

Date of filing of petition for appeal: July 16, 2012

VENUE: If appeal is not filed in Kanawha County, do you reside in or do business in this County?

Yes No

If so, provide the street address and telephone number for your residence or business in this County.

If not, explain your reason(s) for filing this appeal outside of Kanawha County.

FINALITY OF ADMINISTRATIVE ORDER

Is the order appealed from a final decision on the merits as to all issues and parties?

Yes No

If not, what type of order are you appealing?

CASE INFORMATION

State briefly the nature of the case, the relief sought and the outcome at the agency. (Attach an additional sheet if necessary). Appeal from decision upholding issuing of surface mining permit. WV Surface Mine Board upheld the decision of the DEP to issue a surface mine permit.

Does the agency decision contain factual (evidentiary errors)?

Yes No

If so, please list the evidentiary errors briefly. (Attach an additional sheet if necessary).

The DEP failed to hold an informal conference within three weeks of the date of the close of the citizen comment period.

Does the agency order contain legal errors (errors of law)?

Yes No

If so, please list the errors of law briefly. (Attach an additional sheet if necessary).

The DEP failed to hold an informal conference within three weeks of the date of the close of the citizen comment period.

The DEP failed to hold an informal conference within three weeks of the date of the close of the citizen comment period.

CASE MANAGEMENT INFORMATION

Name of Party filing this appeal (Petitioner): Bo Webb, Rob Goodwin, Debra Jarrell, Amber Whittington

Do you wish to make an oral presentation to the court?

Yes No

List counsel for each party to the case at the agency. If a party is not represented by counsel, provide the requested information for that party. Include name, firm name, address and telephone number. (Attach an additional sheet if necessary).

See attached

See attached

Name of attorney or individual filing this Administrative Appeals Docketing Statement:

Thomas A. Rist

Attorney Non-Attorney
(self represented)

Will you be handling the appeal?

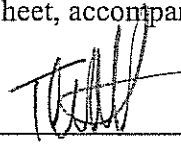
Yes No

If yes, provide name, firm name address and telephone number.

Rist Law Offices, LC

103 Fayette Avenue, Fayetteville, WV 25840 (304) 574-0222

If there are multiple Petitioners add their names on an additional sheet, accompanied by a certification that all Petitioners concur in this filing.

Signature: 

WV Bar Number. 9100

Date: July 16, 2012

Remember to attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the agency final order or decision from which the appeal is taken.
3. A certificate of service, verifying that you have served this Administrative Appeals Docketing Statement upon all of the parties to the agency proceeding, the agency itself and the Attorney General's Office.

Counsel for each party to the case in front of Surface Mine Board:

Counsel for Appellants (Petitioners):

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(304) 574-0224 (fax)
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Counsel for Appellee DEP:

Joseph Jenkins
Office of Legal Services
WV DEP
601 57th Street, SE
Charleston, WV 25304

Counsel for Intervenor Marfork Coal Company:

Shane Harvey
Jackson Kelly
1600 Laidley Tower
PO Box 553
Charleston, WV 25322

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BO WEBB, ROB GOODWIN
DEBBIE JARRELL, and
AMBER WHITTINGTON,

Petitioners,

v.

Administrative Appeal No.:

TOM CLARKE, DIRECTOR,
DIVISION OF MINING AND
RECLAMATION, WEST VIRGINIA
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent,

and

MARFORK COAL COMPANY,

Intervenor-Respondent

**PETITION OF BO WEBB, ROB GOODWIN, DEBBIE JARRELL,
AND AMBER WHITTINGTON FOR JUDICIAL REVIEW OF THE
FINAL ORDER OF THE WEST VIRGINIA SURFACE MINE BOARD**

Petitioners, by and through counsel, Thomas A. Rist and Rist Law Offices, hereby appeal the Final Order issued by the West Virginia Surface Mine Board on June 26, 2012, and request that this Court overturn the WV Surface Mine Board's decision and revoke the permit illegally issued by the West Virginia DEP to Intervenor-Respondent Marfork Coal Company.

I. STATEMENT OF THE CASE

Petitioners seek judicial review of the June 26, 2012 Final Order issued by the West Virginia Surface Mine Board ("Board") that affirmed Respondent West Virginia Department of Environmental Protection's (DEP) decision to issue a surface mine

permit to Intervenor-Respondent Marfork Coal Company (“Marfork”). A copy of the Final Order is attached as Exhibit A.

The permit at issue in this case involves a mountain top removal operation near Marsh Fork and Clear Fork in Raleigh County, West Virginia. This appeal only involves a single legal issue and amazingly, everyone involved in the case *agrees* that the law was not followed.

West Virginia law requires that a public informal conference be held within three weeks after the close of the public comment period. W. Va. Code § 22-3-20(b). In this case, the DEP waited *three years* to hold this conference.

The Surface Mine Board perhaps put it best in the first paragraph of their conclusion:

The Board finds it outrageous that WVDEP flagrantly violated the law by waiting more than *three years* after the initial comment period to hold an informal conference on the permit decision. It is clear from the testimony and admissions of counsel that WVDEP chose to violate the law by not holding the informal conference within the time frame outlined by the statute.

However, even though the board took great issue with the violation of law by the DEP, the Board still upheld the issuance of this permit. The decision of the Surface Mine Board should be reversed and the permit issued in this case revoked quite simply because the DEP took three years to do what legally is *required* to be done in three weeks.

II. JURISDICTION AND VENUE

This petition is properly filed pursuant to W. Va. Code § 22B-1-9. Kanawha County is a proper venue for hearing an appeal from the West Virginia Surface Mine Board. See W. Va. Code § 22B-4-3 and 29A-5-4.

III. TITLE OF CASE BEFORE ADMINISTRATIVE AGENCY

WEST VIRGINIA SURFACE MINE BOARD
CHARLESTON, WEST VIRGINIA

BO WEBB, ROB GOODWIN
DEBBIE JARRELL, and
AMBER WHITTINGTON,

Appellants,

v.

Appeal No.: 2011-12-15-SMB

TOM CLARKE DIRECTOR, DIVISION OF
MINING AND RECLAMATION, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Appellee,

and

MARFORK COAL COMPANY,

Intervenor

IV. KIND OF PROCEEDING AND NATURE OF RULING BY STATE AGENCY

On October 26, 2011, the DEP issued Surface Mining Permit No.: S-300208 to Marfork. Petitioners Bo Webb, Rob Goodwin, Debra Jarell and Amber Whittington appealed the decision of the DEP to issue this permit and perfected their individual appeals in a timely manner by filing a Notice of Appeal with the Board. The Petitioners' appeals were consolidated and an evidentiary hearing was conducted by the Board on May 9, 2012. The Board issued a Final Order on June 26, 2012 and held that the decision of the DEP to issue the permit was affirmed.

V. STATEMENT OF FACTS

1. On October 26, 2011, DEP issued Surface Mining Permit No.: S-300208 to Marfork to conduct mountaintop removal mining operations. See Final Order Page 3 and Certified Record at Page 101.

2. On November 23, 2011, Petitioner Bo Webb filed a Notice of Appeal. See Final Order Page 3, Transcript of Hearing Page 5, and Notices of Appeal.

3. On November 28, 2011, Petitioners Rob Goodwin and Debra Jarrell filed a Notice of Appeal. See Final Order Page 3, Transcript of Hearing Page 5, and Notices of Appeal.

4. On December 2, 2011, Amber Whittington filed a Notice of Appeal. See Final Order Page 3, Transcript of Hearing Page 5, and Notices of Appeal.

5. West Virginia law requires an informal conference to be held within three weeks of the close of the comment period. See W. Va. Code § 22-3-20(b).

6. The comment period for this permit ended June 19, 2008. See Final Order Page 4 and Certified Record Page 101.

7. An informal conference was held three years and two months later, on August 9, 2011. See Final Order Page 4.

8. The Board conducted an evidentiary hearing on May 9, 2012 in Charleston, West Virginia. See Final Order Page 3.

9. The DEP failed to hold the informal conference within three weeks of the close of the comment period. See Final Order Pages 4, 5, and 8.

10. The DEP held the informal conference *three years* after the comment period closed. See Final Order Pages 4, 5, and 8.

11. Jack Spadaro, an expert in surface mine regulations, testified that because the informal conference was held three years after the close of the public comment period the DEP violated West Virginia surface mining laws. See Final Order Page 5.

12. The Board found that conducting the informal conference three years after the close of the comment period constitutes a violation of law. See Final Order Page 5.

VI. ASSIGNMENTS OF ERROR

West Virginia law requires that a public informal conference be held within three weeks after the close of the public comment period. W. Va. Code § 22-3-20(b). In this case, the DEP waited *three years* to hold this conference. The Board somehow managed to find that this extreme delay and ignoring of West Virginia law by the DEP was not significant enough to remand this permit back to the DEP in order to bring it into compliance with the law. This is a significant error which must be remedied by this Court.

VII. POINTS AND AUTHORITIES - DISCUSSION OF LAW

This case is an extreme example of how the citizens of the State of West Virginia have nothing more to rely upon in reigning in the DEP when they absolutely ignore the laws of the State. The West Virginia Code is crystal clear about what is required by the DEP when they decide to issue a surface mine permit:

If written objections are filed and an informal conference requested within thirty days of the last publication of the above notice, the director shall then hold a conference in the locality of the proposed mining within *three weeks* after the close of the public comment period.

W. Va. Code § 22-3-20(b) (emphasis added).

Prior to the start of the evidentiary hearing, the DEP and Marfork both *stipulated* that they failed to follow the law:

(DEP ATTORNEY) MR. JENKINS: ...we can't argue that we didn't meet the technical deadline of 22-3-20 and the associated regulations.

(MARFORK ATTORNEY) MR. HARVEY: I agree. We stipulate that the informal conference was not held within three weeks of the close of the public comment period...

See Transcript Page 18, Lines 14-17 and Lines 22-24.

The Board also stipulated along with everyone else that the DEP failed to follow the law:

The Board finds that conducting the informal conference three years after the close of the comment period constitutes a violation of the law.

Final Order, Page 5, Paragraph 17.

It is obvious that this permit should be sent back to the DEP so that they come into compliance with the law. It is significant that this was not simply a small technicality where the DEP missed the statutory deadline by a few weeks. A *three year* delay is substantial and significant.

One purpose envisioned by the establishment of the Surface Coal Mining and Reclamation Act ("SMCRA") is to provide citizens of West Virginia the ability to voice their concerns about mining operations:

The Surface Coal Mining and Reclamation Act thus clearly envisages a procedure where, after the application is complete, the operator advertises his intent to mine in a certain area, and invites the affected members of the public to file written objections to the application and to request an informal conference at which members of the public may voice their concerns.

Zirkle v. Faerber, 177 W. Va. 3, 5, 350 S.E.2d 3, 6 (1986).

The Respondents argued, and the Board somehow agreed with their decision, that there was not any prejudice to citizens of the State due to a three year delay. This is not supported by anything other than conjecture and misplaced logic. The timeframes

set forth in SMCRA are there for a reason. The law does not take into account prejudice to one party or another when statutory timeframes are ignored. The most analogous situation to this one involves the statute of limitations for tort cases. Courts regularly dismiss tort actions because a party misses the statute of limitations by mere days. None of these cases focus on the prejudice to a party, they focus on the deadline and if it is missed cases are dismissed. Here we are dealing with missing a deadline by *three years*.

Had the legislature wanted Courts to examine prejudice in dealing with timeframes, this language would have been included in the statutes. Here, the legislature chose the word “shall” in attributing the three week time frame to hold the informal conference: “the director *shall* then hold a conference in the locality of the proposed mining within three weeks after the close of the public comment period.” *W. Va. Code § 22-3-20(b) (emphasis added)*.

Even if prejudice to the citizens of West Virginia was the test to determine whether the DEP has followed the law, three years is such an overwhelming amount of time that the prejudice suffered in and of itself by the time lapse is unquestionable. Simply stated, too much can happen when the DEP takes years to do what is supposed to take weeks. In the present case, environmental activist Judy Bonds submitted a timely request for an informal conference to the DEP in 2008. See Certified Record at Page 196 and Transcript at Page 113, Lines 8-16. She did not make it to the informal conference, however, as she passed away on January 3, 2011. Simply stated, three years is too significant of a lapse of time to argue there was no prejudice to anyone.

VIII. REQUEST FOR RELIEF

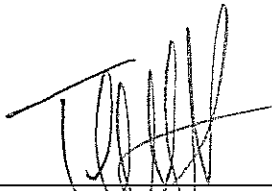
West Virginia Code § 29A-5-4 provides this Court the authority to “reverse, vacate or modify” the decision in this case for a number of different reasons. The DEP has violated statutory provisions and the Board has, in the face of unequivocal evidence to the contrary, upheld the unlawful actions of the DEP.

The Petitioners request that this Court overturn the WV Surface Mine Board’s decision and revoke the permit illegally issued by the West Virginia DEP to Intervenor-Respondent Marfork Coal Company. Additionally, the Petitioners request that this Court award attorneys’ fees and costs to the Petitioners pursuant to W. Va. Code § 22-3-25 and 22-3-33.

Respectfully Submitted,

Bo Webb, Rob Goodwin
Debbie Jarrell and Amber Whittington

By Counsel



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**BEFORE THE WEST VIRGINIA SURFACE MINE BOARD
CHARLESTON, WEST VIRGINIA**

**BO WEBB, ROB GOODWIN, DEBRA JARRELL,
and AMBER WHITTINGTON,**

Appellants,

v.

**Appeal Nos. 11-12-SMB
11-13-SMB
11-14-SMB
11-15-SMB**

**TOM CLARKE, DIRECTOR,
DIVISION OF MINING AND
RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee,

and

MARFORK COAL COMPANY,

Intervenor.

FINAL ORDER

Mr. Bo Webb, Mr. Rob Goodwin, Ms. Debra Jarrell, and Ms. Amber Whittington (“Appellants”) each filed a timely Notice of Appeal with the Surface Mine Board (“SMB” or “Board”) objecting to the West Virginia Department of Environmental Protection’s (“WVDEP”) issuance of the Permit S300208. *see* Notice of Appeal. For ease of reviewing the cases, the Board consolidated the cases for purposes of hearing and final decision. The Appellants requested the Board to visit the site prior to hearing this matter. The Board deferred ruling on the request until after the evidentiary hearing. The Board conducted an evidentiary hearing before a quorum of the

EXHIBIT A

Board and a certified court reporter on May 9, 2012, in Charleston, West Virginia. Having found the issue raised at hearing was a procedural challenge, the Board DENIED the request for a site visit. At the close of the evidentiary hearing the Board deliberated and announced its decision to **AFFIRM** the permit decision of the WVDEP.

During the evidentiary hearing, the Appellants four witnesses including one expert witness: Rob Goodwin, Bo Webb, Keith Porterfield, and Jack Spadaro as an expert in surface mine safety and compliance with the West Virginia Surface Coal Mining and Reclamation Act. The WVDEP called three witnesses including Rob Goodwin, Keith Porterfield, and Thomas Wood as an expert in surface mine permitting. Marfork Coal did not offer any witnesses at hearing.

Tom Rist, Esquire, represented the Appellants in this matter. Joseph Jenkins, Esquire, of the WVDEP Division of Legal Services represented the WVDEP. Shane Harvey, Esquire, of Jackson Kelly PLLC, represented Marfork Coal Company. Board Chairman Mark Schuerger, as an employee of Alpha Natural Resources, the parent company of Marfork Coal Company, did not participate or attend the hearing and recused himself from any discussion in this matter. Board members participating in the decision of this matter were Mr. James Smith, Mr. Jon Blair Hunter, Mr. Ed Grafton, Mr. Ron Crites, and Dr. Henry Rauch. The certified record was submitted by the WVDEP and accepted as evidence in this case. The Board having carefully considered the testimony, transcript, exhibits, and arguments of counsel do hereby **AFFIRM** the Permit decision by WVDEP by vote of 5-1. Mr. Jon Blair Hunter announced a dissenting opinion and voted to remand the Permit back to WVDEP for further consideration and modification.

FINDINGS OF FACT

Background

1. On October 26, 2011, WVDEP issued Surface Mining Permit No. S-300208 (“Permit”) to Marfork Coal Company (“Marfork”) to conduct surface coal mining activities near Marsh Fork and Clear Fork in Raleigh County, West Virginia. Certified Record (“CR”) at p. 101.
2. On November 23, 2011, Bo Webb filed his Notice of Appeal. On November 28, 2011, Rob Goodwin and Debra Jarrell each filed a Notice of Appeal. On December 2, 2011, Amber Whittington filed her Notice of Appeal. Tr. 5/9/12 at p. 5; *see also* Notices of Appeal.
3. The Appellants raised a number of specific objections to WVDEP’s issuance of the Permit but only two issues were raised and argued at hearing those two are summarized as follows:
 - a. The WVDEP should have held the informal conference within three weeks of the close of the comment period. Tr. 5/19/12 at p. 7.
 - b. The Permit does not provide adequate health protection¹. Tr. 5/9/2012.
4. The SMB held its evidentiary hearings on May 9, 2012, in Charleston, West Virginia.

¹The Appellants withdrew the health impact challenge during the hearing. Tr. 5/9/2012, p. 85.

5. Marfork Coal Company's application was submitted on February 22, 2008. The application was advertised with a comment period ending on June 19, 2008. CR. p. 101.
6. Four comment letters were received during the public comment period that ended on June 19, 2008. *Id.*
7. An informal conference was conducted on August 9, 2011, at the Raleigh-Boone Technical Center in Pettus, West Virginia. Twenty-three verbal comments and one prepared written statement were added to the record during the conference.
8. The WVDEP provided an additional ten day written comment period after the informal conference was held. CR. pgs. 72, 82.
9. From the time of the initial application and comment period to the informal conference the Permit was reduced by approximately 500 acres – going from a 700 acre project to a 200 acre disturbance. Tr. 5/9/12, p. 16.
10. Appellant Goodwin testified that he made comments on proposed Permit and attended the August 9, 2011 informal conference. Tr. 5/9/12, p. 24.
11. Appellant Goodwin testified that he was not aware of the additional ten day comment period that occurred in September of 2012 as a result of an ownership change in the property. Tr. 5/9/12, p. 25.
12. Appellant Goodwin testified that his comments were limited at the informal conference because he could not go to the courthouse to review an official copy of the permit and he could not request an information gathering exercise because there was no public comment period immediately prior to the informal conference. *Id.* at 26.

13. Appellant Goodwin stated that he requested an additional a thirty day comment period should have been reopened once the final application was submitted. *Id.* at 28.
14. Permit supervisor Keith Porterfield testified that there is a conflict in the law that requires a final decision on a Permit application thirty days after the informal conference and the requirement that an informal conference be held within three weeks of the close of the comment period. Tr. 5/9/12, p. 47.
15. Mr. Porterfield testified that the Permit went through massive changes between the time of initial application and the final decision on the Permit. *Id.* p. 48.
16. Mr. Jack Spadaro, an expert in surface mine regulations, testified that because the informal conference was held three years after the close of the public comment period the WVDEP violated the West Virginia surface mining laws. Tr. 5/9/12, p. 72.
17. The Board finds that conducting the informal conference three years after the close of the comment period constitutes a violation of the law.
18. The Board finds that after the initial thirty day comment period and statutorily required informal conference three weeks later, there is no requirement for continued public involvement, even if the Permit goes through substantial changes prior to final approval. *Id.* p. 78.
19. Mr. Spadaro testified that the WVDEP is required to conduct an informal conference within three weeks of the close of the comment period and then if the application should go through substantial changes then the application should be re-advertised to provide for additional public participation in the permitting process. *Id.*

20. Mr. Goodwin testified that he attended the informal conference but that he did not speak at the informal conference, as a protest to the disenfranchisement of the citizens, because the conference was held more than three years after the close of the public comment period. Tr. 5/9/2012, p. 105.
21. Mr. Goodwin testified that he provided written comments on the Permit application which included the permit review time line. Tr. p. 107.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to consider these appeals pursuant to West Virginia Code § 22B-1-1 et seq.
2. Appeals are heard *de novo* by the Surface Mine Board as required by West Virginia Code § 22B-1-7(e). The Board is not required to afford any deference to the DEP decision but shall act independently on the evidence before it. *West Virginia Div. of Environmental Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 490 S.E.2d 823 (1997).
3. The Board is empowered to consider appeals, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to matters properly pending before the board. West Virginia Code § 22B-1-5(1).
4. The Board may affirm, reverse or modify the decision of the DEP. West Virginia Code § 22B-1-7(g)(2).
5. West Virginia Code of State Regulations provides that if an informal conference is held, the decision shall be made within thirty (30) days of the close of the conference, unless a later time is necessary to provide an opportunity for an appeal. W.Va. C.S.R. § 38-2-3.32.a.

6. West Virginia Code provides if written objections are filed and an informal conference requested within **thirty** days of the last publication of the above notice, the director shall then hold a conference in the locality of the proposed mining within **three** weeks after the close of the public comment period. W.Va. Code § 22-3-20(b).
7. Pursuant to West Virginia law, within five working days of receipt of an application for a permit, the director of WVDEP shall notify the operator in writing, stating whether the application is administratively complete and whether the operator's advertisement may be published. If the application is not administratively complete, the director shall state in writing why the application is not administratively complete. W.Va. Code §22-3-9(g).
8. West Virginia law requires that if an informal conference has been held, the director shall issue and furnish the applicant for a permit and persons who were parties to the informal conference with the written finding granting or denying the permit, in whole or in part, and stating the reasons therefor within thirty days of the informal conference, notwithstanding the requirements of subsection (a), section eighteen of this article. W.Va. Code § 22-3-21(a). Subsection (a) of section eighteen of the Code provides, upon the receipt of a complete surface-mining application or significant revision or renewal thereof, including public notification and an opportunity for a public hearing, the director shall grant, require revision of, or deny the application for a permit within **sixty** days and notify the applicant in writing of the decision. The applicant for a permit, or revision of a permit, has the burden of establishing that the application is in compliance with all the requirements of this article and the rules promulgated hereunder. W. Va. Code § 22-3-18(a).

CONCLUSION

The Board finds it outrageous that WVDEP flagrantly violated the law by waiting more than three years after the initial comment period to hold an informal conference on the permit decision. It is clear from the testimony and admissions of counsel that WVDEP chose to violate the law by not holding the informal conference within the time frame outlined by the statute.

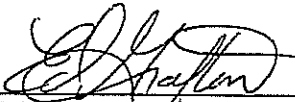
It is also clear to the Board that there is a conflict in the statute that requires an informal conference within three weeks of the close of the comment period and a permit decision a mere 30-days after the informal conference. The Board is a creature of statute and unable to throw out statutes or laws that appear in conflict and so the Board must try to balance that conflict just as the WVDEP has done.

The Board finds that in this circumstance the public would have suffered greater harm if the informal conference had been held within three weeks of the comment period because a permit decision was not until three years later, and the Permit was significantly different three years after the end of the comment period. If WVDEP had held the informal conference three weeks after the close of the first comment period then there would have been no other opportunity for the public to comment before the Permit was issued three years later. Instead, WVDEP held the informal conference in August of 2011 and then provided an additional public notice and 10-day comment period, prior to an ownership and control change, in September 2012. Given that there was no evidence offered of deficiencies in the permit beyond the procedural flaw, the Board finds that the remedy requested by the Appellants would not repair the delay of three years.

The majority of the Board finds that because the WVDEP held an additional comment period that any harm that may have been caused by the three year delay was repaired. Therefore the majority of the Board, based on the circumstances and facts associated with this case, voted to

AFFIRM the decision of the WVDEP. Board member Jon Blair Hunter dissented from this decision and would have remanded the Permit back to WVDEP to conduct an additional comment period and informal conference.

It is so Ordered this 21 day of June, 2012.



Ed Grafton, Vice-Chairman

BEFORE THE WEST VIRGINIA SURFACE MINE BOARD

**BO WEBB, ROB GOODWIN, DEBRA JARRELL,
and AMBER WHITTINGTON,**

Appellants,

v.

**Appeal Nos. 2011-12-SMB
2011-13-SMB
2011-14-SMB
2011-15-SMB**

**TOM CLARKE, DIRECTOR,
DIVISION OF MINING AND
RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee,

and

MARFORK COAL COMPANY,

Intervenor.

CERTIFICATE OF SERVICE

I, Fran Ryan, clerk to the Surface Mine Board do hereby certify that service of the Final Order was served upon the Appellants and Intervenor by certified U. S. Mail and hand delivered to the Appellee on this 26th day of June, 2012 to:

Thomas A. Rist
Rist Law Offices, LC
103 Fayette Avenue
Fayetteville, WV 25840

Shane Harvey
Jackson & Kelly
P. O. Box 553
Charleston, WV 25322

and Hand delivered to: Joseph Jenkins
Office of Legal Services
Department of Environmental Protection

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BO WEBB, ROB GOODWIN
DEBBIE JARRELL, and
AMBER WHITTINGTON,

Petitioners,

v.

Administrative Appeal No.:

TOM CLARKE, DIRECTOR,
DIVISION OF MINING AND
RECLAMATION, WEST VIRGINIA
DEPARTMENT OF
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Respondent,

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MARFORK COAL COMPANY,

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CERTIFICATE OF SERVICE

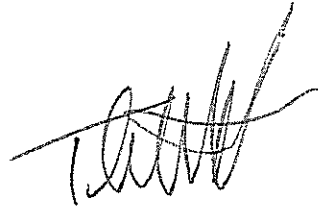
I, Thomas A. Rist, certify that the Administrative Appeals Docketing Statement and Petition of Bo Webb, Rob Goodwin, Debbie Jarrell, and Amber Whittington for Judicial Review of the Final Order of the West Virginia Surface Mine Board were served on this the 16th day of July, 2012 by United States Mail, certified, upon the following:

Shane Harvey
Jackson Kelly
1600 Laidley Tower
PO Box 553
Charleston, WV 25322

Joseph Jenkins
West Virginia DEP
Office of Legal Services
601 57th Street, SE
Charleston, WV 25304

Darrell McGraw
WV Attorney General
WV State Capitol Building 1;
Room 26-E
Charleston, WV 25305

Fran Ryan, Clerk
WV Surface Mine Board
601 57th Street, SE
Charleston, WV 25304

A handwritten signature in black ink, appearing to read 'T. Rist', written over a horizontal line.

Thomas A. Rist