

BEFORE THE WEST VIRGINIA SURFACE MINE BOARD

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

Appellants,

v.

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

WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Appellee,

and

MARFORK COAL COMPANY,

Intervenor.

This is a transcript of the proceedings held pursuant to notice in the above-styled matter on the 9th day of May, 2012, beginning at 8:32 a.m., before the West Virginia Surface Mine Board, at the offices of the West Virginia Department of Environmental Protection, 601 57th Street, Charleston, Kanawha County, West Virginia.

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Surface Mine Board  
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A P P E A R A N C E S:

On behalf of the Appellants:

THOMAS A. RIST, ESQUIRE  
Rist Law Offices, LC  
103 Fayette Avenue  
Fayetteville, West Virginia 25840

On behalf of the Appellee:

JOSEPH JENKINS, ESQUIRE  
WV Department of Environmental Protection  
Office of Legal Services  
601 57th Street  
Charleston, West Virginia 25304

On behalf of the Intervenor:

SHANE HARVEY, ESQUIRE  
Jackson Kelly, PLLC  
1600 Laidley Tower  
P.O. Box 553  
Charleston, West Virginia 25322

Members of the Surface Mine Board:

ED GRAFTON, Vice-Chairman  
HENRY RAUCH, Member  
JON BLAIR HUNTER, Member  
JAMES SMITH, Member  
RON CRITES, Member

ALSO PRESENT: Wendy Radcliff, Legal Counsel

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## P R O C E E D I N G S

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(8:32 a.m.)

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CHAIRMAN GRAFTON: Good morning. My name is Ed Grafton, vice-chairman of the Surface Mine Board. At this time, I'd ask you to turn off all your cell phones and electronic devices because they interfere with the court reporter's recording. The other members of the Board present today are: Jim Smith to my far left, Jon Hunter, Henry Rauch and Don Michael to my right. Our legal counsel is Wendy Radcliff, who is to my left, and our clerk is Fran Ryan, who is sitting in the back.

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We're here to hear evidence in the case of Webb, Goodwin, Jarrell, Whittington versus Tom Clarke, Director of Division of Mining and Reclamation, Department of Environmental Protection, and Marfork Coal Company. Appeals Number 2012 -- 12, 13, 14 and 15 before the Surface Mine Board, SMB. These are the -- we have consolidated all of these appeal into one.

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22

Would counsel representing each party identify themselves for the record, please?

23

24

MR. RIST: Tom Rist for the Appellants, who are all here. I'm sorry. Three of them are here.

1 No, all four of them are here in person.

2 CHAIRMAN GRAFTON: Thank you.

3 MR. JENKINS: Joseph Jenkins for the DEP,  
4 and Scott Driver, also with the DEP.

5 MR. HARVEY: Shane Harvey with Jackson  
6 Kelly representing Marfork. With me is Nick Johnson,  
7 in-house counsel at Alpha, Marfork's parent company.  
8 I also have Bob Whitten with Alpha. Alpha is here --  
9 with us here today, as well.

10 CHAIRMAN GRAFTON: Thank you. The  
11 certified record has been presented and will be a part  
12 of this evidence in this case. Do we have any  
13 questions before we proceed?

14 MR. RIST: No, sir.

15 MS. RADCLIFF: Just for the record, the  
16 Chairman, Mark Schuerger, is an employee of Alpha, has  
17 recused himself from hearing any discussion about this  
18 case, which is why he is not here.

19 CHAIRMAN GRAFTON: Okay. We're now going  
20 to offer each of the representatives to make a brief  
21 opening statement, starting with Mr. Rist.

22 MR. RIST: Sure. Thank you. Good  
23 morning, folks. Thanks for having us here again.

24 Well, I guess you have to have us here since we filed

1 an appeal, but nice to see you all.

2 I think this case is pretty simple,  
3 pretty straightforward, actually. One is the -- you  
4 guys received four separate appeals, the same permit,  
5 and as Mr. Grafton said, this has all been combined  
6 into one. And I think for today to simplify things  
7 and kind of get to the point, there is two things we  
8 are looking at. One is the DEP failed to follow the  
9 West Virginia Code requiring an informal conference to  
10 be held within three weeks of the close of the comment  
11 period in this case. The end of the comment period  
12 was April 2008 -- I'm sorry -- June of 2008.  
13 According to the certified record, the informal  
14 conference wasn't until three years later.

15 And if we can't follow the West Virginia  
16 statutes and the West Virginia code in looking at  
17 these permits from the perspective of the citizens,  
18 what are we supposed to follow?

19 The second issue are the health effects.  
20 And here the impacts of this permit in this area in  
21 the Coal River are substantial and there is a number  
22 of reports that have come out in the last couple of  
23 years that support our allegation that the DEP has  
24 failed to look at the health impacts of this permit,

1 and the DEP is required to do that.

2           It is the absolute first thing in the  
3 West Virginia code dealing with the establishment of  
4 the DEP, and that's something they're supposed to look  
5 at. I don't think that's been done effectively in  
6 this permit. So we're asking you guys to basically  
7 deny the permit, stop the mining. This has to be done  
8 correctly and follow West Virginia code and move  
9 forward.

10           And this should be shorter than the last  
11 time I was in front of you. I'm sure you guys will  
12 all be happy to hear. Thank you.

13           CHAIRMAN GRAFTON: Thank you. Mr.  
14 Jenkins?

15           MR. JENKINS: Thank you, Mr. Chairman.  
16 Just briefly and this may be just colloquy between Mr.  
17 Rist and I. Are you asserting anymore with regards to  
18 the topsoil variance or is that an issue you dropped?

19           MR. RIST: No, we're not going to proceed  
20 with that I think to simply things, which may end up  
21 meaning Ms. White can go back to work.

22           MR. JENKINS: Okay. Well, I appreciate  
23 it, Mr. Rist. With that down then, then I will  
24 address the two issues that Mr. Rist had raised.



1 He's correct, we didn't follow the Code  
2 to a tee with regards to public comment. In fact, the  
3 way the system is set up, this has been a problem for  
4 several years. This Board is well aware we've run  
5 into this issue before given the way that the time  
6 frames are set with regards to informal conferences,  
7 public comment and when we have to issue permits.

8 Prior hearings have stated I believe at  
9 one time Logan never met the time frame 60 percent of  
10 the time, and that was several years ago, but it's  
11 still the same situation that is ongoing. And Mr.  
12 Wood and Mr. Porterfield may also touch on some of  
13 those issues where this has been ongoing.

14 However, this Board has also recognized  
15 that there hasn't been any prejudice to the public  
16 within issuing this permit. And even though we failed  
17 to follow the law technically, the spirit of the law  
18 was still met.

19 And what has happened in this situation  
20 is that after -- and let me back up to kind of explain  
21 how things work. There is a difference between what a  
22 permit is administratively complete, meaning that it  
23 just has all the parts that it needs to be, versus  
24 technically complete, meaning it has all the

1 information that we need to make a knowledgeable and  
2 legally reasonable decision on that permit, whether to  
3 accept it, deny it, or whatnot.

4 And those two differences are what causes  
5 this time frame issue, because once it's  
6 administratively complete it gets published and then  
7 the 30-day public comment -- written public comment  
8 period starts.

9 And I say specifically the written public  
10 comment period because there is -- the one thing that  
11 someone gains by submitting a written comment during  
12 that 30-day period is an official response from the  
13 DEP and request by the DEP for the company to respond  
14 to those comments.

15 Otherwise, comments can be submitted at  
16 any time and our permit reviewers place that in the  
17 permit file and take those into consideration. Just  
18 because it's not officially during the 30-day period  
19 doesn't mean that we ignore the comments and File 13  
20 them. They are placed in the permit and we review  
21 them.

22 There is no prejudice in this situation  
23 because when this was administratively complete back  
24 in mid of 2008 and the public comment period started,

1 this permit was over 800 acres, several valley fills,  
2 and it's been pared down significantly in the time  
3 that the permit was issued from that time. I believe  
4 it's only a third of the initial size.

5 And so when the informal conference was  
6 actually held I believe last spring or actually last  
7 fall -- I don't know off the top of my head -- but  
8 when the informal conference was actually held the  
9 public had a chance to review and comment on what the  
10 permit really looked like, not what it was  
11 administratively complete, because during that review  
12 and we knew it became technically complete, it became  
13 more what the type of permit we issued. And so there  
14 is no prejudice because they actually saw more.

15 If we would have held the informal  
16 conference within 30 days, the public would have  
17 commented on a permit that looks nothing like it does  
18 when it was issued because of the way that the review  
19 worked.

20 Additionally, there was another public  
21 comment period published and a 10-day written public  
22 comment period of approximately a month or two after  
23 the informal conference. And so there was an even an  
24 additional public comment period after the fact that

1 they had an additional opportunity to comment.

2 I believe this happened -- occurred when  
3 Alpha had taken over the Massey property and so there  
4 is a change of ownership and then it opened it back up  
5 to public comment to where everyone -- it was  
6 published in the newspaper, it's in the certified  
7 record, and it was placed in the courthouse. And so  
8 the permit was out there.

9 And, again, everyone has an opportunity  
10 to submit comments, and the public submitted comments  
11 at the informal conference here. So the public had  
12 the opportunity to review a permit, review the permit  
13 that is even more similar to what was issued and  
14 knowledgeably comment on that.

15 Again, the comments would have been for a  
16 permit that looks nothing like it does today if we  
17 followed that technical aspect of it.

18 And so I believe, based on the prior  
19 Board's rulings, that we can show that there was no  
20 prejudice, that the public -- that we met the spirit  
21 of the law, that the public had the opportunity to  
22 comment and to review this permit.

23 As to the health effects, there are  
24 studies out there. The DEP acknowledges that. But

1 none of those studies have shown a causative effect.  
2 We need to know what we need to regulate, not just  
3 mining, not just AEP's power plant. We need to know  
4 -- and that is how all environmental regulations are  
5 set up.

6 Keith will explain in terms of -- an  
7 example, selenium. This Board should be well aware of  
8 selenium. It finally became regulated when there was  
9 a causative effect between selenium and aquatic life.  
10 We developed parameters and set those parameters in  
11 the permit, and that's how we regulate things.

12 With the mining -- with these studies,  
13 they don't pinpoint any particular type of mining, any  
14 particular element, any type of parameter, or anything  
15 that can point to these health studies. It's just a  
16 correlated effect.

17 There has even been a recent review of a  
18 lot of these studies and other things saying that not  
19 only there may be something with regards to coal  
20 mining, but there is several other factors that  
21 weren't taken into account in these other public  
22 health studies. And so we have appropriately  
23 addressed that.

24 And when there is scientific studies out

1 there pinpointing what parameter we need to set a  
2 standard for to govern, then that's how the process  
3 works, not just because there is a correlated effect.  
4 There needs to be causation, and to have causation we  
5 have to have specifically what we can regulate.

6 Now, in terms of public health -- and I  
7 don't know. This may have been more of a preliminary  
8 thing. It's our understanding that Mr. Rist's only  
9 expert is going to be Mr. Spadaro. He is not a  
10 qualified public health expert, maybe mine planning  
11 and things of that nature. But he is not a medical  
12 doctor. He's not a master in public health or an  
13 epidemiologist or any other person that's experienced  
14 enough to testify to these studies, to testify to  
15 public health studies.

16 Furthermore, the entrance of studies  
17 without the authors here for proper cross-examination  
18 is inappropriate, and it doesn't meet the basic  
19 foundational rules of evidence.

20 And so to the extent possible, we would  
21 move to exclude any evidence on the public health just  
22 because we don't think there is a proper expert or  
23 witnesses here to adequately testify to that effect.

24 But, again, I believe we have addressed

1 it. We've addressed it as best as we can within the  
2 regulatory framework with what we were given, what we  
3 are allowed to do, and I believe we can show it.  
4 Thank you.

5 MR. HARVEY: Thanks for your time this  
6 morning. I think a little bit of context is in order.  
7 This is a good project. I don't know if the Board has  
8 had a chance to look through the certified record in  
9 much detail. But this is an old unreclaimed mine  
10 site. Marfork will remine this old mine site that was  
11 never reclaimed. In the process it will reclaim the  
12 site, it will eliminate hundreds of feet of highwall  
13 and along the way it will employ about 50 people.  
14 It's the type of win-win project that everybody should  
15 be in favor of.

16 The only people who oppose it are the  
17 Appellants. I understand it now that they list two  
18 reasons. The first is the timing with the informal  
19 conference. These permitting deadlines in the  
20 statutes and regs are primarily for the operator's  
21 benefit. They make sure that the permit moves along  
22 through the common process, it doesn't wait in the  
23 queue forever, and then it gets issued.

24 There was no prejudice to the Appellants

1 from the delay. As Mr. Jenkins mentioned, this  
2 project was downsized during the delay. It went from  
3 around 700 acres to 200 acres. So from the  
4 Appellants' perspective, I would imagine they would  
5 concede that is a good thing.

6 They were able to comment, as Mr. Jenkins  
7 mentioned, during the informal conference. There was  
8 simply no prejudice to their rights. Everything  
9 happened as if it did if the permit deadlines were  
10 followed.

11 And this Board may remember that there  
12 have been cases in the past where this Board has  
13 recognized that failure to follow these permit  
14 deadlines are not fatal as long as the Appellants were  
15 not prejudiced, and we think it's pretty clear here in  
16 this case they were not.

17 The second issue relates to health  
18 studies. We agree with Mr. Jenkins. I'm not sure how  
19 they plan to present evidence about those health  
20 studies. They are hearsay.

21 As I understand it, they rely on the  
22 studies of Dr. Hendryx from WVU. He is not here today  
23 for us to cross-examine. The only case I know in  
24 which he was called as an expert there was an effort



1 to inquire about his studies and dig deeper into his  
2 findings and he withdrew as an expert. There has been  
3 no opportunity to challenge his findings and we don't  
4 have that opportunity here today.

5 It's simply hearsay and we don't see how  
6 they are able to get that evidence before this Board  
7 without substantial prejudice to DEP and to Marfork.

8 Secondly, even if you looked at Dr.  
9 Hendryx studies, it's important to note -- and I think  
10 Mr. Jenkins touched upon this -- they do not say that  
11 mining causes health impacts. What Dr. Hendryx had  
12 said is there some statistical association between  
13 mining and health impacts that needs to be explored  
14 further.

15 He has conceded that mining does not  
16 cause these impacts, only that they need to have  
17 further study. That is the basis of his studies.  
18 We don't dispute that, but we think that's nothing  
19 that this Board can do anything about.

20 This Board can look at causes if this  
21 project would cause some health impact. This Board  
22 could do something about that, but there will be no  
23 evidence of that here today. So we think for that  
24 reason the permit should be issued. Thank you.

1 CHAIRMAN GRAFTON: Okay. We're ready to  
2 proceed with your case.

3 MR. RIST: Sure. Thanks. For  
4 clarification, I don't know if this would help, but it  
5 sounded to me like the DEP and Alpha would be willing  
6 to stipulate that they missed the deadlines on the  
7 informal conference, and I don't know if they want us  
8 to lay that on the record. If they will stipulate  
9 that that violated 22-3-20 that kind of eliminates me  
10 to even call witnesses to point in the certified  
11 record where things are. I'm not sure if that's  
12 appropriate. I mean, if they just want me to call  
13 witnesses, I'll do it.

14 MR. JENKINS: I mean, yeah. I mean, we  
15 can't argue that we didn't meet the technical deadline  
16 of 22-3-20 and the associated regulations. We just  
17 can't. However, I think Mr. Wood -- or Mr. Rist still  
18 needs to put on evidence that the public or his  
19 clients were prejudiced by that failure. So to say  
20 that, you know, "Oh, we're done. We win," I don't  
21 think that's appropriate.

22 MR. HARVEY: I agree. We stipulate that  
23 the informal conference was not held within three  
24 weeks of the close of the public comment period, but

1 this Board's prior decisions have found that it is not  
2 fatal unless there is some prejudice. I think he does  
3 need to show that to prevail.

4 MS. RADCLIFF: So, in essence, you don't  
5 need to have a witness say that when the -- you know  
6 -- to point what's already in the record. We  
7 established that it was three weeks after the comment  
8 period. However, you need to do with your witnesses  
9 what you think is best.

10 MR. RIST: Right. Thank you. I'll call  
11 Rob Goodwin, please.

12 (Witness sworn.)

13 THEREUPON came

14 **ROB GOODWIN,**

15 the Appellant herein, called as a witness on his own  
16 behalf, and having been first duly sworn according to  
17 law, testified as follows:

18 **DIRECT EXAMINATION**

19 BY MR. RIST:

20 Q State your name for the record, sir.

21 A Rob Goodwin.

22 Q What do you do for a living?

23 A I am an employee of Coal River Mountain  
24 Watch.

1 Q And in case the Board doesn't know, what  
2 does Coal River Mountain Watch do?

3 A Coal River Mountain Watch is a citizens  
4 group located in Naoma, West Virginia, and my job is  
5 to assist citizens with -- dealing with agencies and  
6 mine permits.

7 Q Are you familiar at with the permit that  
8 is at issue in this case? It is Surface Mine Permit  
9 S300208 issued to Marfork Coal Company?

10 A Yes.

11 Q Have you had a chance to review the  
12 certified record?

13 A Yes.

14 Q How did you get a copy of the record?

15 A It was mailed to Coal River Mountain  
16 Watch's address by the Surface Mine Board.

17 Q In your position at Coal River Mountain  
18 Watch, you said that you helped citizens in doing --  
19 tell me that again.

20 A Citizens -- you know -- if they have  
21 questions about, you know, permits, they need to find  
22 the appropriate contact within the Agency, and those  
23 sorts of things.

24 Q So if a citizen was trying to get

1 information about a permit or to possibly voice  
2 concern about a permit, would you provide them  
3 information?

4 A Yes.

5 Q What do you rely on to provide  
6 information to citizens of West Virginia about these  
7 permits?

8 A A combination of the federal Surface Mine  
9 and Reclamation Control Act, the West Virginia Code  
10 and DEP's internal memorandums.

11 Q And when you're providing information to  
12 the citizens of West Virginia regarding time frames  
13 and things like that, do you rely on the West Virginia  
14 Code for that, as well?

15 A Yes.

16 Q In the present case we're dealing with,  
17 my understanding is there were several people that had  
18 sent letters to the DEP voicing concern; is that  
19 correct?

20 A Yes.

21 Q Do you have any idea of whether someone  
22 from Coal River Mountain Watch sent a letter to the  
23 DEP?

24 A Yes. I believe two employees of Coal

1 River Mountain Watch requested an informal conference,  
2 and at least one of them requested an information  
3 gathering inspection before that informal conference.

4 Q Who were the two people that did that?

5 A It would have been Matthew Noerpel and  
6 Vernon Haltom in about June of 2008.

7 MR. RIST: May I approach the witness?

8 CHAIRMAN GRAFTON: Sure.

9 MR. RIST: I'm going to hand you a copy  
10 of the certified record in this case and I am going to  
11 direct you and counsel to page 168 of the certified  
12 record.

13 (Witness examines document.)

14 BY MR. RIST:

15 Q What is that you're looking at there?

16 A This is a letter written by Matt Noerpel  
17 regarding his concerns about the Collins Fork  
18 Remediation Project permit.

19 Q The permit we're here looking at today?

20 A Yes.

21 Q What was the date that is stamped on  
22 there that was received by the DEP?

23 A June 19th, 2008.

24 Q If you flip to page 170 of the certified

1 record --

2 A Yes.

3 Q -- what is that?

4 A This is a similar letter from Vernon  
5 Haltom requesting an informal conference which was  
6 received on June 23rd, 2008, and he also requests a  
7 site visit to the proposed permit area for information  
8 gathering to the informal conference.

9 Q Do you have any idea when the end of the  
10 comment period was for this permit we're dealing with?

11 A It says 6/19/08.

12 Q Do you have any idea when the informal  
13 hearing was held in this matter?

14 A It was held on -- I believe it was August  
15 4th, 2011, or 8th, 2011. It was the first week of  
16 August 2011.

17 Q In your review of the record in this case  
18 and the permit, what area of that record deals with  
19 the health impacts of the mining that's supposed to  
20 take place in this area under the permit?

21 A There doesn't appear to be any designated  
22 section that mentions anything about health impacts of  
23 the operation.

24 Q So you couldn't locate that anywhere in

1 the record laying in front of you?

2 A No statements related to impacts to  
3 health were in the record.

4 MR. RIST: I don't have any other  
5 questions for this witness.

6 MS. RADCLIFF: Mr. Jenkins.

7 MR. JENKINS: Thank you.

8 **CROSS-EXAMINATION**

9 BY MR. JENKINS:

10 Q Mr. Goodwin, did you attend the August  
11 2011 hearing?

12 A Yes, I did.

13 Q Did you make comments on this permit?

14 A I did. However, my comments were  
15 severely limited as, you know, a full review of the  
16 current application was not available at the  
17 courthouse and no inspection was allowed given that  
18 the comment period for requesting that inspection had  
19 expired three years prior.

20 Q Did you try to go to the DEP to look at  
21 the permit?

22 A I reviewed a copy of the permit at the  
23 DEP. However, it was a copy that included voided --  
24 you know -- voided sections and it was extremely hard



1 to decipher what the permit was actually -- you know  
2 -- what the final clean copy of the permit was. That  
3 was my recollection.

4 Q So you would prefer prior information not  
5 be there to compare the differences?

6 A It was not clear as -- it just was not  
7 clear as far as, you know, what the final product was.  
8 It was just, you know, all in one folder. It was not,  
9 you know, condensed into one place. But that could  
10 have -- you know.

11 Q Were you aware that an additional comment  
12 period was published in September?

13 A I was not.

14 Q Do you regularly read the local papers  
15 down there to find notices?

16 A Yes. But I primarily rely on the DEP's  
17 email, public notice system. However, I would have  
18 expected that given the comments submitted and the  
19 interest of the organization that Coal River Mountain  
20 Watch would have been notified of that comment period.  
21 However, they were not.

22 Q Explain to me how your comments were  
23 limited at the informal conference.

24 A I could not go to the courthouse which I

1 have found is the best way to get, you know, an  
2 official copy of the permit as it is. And also an  
3 information gathering exercise was not conducted  
4 because we could not request one because there was not  
5 an open comment period to do so, which I think is  
6 essentially to providing substantial technical  
7 comments that will actually be, you know, specifically  
8 taken into consideration by the permit supervisor.

9 Q What do you believe a site visit would  
10 have provided you?

11 A Separate -- you know -- we would have  
12 looked at the soils there on site and worked with the  
13 company and DEP on the reclamation plan which we did  
14 -- I think, you know, successfully do on, you know, a  
15 permit on the other side of the mountain. You know,  
16 we made improvements to that permit after the  
17 inspection and through the renewal process.

18 We would have looked at the water  
19 quality. We would have been able to pinpoint any  
20 potential, you know, sources of, you know, pollution  
21 or issues that -- you know -- from the permit. How  
22 the permit would affect surrounding areas.

23 Q Wouldn't all of that information be in  
24 the permit or prior -- or other water quality data in

1 the area?

2 A We would not -- it's -- no. There is  
3 nothing that replaces being there on site and doing  
4 your own inspection, as I think, you know, there is a  
5 duty of citizens interested in the area to be able to  
6 check that information given what they have from, you  
7 know, knowing the geographic area and being there.

8 Q Are you aware that site visits for  
9 citizens in not mandatory but is discretionary?

10 A I believe that a site visit is, you know,  
11 essentially mandatory, but I'm not a lawyer.

12 MR. JENKINS: That's all I have. Thank  
13 you, Mr. Goodwin.

14 CHAIRMAN GRAFTON: Mr. Harvey?

15 MR. HARVEY: Yes.

16 **CROSS-EXAMINATION**

17 BY MR. HARVEY:

18 Q As I understand it, Mr. Goodwin -- Godwin  
19 or Goodwin? I'm sorry. Is your name Godwin or  
20 Goodwin? Which is it?

21 A Goodwin.

22 Q I'm sorry. Your complaint is that the  
23 informal conference was not held back in 2008 within  
24 three weeks of the --

1           A     My complaint is more that a 30-day  
2 comment period was not reopened once the final  
3 application that went to the informal conference, and  
4 so -- you know -- and I did send correspondence  
5 regarding the process to DEP, you know, about the  
6 process, and I believe I requested that -- I'm not one  
7 hundred percent sure. I could -- the documents are  
8 here somewhere. -- that, you know, the comment period  
9 be reopened.

10           Q     But as I understand it from listening to  
11 your attorney, you're claiming there was a violation  
12 of law because the informal comment period closed --  
13 or rather the public comment period closed in 2008 and  
14 the informal conference wasn't held within three  
15 weeks; is that correct?

16           A     That's correct, yes.

17           Q     Okay. When that happened in 2008, did  
18 you contact anybody at DEP to complain that the timing  
19 requirements weren't met?

20           A     We were under the assumption that taken  
21 the time that it would be readvertised before an  
22 informal conference as we did not hear back regarding  
23 the inspection request. We did not hear back  
24 regarding the comment.

1           Q     But you didn't contact anybody and say,  
2     "The deadline has run.  Where is our informal  
3     conference"?

4           A     We raised objections about the process  
5     and we found out that the informal conference was  
6     going to be scheduled without reopening the comment  
7     period.

8           Q     In 2011?

9           A     Yes.

10          Q     Okay.  You didn't complain in 2008?

11          A     We were under the assumption that it  
12     would be readvertised because of the changes that were  
13     being made to the permit.

14          Q     Did you make any complaints in 2009 after  
15     a year had gone by and no informal conference?

16          A     The permit was still in review and there  
17     was no complete application.

18          Q     You say you're employed at Coal River  
19     Mountain Watch, correct?

20          A     Yes.

21                   MR. HARVEY:  I'd like to have this marked  
22     as Intervenor's Exhibit 1, please.

23                           (WHEREUPON, Intervenor's Exhibit Number 1  
24     was marked for purposes of identification.)

1 BY MR. HARVEY:

2 Q Does Coal River Mountain Watch have a  
3 website, Mr. Goodwin?

4 A Yes, they do.

5 Q Does it inform people who may visit that  
6 website on how to challenge permits?

7 A Generally.

8 Q The document marked as Intervenor's  
9 Exhibit Number 1, if you go to the third page, has a  
10 page called "If a Permit Might Impact You...What to do  
11 and who to call in West Virginia." Do you see that?

12 A Yes.

13 Q That's a document created and published  
14 by Coal River Mountain Watch, correct?

15 A Actually, I believe we -- I'm not one  
16 hundred percent sure whether Coal River Mountain Watch  
17 created it. Yes, we posted that. It's possible that  
18 may have come from the DEP at one time. I'm not one  
19 hundred percent sure.

20 Q Okay. If you look at the second page  
21 under Number 4, it says, "Contact Coal River Mountain  
22 Watch"?

23 A Right. So that would have been added,  
24 yes.

1 Q That's probably not DEP's document,  
2 right?

3 A No. I was just looking at the front page  
4 here. It looked like it was modified from the -- may  
5 be a DEP document.

6 Q So this document tells folks what to do  
7 if they want to challenge a permit, correct?

8 A Yes.

9 Q And Number 1 says, "Make your concern  
10 official." "Write and call the DEP," correct?

11 A Yes.

12 Q "Tell them what you think about the  
13 permit." You did that correct?

14 A Yes.

15 MR. RIST: I'm going to object to this  
16 line of questioning because it has nothing to do with  
17 whether or not the respondents in this case followed  
18 West Virginia law regarding the comment period. He's  
19 asking questions of someone about whether they're  
20 calling -- something that they posted on their website  
21 is just not relevant.

22 MR. HARVEY: I think the issue is whether  
23 Coal River Mountain Watch or Mr. Goodwin has been  
24 prejudiced by the failure to follow the timelines. My

1 point is everything that they recommend a citizen to  
2 do to challenge a permit was done here. They were  
3 able to do everything that they recommend be done in a  
4 permit challenge. They followed all the steps and  
5 their own guidance.

6 CHAIRMAN GRAFTON: I think you probably  
7 ought to hold this -- limit it as possible.

8 MR. HARVEY: I only had a couple of more  
9 questions, Mr. Grafton.

10 CHAIRMAN GRAFTON: Okay.

11 BY MR. HARVEY:

12 Q Number 5, "Get the facts about the  
13 permit." You did that, correct?

14 A Yes.

15 Q Number 8, "Attend the informal hearing."  
16 You did that, correct?

17 A Yes.

18 Q Number 9, "Prepare for the Surface Mine  
19 Board." You filed an appeal and you're here today  
20 raising your complaints about the permit; is that  
21 correct?

22 A Yes.

23 Q You said in your testimony in response to  
24 questions from your attorney that you were confused



1 because the permit changed between the time it was  
2 advertised and the informal conference; is that  
3 correct?

4 A Yes.

5 Q The permit was downsized, correct?

6 A Yes.

7 Q Do you have any complaint about it being  
8 downsized?

9 A That's a positive thing. However, it  
10 doesn't mean that through a review of it, downsizing,  
11 that you would not want to look for other changes to  
12 the permit which in looking through an entire permit,  
13 as I think you may know, is a timely process to find  
14 every document.

15 Q Okay. The only complaint you made here  
16 today other than the timing of the informal conference  
17 is about health impacts, correct?

18 A Correct. But in conjunction with the  
19 timing, you know, that comment period does relate to  
20 the ability to have an inspection.

21 Q But what about -- if you had more time to  
22 review this permit or the permit application as it  
23 stands now, what additional health impacts would you  
24 raise that you aren't raising here today?

1           A     I think without, you know, a visit to the  
2 site to fully, you know, assess and collect all of the  
3 information, I can't answer that question.

4           Q     Okay. So the permit goes from 700 acres  
5 to 200 acres, correct?

6           A     Uh-huh (affirmative).

7           Q     And your only complaint relates to the  
8 health impacts of that permit, correct?

9           A     We also, you know, made complaints about  
10 the reclamation plan.

11          Q     Okay. I don't hear you pursuing those  
12 here today.

13          A     Because the comment period issue is what  
14 we're here talking about primarily.

15          Q     Okay. But you could have raised those  
16 here today, correct?

17          A     Yes.

18          Q     And, again, you can't tell me how the  
19 permit changing from 700 acres to 200 acres would add  
20 any additional health impacts of claims that you could  
21 bring before this Board here today?

22          A     As I said, we would need an inspection  
23 which was not granted by the Board for this hearing  
24 and also not granted through the informal conference

1 process.

2 Q What information about health impacts  
3 would you learn from an inspection of the property?

4 A We would go -- I think primarily what I  
5 would do is go on site. Although I'm not an expert,  
6 we would like to bring an expert on the site. But I  
7 think assessing, you know, the wind direction,  
8 potentially, you know, where dust could possibly go  
9 from the site, you know, and making suggestions,  
10 changes to the permit to minimize, you know, those  
11 sorts of impacts.

12 MR. HARVEY: I understand that you are  
13 here today to -- scratch that. I think you will have  
14 a better witness to testify about that. No further  
15 questions of this witness.

16 MR. RIST: I have a couple. I'm sorry.  
17 Go ahead.

18 CHAIRMAN GRAFTON: Does the Board have  
19 any questions?

20 (No response.)

21 MS. RADCLIFF: I have one question that  
22 another Board member does, Counsel. If you look at  
23 Mr. Harvey's exhibit, Number 5, did you go to the  
24 Raleigh County Courthouse? Is that where you went?

1 THE WITNESS: Yes.

2 MS. RADCLIFF: What did you find there?

3 THE WITNESS: I believe there was some  
4 documents -- stray documents left for the permit, but  
5 the complete application from what I could find was  
6 not there.

7 MS. RADCLIFF: Was it the original  
8 application that you -- did you go in 2008 when you  
9 were giving your comments?

10 THE WITNESS: No. It was the summer of  
11 -- I think it was late July of 2011.

12 MS. RADCLIFF: When you went there?

13 THE WITNESS: Yeah.

14 MS. RADCLIFF: Did you go there before in  
15 2008 when you were doing comments to see the  
16 application or did someone?

17 THE WITNESS: Someone did, yeah.

18 MS. RADCLIFF: So you don't know whether  
19 it had changed from the time you were there in 2008 to  
20 when you were there in 2011?

21 THE WITNESS: I mean, I know that it -- I  
22 did know that it changed. I did not know specifically  
23 how it changed until I went to the DEP office and  
24 reviewed the permit and then I had some sort of idea.

1 And I knew that the permit got smaller, but I did not  
2 know all of the specific changes.

3 MS. RADCLIFF: The application in the  
4 courthouse, did it indicate anywhere in there that it  
5 had gone from 700 to 200 acres?

6 THE WITNESS: To the best of my  
7 knowledge, no. But what I did actually when I went to  
8 the courthouse is that when I had trouble I went on  
9 the ERIS permit application page and it said that the  
10 application had been removed from the courthouse  
11 around 2008.

12 MS. RADCLIFF: But there were materials  
13 there when you went in --

14 THE WITNESS: There were some, but it was  
15 scattered.

16 MS. RADCLIFF: How much information?  
17 Describe for me.

18 THE WITNESS: It was like I think -- I  
19 don't know --

20 MS. RADCLIFF: Stacks or like disks?

21 THE WITNESS: There were lots of permits  
22 and very disorganized and there was -- I don't know.  
23 It was not any updated information. A couple of  
24 binders, I think. It's hard to recall.

1 MS. RADCLIFF: Okay. Thank you. Mr.  
2 Rist, do you have any redirect?

3 MR. RIST: Yes.

4 REDIRECT EXAMINATION

5 BY MR. RIST:

6 Q Just a couple of things because I want to  
7 clear up what the record says so our testimony is  
8 clear here. Sir, would you look at page 195 of the  
9 certified record?

10 A Yes.

11 Q Would you confirm for me on April 10th,  
12 2008, the general public notice was -- is noted in the  
13 certified record there?

14 A It is, yes.

15 Q Okay. And would you look at page 196?

16 A Yeah.

17 Q And can you confirm for me that on April  
18 22nd, 2008, the DEP received a letter of comment from  
19 Matt Noerpel?

20 A Yes.

21 Q Would you confirm for me on page 197 that  
22 on 6/19/08 it's noted that that's the end of the  
23 comment period?

24 A Yes.

1 Q Would you also note -- I want to clarify  
2 for the record too that on June 23rd of '08 there is a  
3 notation on page 197 that says it received a letter of  
4 comment from Matt Noerpel on June 19th of '08?

5 A Yes.

6 Q That's all in the record?

7 A Yes.

8 Q All right. One other thing to follow up  
9 on. Let's talk about prejudice for a second. How  
10 does it harm the citizens living below these permits  
11 if it takes three years to get around to doing one of  
12 these conferences?

13 A By the time three years would come around  
14 you would, you know, not have as much knowledge about,  
15 you know, the permit application necessarily because,  
16 you know, it would change and so the citizen has to go  
17 back and figure out what changes were made to the  
18 permit application.

19 And, you know, when Coal River Mountain  
20 Watch is helping people that, you know, don't have  
21 experience with challenging permits, you know, the  
22 timeline is something that makes it clear and someone  
23 knows what to expect.

24 Q Have you seen anything in the West

1 Virginia Code that talks about prejudice under the  
2 section dealing with the time frames for the comment  
3 period?

4 A I'm not one hundred percent sure.

5 Q Okay. Is it difficult to advise people  
6 when they come in to see you -- the citizens of West  
7 Virginia when they come in to get help from Coal River  
8 Mountain Watch about the -- what to do with permits if  
9 it takes three years for the DEP and the coal company  
10 to follow the law?

11 A I think it is. However, I think the  
12 situation could be remedied if readvertisement  
13 occurred under that time frame, you know, before the  
14 informal conference so that advertisement, you know,  
15 happened and that three-week window to have the  
16 informal conference, you know, started over.

17 I think that the situation is easily  
18 remediable by just opening the informal conference  
19 again. Because I understand how the Agency may not be  
20 able to meet the deadline, but I think it could be  
21 remedied quickly by opening the comment period which  
22 is what we suggested through the process.

23 And to be honest, I think that if DEP had  
24 done that kind out of our request last summer, we may



1 not be here today.

2 MR. RIST: No other questions at this  
3 time.

4 MR. JENKINS: I have a couple follow-up  
5 questions if I may.

6 **REXCROSS-EXAMINATION**

7 BY MR. JENKINS:

8 Q Mr. Goodwin, so you -- well, do you know  
9 of -- Mr. Rist had asked you whether or not there is  
10 nothing of prejudice in the statutes or in the rules.  
11 You may not know this. Is there a way for us to issue  
12 another comment period three years after the  
13 application was administratively complete?

14 A Yes. You readvertise.

15 Q But actually aren't we supposed to  
16 advertise right after it is administratively complete,  
17 not three years later?

18 A No. I don't think that is necessarily  
19 correct. You can advertise, I believe, once it's  
20 administratively complete, but I don't believe you're  
21 required. You can wait all the way until right before  
22 it's technically complete, but I would advise you to  
23 ask your staff at the DEP about that.

24 Q Well, would you agree, then, that if we

1 held the informal conference within three weeks of the  
2 comment period back in 2008 that we would have  
3 followed the law?

4 A Yes.

5 Q But now since it took that much time and  
6 the permit has changed, would you agree that you're  
7 better off commenting and having an informal  
8 conference with that new information than on the old  
9 information?

10 A Could you repeat the question?

11 Q Do you feel that it's better for you to  
12 have been able to comment at an informal conference  
13 back in 2008 when the permit was 800 and some acres  
14 and a few valley fills, or do you feel like that at  
15 the informal conference in 2011 after the permit has  
16 significantly changed that you had a more  
17 knowledgeable input?

18 A I would say that, you know, that we had  
19 different questions at both times because of the  
20 changes to the permit. As you're saying, impacts may  
21 have been minimized, but we're not of the intimate  
22 knowledge that -- of what specific changes had been  
23 made to go into the informal conference and provide  
24 very clear technical comments, which DEP has indicated

1 to us that is -- you know -- what is needed to be, you  
2 know, effective in the process.

3 Q But if you had an opportunity to review  
4 the permit, how could you not make those comments?

5 A We did not have an on-site inspection and  
6 never -- I don't think ever received a reason why we  
7 did not get that inspection.

8 Q So you're saying that you can't make any  
9 time of comment unless you have an on-site inspection?

10 A We prefer it and we're given that right  
11 under the law.

12 MR. JENKINS: No questions. Thank you.

13 RECROSS-EXAMINATION

14 BY MR. HARVEY:

15 Q Mr. Goodwin, when was the informal  
16 conference?

17 A I'm not -- there is a copy of it in the  
18 certified record.

19 Q Early August. Does that sound about  
20 right?

21 A Yes.

22 Q Okay. And when did you file your notice  
23 of appeal?

24 A Our notice of appeal was filed in

1 December, I believe.

2 Q Let me help you out. Late November.

3 Does that sound right?

4 A Yeah, around Thanksgiving time.

5 Q Okay. So you had over three months to  
6 digest the information you learned in the informal  
7 conference about the permit and make any challenges  
8 that you wanted to make three months later, correct?

9 A Right.

10 MR. HARVEY: No further questions.

11 CHAIRMAN GRAFTON: Any other redirect?

12 MR. RIST: No, sir, no other questions.

13 CHAIRMAN GRAFTON: Call your next  
14 witness. You're excused.

15 MR. HUNTER: I have one. Have you had an  
16 on-site visit?

17 THE WITNESS: We have not. The Board did  
18 give us one nor did DEP in the informal conference  
19 process.

20 MR. HUNTER: So at no time before or  
21 after the informal conference you weren't allowed to  
22 have a site visit?

23 THE WITNESS: No. It was formally  
24 requested.

1 MR. HUNTER: In your experience in the  
2 past, have you normally been given permission to have  
3 site visits?

4 THE WITNESS: Yes. I would say that the  
5 Agency has been incredibly good at doing that and, you  
6 know, willing to work with -- as well as, Alpha  
7 Natural Resources have been very welcoming to do that,  
8 and I think it does very much help the process when  
9 that happens.

10 MR. HUNTER: Thank you.

11 CHAIRMAN GRAFTON: You're excused.

12 (Witness stood aside.)

13 MR. RIST: Did you mark that document as  
14 1?

15 MR. HARVEY: Intervenor's 1.

16 CHAIRMAN GRAFTON: Next witness?

17 MR. RIST: I call Keith Porterfield.

18 (Witness sworn.)

19 THEREUPON came

20 **KEITH PORTERFIELD,**  
21 called as a witness on behalf of the Appellants, and  
22 having been first duly sworn according to law,  
23 testified as follows:

24 **DIRECT EXAMINATION**

1 BY MR. RIST:

2 Q Good morning, Mr. Porterfield.

3 A Good morning, Tom.

4 Q How are you today?

5 A I'm good. Nice to see you again.

6 Q What is your name for the record, sir?

7 A I'm Keith Porterfield.

8 Q What do you do for a living?

9 A I'm the assistant director there at the  
10 Oakhill Regional Office.

11 Q And we've talked on the phone before,  
12 haven't we?

13 A We have.

14 Q And you're always very pleasant to deal  
15 with and I appreciate that.

16 A The same with you, Tom.

17 Q What is your job function with the DEP?

18 A I oversee all of the permitting,  
19 enforcement and administration there at the Regional  
20 Office.

21 Q Was this permit that we're dealing with  
22 today, the Collins Fork permit, something came through  
23 your office?

24 A Yes, sir.

1 Q That was something that you had a chance  
2 to review when it came in back in 2008?

3 A Tom, I don't actually do the review on  
4 the permits. I have staff that -- their expertise --

5 Q Right.

6 A -- it's their job to do that. I more  
7 oversee the general administration of the office.

8 Q You were employed at that office in April  
9 of 2008?

10 A That's correct.

11 Q How long have you been at that office?

12 A I've been at the office since 2003.

13 Q Let me ask you to maybe cut to the short  
14 of it, but you heard earlier the stipulation. Would  
15 you agree that the DEP and Alpha failed to follow West  
16 Virginia law regarding having the informal conference  
17 within three weeks after the end of the comment  
18 period?

19 A Tom, the position we're in -- to answer  
20 your question, yes, we did not meet that time frame.  
21 I think if you would read in the Code the next  
22 statement after that, it actually directs the Agency  
23 to make a decision on a -- a final decision on a  
24 permit 30 days after you had the informal conference.

1           So the position the Agency is in, we have  
2 to pick our poison. We can try to meet that time  
3 frame or we can try to meet the first one. What I'm  
4 here to present to you and defend is I think we made a  
5 decision that best served the needs of the citizens.

6           That permit was a large permit with  
7 valley fills. It went through massive changes. At  
8 one point during the process they were going to  
9 reclaim the impoundment there with spoil from the  
10 surface mine. That thought changed from the company  
11 and then they repositioned the permit again. So it  
12 was going through not minor changes, Tom, massive  
13 changes, massive changes. The product at the end  
14 ultimately was what we ultimately issued that you're  
15 appealing here today.

16           So I would contend that there was no  
17 prejudice from our office and our staff towards the  
18 citizens.

19           Q     But as far as following the law, you  
20 weren't able to do that?

21           A     We were not able to do that.

22           Q     Would you agree that the DEP -- that part  
23 of what the legislature in establishing the Division  
24 of Environmental Protection stated that restoring and



1 protecting the environmental is fundamental to the  
2 health and welfare of its citizens?

3 A That's correct.

4 Q That's 22-1-1, subsection a.1, the first  
5 thing in the Code book that I'm holding up and showing  
6 to you, and I can show it to you.

7 A Yes, sir. No, that's fine.

8 Q What section of the permit application  
9 we're dealing with deals with the health and welfare  
10 of the individual citizens?

11 A Tom, it's not directly addressed as of  
12 today, and we have debated this public health issue  
13 extensively. I want you and the Board to know that we  
14 have asked for comment from the top to the bottom --

15 Q Right.

16 A -- on how the Agency today is going to  
17 respond to that complaint.

18 And, Tom, as Joe has in his initial  
19 statement, we just don't believe today that the Agency  
20 has the ability to make an assertion that coal mining  
21 is the culprit there. There is no causative action.

22 And I would just like for you folks to  
23 know that it's something that we are concerned about,  
24 but we're not a health agency, we're an environmental

1 agency, and we just don't believe we're to the point  
2 that we can take an action as far as the Department of  
3 Environmental Protection.

4 Q Have you ever had the opportunity to read  
5 any of the health impact studies?

6 A I have read the Hendryx report, yes, sir.

7 Q And are you talking about the Hendryx  
8 report that was issued in 2011?

9 A Now, Tom, I want to clarify, I'm not an  
10 expert. Okay?

11 Q Right. I understand.

12 A And I've just read the report. I've read  
13 it a couple of times when it initially came out, and,  
14 of course, I reread it before the hearing. And, you  
15 know, it does have the statistical basis that there  
16 could be something going on in the coalfields in  
17 Central Appalachia. It just doesn't identify the  
18 cause.

19 Q Sure.

20 A And --

21 MR. RIST: Let me approach the witness.  
22 I only have one copy of this. That's the . . .

23 MR. JENKINS: I'm going to object to the  
24 admission of this. I mean, whether or not he's read

1 it, he's not an expert. He can't testify on it and to  
2 it. He doesn't have the author here to testify to the  
3 findings of it. And to put this in the record would  
4 be extremely prejudicial to DEP.

5 MR. RIST: And I would just ask to lay  
6 some foundation before you rule on that as to whether  
7 you can admit it or not, because I haven't asked him  
8 any questions other than had he looked at this and  
9 read it. I want to make sure this is the right study  
10 that we were just talking about.

11 MS. RADCLIFF: You can attempt to lay the  
12 foundation recognizing DEP's objection.

13 MR. RIST: Sure.

14 MS. RADCLIFF: We'll deal with that when  
15 you try to lay the foundation.

16 MR. HARVEY: And if I may just for the  
17 record, I concur and object. It's hearsay.

18 BY MR. RIST:

19 Q Is that the report you and I were just  
20 talking about?

21 A Yes.

22 Q And that's titled, "The Self-reported  
23 Cancer Rates in Two Rural Areas of West Virginia With  
24 and Without Mountaintop Coal Mining," correct?

1 A Yes.

2 Q Who are the authors of that report?

3 A Michael Hendryx, Leah Wolfe -- I'm not  
4 sure. I might butcher that name, but --

5 Q I'll let you try because I don't know.

6 A Juhua Luo and Mr. Bo Webb.

7 Q Bo Webb, who is sitting here today,  
8 right?

9 A Yes.

10 Q Okay. So you have at least reviewed that  
11 and looked at it?

12 A Yes, sir.

13 MR. RIST: I'm going to mark this as  
14 Appellants' Exhibit 1. I'm not going to move for its  
15 admission right now, but I think to lay a record of  
16 what we were looking at, I would at least ask that  
17 this be marked and made a part of the record. So I  
18 guess I am asking for it to be admitted.

19 MR. JENKINS: I would still object.  
20 That's hearsay. I mean, if Mr. Webb is here and he  
21 wants to try to testify to this, then call Mr. Webb,  
22 not to try to get it through an non-expert employee.

23 MR. RIST: Sure. Well, I'd like to have  
24 it marked as our Exhibit 1, and I will get back to

1 laying the foundation and get it admitted here  
2 shortly. Okay? Is there any objection to that?

3 MR. HARVEY: I don't object to it being  
4 marked as an exhibit, no.

5 MR. RIST: All right.

6 (WHEREUPON, Appellants' Exhibit Number 1  
7 was marked for purposes of identification.)

8 MS. RADCLIFF: So that would be your --  
9 is it 1 for you?

10 MR. RIST: Yes. And I may have 300 more  
11 of them. I don't have anymore questions for this  
12 witness. Thank you.

13 MS. RADCLIFF: Do you want to ask your  
14 questions now, or do you just want to deal with what's  
15 been raised on direct? Sometimes we do that.

16 MR. JENKINS: Right.

17 MS. RADCLIFF: So you're not putting  
18 Keith back on and off. It's up to you.

19 MR. JENKINS: I'd prefer to call him  
20 after in our case.

21 MS. RADCLIFF: Okay. Do you have any  
22 questions for him now?

23 MR. JENKINS: Not at this point, no.

24 MS. RADCLIFF: Mr. Harvey?

1 MR. HARVEY: Just a couple.

2 CROSS-EXAMINATION

3 BY MR. HARVEY:

4 Q Mr. Porterfield, do the surface mining  
5 regulations -- let me put it this way. The surface  
6 mining regulations do take steps to protect health and  
7 safety, correct? For instance, blasting regulations?  
8 You need to say "yes" for the --

9 A Well, I'll --

10 MR. RIST: I'd object. They have  
11 objected saying he's not a health expert and now  
12 they're asking him questions about health. So I'm not  
13 sure if that's going to continue. There has to be  
14 some foundation laid that he can answer that.

15 MR. HARVEY: Let me try it this way.

16 BY MR. HARVEY:

17 Q Mr. Porterfield, you in your position  
18 help enforce the regulations in the West Virginia code  
19 and surface mining regulations, correct?

20 A That's correct.

21 Q You're familiar with those regulations  
22 generally?

23 A Generally, yes.

24 Q Are there regulations dealing with

1 blasting?

2 A Yes, there is.

3 Q And those regulations protect people's  
4 health and safety, correct?

5 A As well as property.

6 Q Regulations dealing with wells?  
7 Regulations that protect people's well, correct?

8 A The regulations are designed to protect  
9 both aquatic and human health. Sometimes aquatic  
10 health requires a more stringent parameter than public  
11 health. So in that context, yes.

12 Q Regulations that protect water?

13 A Yes.

14 Q Surface water that people may end up  
15 drinking?

16 A That's correct.

17 Q Regulations that address wind erosion and  
18 airborne contaminants --

19 A Yes.

20 Q -- in the regulations, correct?

21 A That's correct.

22 MR. HARVEY: No further questions at this  
23 time.

24 CHAIRMAN GRAFTON: The Board have any

1 questions? Okay.

2 MR. HUNTER: Within your regional office

3 --

4 THE WITNESS: Yes, sir.

5 MR. HUNTER: -- who is responsible for  
6 reviewing a permit for health regulations?

7 THE WITNESS: Mr. Hunter, we don't have  
8 an expert that I'm aware of within DEP that would be  
9 considered a health expert.

10 CHAIRMAN GRAFTON: Dr. Rauch?

11 DR. RAUCH: Keith, when it comes to the  
12 mining permit, does the company propose to do away  
13 with the slurry impoundment? Is that what you said?

14 THE WITNESS: At one time, Mr. Rauch,  
15 they did. That thought changed within the review  
16 process. And now there is some spoil material that is  
17 placed in the toe area of the impoundment for  
18 abuttrice [sic], but the impoundment is going to be  
19 left intact.

20 And, in fact, they have acquired some  
21 additional permits in the area. They, in fact, may  
22 build -- rebuild a plant, it's my understanding, at  
23 some point in time and utilize the impoundment. So  
24 it's a viable permit today and it remains.



1 DR. RAUCH: Okay. So the impoundment  
2 remains today, then --

3 THE WITNESS: Yes, sir.

4 DR. RAUCH: -- and it's planned to  
5 remain? Thank you.

6 MS. RADCLIFF: Mr. Hunter had a question  
7 that he's asking me that I would ask him to ask about  
8 the citizen inspection.

9 MR. HUNTER: Do citizens have the right  
10 or can a citizen ask for a site visit?

11 THE WITNESS: Yes, sir. And it's  
12 discretionary. There was some internal debate whether  
13 the Agency would conduct those. Here recently,  
14 Secretary Huffman has made a decision that we will  
15 honor all of those, and we have done that. So but  
16 it's not mandatory by law, it's discretionary by the  
17 Agency.

18 MR. HUNTER: So in the past --

19 THE WITNESS: We typically do.

20 MR. HUNTER: Okay.

21 THE WITNESS: We typically do, but it's  
22 discretionary.

23 MR. HUNTER: But in this case it was not  
24 permitted or it wasn't --

1 THE WITNESS: Mr. Hunter, it's 2008. I  
2 wish I could impress you and tell you I knew all of  
3 the details with that. I seem to -- and I don't want  
4 to get up here and guess, but apparently it did not  
5 happen this time and -- but that -- the truth is  
6 saying the world is on fire, so that's -- I'm not sure  
7 how we got there.

8 MR. HUNTER: Another question. If a  
9 citizen files a letter with concerns as apparently  
10 according to Mr. Goodwin that was done by their  
11 organization at least a couple of times back in 2008,  
12 and then there are changes in the permit or there is  
13 going to be an informal hearing, do you inform the  
14 citizens that there have been changes if there is?

15 THE WITNESS: We have no formal process  
16 of doing that. What I think is lost in all of this  
17 though, you know, we have a regional office that is  
18 open everyday. Mr. Goodwin frequently comes to our  
19 office. We make staff available to assist the  
20 citizens. All they have to do, Mr. Hunter, is come by  
21 and we pull that entire permit package out and will  
22 oftentimes assign staff to answer questions.

23 So, you know, much as been said about the  
24 informal conference, but we're open everyday, everyday

1 other than weekends and holidays, and we will assign  
2 staff to help people anytime they have a question. So  
3 anytime they could have come and looked at that permit  
4 during the three year period.

5 MR. HUNTER: But it's at the citizen's  
6 initiative? You don't inform them of --

7 THE WITNESS: No.

8 MR. HUNTER: Okay.

9 THE WITNESS: We don't send -- multiple  
10 changes occur on most permits, multiple changes. That  
11 happens. That's the norm, not the -- you know. We  
12 rarely get a permit in that doesn't go through  
13 changes. I would say I don't ever recall a permit  
14 coming in without some changes.

15 MR. HUNTER: Thank you.

16 MR. RIST: A couple of follow-up  
17 questions if the Board would allow.

18 **REDIRECT EXAMINATION**

19 BY MR. RIST:

20 Q Sir, why is it important for citizens to  
21 participate and provide comments on these permits?

22 A Well, I think it's the best product, and  
23 I think what SMCRA envisions is the process allows  
24 that.

1 Q And it's not necessarily written for the  
2 company then, right, SMCRA?

3 A SMCRA is written for all entities in my  
4 opinion.

5 Q Mr. Harvey was asking you about the  
6 regulations, whether they -- you know -- asked  
7 regulations about blasting, but that's a health issue.  
8 Are there any regulations that prevent citizens below  
9 these sites from getting cancer?

10 A That's not addressed in the application  
11 or the regulations as of today, Tom. There is nothing  
12 in there specifically concerning cancer in our  
13 regulations, not directly.

14 Q Anything concerning birth defects?

15 A Not to my knowledge, Tom.

16 Q But you're telling us today that the DEP  
17 is looking at all of this health information that's  
18 been coming out recently and trying to do something to  
19 address that hopefully in the future?

20 A I'm telling you staff has reviewed these  
21 studies and it's the Agency's position today that  
22 there is insufficient reporting and science to enact a  
23 direct change to our regulations. It does not exist  
24 today.

1 Q Who are the staff that are reviewing the  
2 studies?

3 A We distribute it and requested comments  
4 to all of the regional administrators, as well as  
5 Director Clarke -- Tom Clarke headed that up -- and we  
6 let anybody that had an interest in it, Tom, look at  
7 that.

8 Q Is that public information that we can  
9 look at, whether the comments were given back?

10 A That -- I can't answer that question.

11 Q Who were the people specifically in the  
12 Oakhill region that looked at the health studies? Was  
13 it you?

14 A Actually reviewers actually looked at  
15 those and the permit supervisor. Like I said, we  
16 distributed it to the other regional office, their  
17 permitting staff, as well as our Kanawha City  
18 headquarters.

19 Q Have you guys had any communication with  
20 the West Virginia DHHR regarding the health impact  
21 studies?

22 A Not to my knowledge.

23 Q Do you remember what any of the comments  
24 were you guys received?

1 A I do not.

2 MR. RIST: No more questions from me.

3 MR. SMITH: I have one question to ask.  
4 I'm trying to remember in my mind exactly how this  
5 advertisement works. I get a little bit confused  
6 sometimes thinking about it. Now help me clarify.

7 You knew an advertisement and a comment  
8 period is required after it's administratively  
9 complete; is that right?

10 THE WITNESS: Yes. And that's where they  
11 have attempted to answer every question. It doesn't  
12 mean that question is right.

13 MR. SMITH: Right.

14 THE WITNESS: But there is something in  
15 the application addressing every portion of the  
16 permit. It does not mean that we agree with that.

17 MR. SMITH: Right.

18 THE WITNESS: Or that's feasible and that  
19 there could be, you know, something wrong with that.

20 MS. RADCLIFF: So it's like every box is  
21 checked?

22 THE WITNESS: Every box is checked.

23 MR. SMITH: Just that they have submitted  
24 a complete application?

1 THE WITNESS: That's correct.

2 MR. SMITH: Okay. So then after that  
3 sometimes you require readvertisement, right, that  
4 they have to -- and what triggers that?

5 THE WITNESS: A change of ownership will  
6 trigger that. I'm trying to think. Property issues  
7 where that the property owners may have changed,  
8 issues like that would trigger one.

9 MR. SMITH: But typically the normal  
10 technical review of the permit?

11 THE WITNESS: No.

12 MR. SMITH: Okay. Is there a notice --  
13 after the technical review is complete, is there any  
14 further notice or comment periods that occur after  
15 that? I mean, after you've done the first one,  
16 administrative sort of notice that it's  
17 administratively complete and had a comment period,  
18 and if there are no property owner changes that  
19 require you to do a reissuance, is there another  
20 comment period that occurs before the permit is over,  
21 any other advertisement that has to do with any other  
22 stage?

23 THE WITNESS: No, sir.

24 MR. SMITH: That's it.

1 MR. RIST: No other questions.

2 CHAIRMAN GRAFTON: No other questions?

3 (No response.)

4 CHAIRMAN GRAFTON: Okay. You're excused.

5 MS. RADCLIFF: Actually, I think we will  
6 see you later, right?

7 MR. JENKINS: Right for now.

8 (Witness stood aside.)

9 MR. RIST: We call Jack Spadaro.

10 (Witness sworn.)

11 THEREUPON came

12 **JACK SPADARO,**

13 called as a witness on behalf of the Appellants, and

14 having been first duly sworn according to law,

15 testified as follows:

16 **DIRECT EXAMINATION**

17 BY MR. RIST:

18 Q State your name for the record, sir.

19 A My name is Jack Spadaro, and it's  
20 S-p-a-d-a-r-o.

21 Q Jack, can you tell us a little bit about  
22 yourself? What have you done in the last couple of  
23 decades?

24 A Everybody has heard this before, but I



1 began my career in the 1960s in -- as a mining  
2 engineer trainee and mine safety trainee while I was  
3 in college, and that was in 1966. I began working  
4 even as -- I was in college -- what was then the U.S.  
5 Bureau of Mines that later became the Mine Safety and  
6 Health Administration.

7                   And then in the early '70s I worked  
8 briefly in the mining industry at underground and  
9 surface mines in Fayette County, West Virginia for  
10 Allied Chemical Corporation. And then I worked a  
11 couple of years teaching at West Virginia University  
12 in the School of Mines.

13                   And then in 1972, I was appointed as the  
14 staff engineer for the Governor's Commission of  
15 Inquiry into the Buffalo Creek flood. Then from '73  
16 until '78, I was the chief of the Coal Refuse and Dam  
17 Control Division of the Department of Natural  
18 Resources which later became West Virginia Department  
19 of Environmental Protection.

20                   And in that job I was responsible for  
21 reviewing all of the surface mining permits as well  
22 for issues related to earth structures, such as valley  
23 fills, dams, backfilling and grading, and the  
24 hydrology of the mine, but for surface mines and the

1 surface effects of underground mines.

2 And then in 1978 I went to work for the  
3 federal Office of Surface Mining and I worked on the  
4 federal regulations that were later implemented under  
5 the Surface Mining Control and Reclamation Act, which  
6 was later then incorporated into the regulations that  
7 were adopted by the State of West Virginia I believe  
8 in 1981 which was a similar act to implement the  
9 federal Surface Mining Control and Reclamation Act.

10 Q You're talking about SMCRA?

11 A Yes.

12 Q The West Virginia version?

13 A Yes.

14 Q You helped write that?

15 A Well, the regulations are duplicates  
16 essentially of the federal regulations that I wrote in  
17 the spring and summer of 1978.

18 Then I worked for 18 years for the Office  
19 of Surface Mining as a field supervisor field  
20 engineer. I worked both in enforcement and abandoned  
21 mine lands and I worked on landslides and coal waste  
22 dams and subsidence problems both in enforcement and  
23 in designing remedial measures for reclaiming  
24 abandoned mine lands.

1                   Then in 1996 I returned to the Mine  
2 Safety and Health Administration and went to the  
3 National Mine Health and Safety Academy in Beckley,  
4 West Virginia where I was deputy superintendent until  
5 1998.

6                   And then from 1998 until 2004, I was the  
7 superintendent of the academy which trained all of the  
8 federal mine health and safety inspectors in the  
9 country.

10                   And I retired in 2004 and since then I've  
11 been a consultant throughout really the whole country,  
12 but primarily in Appalachia regarding both mine health  
13 and safety issues and mining environmental issues  
14 specifically dealing with the Surface Mining and  
15 Control Reclamation Act and the Mine Safety and Health  
16 Act.

17                   Q     Have you worked on cases involving  
18 questions of compliance with SMCRA?

19                   A     Yes.

20                   MR. RIST: I would move to certify Mr.  
21 Spadaro as an expert in surface mine safety and  
22 compliance with the West Virginia Surface Coal Mining  
23 and Reclamation Act.

24                   CHAIRMAN GRAFTON: Any objections?

1 MR. JENKINS: No objections to the extent  
2 that, you know, his expertise is limited to what the  
3 regulations state as -- you know -- since he's, you  
4 know, been dealing with them so long and within his  
5 particular expertise which is mining engineering. You  
6 know, to the extent he gets into public health and  
7 analyzing these studies and everything else, I believe  
8 that's well outside the scope of what Mr. Spadaro can  
9 testify to.

10 MR. HARVEY: The same concerns here, Mr.  
11 Grafton.

12 CHAIRMAN GRAFTON: Okay. You will be  
13 admitted and we'll consider part of what occurred in  
14 the comments.

15 BY MR. RIST:

16 Q Have you been in the room today while  
17 everyone has been testifying so far?

18 A Yes.

19 Q Were you here when we did our opening  
20 statements, as well?

21 A Yes.

22 Q You heard the issues that the Appellants  
23 have brought up regarding the permitting process; is  
24 that correct?

1 A Yes.

2 Q In your expert opinion, Mr. Spadaro, did  
3 the DEP and the coal company violate SMCRA in dealing  
4 with the informal conference in this case?

5 A Yes.

6 Q How is that that they violated SMCRA?

7 A Well, they didn't have the informal  
8 conference within the required time period in 2008.  
9 They essentially cut the citizens out of the decision  
10 process, and that's what these regulations were  
11 designed to do, and that was to have active citizen  
12 participation in the decision process regarding  
13 permits, and that's why it was written into both the  
14 federal law and regulations and the state law and  
15 regulations. And they were excluded for a long period  
16 of time as the decisions were being made, and that's  
17 really the essence of the violation.

18 I'm not expert on health and I don't  
19 expect to talk about any health issues.

20 Q Why does it matter then?

21 A Well, it matters --

22 Q I mean, what's the prejudice?

23 A Well, it matters I think as Mr.

24 Porterfield said, it matters because it is important

1 to have the citizens who live nearby a mining  
2 operation to participate actively in the decision  
3 process if a permit is being considered because they  
4 may be affected by -- I have dealt with instances  
5 where there was material damage, for instance,  
6 flooding or damage from dust in the air, blasting  
7 damage.

8                   Those kinds of things are areas that I  
9 have testified about in the case of underground mining  
10 and subsidence. So it's important for citizens to be  
11 able to participate and I do -- I know it is a  
12 discretionary decision, but I do recommend that  
13 citizens, if they have genuine concerns, should be  
14 allowed to do mine site visits during the decision  
15 process.

16                   MR. RIST: Those are the only questions I  
17 have at this time.

18                   CHAIRMAN GRAFTON: Mr. Jenkins?

19                   CROSS-EXAMINATION

20                   BY MR. JENKINS:

21                   Q Mr. Spadaro, can you explain to me how  
22 the citizens didn't have an opportunity to comment on  
23 this permit?

24                   A Well, they did have an opportunity and

1 they did make comments -- I think there were two  
2 letters that were testified about -- but then they  
3 weren't allowed to participate in the required  
4 informal conference in 2008 when the initial decisions  
5 were being made about this permit.

6 And there was a substantial change in the  
7 permit between 2008 and 2011, granted it was a  
8 reduction in the size of the permit, but that would be  
9 a substantial change and that would -- again not  
10 negate the right of the citizen to take a good look at  
11 what is being proposed and seeing how it would affect  
12 the public.

13 Q But after the substantial change was made  
14 an informal conference was held, correct?

15 A Yes. I believe it was in August of 2011,  
16 yes.

17 Q So didn't the citizens have an  
18 opportunity to comment on the substantial change at  
19 that point?

20 A Yes, I would say then they did. But  
21 there was this gap when decisions were being made,  
22 when the permit was being reviewed of about three  
23 years that the citizens were essentially excluded  
24 from.

1 Q And so you're saying because it took  
2 three years the citizens were excluded. If we  
3 followed -- I mean, you're an expert in the law here.  
4 We should have held the informal conference back in  
5 July of 2008, thereabouts, correct?

6 A Yes, yes, that's correct.

7 Q And even if we would have issued the  
8 permit in 2011 we would have technically been in  
9 compliance with the law with regards to public notice?

10 A If you had had the conference in 2008,  
11 yes. July of 2008, yes.

12 Q So couldn't you say then that because  
13 they had informal conference after these substantial  
14 changes that the citizens had more meaningful  
15 knowledge and review of this permit to make comments  
16 that were more applicable?

17 A No. I think by that time all of the  
18 decisions had been made on the permit and they really  
19 hadn't any substantial input.

20 MR. JENKINS: No further questions.

21 MR. HARVEY: No questions.

22 CHAIRMAN GRAFTON: The Board?

23 MR. SMITH: Yeah, I have one question.

24 I'm trying to understand what Mr. Jenkins said, and



1 correct me if I'm understanding this right. If a  
2 person proposes an 800-acre permit and then they see  
3 that it's administratively right, really nothing  
4 technical has been done, they've just proposed we're  
5 going to mine this whole mountain, and so they have a  
6 30-day comment period and then they have an informal  
7 conference, then basically DEP has complied with the  
8 law and the permit can change, if I understand right,  
9 in all kinds of ways to turn into a 200-acre permit,  
10 or a 900-acre permit, or change valley fills in and  
11 out, all of the technical review goes on. The  
12 obligation the DEP has to the public has been  
13 satisfied already before any of changes are involved.

14           And I guess my question is -- I mean, I  
15 understand the time frame thing. But it seems that  
16 the public having -- would want to have this  
17 conference, this comment period, at the end of the  
18 technical review to see what is really going to be  
19 built on that hill, whether it's more than they  
20 originally thought at the first 30-day conference or  
21 less.

22           And then I listen to Mr. Porterfield say  
23 that public comments are always welcome and that they  
24 -- anybody who wants to come over and talk about the

1 permit they're willing to talk about it. So I'm torn  
2 a little bit between the fact that they missed the 30-  
3 day deadline on one meeting and the fact that  
4 apparently there is sort of an open-door policy;  
5 people come in and put stuff during this whole three  
6 year period. I mean, people can come and evidently  
7 some of these folks have and talked to DEP, put in  
8 their interests and their concerns, and Mr.  
9 Porterfield indicates they're considered.

10 And then at the end of this whole  
11 process, having this public put in their input, even  
12 though it may not be statutory but it's there, then at  
13 the end of the process they have this conference and  
14 there is an opportunity for people I guess just before  
15 the thing happens.

16 Practically speaking doesn't that satisfy  
17 the need better than saying, "We're going to build a  
18 mine that it's going to take us three years to decide  
19 exactly where we're going to build, but you get a  
20 chance right now to say something and then your chance  
21 is over"? Do you understand what I'm saying?

22 THE WITNESS: I understand what you're  
23 saying.

24 MR. SMITH: Outside of just the idea

1 whether you actually met the deadline.

2 THE WITNESS: Right. I understand  
3 exactly what you're saying. But my experience  
4 actually goes back to even before the Act was passed,  
5 the Federal Act that was passed and signed by  
6 President Carter, because I rode around in a  
7 helicopter with Morris Udall, who is the father of the  
8 bill, and Nick Rahall, and one of the things they  
9 wanted, and the way they wrote the law and then later  
10 the regulations, was to have citizens participating  
11 all the way through the decision process.

12 And what has happened here is that  
13 essentially decisions were made over a long period of  
14 time where the citizens were really not -- they could  
15 come in and review things, but they really weren't  
16 part of the decision process.

17 And had they been engaged in that process  
18 earlier on in June or July of 2008, I think that would  
19 have satisfied the requirements of the regs and the  
20 Act. Even if changes were made that may have been  
21 beneficial, they still weren't included -- I don't  
22 know whether they were or not. I haven't dealt with  
23 that. I've just dealt with the citizen participation  
24 issue.

1                   And what has often happened is really all  
2 of the major decisions are made before the citizens  
3 are actually participating, and that I think really  
4 happened here. There were decisions made in that  
5 three year interval where no one was really having a  
6 chance to have direct input with the decision makers  
7 in the form of an informal conference. And that's  
8 really I see the great weakness in what happened.

9                   MR. SMITH: I understand. But under the  
10 statutory procedure, wasn't their participation at the  
11 end of it, after they made their first set of  
12 comments? Unless they used Mr. Porterfield's sort of,  
13 you know, informal arrangement that he keeps his door  
14 open all the time.

15                   THE WITNESS: Right.

16                   MR. SMITH: Because if they use just  
17 what's in the law, wouldn't their participation have  
18 ended at the very beginning essentially? They put  
19 their comments in, they had their informal conference,  
20 and then really they're finished, right?

21                   THE WITNESS: Well, no. Then they can go  
22 through this process, the hearing process and then  
23 litigation.

24                   MR. SMITH: Oh, yeah, that's been taken

1 away. But I mean in the decision process of the  
2 technical review of the permit, which is what you're  
3 indicating --

4 THE WITNESS: Right.

5 MR. SMITH: -- is the critical thing  
6 here, I think.

7 THE WITNESS: Right. But what I'm saying  
8 is from June or July of 2008 there were decisions  
9 being made apparently in the review process all along  
10 and the citizens weren't a part of that. That's what  
11 I'm saying. They had nothing that they could really  
12 look at to say, "Well, this is the final product that  
13 we can comment on," because it was influx and they  
14 weren't included. That's all I'm saying. Okay?

15 MR. SMITH: Again, my point is I don't  
16 understand how the statutory process includes the more  
17 rather than less than the current process.

18 THE WITNESS: Well, it includes them  
19 until a final decision is made. It's supposed to.

20 MR. SMITH: It includes them for 30 days,  
21 apparently.

22 THE WITNESS: Yes, yes.

23 MR. SMITH: But what about the three  
24 years after the 30 days? They don't get to look, do

1 they, after that?

2 THE WITNESS: If there is a change in the  
3 -- if the permit is changing, yes. And, in fact, if  
4 there is a -- you know -- I can't remember what  
5 provision it's in, but if there is a substantial  
6 change in any permit, we can often ask -- the citizens  
7 can often ask for advertisement to be made to  
8 advertise the changes in the permit if it's  
9 substantial. And when you talk about a difference of  
10 hundreds of acres, then it would be a substantial  
11 change.

12 MR. SMITH: But that's the only way, if  
13 someone would ask for that?

14 THE WITNESS: Right.

15 MR. SMITH: Otherwise, if I'm  
16 understanding right, after the first 30 days before  
17 the permit is really technically reviewed or changed,  
18 or really evolves into this final animal that they're  
19 going to approve, after that 30-day comment period  
20 there is no involvement statutorily by the folks that  
21 are living there except that they move the informal  
22 conference to the end of the process --

23 THE WITNESS: Right.

24 MR. SMITH: -- and then apparently DEP has

1 this open door policy.

2 But according to law -- what I'm  
3 struggling with here is it seems like if you really  
4 follow the law, like the Appellants are asking, what  
5 we do is we say, "We're going to build a coal mine,  
6 you've got 30 days to think about it and give us your  
7 comments and then you're done," I mean, basically, if  
8 you really follow the law. And all the changes they  
9 could have there is no statutory method if we really  
10 wanted to follow exactly what the law is for the  
11 citizens to be involved.

12 THE WITNESS: I think you may be right.

13 MS. RADCLIFF: How do you balance the  
14 question between, as Mr. Porterfield talked about, the  
15 requirement that they make a decision on the permit 30  
16 days after the informal conference? What is your  
17 recollection of that balancing that goes into that?  
18 Do you deny the permit?

19 THE WITNESS: Theoretically all of the  
20 citizens' input, including the comments at the  
21 informal conference and so forth, has to be -- should  
22 be taken into consideration by the people who are  
23 making the decision on the final nature of the permit.

24 And that's the way I think all of us

1 envisioned it when we were writing these regs, that it  
2 would give, you know, weight to whatever comments were  
3 raised during the informal conference. And then, of  
4 course, if there were really serious issues, you can  
5 have a formal hearing. I mean, you can do that.

6 MR. SMITH: Do you question that relating  
7 to the requirement that the DEP make a decision on a  
8 permit within 30 days?

9 MS. RADCLIFF: After the informal  
10 conference.

11 THE WITNESS: Yeah, they're supposed to.

12 MR. SMITH: Actually decide whether  
13 they're going to get the mine permit. That's  
14 impossible, isn't it?

15 THE WITNESS: Well, that's --

16 MR. SMITH: That is practically  
17 impossible.

18 THE WITNESS: Yeah, yeah.

19 MS. RADCLIFF: The statute says --

20 MR. SMITH: I understand. But if these  
21 guys were making decisions on permits within 30 days,  
22 they would have almost no review of the permit. It  
23 can't do that.

24 MS. RADCLIFF: That's why I'm asking



1 about the balance. If you meet the compliance with  
2 the argument that's being made -- and I understand the  
3 argument and everyone seems to agree that DEP missed  
4 the deadline.

5 THE WITNESS: Yes.

6 MS. RADCLIFF: If you go with that and  
7 you say, "Okay. The informal conference should have  
8 been held," but then a decision on the permit isn't  
9 made within the 30 days and it goes, as Mr. Smith was  
10 saying, three months -- I mean three years --

11 THE WITNESS: Right.

12 MS. RADCLIFF: -- and then a decision is  
13 made, there is no requirement that there would be any  
14 citizen involvement after the informal conference. So  
15 how do you see that conflict between the 30 days after  
16 --

17 THE WITNESS: Okay. I see what you're  
18 saying.

19 MS. RADCLIFF: -- 30 days after the  
20 informal conference? You know, because in this  
21 instance the permit went for 700 acres to 250 acres or  
22 something like that.

23 THE WITNESS: Right.

24 MS. RADCLIFF: It clearly downsized, but

1 that couldn't -- that wasn't done in the 30 days after  
2 you would have even had the deadline for the informal  
3 conference.

4 THE WITNESS: All right. Here's my  
5 point. You had a chance to have an informal  
6 conference where people could expand upon the issues  
7 that were raised in the comments. That didn't happen.  
8 The decisions were being made on the permit where  
9 there had not really been any formal -- or informal  
10 input in the conference. So how could the decision  
11 makers really know exactly what the citizens had  
12 concerns about if they hadn't at least had that  
13 informal conference?

14 And so they went on making the decisions,  
15 whatever they were, over the next several years, but  
16 they didn't get that initial input that they could  
17 have had in an informal conference. And that I think  
18 then says that they, because they were making the  
19 decision without that benefit, they were violating the  
20 law. That's the way I see it, you know.

21 And, you know, I do know that it was a  
22 very important part of the way how the Act was written  
23 and later adopted by West Virginia. The citizens --  
24 that their input be made eyeball to eyeball with the

1 decision makers in the informal conference before the  
2 final decision is made.

3 MS. RADCLIFF: Any follow-up?

4 MR. RIST: No, ma'am.

5 MS. RADCLIFF: Thank you, Mr. Spadaro.

6 MR. JENKINS: I've got one question, if I  
7 may.

8 **CROSS-EXAMINATION** (continuing)

9 BY MR. JENKINS:

10 Q Mr. Spadaro, you're saying that there was  
11 no initial input, but wasn't there a 30-day public  
12 comment period?

13 A Yes. And there were two -- I think two  
14 letters that were sent during that 30-day comment  
15 period.

16 Q So even without the informal conference,  
17 there was an initial input from citizens available?

18 A Well, from two citizens. But the  
19 informal conference would have allowed more citizens  
20 to participate and the concerns could be expanded  
21 upon. That's the value of that kind of conference.

22 Q Why would more people get a chance with  
23 the informal conference? I mean, isn't informal  
24 conferences sometimes limited by venues, by timing,

1 while the public comment period is 30 days and 10,000  
2 citizens of West Virginia could send in letters on  
3 that comment, but 10,000 people may not be able to fit  
4 in a small community center?

5 A Well, that's true. But, you know, not  
6 everybody reads the newspaper, you know, and sees the  
7 advertisement. So this expands the participation of  
8 citizens. That's what it's intended to do.

9 Q Well, aren't the informal conferences  
10 also advertised in the newspaper?

11 A Yes.

12 Q So your same argument that they didn't  
13 see the public comment would be the same for the  
14 informal conference so they wouldn't show up for the  
15 informal conference?

16 A Well, what I'm saying is during that 30-  
17 day period, if citizens have made comments and someone  
18 has asked for an informal conference, there is usually  
19 the opportunity for more people to participate, and  
20 that's really what it's all about.

21 MR. JENKINS: No further questions.  
22 Thank you, Mr. Spadaro.

23 MR. HARVEY: No questions.

24 MR. RIST: No follow-up.

1 CHAIRMAN GRAFTON: More questions from  
2 the Board?

3 (No response.)

4 MS. RADCLIFF: You're excused.

5 (Witness excused.)

6 MR. RIST: I call Bo Webb.

7 CHAIRMAN GRAFTON: Let's take a 15-minute  
8 break.

9 (WHEREUPON, a recess was taken.)

10 CHAIRMAN GRAFTON: We're back on the  
11 record.

12 (Witness sworn.)

13 MR. RIST: For the record and for  
14 clarity, I'm taking back Exhibit 1 that we marked. It  
15 wasn't admitted, the health study. I'm going to  
16 remove the health impact complaint from our appeal and  
17 focus in on the first part of it. Okay? And so we're  
18 just going to waive any issues with health impacts to  
19 try to clarify this hearing and get to the end of it.

20 MS. RADCLIFF: Okay.

21 (WHEREUPON, Appellants' Exhibit Number 1  
22 was withdrawn as an exhibit.)

23 (Witness sworn.)

24 THEREUPON came

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BO WEBB,

the Appellant herein, called as a witness on his own behalf, and having been first duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. RIST:

Q Good morning, sir.

A Good morning.

Q Would you state your name for the record?

A My name is Bo Webb.

Q Mr. Webb, are you one of the appellants in this case?

A Yes.

Q Have you been in the hearing room the full time?

A Yes, I have.

Q For the opening statements, through all of the witnesses?

A Yes.

Q I want to ask you specifically the -- one of the issues we're dealing with is regarding the informal conference, correct?

A Yes.

Q I mean, that is the issue, that's the

1 only one we're looking at now, right?

2 A Yes.

3 Q Is that a yes?

4 A Yes.

5 Q In the testimony of Mr. Porterfield we  
6 were discussing, and Mr. Spadaro, we were discussing  
7 citizen involvement in this process. Do you have any  
8 experience with that?

9 A Yes.

10 Q As a citizen?

11 A Yes, I have.

12 Q Where do you live?

13 A I live in an area of Naoma referred to as  
14 Peachtree, the hollow.

15 Q What is the name of the stream that runs  
16 through there?

17 A Marsh Fork.

18 Q And that stream empties into the Coal  
19 River, correct?

20 A Yes, it does.

21 Q Is your home below Marfork permits?

22 A It's directly beneath a 2,000 acre  
23 permit.

24 Q And as a citizen and a person that

1 resides underneath one of these permits, you have  
2 experience in dealing with the DEP as a citizen,  
3 correct?

4 A Yes.

5 Q All right. Tell us about that.

6 A Well, several times I -- to be specific,  
7 one time that absolutely is in the forefront of my  
8 mind took place in 2009, what I consider excessive  
9 blasting, and I filed a complaint with the blasting  
10 office here.

11 Q What's "here" mean?

12 A Here at the DEP, here at this location.  
13 I filed a complaint and I was told that someone would  
14 get back with me, and about three or four days went by  
15 and no one got back with me so I called again. And  
16 then I did have a blasting inspector call me back and  
17 told me that they were -- would look into it and call  
18 me back the following week. That never happened.

19 Two or three more weeks went by and I  
20 called the blasting chief, Dave Vande Linde or Dave  
21 Van Linde. I'm not sure how to pronounce his last  
22 name. And then I got some response from the blasting  
23 inspector, but that still took another couple of more  
24 weeks. And it was a lady and she told me that --



1 well, she looked into it and there was no blasting on  
2 the day that I filed my complaint. It did come from  
3 that mine site above me and I had watched the dust  
4 come off the site, the whole bit.

5 So I then ran into an inspector that  
6 inspects that mine and asked him if he would come and  
7 take a look at what they were doing there because all  
8 of this stuff was coming off the site -- downslope  
9 spillage, dust, rock, boulders, flyrock and all of  
10 these things -- and he told me no, that he would not  
11 walk beneath a blasting site. So it was pretty  
12 frustrating.

13 So I then went to an informal conference  
14 that Mr. Porterfield was at, and I got that inspector  
15 in front of Mr. Porterfield and asked him to come  
16 again, and he said that his knees were bad and he said  
17 that he would go to the top of the mine site and look  
18 over. So I didn't know -- you know -- what are you  
19 going to do? They're not going to do anything, so I  
20 started videotaping.

21 And a couple of more three weeks went by  
22 and they were blasting and stuff was going on, so I  
23 took the videotape to Washington, D.C., and I went to  
24 the federal Office of Surface Mining and I showed

1 them, and I filed a formal complaint there.

2 And I get back to West Virginia and about  
3 three days later the federal Office of Surface Mining  
4 in Beckley contacted me and told me they would be  
5 coming down to my house, and they did. They brought  
6 the DEP blasting office with them.

7 And, previously, a couple of three months  
8 before that, because of all of the continuous  
9 blasting, the DEP told me they would put a seismograph  
10 on my property, and they did do that. They never  
11 looked at it as far as I knew, but they did put it  
12 there, and when they came down with the feds they dug  
13 it up. It was full of water. It wasn't sealed  
14 properly. It wouldn't read -- it couldn't read it.

15 So we went up to where I was talking  
16 about, right above my house up in the hollow, and the  
17 feds saw all of this, and the one gentleman from the  
18 federal office, his name was Sam, he traced the  
19 boulders that had came down and traced it right back  
20 to the mine site and saw where it knocked trees down  
21 and all of this stuff. And it landed real near my  
22 garden, by the way.

23 And the short of the story is that the  
24 feds then took the DEP to the mine, which was the Ed

1 White Surface Mine, and looked at their records there,  
2 and they did blast on the day that I complained and  
3 they blasted the exact time I complained, and they  
4 exceeded their blasting limits. So they ended up with  
5 four violations.

6 And they were told that they couldn't  
7 blast anymore above my home if the wind direction was  
8 coming directly down. We got covered in dust. So it  
9 was a normal occurrence which was happening. So they  
10 were required to monitor the wind direction.

11 They were required to videotape the  
12 drilling of the holes for the blasting, and they were  
13 required to videotape the blasting, and they were told  
14 they could not blast there -- they could not mine the  
15 area again until they cleaned up the downslope  
16 spoilage that had come off their mining permit that  
17 was all down the valley. And I thought that's really  
18 good, and it was good, and it stopped.

19 And then I saw where they, the company,  
20 who was Massey Energy, of course, and it was Alex  
21 Energy, had applied for a variance on their permit, a  
22 revision to that permit, with the West Virginia Office  
23 of DEP to -- and the way it was given -- to blast  
24 further, to mine more, to come closer to my home than

1 they had already been.

2 And the DEP rationale was that, "Well,  
3 they can't get down there to get the spoilage off so  
4 we're going to let them blast down to it and they can  
5 get the coal on their way."

6 That didn't make sense that you're, you  
7 know, harming -- you're threatening us from there and  
8 you want to blast down another two or three hundred  
9 feet, whatever it was, a hundred feet. I forget the  
10 footage. But you actually want to blast closer to my  
11 home to clean up the mess you have created from  
12 blasting further from my home.

13 So that's the results I got with the DEP  
14 in that case, and it's still going on, not as bad  
15 right now. As a matter of fact, I have contacted the  
16 Office of Surface Mine again, the feds again, and I  
17 have to go through this whole process that I went  
18 through last time in order to get them to stop doing  
19 what they're doing right now.

20 My deck is covered with dust nearly  
21 everyday, and it's got glass in it from the sandstone.  
22 And it's not everyday, but it's a lot of days, and  
23 it's gritty.

24 And so I called OSM two weeks ago and

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1 they told me the process I had to go through, like I  
2 did before, but I've been so busy I haven't had time  
3 to get to it and hopefully I will get to that next  
4 week.

5 Q Let me ask you, Bo, after telling us  
6 about that, and the point I think is, are you  
7 prejudiced by the DEP for a coal company not following  
8 the law as a citizen under a mine?

9 A Well, absolutely. Absolutely.

10 Q Is it significant to you to be able to  
11 attend an informal conference?

12 A It's hugely significant. Whether that  
13 permits grows or decreases, it's significant for a  
14 citizen to know what's in that permit.

15 Q And it's what the law requires, right?

16 A Yes, it does.

17 Q When Jack was testifying he was being  
18 asked about . . . I lost my train of thought, didn't  
19 I? That's what happens when you have a six month old  
20 that wakes you up.

21 With the informal conference itself,  
22 there was testimony about whether citizens would  
23 be . . . I'm sorry. Give me a second. I know what it  
24 was.

1 A Good.

2 Q Thank you. You have worked with Coal  
3 River Mountain Watch in the past; is that correct?

4 A Volunteered.

5 Q As a volunteer. All right. And you know  
6 Rob; is that right?

7 A Yes, I do.

8 Q The DEP attorney who was talking with  
9 Jack was asking questions about, "Well, there is more  
10 participation if you write letters, et cetera, et  
11 cetera." Tell me where you live in the Coal River  
12 valley. Do you guys get the newspaper regularly?

13 A No, we don't. Where I live, we don't  
14 even get the newspaper in Peachtree.

15 Q Why?

16 A Because they can never get anyone on a  
17 consistent basis to deliver it, so we don't get it. I  
18 rely on the DEP's website and I subscribe to those  
19 notices.

20 Q Right. What would Coal River Mountain  
21 Watch do when one of these informal conferences was  
22 scheduled?

23 A I've done it many times. Coal River  
24 Mountain Watch or someone will find out about the

1 permit and then when an informal conference is  
2 granted, then I have done many times -- years ago I  
3 did it a lot -- then I would go up the hollow in  
4 Peachtree and Drews Creek and those places and knock  
5 on doors, let my neighbors and let the community know  
6 that there is going to be an informal conference.

7 "The mine site is going to expand above  
8 your house here. This would be a good opportunity for  
9 you to come and understand some things about this  
10 permit." And we could get people out that way that  
11 were not aware.

12 So that informal conference is vitally  
13 important to those people that are not aware that this  
14 is going to happen.

15 And Mr. Porterfield came to our community  
16 with some other inspectors and filled the community in  
17 on one in particular and we got almost all of those  
18 people out by knocking on doors and posting notices  
19 up, and that was a few years ago in Drews Creek.

20 Q So that's citizens of West Virginia  
21 relying on an informal conference, then?

22 A Yes.

23 Q To voice their concern to the DEP?

24 A And to learn, and to learn what's going