

1 on, and look at the maps and get an understanding of  
2 what's getting ready to happen to them, or are they in  
3 harm's way.

4 MR. RIST: No other questions. Thank  
5 you, Bo.

6 CROSS-EXAMINATION

7 BY MR. JENKINS:

8 Q Mr. Webb, an informal conference was held  
9 in this situation, was it not?

10 A Yes, it was.

11 Q Okay. And have you ever been to the DEP  
12 in Oakhill to review?

13 A Yes.

14 Q And so you have reviewed files and  
15 permits and other stuff?

16 A Yes, I have in the past.

17 Q Have you ever spoke with permit reviewers  
18 and discussed issues, or tried to catch Mr.  
19 Porterfield at the office?

20 A Yes, I have.

21 Q Has DEP ever denied you access to review  
22 any of that information? I mean, within reasonable  
23 time before closing time when everyone is leaving?

24 A No, they haven't.

1 Q So they've been pretty open and  
2 forthcoming with information and questions --

3 A Generally. I have had to call the  
4 secretary a couple of times when I was not getting  
5 what I thought was in the spirit of goodwill. I  
6 wasn't being treated fairly.

7 Q But is that more related to inspection,  
8 not really the permitting side of it? I mean, I know  
9 you went through this whole thing of trying --

10 A Yes.

11 Q But in terms of permit review and all of  
12 that, I think it's been explained it's an open door  
13 policy. Would you agree with that?

14 A Yes. I will say this, though. For the  
15 average person to go into the DEP office and ask for  
16 -- to review a permit, it's beyond their comprehension  
17 to really truly understand it.

18 And they will pull out the file for you  
19 -- and I've had it where they bring it to me on a  
20 cart. There's so many -- you know -- there's a lot of  
21 work there. So the average citizen doesn't -- is not  
22 going to understand that.

23 And the DEP doesn't have the staff to  
24 stand there and train these people for two or three

1 days to really understand what they're looking at.  
2 They're just looking at paper with a lot of things on  
3 it, you know, and that's what -- I was overwhelmed by  
4 it the first time that I looked at a permit. And so  
5 the average citizen is not going to benefit from going  
6 and looking at that.

7 Q When you go door to door and try to get  
8 the attendees to the informal conference, why don't  
9 you do that to notify people of the public comment  
10 period?

11 A There is no sense in doing that. It  
12 doesn't make -- they can make their comments at the  
13 informal conference.

14 Q So you don't think we should have a  
15 comment period, but just an informal conference?

16 A No. I think the comment period is good  
17 for those that cannot make an informal conference or  
18 those that feel they don't need to be at an informal  
19 conference. Those that want to write a letter, that's  
20 fine.

21 But people want to come there so they can  
22 talk to these DEP inspectors and reviewers to ask  
23 about specific things in that permit before the  
24 informal conference starts. Mr. Porterfield is well

1 aware of that and he has participated in it, and he  
2 has seen how citizens do benefit from that.

3 So we try to get citizens out so they can  
4 learn about the process. They can learn more about  
5 what is happening in their community and in their  
6 environment.

7 Q And would you say that occurred here with  
8 the informal conference, people came out and --

9 A I'm not aware. I was not -- I didn't  
10 come to this informal conference. I wasn't -- I was  
11 in Washington. I wasn't here. I was not around.

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

14 THE WITNESS: Sure.

15 **CROSS-EXAMINATION**

16 BY MR. HARVEY:

17 Q Mr. Webb, I'm trying to understand. You  
18 did go to the informal conference in 2011, correct?

19 A No, I didn't.

20 Q Members of Coal River Mountain Watch went  
21 in 2011, though, correct?

22 A As far as I know, Coal River Mountain  
23 Watch went. Me, physically, I did not go.

24 Q Did other members -- I think Mr. Goodwin

1 testified that he went to the informal conference.

2 A Yes, he did. I believe he did, yes.

3 Q Okay. And I'm trying to understand your  
4 complaint. Is your complaint then that the conference  
5 was not held in 2008?

6 A Yes.

7 Q Okay. And why does that matter?

8 A Well, again, citizens need to know what's  
9 going to happen in their community. If you lived in a  
10 mountaintop removal community, you would want to know  
11 and you would want to be involved in the process, and  
12 that's what that's for and that's why it needs to be  
13 done. And if the permit has changed, I believe it  
14 needs to be done every time the permit has changed on  
15 a final permit. What prevents them from doing  
16 whatever they want to with the permit once they get  
17 the basics done before they finalize it?

18 Q The changes that were made here, the  
19 reduction in impacts, those could have been made prior  
20 to the informal conference had it been held in 2008,  
21 correct?

22 A That's correct, but they were not.

23 Q But had they been, you'd be right where  
24 you are now, correct?

1 A No, not really.

2 Q No. Let's say in 2008 the permit was  
3 subject to public comment. Are you with me?

4 A Yes.

5 Q And then changes were made and then you  
6 had your informal conference in 2008, correct? At  
7 that time you would have learned about the changes to  
8 the permit and then decide whether to appeal it or  
9 not, correct?

10 A Based upon the information at that time,  
11 yes.

12 Q Okay. That's no difference than what has  
13 happened here, correct? The permit was changed after  
14 the public comment period, you went to the informal  
15 conference, you learned about those permit changes,  
16 you digested them and you decided to file an appeal,  
17 correct?

18 A Again, I didn't. I didn't.

19 Q But Coal River Mountain Watch did,  
20 correct?

21 A Yes.

22 MR. HARVEY: Okay. No further questions.

23 CHAIRMAN GRAFTON: The Board have any  
24 questions?

1 (No response.)

2 CHAIRMAN GRAFTON: Any redirect?

3 MR. RIST: No more. No, thank you.

4 CHAIRMAN GRAFTON: Okay. You're excused.

5 (Witness excused.)

6 MR. RIST: We rest.

7 CHAIRMAN GRAFTON: Mr. Jenkins?

8 MR. JENKINS: Yeah. If I could have just  
9 a minute.

10 CHAIRMAN GRAFTON: Okay. Let's take a  
11 five-minute break.

12 MR. JENKINS: Thank you.

13 (WHEREUPON, a recess was taken.)

14 CHAIRMAN GRAFTON: Let's go back on the  
15 record.

16 MR. JENKINS: Thank you, Mr. Chairman.  
17 The DEP would like to call Mr. Goodwin back to the  
18 stand just briefly.

19 THEREUPON came

20 **ROB GOODWIN,**  
21 called as witness on behalf of the DEP, and after  
22 having been previously duly sworn according to law,  
23 testified as follows:

24 **DIRECT EXAMINATION**

1 BY MR. JENKINS:

2 Q I don't think you have to be sworn back  
3 in, but, Mr. Goodwin, if you would just state your  
4 name for the record, please.

5 A Rob Goodwin.

6 Q And you still are under oath, are you  
7 aware of that?

8 A Yes, sir.

9 Q Briefly, where do you live, Mr. Goodwin?

10 A I live part-time in Rock Creek, West  
11 Virginia and part-time in Charleston, West Virginia.

12 Q And what are your -- I believe you said  
13 you were employed by Coal River Mountain Watch. What  
14 are your official duties there?

15 A I coordinate the Citizen Enforcement  
16 Project which is, you know, kind of like a watch dog  
17 organization, and I distribute "Now Your Rights"  
18 information to citizens.

19 Q So when Mr. Webb was explaining going  
20 door to door trying to gather up people for informal  
21 conferences and everything, do you coordinate that?

22 A I participate in that, yes.

23 Q Do you live below this proposed mine?

24 A Well, the residence that I stay at in



1 Rock Creek is, you know, just over the ridge from the  
2 proposed mine.

3 Q But not directly below it?

4 A Not directly below it.

5 Q Not within the immediate watershed,  
6 meaning the -- I mean, maybe eventually the streams  
7 would flow around the ridge or something to you, but  
8 in the immediate hollows there?

9 A No. I think it is possible dust from the  
10 operation, if the wind was right, could make it into  
11 this side of the ridge.

12 Q You were present at the informal  
13 conference, correct?

14 A Yes. But I'd like to note for the record  
15 the informal conference was a split conference on two  
16 permits at once, and my comments to the microphone and  
17 Mr. Wood, you know -- actually it was Dustin Johnson,  
18 you know, raised concerns about the process at which  
19 that informal conference was issued.

20 And I did not issue comments and stated  
21 that on the permit itself because of the process and  
22 because of a letter that I sent to DEP, you know,  
23 objecting to the process and requesting that it be  
24 readvertised through Mr. Clarke and maybe Mr.

1 Porterfield. That request was denied and that they  
2 were going to have the informal conference as  
3 requested. And I have a copy of that letter today if  
4 you care to look at it.

5 MR. JENKINS: I believe it's in the  
6 certified record. Tom, may know exactly where it's at  
7 in there.

8 MR. RIST: I might.

9 BY MR. JENKINS:

10 Q So even though you knew that the informal  
11 conference was going to be held as done, you just  
12 chose not to make any comments on the permit aside  
13 from the procedure?

14 A Correct.

15 Q Why is that?

16 A Because I believe that, you know,  
17 citizens were disenfranchised from attending that  
18 conference and appropriately being able to prepare on  
19 that permit because of the process.

20 Q Yet the informal conference was still  
21 held and all of those there and present and received  
22 notice in the newspaper, I believe email and all of  
23 that, they had the opportunity to comment, you had the  
24 opportunity to comment, correct?

1           A     I did not have the opportunity to comment  
2 on the permit directly because -- yeah.

3           Q     Why not?

4           A     Not written comments. Not written  
5 comments during the comment period, only during the  
6 informal conference.

7           Q     But why didn't you have the opportunity  
8 to submit comments during the written comment period?

9           A     Because there was no written comment  
10 period prior to the informal conference in the days  
11 leading up to the informal conference.

12          Q     But there was one initially when it was  
13 complete, correct?

14          A     Coal River Mountain Watch commented  
15 during that comment period.

16          Q     So Coal River Mountain Watch made  
17 comments there. Did Coal River Mountain Watch make  
18 comments at the informal conference?

19          A     Members of Coal -- I don't know. Some  
20 members of Coal River Mountain Watch did. I'm not --  
21 I can't speak exactly to the comments that were made  
22 on the Collins Fork permit precisely.

23          Q     Have you ever submitted written  
24 documentation or comments at the informal conference?

1 A Yes, I did in this case, and I think I  
2 provided the record of the timelines of the permit.

3 Q So you could have actually submitted  
4 written comments at the informal conference?

5 A Right. But I would not be given the same  
6 rights as a written comment period, which there are  
7 rights in the written comment period. I was not given  
8 the same rights.

9 Q The right being an informal conference?

10 A Informal conference and the right to  
11 request to gather information. And I believe at that  
12 time, if a request to gather information via  
13 inspection was requested, it would have been written  
14 thanks to a directive from Mr. Huffman.

15 Q Why didn't Coal River Mountain Watch  
16 request a site visit during the public comment period  
17 initially?

18 A I believe there is a document there that  
19 we did.

20 Q So Mr. Haltom is with Coal River Mountain  
21 Watch? He doesn't indicate as such. I believe your  
22 attorney pointed to certified record either page 170  
23 and 171. I think they're actually duplicates.

24 A Mr. Haltom is the executive director of

1 Coal River Mountain Watch.

2 Q But apparently he didn't submit comments  
3 based on Coal River Mountain Watch, just for himself?

4 A Yeah.

5 Q Do you have -- can you actually look at  
6 page 170 and 171?

7 A (Witness complies.)

8 Q I believe they're identical. I can't see  
9 a difference.

10 A Yes.

11 Q But we'll just look at Certified Record  
12 Page 170. Can you tell me the date that it was  
13 received in Oakhill?

14 A That would be June 23rd.

15 Q And I believe you testified earlier that  
16 the close of the comment period was June 19th?

17 A Yes. And the letter is dated June 19th.

18 Q But it does say received June 23rd,  
19 correct?

20 A It does indicate that here, yes.

21 Q Now, Mr. Goodwin -- and I think we've  
22 actually maybe dealt directly through email on some  
23 site inspections and different things, but you're  
24 pretty active opposing permits and commenting. Has

1 DEP ever prevented -- aside from this one issue where  
2 we chose not to do another comment period, but has the  
3 DEP ever prevented you from submitting comments,  
4 coming into their office, reviewing permits?

5 A No. But I would like to note for the  
6 record that there have been occasions when I have  
7 tried to review permit applications at the Oakhill  
8 office and indicated I would have to submit a FOIA to  
9 review the permit at the Oakhill office, which I'm not  
10 a hundred percent sure whether that was the case for  
11 this Collins Fork permit, but that has happened to me  
12 on a request to just review permits at the Oakhill  
13 office.

14 Q But if you submitted that request, then  
15 you would have access?

16 A You don't have to submit a FOIA to review  
17 a mine permit. That would not be an open door policy  
18 if you had to submit a FOIA.

19 Q If you submitted a FOIA to review a  
20 permit, has it ever been denied?

21 A No, it has not. But why would you have  
22 to go through a process for two days -- that's my  
23 question -- for the FOIA? I think that -- there was  
24 testimony that there was an open door policy. I don't

1 think that there has been an open door policy all the  
2 time for reviewing permits. Sometimes you are  
3 required to do a FOIA. That's my experience with the  
4 Oakhill office.

5 Q How many times?

6 A It is at least two occasions that I have  
7 gone in there, and after then I just assumed that was  
8 the policy because it seemed to change.

9 Q How many times have you been up -- how  
10 many permits have you reviewed at Oakhill?

11 A Probably I'd say at least 15 or 20 over  
12 the last two years.

13 Q So roughly ten, 15 percent they required  
14 FOIAs, but the rest they had no trouble with you  
15 looking at it?

16 A Well, many of those were among one FOIA  
17 request, so there was more than one permit per FOIA.

18 Q So you request several permits at once?

19 A At times, yes. It's hard to provide  
20 information to citizens because I've had to -- after  
21 that instance, I had to start telling citizens that  
22 they would have to submit a FOIA just to go review  
23 permits. And, you know, that's maybe the case in  
24 Oakhill, that's maybe not the case in Logan. It can

1 be confusing.

2 So clarity in the process is, you know,  
3 just not there for me, but I believe that is possibly  
4 another issue not for this hearing.

5 Q So aside from having to fill out a FOIA  
6 request and waiting two days, you haven't had an issue  
7 going in there looking at permits?

8 A Generally the staff is very helpful.

9 Q And have you had an opportunity to speak  
10 with staff and ask questions?

11 A Yes. They're very -- yeah.

12 MR. JENKINS: I don't have any further  
13 questions. Thank you.

14 MR. HARVEY: Just a couple.

15 **CROSS-EXAMINATION**

16 BY MR. HARVEY:

17 Q Mr. Goodwin, in the informal conference,  
18 I take it that members of Coal River Mountain Watch  
19 raised the concerns with health studies we've heard  
20 about here today?

21 A I'm not a hundred percent sure whether  
22 those concerns were raised specific to the Collins  
23 Fork permit. As I said, my concerns were the process  
24 at which the informal conference was held.



1           Q     But at least initially when you showed up  
2 here today that was one of the bases of your appeal,  
3 were the health studies, correct?

4           A     Yes.

5           Q     Were any of those health studies complete  
6 back in 2008?

7           MR. RIST: I object because we have  
8 removed this as an issue with the appeal. I tried to  
9 do it to simplify it. It's not relevant now. I'm  
10 sorry. We weren't doing that to cause trouble. I was  
11 trying to simplify it and focus on what we think the  
12 issue is.

13           MR. HARVEY: I think the point is simply  
14 that the delay, the three year delay, actually has  
15 enhanced their ability to raise issues that weren't  
16 present back in 2008. That's the point.

17           CHAIRMAN GRAFTON: Let's go on to another  
18 topic.

19           MR. HARVEY: That's all the questions I  
20 have, Mr. Grafton.

21           CHAIRMAN GRAFTON: Any redirect?

22           MS. RADCLIFF: No. It's actually -- I  
23 mean, do you have any questions?

24           MR. RIST: Yeah. I think I do want to

1 clarify one thing as I sat here looking at the record,  
2 Rob.

3 CROSS-EXAMINATION

4 BY MR. RIST:

5 Q Would you look at page 196 of the  
6 certified record?

7 A (Witness complies.)

8 Q And making sure we've got all the dates  
9 in here received and correct, on June 17th of 2008, do  
10 you see any other requests for informal conferences in  
11 the record?

12 A June 17th?

13 Q Yes, sir. No, page 196.

14 A Yes. It says, "On 6/17/08, received  
15 letter . . . and request for an informal conference  
16 from Julia Bonds of Coal River Mountain Watch."

17 MR. RIST: That's the only question I  
18 had. Thank you.

19 CHAIRMAN GRAFTON: Okay. You're excused.

20 (Witness excused.)

21 MR. JENKINS: The DEP would call Mr.  
22 Keith Porterfield.

23 THEREUPON came

24 **KEITH PORTERFIELD,**

1 called as a witness on behalf of the DEP, and after  
2 having been previously duly sworn according to law,  
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. JENKINS:

6 Q Mr. Porterfield, if you would state your  
7 full name for the record?

8 A Keith O. Porterfield.

9 Q And I believe you are still under oath.  
10 Do you understand that?

11 A Yes, sir.

12 Q And, again, just for the record, please  
13 just state your title and general job duties.

14 A I'm an assistant director with DEP  
15 responsible for all aspects of the Oakhill Regional  
16 Office.

17 Q And, Keith, are you familiar -- Mr. Webb,  
18 I believe, was talking about these blasting  
19 complaints. Are you familiar with those complaints?

20 A I am.

21 Q And can you just explain just your  
22 knowledge of those events?

23 A Yeah. Much of what Mr. Webb testified  
24 about is correct. He had made complaints to the

1 office OEB, which we do not manage. I do not manage  
2 that office. That's managed directly out of Oakhill.  
3 There had been some delay on an on-site inspection. I  
4 was also present at the hearing when Mr. Webb  
5 requested the on-site inspection to Mr. Mike Fury, who  
6 is the inspector.

7                   And his response was that he did have  
8 very bad knees, but he had access to the mine site  
9 from the top, and it was not necessary for him to walk  
10 from the bottom of the hill to the top of the mountain  
11 to do an inspection of that site.

12                   And Mr. Fury, I don't think he meant that  
13 to be adversary to Mr. Webb. I wanted to say that.  
14 But that in itself is what was said.

15                   In his testimony concerning the permit  
16 revision, what the Agency required Alex Energy or  
17 Massey to do at that particular time is actually bond  
18 those slip areas. They had blasted some material over  
19 the hill. It was very, very steep. We felt like that  
20 it needed to be permitted so we could have good  
21 control of it.

22                   However, this was a mountaintop removal  
23 site with multiple layers of coal seams to be mined.  
24 We made a decision to first stabilize the slide with

1 seed and hay bales and then the mining progressed as  
2 originally permitted. We did not authorize additional  
3 coal seams to be mined under the IBR. We simply  
4 recognized that we could totally remove that material  
5 once the mine site developed low enough to actually  
6 get over the hill and pick it up, and that is, in  
7 fact, what happened.

8           Once we -- those coal seams, the lower  
9 coal seams, was mined, we required Marfork at the time  
10 to take an articulated truck to physically pick up  
11 that material and remove it back on top of the  
12 mountain and clean that up. We have had no additional  
13 problems with that slide areas. That is what the IBR  
14 addressed.

15           That issue was addressed by -- our permit  
16 actions went through a formal review from OSM. It  
17 went not only to the Beckley Regional Office, it went  
18 to the Pittsburgh offices of OSM, and we were found to  
19 have acted appropriately with that permit action.

20           And I don't have that document here  
21 today. I didn't realize we were going to be speaking  
22 about Ed White, but, you know, I could get that.

23           MR. JENKINS: That's all the questions I  
24 have. Thank you.

1 MR. HARVEY: No questions.

2 CROSS-EXAMINATION

3 BY MR. RIST:

4 Q What are the application milestones?

5 A Mr. Wood probably would be more  
6 appropriate to that, Tom. That's how we track.  
7 That's how we track what's on an application. But he  
8 is prepared to discuss those milestones.

9 Q Well, I've got you on the stand now, so  
10 I'll ask just a few questions. But that's kind of  
11 like a log of what's going on; is that fair to say?

12 A Yes.

13 Q I've already clarified the date the  
14 comment period ended under the West Virginia Code. It  
15 was June 19th, 2008, correct? Is that right?

16 A Yes.

17 Q And it's on Certified Record Page 197 if  
18 you want to look. But between June 19th, 2008, and  
19 the date that the DEP issued notification of the  
20 informal conference, do you have any idea how many  
21 entries showed up on the log between those two dates?

22 A I do not.

23 Q If I told you it was about 70, does that  
24 seem about right?

1           A     Well, as I previously testified, Tom, it  
2     went through multiple, multiple changes, and every  
3     time those changes occurred that application would go  
4     back and forth between the consultant and company and  
5     DEP. So that would not surprise me.

6           Q     There was a lot of stuff going on between  
7     the time that this request for a conference happened  
8     and the time that you guys finally did the conference.  
9     All kinds of things happened to this permit.

10          A     Yes.

11          Q     Huge changes. We heard about huge  
12     changes happening basically, right?

13          A     Yes, sir.

14          Q     The acreage of this thing was going from  
15     one to another, correct?

16          A     It was diminishing. That's correct.

17          Q     What are the other big things that were  
18     changing?

19          A     How the impoundment was going to fit into  
20     the mining process. That was the other major change.

21          Q     Major changes.

22          A     Major changes.

23                 MR. RIST: Major, major changes. Okay.

24     Those are the only questions I have. Thank you.

1 CHAIRMAN GRAFTON: The Board have any  
2 questions?

3 MS. RADCLIFF: Mr. Porterfield when you  
4 were on the stand earlier, you talked about the  
5 requirement of advertising when it is administratively  
6 complete. Can you talk about the difference between  
7 administratively complete and technically complete?

8 THE WITNESS: I can and I need to further  
9 explain an answer that I provided earlier. There is  
10 regulations that West Virginia has proposed that allow  
11 an opportunity for public comment once an application  
12 is technically complete. OSM has refused to approve  
13 that regulation. We have been directed not to enact  
14 that until at such time as our federal counterparts  
15 approve that, Wendy. And I wanted to clarify that to  
16 you, Jim, and for everybody. That's an oversight on  
17 my part. I knew that. I knew we weren't doing it,  
18 and that's the reason why.

19 Technically complete is when the  
20 application has went through all of the technical  
21 review. We believe when an application is technically  
22 complete that it is not only they have answered all of  
23 the questions but they have answered them correct.  
24 And at that point in time we begin the conclusion to



1 the permit. Administratively, they have just answered  
2 all of the questions. Is that helpful?

3 MS. RADCLIFF: It is. Except that in the  
4 regulations right now, if you go to 38CSR2 3.2.g that  
5 deals with Notice of Technical Completeness, there is  
6 no indication in the regs, at least in the regs that  
7 are distributed, that that has not been approved by  
8 OSM.

9 THE WITNESS: You know, I acknowledge  
10 that, and we have --

11 MS. RADCLIFF: The legislature has made  
12 that determination. I mean, all throughout the reg  
13 book that the Board gets and gives out to the public,  
14 it says that it will be in bold if it's not approved  
15 by the OSM, and there is no indication in the  
16 regulations, anyway -- I mean, I'm open if you want to  
17 deal with that and point that out.

18 MR. JENKINS: It's my understanding --  
19 because I had that question when I first started  
20 working here. It's my understanding that OSM hasn't  
21 approved anything since 2008, and that I think just  
22 with the reiterations of this some prior changes kind  
23 of get the highlighting or the underlining or  
24 whatever. It's just gotten lost.

1 I mean, this is for our use, the public's  
2 use. This is not an official document. The official  
3 document is with the Secretary of State and with the  
4 federal regulations.

5 There is an approval section under -- I  
6 believe it's 70CFR7 something where West Virginia's  
7 regulations are approved, and under there you can  
8 clearly see from the most recent federal regulations  
9 that nothing has been approved since 2008, and that's  
10 when this section was added in.

11 It actually highlights the fact that  
12 we've been dealing with the situation for awhile and  
13 we're actually trying to fix it to give us the  
14 authority to give the citizens an opportunity to  
15 comment once the permit is kind of finished, if you  
16 will. But it's still -- you know -- the feds are  
17 sitting on it.

18 MS. RADCLIFF: Thank you.

19 MR. HUNTER: I have a question.

20 CHAIRMAN GRAFTON: Okay.

21 MR. HUNTER: In that case, how are we  
22 supposed to know which of the regulations are in  
23 effect and which are not?

24 MR. JENKINS: Well, I mean, I've had to

1 do the same myself, Mr. Hunter. It's just -- I can't  
2 -- you know -- I'm purely speculating why some of the  
3 changes haven't been noticed. And I think it even is  
4 to where only the -- in the newest book only the 2001  
5 ones, I believe, are showing, while the '09 and '08  
6 ones aren't.

7 I mean, it's dual federalism. It puts us  
8 in a weird situation because our program has to be  
9 approved by the federal government, and if they don't  
10 act on something -- I mean, we could have statutes  
11 there that are inoperative. Even if the legislature  
12 enacts something, there still has to be something  
13 approved, some approval from that.

14 So not only do we have a statute that  
15 technically says we should do something, but the feds,  
16 if they don't approve it, it's not there yet. And  
17 that's the agreement we have with the federal  
18 government when we took over the program and accepted  
19 sole responsibility for that.

20 MS. RADCLIFF: I will just point out  
21 that's where I'm amiss, because my understanding from  
22 reading this document that is distributed to the Board  
23 as the official document, I did not know that I needed  
24 to go back and parse it out with what's been filed

1 with the Secretary of State's Office. And as -- you  
2 know -- to point out --

3 MR. JENKINS: No, I understand.

4 MS. RADCLIFF: -- just to get on a soap  
5 box for a minute, as an attorney that advises the  
6 Surface Mine Board, if I'm having trouble with that,  
7 where do you get to where a citizen that comes -- you  
8 know -- gets this document and reads it and doesn't  
9 think that that's the fact, that, you know, there is a  
10 notice of technical completeness and -- you know.

11 MR. JENKINS: Trust me, Wendy, I've had  
12 the same questions when I started here and I'll look  
13 at a statute and they tell me, "Well, OSM hasn't  
14 approved it." "Okay."

15 MS. RADCLIFF: Allow me to say that I  
16 will now get the Board a copy of the -- since they're  
17 presented in the Secretary of State's Office as having  
18 been -- or however it is that we go and get the  
19 federal register on what's been approved or not, we  
20 also need to send a little letter to Dennis Boyles  
21 asking him to please get busy on --

22 MR. JENKINS: And, Wendy, what I can do  
23 is that -- if the Board would like it, I can submit  
24 just a copy as a supplement of the current federal

1 regulation of what has been approved and what has not  
2 been approved, because there is a table of changes  
3 that were submitted.

4 Because even if the official copy is in  
5 the Secretary of State's Office, that official copy  
6 will have this here.

7 MS. RADCLIFF: Right.

8 MR. JENKINS: It's the actual Code of  
9 Federal Regulations that will say what sections have  
10 or have not been approved and changed. There is a  
11 table that says what has been approved from the  
12 beginning of our program and then there is a separate  
13 section that says things that were specifically  
14 disapproved or modified by OSM.

15 MS. RADCLIFF: No, I can do that. But I  
16 appreciate that.

17 MR. JENKINS: Okay.

18 MS. RADCLIFF: And I appreciate you  
19 clarifying that because, you know, we have these books  
20 up here and we're like why isn't anybody dealing with  
21 the question of whether or not it's technically  
22 complete. So in terms of the record, I appreciate you  
23 clarifying that for us.

24 THE WITNESS: So noted.

1 MR. JENKINS: I thought I had a -- just  
2 briefly, if I may. I'm sorry. I know we got off  
3 track there. Just one question there.

4 REDIRECT EXAMINATION

5 BY MR. JENKINS:

6 Q Keith, Tom has pointed out that there is  
7 about 70 entries just at least on what Mr. Goodwin had  
8 submitted in the informal conference and what is in  
9 the certified record. But -- and maybe this would --  
10 well, if the informal conference was held after those  
11 70 entries, isn't it better that the citizen was able  
12 to review those entries from what was changed over  
13 that time to make a more meaningful comment during the  
14 informal conference?

15 A I do believe that and I can testify --  
16 you know -- Mr. Goodwin talked about he disputed maybe  
17 our open door policy just a little bit, and I'd like  
18 to speak to that.

19 If anyone wants to have the Agency make a  
20 document and we have to provide them information, CDs,  
21 or permit maps, then we do request a FOIA be filled  
22 out because there is typically a fee associated with  
23 that.

24 To the best of my knowledge, and it's

1 certainly not our policy, if you just want to come in  
2 there and look at an application, we never require a  
3 FOIA. And if that happened, I apologize, but that  
4 clarifies our policy. We do track what the Agency  
5 releases. If folks just come in and want to look at  
6 something, typically that does not require a FOIA.  
7 And, Rob, I'll follow up on that.

8                   What was your other question? I lost my  
9 train of thought.

10                   MR. JENKINS: I believe you answered it,  
11 Mr. Porterfield.

12                   THE WITNESS: Okay.

13                   MR. JENKINS: I don't have any further  
14 questions. Thanks, Keith.

15                   CHAIRMAN GRAFTON: Okay. You're excused.

16                   MR. RIST: Can I ask a couple? I'm  
17 sorry.

18                   RECROSS-EXAMINATION

19                   BY MR. RIST:

20                   Q     If all of this stuff is going on between  
21 the time that the comment period ends and the informal  
22 conference happens -- I mean, the West Virginia Code  
23 is crystal clear. You guys are tired of listening to  
24 me say that. You all know what it says. You know it

1 and they have all stipulated, "Yeah, we missed it."

2 So here's the problem: How does the  
3 citizen know this? How does a West Virginia citizen  
4 is supposed to look at the West Virginia Code that  
5 says you do this within three weeks. It doesn't  
6 happen for three years. What are they supposed to do?  
7 Just think, "Oh, they must be making changes. We'll  
8 wait for them"? Are they supposed to come in all the  
9 time and check this stuff?

10 A Tom, all I can say is is that we have a  
11 regulation there that is impossible to meet. If I  
12 would have met the three week conference, okay, you  
13 would be here today wanting to enact the other  
14 regulation right behind it that says you have to make  
15 a permit decision within 30 days. So we're in a  
16 position where that it's impractical for me to do. I  
17 can't meet both of those and we're not disputing that.

18 What I'm telling you today and before  
19 this Board, I believe our actions better served the  
20 community than any other way possible, I believe, by  
21 them having access to our office the entire time it's  
22 under review. We never deny people the chance to look  
23 at that application. We assign staff as appropriate  
24 to answer questions and then we had the hearing at the



1 end of the permit when it was an accurate reflection  
2 of what was going on on that property. I believe that  
3 was the correct thing to do.

4 I'm not disputing that it didn't line up  
5 with that particular point of the Act. I'm simply  
6 pointing out that if I had met that particular point,  
7 then I would be here today and you would be asking me  
8 why I didn't issue or deny the permit within 30 days.

9 Q What am I supposed to follow then as a  
10 citizen in West Virginia? Where do I look in these  
11 rules to follow? If the law is not being followed,  
12 what are we following?

13 A Well, you know, I've answered that to the  
14 best of my ability as to what we've done.

15 Q Do those permits take three years between  
16 the time that the comment period closes and the  
17 informal conference?

18 A Typically, no.

19 Q This is extraordinary?

20 A Typically, no.

21 Q You've never seen this before, have you?

22 A I can't say that.

23 Q This is the longest one -- this has got  
24 to be the longest period ever.

1 A No, I can't say that.

2 Q What is the longest one you've seen?

3 A You know, this is a long one. Tom, I've  
4 been here 30 years and I just -- I don't want to put  
5 information out there that would not be correct.

6 Q But as far as --

7 A This one went through a lot of changes,  
8 and that's why we had three years getting it to a  
9 point that we believed it met the criteria of the  
10 regulations. And, you know, I'll defend that  
11 decision.

12 Q I understand that.

13 A I'm here defending it today.

14 Q And we're all sitting here pulling our  
15 hair out --

16 A I know.

17 Q -- because we don't want to follow.

18 A I know.

19 Q I mean, we're even having corrections  
20 between the DEP attorney and the Board attorney and  
21 trying to figure out all of this stuff. And so from a  
22 citizen's standpoint, if it's not followed, we don't  
23 know what to do.

24 A Maybe you could help us compel OSM to

1 approve that reg package.

2 Q They don't care what I think about that.

3 A That would help us all. Obviously, we  
4 would like that. We would have not put it in our  
5 regulations, but we have to have federal approval  
6 before we can move forward on it.

7 MR. RIST: I don't have any other  
8 questions. Thank you.

9 MR. HUNTER: Have you ever had more than  
10 one informal conference on a permit?

11 THE WITNESS: Yes.

12 MR. HUNTER: So it is possible like in  
13 this siltation you could have one informal conference  
14 and then because there was substantial changes have  
15 another informal conference?

16 THE WITNESS: It's certainly possible  
17 with -- as ownership changed. If they would have  
18 elected -- in this particular case, they could have  
19 had another conference if they would have requested  
20 it. We readvertised again and opened it up to public  
21 comment due to the fact of the ownership change. If  
22 they would have elected to comment and request a  
23 hearing, then we would have had another hearing.

24 MR. HUNTER: But if there is a

1 substantial change in a permit as there was in this  
2 one, then that's not cause for possibly having an  
3 informal conference?

4 THE WITNESS: You know, that's  
5 discretionary, and I would have to research the  
6 regulations to look at that and further evaluate that.

7 But, you know, the point I'm trying to  
8 make, Mr. Hunter, we had the hearing when it was  
9 technically complete, you know, that's when we had it.  
10 They got to see the product at the end of the road.  
11 They didn't have to request it, it was there. That's  
12 when we had the informal conference.

13 MR. HUNTER: But I think Mr. Spadaro's  
14 testimony was that if you had the informal conference  
15 before it's complete, then that gives you information  
16 for which you can then change the permit and such in  
17 the future. But in this case it appears that because  
18 you didn't have that the only thing you had to go on  
19 was some of the comments that were submitted, you  
20 know, in written form.

21 THE WITNESS: Yes, sir. And I would  
22 point that Mr. Goodwin is at our office a lot, and  
23 anybody can come and look at any application that  
24 they're interested in any time during that comment.

1                   And I'm surprised much as been said about  
2 this informal conference. We're open from 8:00 to  
3 4:00 everyday and folks can just walk in, and I've  
4 asked all of them to do that and look at these  
5 applications any time during the process.

6                   MR. SMITH: Let me ask you one question I  
7 caught listening to your answer there. There was an  
8 initial notification and you got comments?

9                   THE WITNESS: Yes, sir.

10                  MR. SMITH: And then there was an  
11 informal conference at the end of the technical period  
12 three years later?

13                  THE WITNESS: Yes, sir.

14                  MR. SMITH: What were you saying about  
15 because of -- in this permit because of the ownership  
16 change there was another comment period? You had  
17 another advertisement and another conference period at  
18 some time?

19                  THE WITNESS: We had another  
20 advertisement and people could have commented and  
21 requested a hearing.

22                  MR. SMITH: No one commented?

23                  THE WITNESS: No one commented.

24                  MR. SMITH: Did that happen during the

1 technical review while that was going on?

2 THE WITNESS: I would have to defer to  
3 Mr. Wood. He is prepared to answer that question as  
4 to when that occurred.

5 MR. SMITH: And that would have  
6 precipitated another informal conference?

7 THE WITNESS: Yeah.

8 MR. SMITH: Okay.

9 THE WITNESS: Yes, sir.

10 CHAIRMAN GRAFTON: Any other questions?

11 MR. RIST: No, sir.

12 MR. JENKINS: No, sir.

13 CHAIRMAN GRAFTON: All right. Mr.  
14 Porterfield, you are excused.

15 MR. JENKINS: Thanks, Keith.

16 (Witness excused.)

17 MR. JENKINS: DEP would call Mr. Tom  
18 Wood.

19 THEREUPON came

20 **THOMAS WOOD,**

21 called as a witness on behalf of the DEP, and after  
22 having been duly sworn according to law, testified as  
23 follows:

24 **DIRECT EXAMINATION**

1 BY MR. JENKINS:

2 Q Tom, if you would state your full name  
3 for the record, please?

4 A My name is Thomas Wood.

5 Q And what is your current position at the  
6 DEP?

7 A My official title is environmental  
8 resource program manager, and I handle -- part of that  
9 responsibility is to manage the Article III permitting  
10 section.

11 Q And can you just explain some of your job  
12 duties?

13 A My job duties are to assign permitting  
14 responsibilities to our permit review staff, ensure  
15 that the applications that are reviewed are in  
16 compliance with the laws and regulations, and make  
17 recommendations of approval or denial for  
18 applications.

19 Q Would it be fair to say you are the  
20 permit supervisor?

21 A Yes, I am.

22 Q You coordinate essentially all of  
23 Oakhill's permitting?

24 A Oversee -- I have assistance with that

1 responsibility, but, yes, I oversee that.

2 Q And how long have you been with the DEP?

3 A Eighteen (18) plus years.

4 Q And during that time, what were your  
5 other positions besides permit supervisor?

6 A I was an inspector with Mining and  
7 Reclamation for over 15 years, and I worked with the  
8 Division of Water and Waste Management for over two  
9 years.

10 Q How long have you been doing the  
11 permitting responsibilities?

12 A I've been the permit supervisor since  
13 July of 2010.

14 Q Almost two years?

15 A Yes.

16 Q And you're familiar with all of the  
17 Article III permitting?

18 A Yes, I am.

19 MR. JENKINS: I would like to certify Mr.  
20 Wood as just an expert in Article III permitting?

21 MR. HARVEY: No objection.

22 MR. RIST: No objection.

23 CHAIRMAN GRAFTON: Admitted.

24 BY MR. JENKINS:



1 Q Mr. Wood, are you familiar with the  
2 permit under appeal right now?

3 A Yes, I am.

4 Q And can you just generally describe how  
5 you are familiar with the permit?

6 A Well, I'm aware that the application of  
7 the surface mine was submitted in 2008, in February,  
8 and the -- it was issued an SMA number in April, which  
9 meant at that point it was administratively complete,  
10 and at that time it was given permission to advertise.  
11 A copy of the application was placed in the courthouse  
12 and the end of comment period occurred on June 19th of  
13 2008.

14 Q All before you assumed your duties?

15 A Yes. Well before I assumed by duties.

16 Q But you have reviewed the history of this  
17 permit and the permit file?

18 A Yes, I have.

19 Q And when you took over your duties in  
20 Oakhill, did you become aware of I guess this permit  
21 and what it was going through?

22 A Yes. I was aware that this permit was  
23 initially submitted with 831.44 acres during the  
24 review process, and some requirements by EPA the

1 applicant chose to reduce the acreage down 264.22  
2 acres.

3 Q And what type of mining operation was it  
4 in its 831 acres?

5 A It was a contour mine, multiple seam  
6 contour, highwall mining and on steep slopes.

7 Q And what is it in its current?

8 A It's stayed the same.

9 MR. JENKINS: I'll have this marked as  
10 DEP Exhibit 1.

11 (WHEREUPON, DEP Exhibit Number 1 was  
12 marked for purposes of identification.)

13 MR. JENKINS: Hopefully everyone can see  
14 this all right.

15 BY MR. JENKINS:

16 Q Mr. Wood, are you familiar with this map?

17 A Yes, I am.

18 Q Can you just briefly explain what this  
19 map shows?

20 A This map depicts the total permit area  
21 that was originally proposed as the green and yellow  
22 area, and the yellow area depicts the areas that were  
23 deleted, which totaled about 567.33 acres, and the  
24 green area depicts the actual permit area that we

1 approved.

2 Q So the green is what has been approved  
3 and then green and yellow together was the original  
4 permit?

5 A That's correct.

6 Q So the yellow was deleted during this  
7 three year period of the changes?

8 A That's correct, yes.

9 MR. JENKINS: If I may approach again.  
10 And, again, this map is up on the . . .

11 (WHEREUPON, DEP Exhibit Number 2 was  
12 marked for purposes of identification.)

13 BY MR. JENKINS:

14 Q Now, Tom, if you could just briefly  
15 explain this map. Are you familiar with it, as well?

16 A Somewhat familiar. This map appears to  
17 depict the approved permit area in the green, and the  
18 area in the yellow depicts the Collins Fork  
19 impoundment, and the red area behind the Collins Fork  
20 impoundment depicts the mining area that was proposed  
21 that was deleted.

22 Q So is it fair to say, then, that this map  
23 just shows a little bit more detail than the previous  
24 green/yellow overlay?

1           A     Yes.  It shows the mineral removal area  
2 and the deleted area from the previous map.

3           Q     And the impoundment is not a part of this  
4 permit anymore, is it?

5           A     No, it's not.

6           Q     Now, Mr. Wood, have you had a chance to  
7 examine this site?

8           A     Yes, I have.

9           Q     Can you just -- I think you had taken --  
10 we have taken an aerial view of the site, have we not?

11          A     That's correct.

12          Q     And I believe you took some pictures here  
13 and I'll just mark them as we go.  That looks like  
14 that's it.

15          A     Okay.

16          Q     And, Tom, while I'm passing these outs,  
17 if you just kind of want to explain this briefly.

18                   MR. JENKINS:  We'll have this marked as  
19 DEP Exhibit 3, it's the photograph I'm handing Mr.  
20 Wood and it is up on the screen, as well.

21                           (WHEREUPON, DEP Exhibit Number 3 was  
22 marked for purposes of identification.)

23                   THE WITNESS:  This is a view of the  
24 permit taken from the helicopter looking north and the

1 permit area is located in the photo center left, and  
2 you can see the Collins Fork impoundment -- it's  
3 located in the photo lower left -- and the Workman's  
4 Creek drainage area located lower right, and there is  
5 existing highwall visible, and at the base of that  
6 highwall is the approximate permit boundary from that  
7 view.

8 BY MR. JENKINS:

9 Q And as part of this proposal will that  
10 highwall be reclaimed?

11 A That highwall is proposed to be  
12 reclaimed.

13 MR. RIST: I'm sorry, sir. I'm going to  
14 object to his testimony. He's testifying about site-  
15 specific information. I'm representing citizens that  
16 have asked for a site inspection that has been denied  
17 and right now we have currently a pending motion for a  
18 site inspection that's not been ruled on. I can't  
19 respond in a hearing to testimony about what's on the  
20 site if I've not been able to go there myself.

21 MR. JENKINS: I mean, if I may respond.  
22 All site visits are discretionary. I mean, as part of  
23 our regular duties, we have a right of entry to the  
24 mining permit, and, of course, this Board can't deny

1 the company itself from testifying about its own  
2 property. This is done to show the differences of  
3 what's changed between the original permit and what's  
4 proposed to be done.

5 It goes to the prejudice of the citizens,  
6 that we're showing that, you know, this exists here,  
7 that it's been reduced to a third of its prior size,  
8 that the impacts to the citizens and everyone else has  
9 been significantly reduced, and that they had an  
10 opportunity to commit on the final product. I believe  
11 it is appropriate and adequate.

12 CHAIRMAN GRAFTON: Well, I would minimize  
13 comments to these kinds of things, I think, since most  
14 of the things we are arguing has been withdrawn.

15 MR. JENKINS: We can do that. I mean, it  
16 was to offer perspective and to show the changes it  
17 has gone through, but we'll -- I think this -- we will  
18 leave it as this one picture and I will just move on  
19 and we will use the maps.

20 CHAIRMAN GRAFTON: Okay.

21 MR. JENKINS: Thank you, Mr. Chairman.

22 BY MR. JENKINS:

23 Q Now, Mr. Wood, there has been some talk  
24 -- do you have -- I believe you have it actually

1 opened on the application milestones and what's going  
2 through there. Have you had a chance to review the  
3 written comments that were submitted by the citizens  
4 even back in '08 and submitted at the informal  
5 conference?

6 A Yes.

7 Q And did you and your staff review those  
8 as part of your process in reviewing this permit?

9 A Yes. All comments received during the  
10 30-day comment period, as well as the informal  
11 conference, are taken into consideration with the  
12 deliberation of the issuance or denial of the permit.

13 Q Now, if someone submitted comments  
14 outside the period, say, you know, a month later or  
15 whatnot, do we still -- does DEP still take those into  
16 account?

17 A Yes, we take those into account. The  
18 only difference is we are not required to send a  
19 response to the commentor on anything received outside  
20 the 30-day comment period.

21 Q So even during -- there has been a lot of  
22 testimony, which I'm sure you are aware of -- you were  
23 sitting here -- that citizens didn't have an  
24 opportunity to comment between 2008's close of the

1 comment period and the informal conference. Would  
2 they had still have had the opportunity to comment?

3 A Yes.

4 Q Could they have still submitted a written  
5 comment?

6 A Yes.

7 Q Could they have met with you or your  
8 staff to let them know their concerns?

9 A At any time during normal operating  
10 hours, yes.

11 Q Are you aware of any comments submitted  
12 by Mr. Goodwin or the other Appellants aside from the  
13 ones that I believe are in the certified record?

14 A Well, the comments received during the  
15 30-day comment period. I'm not sure of -- I think we  
16 had maybe half a dozen. I'm not sure of all of the  
17 individuals who submitted those, and we also received  
18 verbal and written comments during the informal  
19 conference, and all of those were taken into  
20 consideration prior to our decision to issue the  
21 permit.

22 Q And actually wasn't that reporting made a  
23 part of this record?

24 A Yes.



1 Q If I can direct you to the certified  
2 record on page 170.

3 A (Witness complies.)

4 Q This is a letter from Mr. Haltom that I  
5 believe Mr. Rist had pointed out. When was it  
6 received?

7 A The date stamped, June 23rd, 2008.

8 Q And what is the DEP's policy on receiving  
9 public comments?

10 A We will accept public comment outside the  
11 30-day window provided that the postmark is on the  
12 last day of public comment.

13 Q And is there any indication here that  
14 this is postmarked?

15 A I do not have that information in front  
16 of me.

17 Q Would that typically be entered in the  
18 application milestones or the -- what do they call it  
19 -- history report?

20 A You know, I couldn't say in every  
21 instance that it would be, but that's something we  
22 look at when we receive comments, as to whether they  
23 were received within the 30-day period, and that would  
24 let us know that we need to respond and the applicant

1 also has to respond.

2 Q But, in this instance, we're not sure if  
3 there was a postmark by June 19th?

4 A I could not say for sure that it was or  
5 wasn't.

6 Q In your experience, are we required by  
7 statute or by rule to grant a site visit?

8 A No. I believe the language says "may."

9 Q So it's the DEP's discretion, right?

10 A (Witness nods affirmatively.)

11 Q But we are required to grant an informal  
12 conference, correct, if requested?

13 A Not in all instances, no.

14 Q But in this instance?

15 A In this instance, yes.

16 Q And we did hold an informal conference in  
17 this instance?

18 A Yes, we did.

19 Q Were you at that informal conference?

20 A Yes, I was.

21 Q And I can't remember. Were you the one  
22 accepting comments at this hearing?

23 A No. Due to the fact that this was a dual  
24 informal conference, I was hearing comments from

1 another application. Dustin Johnson, who serves as my  
2 permitting coordinator, received comments for this  
3 application.

4 Q And when something is submitted for this  
5 application at the informal conference, is it made  
6 part of the record and placed in the permit file?

7 A Yes, it is.

8 Q And so Mr. Goodwin -- if you could turn  
9 to page 194 of the certified record.

10 A (Witness complies.)

11 Q With something like this, would this mean  
12 that Mr. Goodwin submitted this application milestones  
13 at the informal conference?

14 A Yes.

15 Q Now, Mr. Wood, in your experience -- just  
16 explain to me how you dealt with this issue, because  
17 you came in the middle of it and there is this issue  
18 of the public comment period being back in 2008 and  
19 then an informal conference coming up. Just in your  
20 experience, I mean, how did you reach the decision to  
21 hold the informal conference then?

22 A Well, I knew that significant reductions  
23 in the amount of acreage in this application had  
24 occurred over the three years it was in review. And

1 let me say that this isn't the only application that  
2 has been in review for a number of years. I recently  
3 terminated eight applications that had been in review  
4 for sometime. Because of some restrictions currently  
5 placed by EPA, the applicants decided to just not  
6 pursue them. So rather than -- that happened here.  
7 The applicant decided to redesign the application and  
8 that's why it took so long.

9 And when I came on board as permit  
10 supervisor, you know, it was in the midstream of the  
11 review and I knew that the informal conference didn't  
12 take place as the law had instructed us to within  
13 three weeks of the end of comment. So, you know,  
14 there was nothing I could do about that, that had  
15 already passed.

16 So rather than try to do something in  
17 midstream with a partial product, we decided to wait  
18 until it was technically complete to hold the informal  
19 conference, and we advertised in the local paper that  
20 circulates in the county two weeks prior to the  
21 informal conference and then held the informal  
22 conference on August 9th, 2011.

23 And at the time the citizens were offered  
24 the opportunity to provide written and verbal

1 comments, and like I said earlier, we take those into  
2 consideration when we make our decision to issue or  
3 deny an application.

4 And it has already been stated that due  
5 to the fact that the company that originally submitted  
6 the application changed ownership there was a  
7 readvertisement that took place September 29th and it  
8 was advertised one time with a ten-day comment period.  
9 This occurred after the informal conference, and it  
10 also allowed the citizens to provide comments at that  
11 time.

12 And if we would have received any  
13 comments, we would have -- or a request for an  
14 informal conference, we would have held an informal  
15 conference, but there were none received.

16 And once the ten-day comment period was  
17 up, we commenced assembling all of the required  
18 documents and findings to approve the application.

19 Q Tom, if I could point you to page 82 in  
20 the certified record.

21 A (Witness complies.)

22 Q Is this the second publication that you  
23 were referencing?

24 A Yes, it is.

1 MR. JENKINS: I know there has been some  
2 talk on whether or not this was -- these permits were  
3 submitted at the courthouse. If I may approach. I've  
4 marked these -- it would probably be better to go  
5 chronologically. But the first page I would mark as  
6 DEP Exhibit 5 and the second page I would mark as DEP  
7 Exhibit 4.

8 (WHEREUPON, DEP Exhibits Numbers 4 and 5  
9 were marked for purposes of identification.)

10 BY MR. JENKINS:

11 Q And, Mr. Wood, if you would just briefly  
12 explain what these forms are.

13 A These acknowledgements are given to the  
14 applicant to place a copy of the application in the  
15 local courthouse, and we require that this be done to  
16 show that they were placed for public review. And we  
17 have one that showed it was placed on the 10th day of  
18 April of 2008, and then it was placed again on the  
19 16th day of September 2011.

20 Q And for the April 10th, 2008, is that the  
21 second page?

22 A Yes, that's correct.

23 Q And so please let the record reflect  
24 that's DEP Exhibit 4. And for the September 16th

1 date, is that the first page?

2 A Yes, it is.

3 Q And please let the record reflect we will  
4 mark that as DEP Exhibit 5. Are these common forms  
5 that are made a part of the permit file?

6 A Yes, they are.

7 Q And essentially what is this, I mean,  
8 what --

9 A This is an acknowledgement from the  
10 County Clerk's Office that an application has been  
11 placed at the courthouse for public review.

12 Q And so this verifies that the permit  
13 application was placed in the county courthouse?

14 A Right. This can be done by either the  
15 applicant or a representative of the DEP.

16 MR. JENKINS: Tom, thank you. I don't  
17 have anymore questions. Thank you.

18 MR. HARVEY: No questions.

19 **CROSS-EXAMINATION**

20 BY MR. RIST:

21 Q To make sure I'm right, then the -- it  
22 would have been -- May 20th, 2008 would have been the  
23 last date of publication of the permit, at least the  
24 first time around, correct?

1 A There are --

2 Q I'm looking at page 81.

3 A Page 81.

4 Q You're required to publish four  
5 consecutive weeks?

6 A Yes, that's correct.

7 Q Were there changes that were required by  
8 the EPA to this permit?

9 A There were some things going on that the  
10 applicant felt like it would be -- they would be  
11 better off to reduce the size of the application  
12 rather than wait and see what would transpire with the  
13 changes that were coming about.

14 Q Was selenium an issue?

15 A I'm not sure what the issue was. I just  
16 knew that there were some things that had come up and  
17 the applicant decided, you know, if we want to mine  
18 this area within the time frame that they had planned  
19 we need to scale back to avoid those issues that EPA  
20 was concerned about.

21 Q I think you already testified to this,  
22 but I want to be crystal clear on it. You said by the  
23 time you came in and picked up this application that  
24 they had already violated the West Virginia law



1 requiring the informal conference within three weeks,  
2 correct?

3 A I did not come on board until July of  
4 2010.

5 Q In July of 2010, you picked this up and  
6 reviewed it, the whole application, you saw that they  
7 hadn't had that informal conference, correct?

8 A That's correct.

9 Q And you understand that violates West  
10 Virginia law?

11 A Yes, I do.

12 MR. RIST: No other questions.

13 CHAIRMAN GRAFTON: Questions?

14 MR. SMITH: I have one question. I guess  
15 the issue, then, and thinking about here is whether  
16 having an informal conference at the beginning of the  
17 review or having an informal conference at the end of  
18 the design and review how much that denied the public  
19 from some type of, you know, input or hurt the  
20 development of an acceptable permit, I guess?

21 THE WITNESS: Right.

22 MR. SMITH: And I understand the law says  
23 within 30 days, and I'm trying to understand the  
24 practical implications. So given that -- and I think

1 that's based on the thought that if you have input  
2 from everyone at the beginning of the technical review  
3 then that can shape the technical review and make it a  
4 more acceptable permit at the end. And then as sort  
5 of a counter to that, if you get the comment at  
6 anytime during the review prior to issuing the permit,  
7 you can always use that to shape the permit and again  
8 become an acceptable permit.

9                   So my question is: You did end up  
10 actually having one informal conference, two comment  
11 periods, but only one that anyone commented, and there  
12 was only one informal conference at the end of the  
13 technical period is what happened?

14                   THE WITNESS: Right.

15                   MR. SMITH: The issues that were raised  
16 at that meeting then that may not have been available  
17 to DEP during the technical review and then at the end  
18 after you got done with your technical review and you  
19 had an informal conference and people came and  
20 commented, did those change anything? I mean, I have  
21 not heard what they are or they're being -- were there  
22 material issues?

23                   I understand people may not like the  
24 permit, but were there technical issues that caused

1 you to have to change the permit before you issued it  
2 that if you had in the beginning of the technical  
3 review process you would have incorporated then? I  
4 mean, what's the actual where the rubber meets the  
5 road, the results of the public input on these comment  
6 periods?

7 THE WITNESS: Well, in this instance, I  
8 don't recall any comments that were provided that  
9 changed our findings in any way.

10 Now, in the past and some other  
11 applications, we have received comments that required  
12 us to look back at certain sections with new  
13 information provided and make different findings. But  
14 in this case there were no new findings based on the  
15 comments that we received during the informal  
16 conference.

17 MR. SMITH: That's all I have.

18 MR. HUNTER: I believe you testified that  
19 you're not required to grant site visits, et cetera?  
20 That's discretionary?

21 THE WITNESS: That's correct.

22 MR. HUNTER: Mr. Porterfield stated that  
23 Secretary Huffman has now changed that to say that you  
24 will grant site visits. Were you aware of that?

1 THE WITNESS: That's the current  
2 practice, yes.

3 MR. HUNTER: So in this case there was no  
4 site visit permitted, right?

5 THE WITNESS: No, sir.

6 MR. HUNTER: Now, you also indicated that  
7 during the three year process it's possible for the  
8 public to come in and make comments, et cetera, but  
9 you're not required to respond to those comments; is  
10 that correct?

11 THE WITNESS: That's correct.

12 MR. HUNTER: I notice in the record there  
13 was no record of any public comments coming in after  
14 the 2008, so evidently there weren't any or you just  
15 didn't have to respond to them?

16 THE WITNESS: We will track those  
17 comments, but there is no requirement for us to  
18 respond or to require the applicant to respond to the  
19 comments.

20 MR. HUNTER: Now, on the public notice  
21 here on the application being filed at the county  
22 courthouse in Raleigh County, did that application  
23 that was filed there have the changes that were being  
24 proposed to the permit, the reductions? What did that

1 application have?

2 THE WITNESS: The original placement of  
3 the application would have been the 800 plus acre  
4 concept.

5 MR. SMITH: In 2008?

6 THE WITNESS: Yes, in 2008. In 2011, it  
7 would have been the reduced acreage, 264.22 acre  
8 concept.

9 MR. HUNTER: So the application at  
10 Raleigh County in 2011 would have had the reduction  
11 and those changes?

12 THE WITNESS: That's correct.

13 MR. HUNTER: Okay. Thank you. That's  
14 all. Thanks.

15 CHAIRMAN GRAFTON: Any other questions?

16 MR. JENKINS: No further questions.

17 CHAIRMAN GRAFTON: Okay. You are  
18 excused.

19 MR. RIST: No questions, thank you.

20 (Witness excused.)

21 MR. JENKINS: We rest. We don't have any  
22 further witnesses.

23 MR. HARVEY: Mr. Grafton, we have no  
24 further witnesses, but we would like to move the

1 admission of our Exhibit Number 1.

2 MR. JENKINS: And likewise for the DEP,  
3 Exhibits 1 through 5.

4 CHAIRMAN GRAFTON: Any objections?

5 MR. RIST: No.

6 CHAIRMAN GRAFTON: Okay. They will be  
7 admitted.

8 (WHEREUPON, Intervenor Exhibit Number 1  
9 and DEP Exhibits Numbers 1 through 5 were admitted  
10 into evidence and made a part of the record.)

11 MS. RADCLIFF: Tom, you withdrew -- you  
12 had one and then withdrew it; is that correct?

13 MR. RIST: That's right.

14 MS. RADCLIFF: Okay. Do you have any  
15 rebuttal?

16 MR. RIST: No.

17 MS. RADCLIFF: Generally what we do now  
18 is if you want to do closings we do closing. If you  
19 prefer to do proposed findings and conclusions, we do  
20 that.

21 MR. RIST: I'd prefer to just lay the  
22 record now and be done.

23 MS. RADCLIFF: Does everyone agree?

24 MR. JENKINS: Sure.

1 MR. HARVEY: I'd like to say a few words  
2 in closing. I don't know if they plan on doing so or  
3 not.

4 MR. RIST: That's what I meant.

5 MS. RADCLIFF: I think that's what they  
6 meant, just not filing proposed findings and  
7 conclusions. We will start with Mr. Rist.

8 MR. RIST: I'll stand up I guess because  
9 I'm not very good talking while I'm sitting, as you  
10 can see, because I'll lose track of what I'm saying.

11 I had a case once where someone had some  
12 damage to a well, basically, and their water had been  
13 fouled pretty bad, pretty badly, and we filed a civil  
14 complaint. We didn't file it within two years of when  
15 they discovered the water, and there is a law in West  
16 Virginia that says you file it within two years,  
17 period. It says "shall," the words are "shall," I  
18 think, in that statute. And the case got dismissed on  
19 summary judgment, meaning the person with the fouled  
20 water didn't have any recourse.

21 They were greatly prejudiced because now  
22 they have no drinking water. Yet the law in that case  
23 says "shall." The law doesn't look at it and say,  
24 "Well, you didn't do this in a timely manner." I

1 think it was two years and two months or something  
2 like that, was the date when we were finally able to  
3 get this and file it. The thing that is interesting  
4 about the law it doesn't really care about whether  
5 someone is prejudiced or not when the law has not been  
6 followed. That's not the point of the law. There is  
7 rules in place for reasons.

8                   Obviously, in this case here, our  
9 complaint is very straightforward. There is the West  
10 Virginia Code 22-3-20. It's very strict on what has  
11 to happen, and there is not a person in here that has  
12 disagreed that the law wasn't followed.

13                   I don't even know why I'm standing here  
14 talking. I think I should be able to sit and say,  
15 "Sounds good. Issue the ruling. They didn't follow  
16 the law. You must deny." I tried to think up, "The  
17 glove won't fit, you must acquit, something,  
18 something, you must deny," but I don't know what the  
19 other word is.

20                   I've been frustrated by not being able to  
21 help people that were severely damaged by things  
22 because sometimes they can't get to it fast enough and  
23 they can't get in front of the court fast enough. And  
24 here they did, everybody did. I mean, they went

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1 Woodvale Heights, Hurricane, WV 25526

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1 through the process.

2           This is what the citizens are supposed to  
3 do, is to follow the law that's in place. That's what  
4 the companies are supposed to do, that's what the DEP  
5 is supposed to do. It's what you guys who are in  
6 charge with making sure is happening, is the law is  
7 followed. It wasn't followed.

8           It wasn't just not followed. I didn't  
9 come in and say, "Well, you know, you had the comment  
10 or you had the involuntary comment -- I'm sorry, not  
11 involuntary -- ". . . you had the conference in this  
12 case, the informal conference, five months later, and,  
13 you know, you're five months late. It should have  
14 happened within three weeks."

15           You didn't have it five weeks. No, this  
16 isn't some small potato I found, a technicality that  
17 we can go and get the Surface Mine Board to rule on.  
18 Three years, three years.

19           In the time it took for this to go from  
20 one place to another, I had two children. I moved  
21 from where I lived in a different state to this one.  
22 I lost four family members, picked up three others  
23 from a brother.

24           Come on. What happened to you all over

1 these three years? What happens to all of us? What  
2 happens to the citizens that are under these mines in  
3 three years? Some of them pass away. Some of them  
4 move on. Some of them are fired up when this happens  
5 in 2008 that this is going to happen above their  
6 house.

7 And by 2011, they don't care anymore  
8 because whether they sent letters or went to a  
9 conference or a complaint, what's it matter? It's  
10 been three years. They're worn out. Why show up?

11 So to say that there's not been prejudice  
12 in the case is disingenuous. There has been a great  
13 amount of prejudice. This thing changed big time.  
14 Well, it went from bigger to smaller. Good, I'm glad.  
15 It doesn't change what we think the damage will be in  
16 the end. But that's not the point.

17 There is prejudice when you can't see  
18 what's going on with it, when what's published in the  
19 newspaper on one day isn't the same thing that happens  
20 three years later. It's been changed.

21 Seventy (70) entries were in that log  
22 between the time this thing was published and the time  
23 this conference happened. That is substantial.

24 And, really, from the standpoint of

1 citizens in West Virginia trying to deal with this  
2 stuff, that's the only thing we have to follow is the  
3 law in trying to challenge these things and figure out  
4 what is going on and they get their voices to be  
5 heard. And if we don't follow it, we don't have  
6 anything left.

7 And I think it's your all's duty on this  
8 board to see that this is followed through with. And,  
9 you know, what? Really, to solve the problem here,  
10 the permit needs denied. They need to go back and  
11 refile that. We heard testimony from the DEP folks  
12 that that would be very difficult, nearly impossible  
13 to follow. Well here everything is done. Just follow  
14 the law. That's all we ask. It's pretty simple.  
15 Thank you.

16 MR. JENKINS: Thank you, Mr. Chairman.  
17 I'm just going to address briefly. I mean, we admit  
18 with Mr. -- and agree with Mr. Rist. We didn't  
19 technically follow the law. That's difficult to do in  
20 our situation.

21 When SMCRA was passed back in 1977 and  
22 initially done, reviews were simple, quicker. Now  
23 we're talking several experts. Sometimes it takes  
24 even a year or two for engineers, geologists,

1 biologists, everyone to get together to even put  
2 together an application and then -- significantly more  
3 time, especially on a new permit. This isn't a simple  
4 IBR. This is a new permit that's gone through  
5 substantial changes.

6 Now, Mr. Rist thinks that these 70  
7 entries and all of these changes is prejudicial to the  
8 citizen. Well, if we followed the law technically,  
9 the citizen would have already been done. His comment  
10 would have already been submitted. He didn't have --  
11 he wouldn't have had an opportunity for an informal  
12 conference or another comment period after those  
13 changes were made. He would be none the wiser.

14 Here our folks at the DEP made the  
15 decisions based on, "Look, we can give a more  
16 meaningful review by having a closer technically  
17 complete application," because then the citizens see  
18 what's there, see's where the mining is going to  
19 occur, what valley it's in, what mountain it's on, is  
20 it closer to their home, is it farther from their home  
21 now with these changes.

22 Because with that 800 some acres farther  
23 south, someone that is on the southern end of that  
24 permit, if you look back at the maps, probably doesn't

**CHAMBERS COURT REPORTING**

1 Woodvale Heights, Hurricane, WV 25526

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1 have any beef now, or maybe, I mean, you never know.  
2 But there obviously right above them was completely  
3 removed, and so their comments wouldn't have been as  
4 valuable. But now they see it and say, "Oh, okay."  
5 No area was added. It was all the same area. It was  
6 just reduced. The impacts were reduced.

7           And because we had waited on holding that  
8 informal conference, the citizens had more meaningful  
9 opportunity to comment because the flip side of the  
10 citizens' argument is that if we should have followed  
11 the law then they should have been done back in 2008  
12 in August, even though we may have taken three more  
13 years to issue that permit. No further comments on  
14 what that was. That's the technical aspect of it.

15           But the reality is that the Appellants  
16 themselves regularly go to the DEP, regularly review  
17 things. Our folks regularly accept comments, put them  
18 in the file, take them into account. Of course, there  
19 is not specific requirements that we respond to them  
20 or grant them another informal conference if they  
21 submitted comments outside the period.

22           But an informal conference was held here  
23 and the additional period was held. There was  
24 required -- legally required notice in the paper to

1 give the citizens another opportunity to give  
2 essentially what Mr. Goodwin and his group was asking  
3 for, another period for written comment. That wasn't  
4 the 30 days, but it was another ten or 15-day period  
5 in September before this permit was issued.

6 And prior this Board -- and another thing  
7 that hasn't been mentioned but this Board has  
8 addressed it before in one of its prior decisions, and  
9 it specifically said that, "The opportunity for a  
10 de novo hearing before this Board corrects any  
11 procedural defects below without imposing additional  
12 burden on the permittee or the appellant."

13 And so this de novo hearing as well is  
14 another opportunity for the citizens to make their  
15 concerns known. They have made several concerns and  
16 they dropped them all by the time that we're finishing  
17 up here.

18 And so they have had a chance to review  
19 this permit. It's been properly placed in the  
20 courthouses. It was always available at DEP to where  
21 they could go in and review it and go through it. And  
22 so there is no prejudice. In fact, it's been more  
23 beneficial, we believe, for the citizens to have a  
24 completed product and know the changes that have gone

1 in there to comment on; hence us even putting in their  
2 a regulation to try to get that.

3           This has been a problem. I mean, this  
4 Board has had several rulings. Another one that I  
5 will quote here. "The evidence does not establish a  
6 violation of any of the advertising or public  
7 participation provisions. However, even if such a  
8 violation existed, the constant opportunity for  
9 comment provided to the Appellants by DEP from the  
10 date that the permit application was filed until the  
11 date it was granted, and the fact that the Appellants  
12 availed themselves of these opportunities, is  
13 sufficient to demonstrate that the Appellants had  
14 actual notice of the permit application and a lack of  
15 prejudice to the Appellants' interests."

16           That has happened here. They have had  
17 the opportunity to visit DEP to issue their comments,  
18 to address their concerns, to go to the informal  
19 conference, to request another informal conference if  
20 they wanted to.

21           And so this Board has held that in this  
22 instance, even though there may be some procedural  
23 defects, which we readily admit, we can't deny that,  
24 that they can be solved or corrected or remedied

1 through additional procedures that we've gone through.

2           They've had -- the citizens have had  
3 meaningful review. We believe that we've addressed  
4 those, that they had the opportunity, and that even if  
5 we would have given them another 30-day comment period  
6 in violation of law, or even if we would have had an  
7 informal conference three weeks back in '08 from the  
8 public comment period, that the review would have been  
9 less meaningful, and it was in this situation. Thank  
10 you.

11           MR. HARVEY: I think it's clear there was  
12 no prejudice here. The Appellants did everything they  
13 would normally do. They read the advertisement. They  
14 filed comments opposing the permit. They requested an  
15 informal conference. They went to that informal  
16 conference.

17           Four months later, four months later,  
18 they filed an appeal raising all of the objections  
19 they could have raised. They had four months to  
20 review all of this new information. They now complain  
21 about -- made every objection they could have made in  
22 that appeal.

23           That appeal was filed in late 2011.  
24 Since then this hearing has been continued multiple



1 times. We are here today in mid May. What complaints  
2 did they raise today? None. All about the timing.  
3 They complain about all of this information that they  
4 were somehow sandbagged by our surprise buy. It's  
5 been almost a year since they have been to the  
6 informal conference, at least nine months. What did  
7 they bring before this Board today? We're all here.  
8 Nothing.

9 Now what they ask for is to go back and  
10 redo all of this again. Have another informal  
11 conference, delay, come back and raise all of the same  
12 objections they could have raised here today. All the  
13 while, this site will stay unreclaimed. All of this  
14 highwall will continue to exist. We won't be  
15 reclaiming this old highwall, fixing this old site.  
16 Fifty (50) people won't be working. There has been no  
17 prejudice. We're here today. They could have raised  
18 these issues.

19 This is an important point. They claim  
20 there is prejudice because the permit changed between  
21 the advertisement and the informal conference. I  
22 think Mr. Smith figured this out. That happens all  
23 the time.

24 Did you hear my conversation with Mr.

1 Webb? We could have made all of these changes in the  
2 30-day period in 2008. He'd be right where he is  
3 today. He would have had to go to the informal  
4 conference. DEP would explain those changes. They  
5 could have filed an appeal. Delay means nothing.  
6 These permits are always -- are often changed in the  
7 period between the public comment and the  
8 advertisement and the informal conference.

9 That's why you have the informal  
10 conference so that the appellant can understand the  
11 permit as it's ready to be issued, make comments, and  
12 then if they don't -- if their comments aren't taken  
13 into effect, they can file an appeal.

14 That's what happened here. They had four  
15 months to review this. They had five or six months to  
16 prepare their appeal. They have come here with  
17 nothing.

18 Mr. Jenkins, I think, was quoting from a  
19 case, Wendy. It's, I believe, Chafin versus Callaghan  
20 and Mingo Logan Coal Company. It's a 1993 case. It  
21 says just what Mr. Jenkins said it did, if there is no  
22 prejudice to the appellant as a result of permitting  
23 procedural flaws, the permit can be issued by this  
24 Board or approved by this Board.

1 I have copies of the case if that makes  
2 it easier. If you would like me to provide more  
3 information about the site, I can do that. It's  
4 Appeal Number 93-33-RBR.

5 One final issue. There was some  
6 discussion of a site visit. Mr. Spadaro, who is not  
7 here now -- oh, there he is -- admitted himself that's  
8 discretionary. I know the DEP's practice has changed  
9 now, perhaps for the better. Back then that was not  
10 the practice.

11 Again, I don't know what a site visit  
12 would have informed these appellants about their  
13 appeal. All I heard about were health impacts. I  
14 think Mr. Goodwin said if he had gone to the site he  
15 could have learned about wind direction or water  
16 direction. That's publicly available information. He  
17 could have gotten that without a site visit.

18 And they didn't even pursue those issues  
19 here today before this Board. And that's the  
20 important point. We're here today. They could have  
21 raised the complaints they want to raise six months  
22 down the road. Thank you.

23 MS. RADCLIFF: You have the burden so you  
24 get the last word.

1 MR. RIST: All we're asking is that they  
2 follow the law. We don't know what else to do. We  
3 don't know what else to follow if they don't do that.  
4 They just frustrate that and say, "There is no  
5 prejudice. We waited three years. Sorry." There is  
6 nowhere else for them to turn in this case.

7 And I think it's pretty clear that was an  
8 extraordinary amount of time. The DEP gentleman,  
9 Keith Porterfield, was in agreement that it took an  
10 extraordinary amount of time for this to take -- for  
11 this to happen.

12 So we'd ask that you deny the permit.  
13 They need to start over and follow the law.  
14 Otherwise, why do we even have the law? Why are we  
15 even here? Why do we have the Surface -- why don't we  
16 just do whatever we want? You've got to follow the  
17 law.

18 CHAIRMAN GRAFTON: Thank you.

19 MS. RADCLIFF: It's up to you whether you  
20 want the Board to come back on the record and make an  
21 announcement, or do you want them to just issue a  
22 written order? Do you want to hang around? They can  
23 take a break and discuss it and come back in and  
24 formally go on the record and make the announcement

1 or -- you know -- it's really --

2 MR. JENKINS: From my position, it's the  
3 Board's preference, I mean, if they want to make a  
4 decision today or wait to do an order.

5 MS. RADCLIFF: They will make a decision  
6 today. It's just whether or not you want to hang  
7 around and wait and have the court reporter put it on  
8 the record.

9 MR. JENKINS: Well, I work here so I'm  
10 hanging around. So, yeah.

11 MS. RADCLIFF: Okay. The Board will then  
12 take a break and we will come back on the record and  
13 make an announcement.

14 CHAIRMAN GRAFTON: At some time later.

15 MS. RADCLIFF: Do you want to come back  
16 on the record and make an announcement, or do you want  
17 to issue a written order?

18 MR. HARVEY: If I may, I mean, we're  
19 prepared as I said in closing to begin work, put  
20 people to work. That takes planning. We'd like to  
21 know as soon as we can. I appreciate the Board's hard  
22 work today and I don't mean to make them work any  
23 harder than they already have, but it's important to  
24 us to have that information as timely as we can get it.

1 CHAIRMAN GRAFTON: And we will get it  
2 timely.

3 MR. HARVEY: Yes, Mr. Grafton. I  
4 appreciate it.

5 CHAIRMAN GRAFTON: So we will meet and  
6 deliberate. If it looks like we're having some  
7 trouble reaching a decision, we will come back and  
8 make an announcement to anybody that's here. So we'll  
9 go off the record at this point.

10 (WHEREUPON, a recess was taken.)

11 CHAIRMAN GRAFTON: Okay. We'll go back  
12 on the record. I will read the decision of the Board,  
13 and I will provide a copy of this to the court  
14 reporter. The Board is outraged that WVDEP flagrantly  
15 violated the law by waiting more than three years  
16 after the initial comment period to hold an informal  
17 conference on the permit decision.

18 It is clear from the testimony and the  
19 admissions of counsel that WVDEP chose to violate the  
20 law by not holding the informal conference within the  
21 time frame outlined by the statute.

22 It is also clear to the Board that there  
23 is a conflict in the statute that requires an informal  
24 conference within three weeks of the close of the