



STATE OF WEST VIRGINIA
STATE WATER RESOURCES BOARD

1205 Greenbrier Street
Charleston, West Virginia 25311

DR. EDWARD H. CRUM
P. O. Box 117
Charlton Heights, WV

March 14, 1980

FOR IMMEDIATE RELEASE

FRANCES E. HUNTER
Board Secretary

JOHN C. AILES
P.O. Box 520
Romney, West Virginia

Larry W. George
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Huntington, West Virginia

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WATER RESOURCES BOARD TO MEET

The State Water Resources board has scheduled a meeting for Tuesday, March 25, 1980 at 9:00 a. m. in conference room 674 of the Motor Vehicle Building located at 1800 Washington Street, East, Charleston, West Virginia.

Purpose of the meeting is to:

1. Rehear argument from counsel in Appeal No. 125 - Upper West Fork River Watershed Association, Inc. and Kyle & Icie Bush vs. Chief - Division of Water Resources, State Department of Natural Resources and Director, State Department of Natural Resources.
2. Discussion on Appeal No. 103 - Borgman Coal Co. vs. Chief, Division of Water Resources - State Department of Natural Resources - decision will be made as to setting a date for a formal hearing.
3. Olga Coal Co. - Appeal No. 110 - vs. Chief, Division of Water Resources, State Department of Natural Resources - withdrawal of Olga Coal Co.'s stay will be considered and a decision made as to a date for a formal hearing.
4. Report on status of Town of Fayetteville's Appeal No. 109 - Division should have report ready for Board by this date.
5. To consider the adoption of additional rules of procedure for the State Water Resources Board.
6. Status of cases handled by the Attorney General's Office.

The meeting is being held pursuant to Chapter 6 Article 9A of the Code of West Virginia 1931 as amended and in accordance with the rules and regulations promulgated and filed in the Office of the Secretary of State.

The meeting is open to the public. Seating capacity of the conference room is 20.

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RECEIVED

March 14, 1980

MEMORANDUM TO: ALL BOARD MEMBERS

FROM: Fran Hunter, Board Secretary

RE: Proposed Agenda for Meeting March 25, 1980 to be held at 9:00 a. m. in conference room 674 of the Motor Vehicle Building, 1800 Washington Street, East, Charleston, WV

1. Rehear argument from counsel in Appeal No. 125 - Upper West Fork River Watershed Association, Inc. and Kyle & Icie Bush vs. Chief - Division of Water Resources, State Department of Natural Resources and Director, State Department of Natural Resources.
2. Discussion on Appeal No. 103 - Borgman Coal Co. vs. Chief, Division of Water Resources - State Department of Natural Resources - decision will be made as to setting a date for a formal hearing.
3. Olga Coal Co. - Appeal No. 110 - vs. Chief, Division of Water Resources, State Department of Natural Resources - withdrawal of Olga Coal Co.'s stay will be considered and a decision made as to a date for a formal hearing.
4. Report on status of Town of Fayetteville's Appeal No. 109 - Division should have report ready for Board by this date.
5. To consider the adoption of additional rules of procedure for the State Water Resources Board.
6. Status of cases handled by the Attorney General's Office.
7. Discussion and adoption of Board Policy regarding travel expenses.
8. Discussion and decisions regarding Board procedures and organization.
9. Other Board business.

MINUTES OF MEETING OF THE WEST VIRGINIA STATE WATER RESOURCES BOARD

LOCATION: Conference Room 647 in the Motor Vehicle Bldg. located at
1800 East Washington Street, Charleston, WV

DATE: March 25, 1980

TIME: 9:00 A. M.

* * * * *

The State Water Resources Board met at the above location, date, and time and the meeting got under way with Mr. George making a motion to remove Mr. Ailes as Chairman which was seconded by Dr. Crum.

Mr. Ailes stated the motion was out of order because a proper agenda had been filed in the Office of the Secretary of State and we would take it up as Item 8.

The Board then took up the matter of the Upper West Fork River Watershed Association, Inc., Appeal No. 125 and Kyle & Icie Bush vs Chief - Division of Water Resources, State Department of Natural Resources and Director - State Department of Natural Resources.

After hearing arguments, discussion and questions from Mr. Ron Shipley, Assistant Attorney General and Mr. John Purbaugh - Counsel for the Upper West Fork River Watershed Association, Inc. the Board took the matter under advisement.

The Borgman Coal Company Case was then discussed with Mrs. Karen Watson, Assistant Attorney General representing the State and it was agreed if an agreement could not be reached in the immediate future, the case would be set for a hearing.

The Olga Coal Company Appeal No. 110 vs. Chief - Division of Water Resources - State Department of Natural Resources was next on the agenda. Mr. Robert Pollitt, Assistant Attorney General discussed this with the Board and reported the matter was expected to be resolved at a very short

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time and would report to the Board on negotiations.

Mr. Larry Gonzales, Attorney at Law with the law firm of Love, Wise, Robinson & Woodroe representing the New River Company appeared to discuss an additional possible stay of execution.

On motion of Mr. George, which was seconded by Mr. Kirkpatrick, the Board Chairman was authorized to sign a stay of execution requested by the New River Company provided the State agreed for a period not to exceed 60 days.

The Board received a verbal report on the status of the Town of Fayetteville appeal. Chairman Ailes will complete the findings of fact and conclusions of law and enter an ORDER as soon as he receives the written report from the inspector.

The Board then discussed with the Assistants to the Attorney General present the work being done on revising the regulations and it was agreed we would discuss with Chief Robinson the problem of technical review and assistance. Mr. Kirkpatrick made the motion which was seconded by Dr. Crum that we shall ask Mr. Robinson to set up a task force (Motion carried).

The Chairman and Secretary reported on a conference with the Chief which the Board directed at their March 3rd meeting to the effect that the Board Secretary will contact the necessary offices and divisions and prepare quarterly reports for the Board members on the status of cases.

The Board then received and discussed reports on the status of pending cases with the Assistant Attorney General involved.

Mr. George then brought up the accusation that the Board and the Chairman in the past had been lax in their duties in allowing cases to drag on 6 - 8 years. When requested by the Chairman to divulge the name or appeal number of any of the cases to which he was referring, Mr. George refused to name a single case. Although it was pointed out to

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Mr. George that his refusal to name a case or to look at the data concerning any matters that he had alluded; his failure to do all this was an admission by him that his charges were false, he still refused to name a case.

Mr. Dennis Abrams, Senior Assistant Attorney General gave the Board a brief report on the OSM-DNR legislation.

Mr. George made a motion that travel expenses and per diem for the last Board meeting which was on March 3rd and today's Board meeting be limited to no more than \$275.00 per Board member which was seconded by Dr. Crum and after discussion Dr. Crum and Mr. George voted "aye", Mr. Kirkpatrick and the Chair votes were "nay" - motion failed for lack of majority.

Mr. George then moved that Dr. Edward Crum be seated immediately as Chairman of the State Water Resources Board - Dr. Crum seconded the motion. After considerable discussion the votes were taken, Mr. George and Dr. Crum voting "aye", Mr. Kirkpatrick and the chair voting "nay" - motion failed for lack of majority.

There then was a discussion of minutes of the October 5, 1979 meeting but no conclusions were reached as to any changes at this time.

The minutes of the meeting of March 3, 1980 were approved.

Mr. Kirkpatrick and Mr. Ailes both made a plea to the other Board members that the ill-feelings and petty misunderstands be put aside and that personal animosities be curbed so that the Board could proceed as expeditiously as possible to get along with its workload.

The meeting adjourned at 1 o'clock.

A copy of the Notice of Hearing that was filed in the Office of the Secretary of State's Office announcing the meeting and the transcript of the tape recording are hereto attached and made a part of these minutes.

BOARD MEETING - MINUTES - March 25, 1980

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Respectfully submitted,

your secretary

enclosures

MINUTES

STATE WATER RESOURCES BOARD

March 25, 1980

The West Virginia State Water Resources Board met at 9:00 a. m. March 25, 1980 in the Motor Vehicle Building Conference Room 647 - located at 1800 East Washington Street, Kanawha County, Charleston, West Virginia, with Mr. John C. Ailes, Chairman presiding. Other Board members present were Dr. Edward H. Crum, Mr. Larry George and Mr. Forrest Kirkpatrick. Also present were Assistants to the Attorney General - Mrs. Karen Watson, Ms. Ruth Ann McQuade, Messrs Dennis Abrams, Ron Shipley and Robert Pollitt; from the Coal Section of the Division of Water Resources, Department of Natural Resources were Ms. Pam Hayes and Mr. Paul Ware; Mr. Skip Johnson - Staff Writer of the Charleston Gazette Newspaper; Mr. Larry Gonzales - Attorney-at-Law of the law firm of Love, Wise, Robinson & Woodroe and Mr. John Purbaugh, Attorney-at-Law associated with the West Virginia Legal Services Plan.

A copy of the Notice of Hearing that was duly filed in the Office of the Secretary of State pursuant to Chapter 6 Article 9A of the Code of West Virginia 1931, as amended, is hereby attached and made a part of these minutes thereof.

The meeting got under way with Mr. Larry George making the motion to begin with Item 8 of the Board's Proposed Agenda (copy attached) and made the motion that Dr. Edward H. Crum be seated immediately as Chairman of the West Virginia State Water Resources Board. Mr. Ailes stated the Board had filed the proper notice of hearing with the Secretary of State as described above and due to the fact that there were attorneys present for the purpose of presenting to the Board cases, data, etc., and that at this time Item 1 - Appeal No. 125 - Upper West Fork River Watershed Association, Inc. (Mr. Kirkpatrick at this time also moved we proceed with the agenda)

*absent:
Dr. Brando*

and Kyle & Icie Bush vs Chief - Division of Water Resources, State Department of Natural Resources and Director - Department of Natural Resources would begin so that we would not be taking up the time of the people present on other matters and we would get to Item 8 in regular succession, (Mr. George replied o. k. then - we'll wait until Item 8 then) and the meeting got underway with Mr. Ailes stating that Mr. Purbaugh has filed with the Board, this morning, a petition for a declaratory ruling - the Director has withdrawn the original certification initially complained of for procedural reasons (Mr. Purbaugh interjected at this time with 'that's correct') and that he is in the process of reissuing it (certification) and the question before the Board is if the Board does have jurisdiction of a 401 certification.

Mr. Purbaugh - that's correct - I think the reasons are stated in the petition, but in the text of the Director's letter the withdrawing certification, his intent to reissue it and I think it inevitable the Board will face the same question that's now before it and so I think in the interest of saving your time and utilizing all the paper that's been produced in the case to date, that you exercise your authority to make a declaratory ruling on whether or not you have jurisdiction over this case. That way everyone will know whether or not this is the proper place to come .. and we can proceed to settle the issue as it needs to be settled further on down the line.

Mr. Ailes - Mr. Shipley - do you have any comments on that?

Mr. Shipley - Yes, Chairman Ailes - first of all we would oppose the motion for a declaratory ruling for several reasons. First of all, the posture of the case may very well change, i.e., we may issue regulations and we may give a hearing on the issue and therefore petitioners first question of law as specified in the appeal filed on January 4th may be a moot question.

Secondly, we may also waive certification as opposed to certifying or granting certification; that would also change the posture of the case. This issue will come up again soon. If we go ahead and re-certify consequently I don't

believe you can take it up now or you can take it up later -- as far as saving time, it saves time either way because you are still going to have to go through the same machinery to reach your decision. The question is whether or not you want to do it now or do it later and I don't think it necessarily saves time. It's that it gets it done now and maybe not a month from now. Third is we don't believe you have any jurisdiction in the first place, so we don't think you should take it anyway, but that's basically our reasons for opposing the declaratory ruling.

Mr. Purbaugh - If I may respond to a couple of Mr. Shipley's points - the fact that something the Director may do in reissuing certification could change some of the substantive grounds on which we were appealing but still would not affect the issue of whether or not you can hear the appeal whatever the grounds, and I think that it's not a simple question of just deciding it now or deciding it later. If you wait until certification is reissued and the paperwork starting this process is filed again and another meeting is scheduled and arguments are delivered and your questions are answered and your decision is reached, the process is likely to take a couple of months. In the meantime, the certification stays in place and is acted upon and I think that in that time span some irreparable harm could likely occur and the reason that I'm here before this Board is in an attempt to settle the question of whether or not the Board has the power to review the Director's action; someone must have the power to review the Director's action and if it is not this Board, then it will have to be developed somewhere else, but, before I seek to develop it anywhere else, I think it's necessary to allow an administrative Board such as this to determine whether it's powers include the review of this question. That's my response to Mr. Shipley.

Mr. Shipley - First of all, it seems that what counsel is saying is that he is committed to coming back to this Board at a later time. The

State believes this is not his only remedy - that's one of the basics of our argument - that we don't believe you have jurisdiction. Consequently, he should be somewhere else. We are not exactly sure where that somewhere else is either, but the point is we are positive he should not be coming here. It seems to me he is telling you that if you do not issue a declaratory ruling that he will be coming back here. The other thing is that the - I would just like to point out and perhaps it does not need pointing out, that the Board is somewhat in a turmoil at this point and perhaps that it does not need another controversial issue at this point.

Mr. Kirkpatrick - What prompted you to say that?

Mr. Shipley - Well, right before I got up here to argue there was a motion made by one of the Board members asking that the Board be restructured basically...

Mr. Kirkpatrick - I don't think that has anything to do with the issue. I wish you would not bring this in.

Mr. Shipley - O.k.

Mr. Kirkpatrick - No one said that Board is in a turmoil and you have no right to say it. Now proceed on what your argument is.

Mr. Shipley - Well, that's it.

Mr. George - I have a question - I guess you are saying they ought to be in circuit court?

Mr. Shipley - That's one avenue that he may be able to exercise.

Mr. George - Is it not the case that in administrative decisions that the courts really don't deal with the substance of issues - they simply deal whether decisions were procedurally correct.

Mr. Shipley - No, they can go into the substance of it different scope of review - depending upon what statute is involved.

Mr. George - So you are saying that the Kanawha Circuit Court would go into policy durations?

Mr. Shipley - They would very well possibly - I am not positive they may get into - depends on what their scope of review is, what their judicial review is - If there is substantial evidence tested, I believe they would get into the merits - the substance of it.

Mr. Ailes - This specific case, the only question is whether or not this Board has jurisdiction of the certification by the Director in the 401 - 404 activity and the permit issued by the Corps of Engineers under the 404 - that is the sole question posed here; well, the problem that is concerning me is that the substance of the appeal is -- has to be based on the fact the Director issued certification pertaining to disposal of earth and so forth, at the Stonewall Jackson Dam.

In the Director's letter, a copy of which you submit here, says that he is withdrawing that certification and that he will be reissuing it - I don't know what reissue means specifically - he is going to re-exercise his option to do whatever he wants to do under certification - his laws. He has withdrawn it because of your objection to his procedures that he followed in arriving at the first one and he is setting up the procedures and going to reissue the permit. Well, since he has withdrawn the certification he is going to reissue something in connection with the certification. The fact that he used the term - used is immediately taking proper steps for reissuing doesn't necessarily mean that he is going to certify, and, so I am not sure your original appeal to the Board can still stand on a certification which no longer exists.

Mr. Purbaugh - My motion is to convert that appeal into a petition for declaratory ruling. The section I refer to is in the Administrative Procedures Act and is applicable to this Board. 29A-4-1 is designed to allow any agency and this Board is an agency as defined in this Act, to make a ruling such as this governing its power, its jurisdiction to hear a certain case. That type of a ruling - a declaratory ruling-allows my clients to know whether or not to come here and knowing whether or not to come here is

important because in this hypothetical appeal to Circuit Court that Mr. Shipley has brought up, I must inevitably satisfy the Circuit Court Judge - that I have sought to exhaust any available administrative remedies and then in a few words, what is available? Is this an available administrative remedy? I must first ask you, and I asked you in the appeal, now the Director has withdrawn the certification. I'm asking you to state whether you have the ability to hear this appeal in a declaratory ruling and I think that if you or the attorneys advising you would look at 29A for awhile, it does provide that authority. I think it is designed to deal specifically with this situation.

(Mr. Ailes looks at that section of the Code 29-A-4-1).

Mr. Shipley - May I say something, Mr. Ailes?

Mr. Ailes - Sure.

Mr. Shipley - First of all, we agree that the Board would have the power to go ahead and act upon this motion and turn the appeal into a declaratory ruling. We do believe you have the power and authority to do so but what we are saying to you in response, is we don't believe you ought to at this time. We think that there is not enough reasons for you to take that action and basically because the posture of the case may change either because we issue regulations or because we waive certification as to opposed to issuing certification or granting certification is probably the technical term because we believe that the issue would be reviewable against soon; consequently we don't believe that a whole lot of time is saved and is, a matter of fact that it saves the Board any time in an absolute sense, only that you decide it now--maybe deciding it--maybe in April, so we agree, that yes, you do have the power to change this - to act on the motion for a declaratory ruling and to make a decision on this case. We just don't believe you should do it at this time. We would also urge if you would act upon the declaratory ruling and besides issue one, we would also request that our position as argued back in January 4th be upheld.

Mr. Kirkpatrick - As I understand your recommendation to the Board - do not review the matter now? When does the appellant come back and who do they come back to? Does it float in limbo for awhile?

Mr. Shipley - Well, until -- yes, sir - although I do not mean to say that in a derogatory sense, what I mean to say is the reason they are floating in limbo is that they are not adversely effected; consequently, they do not have an appeal. Okay, when they come -- if they come back -- for example in the next 30-40-50 days, we may take a certain action which would not adversely effect them. Consequently, they would not have an appeal. The posture of the case may very well change. That's our point.

Mr. Purbaugh - But regardless of what you do as a result of this new attempt to issue a valid certification, if it in any way falls short of what my clients needs are and if they feel that it does adversely effect them, they'll need to know where to go and the time lag between their asking you again, may we come here? Do you have jurisdiction and the issuance of a decision is what's the reason behind my filing for a petition for a declaratory ruling, that the time lag shouldn't - that's when they'll hang in limbo. Hang is a very apt phrase because while that certification letter is out being used by the Corp as a basis for their actions, I'm here asking you whether or not you can hear it again.

Mr. Ailes - I understand there is no certification letter. It has been withdrawn.

Mr. Purbaugh - That's correct, but we are talking about what happens when it gets reissued and I come back and request the Board's ruling on whether it has jurisdiction to hear the appeal and the time lag between my request and your eventual ruling in any review I see to that ruling..

Mr. Ailes - What happens if in issuing that letter he waives certification?

Mr. Purbaugh - Then I'll want to appeal that waiver. That waiver must be based on a decision and that decision must have reasons behind it and my clients will want to examine those reasons and the whole basis of this

appeal is his first - decision was made without anybody knowing that he was going to make it - without anyone knowing what were the criteria he was going to apply and until this whole process is done over with some integrity, some regulations to guide the method in which the decision is made, we've got to know whether this the appropriate place to come or not. That's the substance of my argument on the declaratory ruling. You have the power to say whether or not you have the power or not to decide this case. Please tell us and we will deal with the end.

Mr. Shipley - May I say one final thing in response. The State has to disagree that people did not know that the Director was going to make this decision. People should have known it - the Corps of Engineers itself issues a public notice saying that certification has to be issued by the State. Consequently people should have known that he was going to have to make that decision. People had the opportunity to submit comments to the Corps as well.

Mr. Purbaugh - But you withdrew it based on your failure to do those things. Is that right?

Mr. Shipley - Based on to set-up of certain procedural guidelines, correct.

Mr. Purbaugh - Then I'll just submit the petition to ruling and then proceed to answer any questions you might have upon it or other matters.

Mr. George - I have a question, but I think that all Mr. Purbaugh is asking for is an answer and after all that he and his people have gone through, they certainly are entitled to an answer regardless of what it is.

Mr. Ailes - If we accept this petition it would be up to Mr. Purbaugh to defend that petition in court. That's all. As far as I am personally concerned I am a little concerned about the fact that you don't have any existing action of the Chief upon which to base your thing. Now you can do one of two things, in my mind, you can go back to what we have talked about on the January 23rd meeting - when you all presented your pro-arguments and also your briefs that were submitted, and so forth - and your stipulation

of facts on that thing - go back to that point and rule on that because at the time we heard that there was an existing letter of certification out and the question of whether or not we had jurisdiction at that time. But I think we could make a declaratory ruling, but the declaratory ruling he is asking for is a ruling on the question of whether or not we have jurisdiction of the certification of the 404 permit issued by the Corps of Engineers which goes back to the same thing that was argued before.

Mr. Purbaugh - And that is indeed, the same question that was argued before - precisely the same question and the reason that I filed the petition for declaratory ruling, Mr. Chairman, is that since the certification has been withdrawn if in your and the Board's opinion there is no longer a certification to be appealed, there is nevertheless an issue of your judgement to be ruled on.

Mr. Ailes - That's very well. Anybody have any objection to accepting this petition for a declaratory ruling other than Mr. Shipley?

Mr. George - I am in favor of accepting this petition - Mr. Crum -

Mr. Ailes - Very well, we will accept the petition and note that Mr. Shipley has objected to our ruling.

Mr. Shipley - I believe my objections are on the record, sir.

Mr. Ailes - Yes, and now that puts us in the position of discussing the basic question of whether or not this Board has jurisdiction to entertain an appeal of a certification by the Department of Natural Resources - by the Director, specifically of a letter of certification on a 404 permit issued by the United States Corps of Engineers. Do counsel have any additional oral argument they want to present on that specific question?

Mr. Purbaugh - Mr. Chairman, I would just simply ask that the prior record as introduced in the appeal and the prior briefs of the parties and arguments as transcribed at our last meeting be included in your consideration on a declaratory ruling and that I am present here today at the Board's request to answer questions and be available for any re-argument that you

may wish to hear. I have nothing that I wish to add in the way of argument.

Mr. Shipley - I would concur with Mr. Purbaugh's statement.

Mr. Ailes - Mr. George, you are the one that wanted this matter brought up again on the basis that you have some questions. Before you ask them, I have to ask you are you a member of that Upper West Fork Watershed Association?

Mr. George - Am I a member?

Mr. Ailes - Yes, sir.

Mr. George - No.

Mr. Ailes - All, right..

Mr. George - I would like to clear the record ..

Mr. Ailes - Now if you have any questions to ask, you may proceed.

Mr. George - For the sake of the record, as long as we are talking of organizations, I belong to one conservation group and it is the West Virginia Highlands Conservancy of which I am a member and a Director and I belong to no other conservation group and I have never belonged to any other conservation group. Mr. Purbaugh, in reviewing the record from the last hearing your argument was that - was the Director signed the certification of that - that he should not have - the Chief should have signed that - is that correct?

Mr. Purbaugh - That was one aspect of the argument. There were others, yes.

Mr. George - You are saying regardless of who signed it, it was an Order of the Chief as in the meaning of the statute?

Mr. Purbaugh - And therefore appealable as such under that one grant of the Board's jurisdiction, yes. There were other arguments-the Board has more than that one particular grant or jurisdiction and my other primary argument was that the Board's right of jurisdiction not only covers not only permits issued by the Chief as mentioned in the one specific section, but also any other permit issued under the Chapter and the word permit is nowhere defined. In the Chapter permits issued by the Chief are set forward in one grouping of

the Chapter but that certification granted by the Director was done in accordance with the powers he was given by this Chapter and that as such, it was an action taken under the Chapter which you have the power to review. Basically my argument is that if the Director or the Chief takes an action under under this Chapter as obviously this was done under the Chapter, then you have the power to review it. Your review jurisdiction as is large as the scope of the Acts which you have taken under the Chapter. Otherwise, Acts will escape review and the Board will not be involved in all the matters that it is intended to be involved in.

Mr. George - Mr. Shipley, any comment? Would you like to respond?

Mr. Shipley - I would like to respond. I could do it now or I could do it later.

Mr. George - Well, let me ask. I haven't read this recently, but is it not the case under the Federal Water Pollution Control Act it specifies that all certain petitions shall be carried out by the State water pollution control agency?

Mr. Purbaugh - That's correct and the Chief is designated by the State Act as the person responsible for fulfilling those responsibilities and the Division of Water Resources is designated by the State Act as the quote 'water pollution control agency'.

Mr. Shipley - This is what I see is a critical point in this. If you would like to respond - let me respond to your second question first. First of all, Section 401 does not say the State that in certification has to be given by the State water pollution control agency. That's the section we are dealing with. That is the section that tells the State to certify. I mean that's the only one you can go under regardless of what other duties the Federal Water Pollution Control Act provides for. Certification is not required by the State water pollution control agency. It is required only by the State. It is then up to the State to tell which of its agencies shall do so - shall certify. Our position is that the Director has the power

to do so. Under two sections of the statute one is 20-5A-4 which says approvals and recommendations shall be made by the Director. It is our position that certification is an approval not an Order under the statute. Consequently 20-5A-4 does give him the right to issue certification. Secondly, however, under the Director's general powers - section 20-1-7 (30) gives him the power to take up such other steps as may be necessary in his discretion for the proper and effective enforcement of the provisions of this Chapter.

Mr. George - When was that written?

Mr. Shipley - I do not know - it was awhile ago.

Mr. George - I guess it was 1964 - before the Water Pollution Control Act.

Mr. Shipley - The point is and one of the reasons we oppose your jurisdiction upon a policy basis. I am not going to touch upon a legal basis right now because I think that a legal basis is spelled out. Your jurisdiction is spelled out by the Section 15 and it goes to Orders of the Chief. It goes to failure to act within a specific time period and it goes to permits issued under that Article and our position as you can tell from the record is that it does not fit any of those but from a policy standpoint. The point is that certification of 404 and other types of permits such as Section 10 permits -- I'm not going to touch on the NPDES because it is arguable. You may have jurisdiction under there because not for a policy reason but because the Chief signs them. We might argue about Order whether or not it is an Order but the point is when the Director certifies Section 404 permits more issues come into play. More than just one related issue - wildlife issues come into play, coal issues, natural resources come into play - public land issues because of if you are filling in something the State owns, it is public lands corporation involved. You need a license from them to go ahead and fill. There is a lot more issues that come into play, so we believe you don't have jurisdiction and should not exercise jurisdiction for a policy reason as well as a legal issue which we think is clear. So that is basically my response.

Mr. George - (of Mr. Purbau8h) - Is there anything you would like to add?

Mr. Purbaugh - I mention this in the prior argument and I will mention it again, the fact that the Director has delegated his authority to issue certification in the NPDES program to the Chief and the Chief does sign those certifications and as such may be reviewable by this Board makes it to me terribly inconsistent that the Director decides that he will do the 401 certifications - apparently the decision about who signs is a convenient to decide whether or not it can be reviewed .

Mr. Ailes - At the present moment we are operating under an opinion from the Attorney General's Office which says we do not have authority to review 401 NPDES certification. The attorney may change his mind. The courts may change it for him or us, but as of the current time, there is no inconsistency in saying that we can not review a 404 permit because we are not reviewing 401 permits at this time and have not.

Mr. Purbaugh - I am not suggesting that the inconsistency is with the Board, rather with the Director in his designation of who may sign what.

Mr. Shipley - I would like to respond to that. We do not believe it is inconsistent at all. Obviously the NPDES issue is one that directly relates to discharges into waters of the State - that is exactly what NPDES controls -- discharges.. 404 permits and the certification there takes into account a lot more than just the water resources of the State and so the Director is not being inconsistent at all; as a matter of fact, we believe he is exercising discretion given to him - given to him by the Legislature and we believe he is exercising it in a proper manner.

Mr. Ailes - Any other questions. No further questions - well, thank you gentlemen. The Board will have to take this under advisement and we will argue about it and try to decide as quickly as possible and let you know and give you an opinion, a very brief opinion stating briefly the reason for our decision. We thank you for coming.

The next item on the agenda is the Borgman Coal Company. Is this yours Karen? Let me explain to the Board that it has developed that the Attorney

General's Office and the counsel for Borgman have come to an understanding on this and so because of the nature of the understanding, we told the Borgman people that there is no point in coming all the way down here from Kingwood, Preston County, to hear what Karen is about to tell us, so proceed.

Mrs. Watson - Well, I will give a status report on the posture of the case to the Board-I believe that is what was requested at this hearing. No agreement has been reached between the parties as the Board will recall, this case was generally continued August 27, 1976 - since that time, Borgman Coal Company has or did submit an application for a treatment system for the operation of their mine and this treatment system was found to be acceptable to the Division; therefore a permit to operate the mine was issued in November of 1979. However, this permit did not address the issue of abandonment. It provided that abandonment plan would be required at some time under the permit. However, the company has not submitted any additional plans from their former application from back in 1976, which of course, was denied by the Chief. So I have talked with Mr. Wehner, the attorney for Borgman, and we may be able to stipulate the issue of adequate treatment. That was one ground for the Chief's denial. We may be able to stipulate that that question is now moot.

However, on the issue of abandonment - we are not or have not reached any agreement and we are - both parties are prepared to go to hearing on that issue if the Board would like to set a hearing date and I did ask Mr. Wehner what kind of time frame he would be interested in and myself and both parties could be ready to go by April 20th which is less than a month. We would be glad to appear before the Board and go to hearing on the issue of abandonment or we may have some kind of agreement at that time.

The division would like to have this matter resolved. It has drag on for some time now due to various reasons and we feel that the issue of abandonment should be resolved now. We would like to see it resolved soon.

Mr. Kirkpatrick - How long has this dragged on?

Mrs. Watson - Well, as I said the appeal was filed in 1976 and the Board on its own motion continued the hearing date - generally continued it. No hearing date was ever set. The Division, through Chief Hall, corresponded with the Board on one occasion in 1977 - asking for the Board to do something to resolve it; however, to my knowledge no hearing date has ever really been requested by the Division.

I believe the Division was attempting to work with Borgman Coal and as I said, they did through negotiations, have resulted in an adequate treatment system for the active mine operations but they have not reached any agreement on the abandonment issue.

Mr. George - Would the Division issue a new permit for both the combined treatment facilities and abandonment plan or is it two permits?

Mrs. Watson - We have not talked about that but I would assume that the abandonment issue would be incorporated into the permit since the law does require that an abandonment plan be submitted with an application for operation.

Mr. Ailes - However, the law also provides the Chief can in writing, waive the plan for abandonment and in many places where you have a coal mine that is going to last 25 years or so he will waive that in writing up until they come in for that last permit or the next to the last permit. At that time it is required.

Mrs. Watson - But I may add that in this case -

Mr. Ailes - In this case he did not do it.

Mrs. Watson - I do not want to get into argument - Mr. Wehner is not here.

Mr. Ailes - In this case he did not waive it.

Mrs. Watson - The permit clearly said - the Chief is not waiving the abandonment and that was in contemplation of the Board hearing that matter.

Mr. Ailes - The only reason I am raising that, Karen, is that would indicate that the Chief could simply modify the existing permit by adding the abandonment plan as another section to that permit if that can be worked out. In other words, it could be done as an added section to the permit. No legal problem

about that, providing the Chief and the company can agree as to how the abandonment might be worked out - so far they have not been able to do so.

Dr. Crum - I have a question, am I looking at this right? You are looking for the Board to give you some direction in where you are trying to go with respect to permits when you look at abandonment? Is that the reason this suit was brought in the beginning?

Mrs. Watson - I cannot say, as we did not file the suit - Borgman filed the suit.

Mr. Ailes - I was there - I will tell you about it. Borgman Coal Company filed their appeal. It was received on the 22nd day of August 1976. The statute requires that within 20 days of notice of receipt of an appeal, the Chairman of the Board must set a date for a hearing. The date he sets must fall within that 20 days; however, he cannot set that date for the first 7 days of the 20 so that narrows the period down in which he can actually act to 14 days because he has to wait. I mean the date he sets cannot be as close as 7 days because that is the period of time that is allowed to the Chief to prepare his administrative file. He has, incidently, 3 days notice in which to get his notice - after the appeal has been filed, so it can be as much as 10 days before he can have the administrative file ready.

As a practical matter in setting these cases, we invariably set a date within the 20 days as required; however, neither counsel for the appellant nor the Assistant Attorney General assigned the case can be ready to present their evidence and try the case on the date it is set. So the case is set and notice is set out - a statutory notice that the appeal is set for a certain date to come to comply with terms of that statute and at the same time a..

Mr. George - Are we going somewhere?

Mr. Ailes - At the same time, yes we are going somewhere, if you would just pay attention, at the same time a letter goes out continuing the hearing - nobody is going to be ready. If we get a case in today, this is the 25th of March - we have 6 days left in March and 14 days in April which

means I will have to set the hearing somewhere around the 12th or 13th of April who knows - no attorney present can get his case ready in that length of time..So at the request of one or the other or the request of both parties the Board many times, we have said on motion of the Board, because the statute says the Board on its own motion can do it, on many times we say the request of the parties, the case is continued until further notice because I do not know how long it is going to take the Assistant Attorney General to get his or her case ready and I do not know how long it is going to take the appellant to be ready to do it so we give a general continuance. The attorneys then are supposed to then advise me of when they can be ready to try the case. As soon as I am so advised, we then start the administrative process of finding a date that will suit the most people - the witnesses, Board members, attorneys, court reporter and everybody else and set a date for a hearing. *In the Borgman case, neither Mr. Wehner, who is the attorney for Borgman nor the Assistant Attorney General ever informed me that they were ready to try the case.*

The Board asked from time to time what is the status of the Borgman Case and at one time, John Hall wrote us a letter and how about doing something about the Borgman Case and whereup we asked it again and that is when the inspector went up there and then when Borgman came in and filed a new application and got their permit to operate the treatment facility - but we still have never resolved the case of the abandonment permit for the very simple reason *that counsel for the appellant - Borgman or the appellee - the Chief - have only this day told me they are ready to go to hearing on it.*

Now that they have said that, we can go ahead and set a hearing date - it's that simple.

Mr. George - I can't imagine anything more serious in this State than allowing a mine to operate without an abandonment plan - this is just unconscionable.

Mrs. Watson - They can - they were not granted a stay by the Board. So the Division, at any time in the past, could have taken enforcement action and I am not really able to explain why the Division has not taken action. I, we have had a sort of confusion here. I am not really able to say what the problem is. I think it is a combination of the Attorney General's Office - until recently we did not and I did not know who was handling it. The Division did not through whatever reason -- did not make their wishes entirely known upon -- the Attorney General, and I might add Borgman was always grouped with the New River Company case since the two cases were very similar factually dealing with abandoned mine perpetual treatment issues and that the letter that Mr. Hall sent to the Board in April of 1977 refer to both of these cases and asking the Board to do what the Board could do to resolve both of those cases. It did not ask for a hearing date as Mr. Ailes said.

Mr. George - When was that letter sent?

Mrs. Watson - In April of 1977. I believe this letter did precipitate the "Ailes Committee" meetings and that was a response of the Board. I believe the Division fully supported the "Ailes Committee" efforts and saw that as a vehicle to perhaps resolving the Borgman and New River Cases.

The New River case has been heard - the Division did expend its time and effort on that and we - I can't really explain why so much time has elapsed but we are ready - the Division does want the Borgman case resolved and we are ready - can be ready in a month to go to hearing.

Mr. George - I have never heard of Borgman Coal Co. until the last meeting, when finally, after I have been on this Board for 18 months we got a docket, which I've felt a major accomplishment and if I had ever known something like this was going on it would have been the first thing I would have pushed. I just cannot understand what has been going on with this at all.

Mr. Ailes - You have never asked the question before.

Mr. George - I've asked for a docket and you would not give me one.

Mr. Ailes - I'm not going to get in a fight with you about it, but Mrs. Watson brought up the matter of the "Ailes Committee" - now you were not on the Board at that period of time. Mr. Crum came on the Board and attended one or two of those meetings but the committee had been in existence for some time. The Borgman case and the New River case involves what happens when you have a coal mine that has ceased to function, that is - ceased to mine coal.

In that situation, the mining laws require that you seal the openings of the mines, that is, they put in what is called a "dry seal" which is a seal which permits no water to escape at all. Experience here and in Pennsylvania both has been eventually the head waters have built up to a point where you get the seal back or you get a blow-out somewhere else in the outcrop.

There was a theory that you could put in a wet seal" which is a seal to keep people from going in the mine. That contains a siphon pipe that lets the water drain out. The theory of the siphon pipe was that eventually it would cut off the oxygen in the coal mine and that it would stop the chemical reaction and you would no longer get the iron and sulfur coming out of the mine.

Unfortunately, that does not work either because there are so many cracks and fissures through the earth that the oxygen gets in there and you still get it after a number of years.

The State Water Resources Board, and this is in answer to your unconscionable remark, asked the coal industry to join together with the Division of Water Resources to make a study of what could be done to take care of that acid mine drainage that would be coming out of the mines after they had finished working them.

That committee met - I don't know the number of times. Membership varied

from meeting to meeting 45 - 50 people. We had presidents of some of the major coal companies such as Valley Camp in attendance at the earlier meetings and then they later designated representatives - the Board acting simply as a referee or sponsor and took no part in deliberation or discussion.

This committee was composed of three study groups - legal, technical and financial (and at this time Mr. Ailes went into discussion about the various committees and their functions) and stated that this was all going on due to the Borgman case and a number of other similar cases including New River which had or would have perpetual treatment until the OSM was passed by Congress - at that time the meetings ceased or by agreement disbanded. There was a great deal being done but not highly publicized. We were just arriving at a conclusion when this other thing came along, which superceded anything we might have done.

Mr. George - The Legislature declared it a policy of this State that we will combat permanent drainage problems with abandonment plans and there simply is no excuse to allow this to go on for 3 1/2 years without an abandonment plan regardless of what it was or how bad it was and Borgman has often been cited to me by professional people in the Department of Natural Resources as a manner in which the Board failed to support the policy efforts of the Department of Natural Resources -- this case among several others.

Mr. Ailes - Well, I don't know who is doing that. The Borgman case has not been to hearing for the simple - what Karen just told you - they have not asked for it.

Mr. George - Why didn't you ever tell us about it? Why didn't you tell anyone about it? I never heard of it until the last meeting. I never heard of Olga until the last meeting.

Mr. Ailes - You may not recall of hearing about those by name, but we have discussed these on various occasions.

Mr. George - Why wouldn't you give the Board a docket?

Mr. Ailes - Why wouldn't I give you one?

Mr. George - We requested minutes, reports, dockets a year and a half ago.

Mr. Ailes - All right, Mr. George, I will answer that. We have operated from February 1st 1979 until October 21st 1979 without a secretary.

Mr. George - We had secretarial help available in the Division of Water Resources. If we would have asked they would have helped out.

Mr. Ailes - Not the kind of secretarial help that had the knowledge to go through and get this information, as soon as..

Mr. George - If you knew this was going on why didn't you tell anybody?

Mr. Ailes - I don't know what you mean.

Mr. Kirkpatrick - I think we ought to table this. If we are going to have a hearing on this..

Mrs. Watson - I wish to request that the Board set a hearing on this case.

Mr. Kirkpatrick - I move that the Board set a hearing on this case.

Dr. Crum - I will second it.

Mr. Ailes - O. K. we will set a date for hearing. In order to set a date for a hearing I will have to contact everybody to find out a date that is most suitable for everyone-least inconvenient for most people - I have already made that note.

Mrs. Watson - Mr. Wehner did say if at all possible, he would like the hearing date to be after April 20th as he is now in their term of court up there.

Mr. Ailes - We will have to get the services of the court reporter, etc., so it will take that long.

Mr. George - I would like to note that my final exams are the first two weeks of May so that is out and to get Borgman on the right track I would move that the Board issue a stay -- what do they need?

Mr. Ailes - They do not need a stay. They don't need anything. They are operating a treatment plant. They do not need anything.

Mr. George - They do not have an abandonment plan.

Mr. Ailes - They are operating a treatment plant. They are not polluting any water. They do not have an abandonment plan and it is going to be 7 years before they need one according to the latest information I got.

Mrs. Watson - I do not know, but I question what the Board can do in this matter - it is really up to the Division to take up any enforcement action for the fact you are correct, they do not have an abandonment plan.

Mr. Kirkpatrick - In this case - the Borgman case - the Division has not done what it should have done. They could have stopped them any time - the Division has responsibility there - we are an appeal Board.

Mrs. Watson - Mr. Kirkpatrick, criminal warrants have been obtained and I believe that's what participated..

Mr. Ware - We have the authority to bring charges.

Mr. Kirkpatrick - Have you brought them?

Mr. Ware - Yes.

Mr. Ailes - You want to wait until the 15th of May?

Mr. Kirkpatrick - I want to make a point. I think it has been..

Mr. Ware - It doesn't stop the water - the water needed to flow...

Mr. Kirkpatrick - Did you ask for a hearing?

Mr. Ware - No, I haven't.

Mr. Kirkpatrick - Then that's your next step, isn't it?

Mr. Ware - We asked the Chief of the Division to request one.

Mrs. Watson - I might add you all's remembrance - the issue of abandonment is now being litigated in Kanawha County Court and that has been a consideration in the Division's posture and constitutional issues have been raised about whether that section of the code that you are looking at is constitutional and it may be that by the time this hearing is held that the whole section might be considered unconstitutional - I just mentioned that to indicate that things have been done on the abandonment issue and we are actively defending against that.

Mr. Kirkpatrick - What's that case?

Mrs. Watson - New River.

Mr. Ailes - Anything else in reference to Borgman?

O. K.-the next is the Olga Coal Co. and Pollitt is here. Mr. Tutwiler called me and I told Mr. Tutwiler that the Board would accept your (Pollitt's) statement on his behalf.

Mr. Pollitt - Thank you, Mr. Chairman.

Mr. Ailes - And you told me you had agreed to it.

Mr. Pollitt - Gentlemen of the Board -- Mr. Tutwiler and I have been in correspondence about 20 times over the past two weeks and have tentatively reached an agreement in this case (and went on to relate the incidents relating up to the suspension of the permit). The final two deficiencies are now to be solved - and an inspection of the site (cleaning of Pond # 6 and the construction of a diversion ditch around a coal dump are to go to a pond so that the water can be properly treated).

Mr. Pollitt continues - the status of the settlement is this. The company was preparing (last week) for an inspection by the Water Resources Division's inspector to comply - to see if they were complying with the Department's requirements. As I talked to Joe Holly yesterday, the inspection is set for Thursday morning after 10 o'clock and we will know shortly after Joe's inspection of that facility, whether or not the company can meet the Department's requirements and if they do - upon that inspection, the permit will be reissued - reinstated to Olga Coal Co. and the appeal will be withdrawn and the case dismissed.

Mr. George - Are you satisfied with their progress?

Mr. Pollitt - Surely, the inspector Carroll Vestel told me they had made substantial progress on 8 of the 10 violations and that he felt that the company was trying to overcome their problems and that, in fact, that the company was not in as bad a shape as some of the other companies down in that area - and the company even spent Saturday and Sunday trying to correct

their problems and he (Vestal) feels comfortable in what they (company) have done.

Mr. Kirkpatrick - What is the Division's position on this?

Mr. Pollitt - The Division? I have not talked to the Chief - the inspector and supervisor in the area think if they can correct # 6 pond problem they will be in satisfactory compliance with the Department's requirements and we can go ahead and reinstate the permit and then the appeal can be withdrawn.

Dr. Crum - Are they operating?

Mr. Pollitt - They are operating now and have been since the appeal was filed.

Mr. George - The Board issued a stay in this case?

Mr. Pollitt - That is of some question - I don't believe - let me put it this way, there has been a lack of communication between myself and the inspector for the past 6 - 8 months and apparently the inspector was as not as concerned about their operation -- without the permit -- without a stay I mean as they (company) are substantially trying to comply. So if any problem lags there, it is probably because of lack of communication between myself and the inspector.

Mr. George - If we would have a meeting - say sometime in mid to late May - do you think that this all...

Mr. Pollitt - We would either have a report for you at that time or request a hearing prior to that time. Gentlemen, any further questions?

Mr. Ailes - Anything else?

Mr. Kirkpatrick - I think that we should have a report.

Mr. Pollitt - O. K.

(brief break was taken while secretary put on a new tape)

Mr. Kirkpatrick - I don't think that these cases should be left to drag on - if we have something to do we ought to be doing it.

Mr. Pollitt - I agree.

Mr. Ailes - At this point, if there is no objection, I will let Mr. Gonzales -- he has a question to ask us concerning the New River Case. Unfortunately, it did not come up until one day after the official open meeting notice had gone out and we were not able to put it on the agenda; so go ahead, Larry.

Mr. Gonzales - Mr. Chairman and members of the Board - we have filed a motion for an extension of time on the permit and to be quite frank, I had not been thinking of the "sunshine law" and I am hesitant at this point to really get into the merits.

Mr. Ailes - We can't discuss the merits at this time.

Mr. Gonzales - The motion is with the Board and our reasons for asking for that extension are included in that motion.

Mr. Ailes - Right.

Mr. Gonzales - And my only request today is that we be given a chance - an opportunity to present evidence relating to those grounds, and ..

Mr. Ailes - Now Mr. Pollitt informs me that he just got your motion today at the Attorney General's Office and he has not had a chance to confer with the Chief to determine whether or not they are going to oppose your motion. I would therefore suggest that you all would find that out and make your decision as soon as possible and if agree, let us know and if you disagree let us know in time that we can hear an argument on a motion for a stay at our next meeting.

Mr. Pollitt - All right, Karen and I will talk with the Chief on the New River motion within the next day or so and will try to get back with the Board immediately.

Mr. Gonzales - We would be prepared for that hearing any time the Board sets it and it comes within the "sunshine law".

Mr. Pollitt - I don't believe it will take much preparation for the Department to prepare to defend that motion if we decide to oppose. Obviously it is clear it's New River's claim and I don't know if we could produce new

evidence of any substantial disagreement.

Mr. Ailes - Would you let us know?

Mr. Pollitt - We will.

Mr. Ailes - Now let me ask the Board this -- in the event that the State agrees to a stay with New River people, would you give me authority to sign an Order granting the stay?

Mr. George - For what period of time?

Mr. Ailes - For whatever period of time they agree to. I don't want to set the date.

Mr. Pollitt - Like I said, we would have to discuss this all with the Chief. Neither one of us I am sure here .. we did not get the motion until late last evening about 3:30 so we did not have a chance. They mailed it on March 20th from downtown Charleston to here, so there's - it's a little ridiculous - 5 days - I'll clue you in - the Capitol mailing system is not the most efficient in the world.

We can mail something from here to the Attorney General's Office across the street and in three days they will see it.

Dr. Crum - You have until when at this point?

Mr. Gonzales - April 1.

Mr. Ailes - I'll put it this way, Mr. Crum. I would - we could simply do this by mail - what I am trying to do is save having a meeting if we don't have to. If that's the only subject that we would be having a meeting on and they will come in here and say "we agree to a stay for so many days", there's not much we can do to say, O. K., you've got it.

Dr. Crum - Well, I think the Board can take a different position than either one of these two gentlemen. They can repeal anything and we can..

Mr. Ailes - All right then. We will call a meeting - then - you will let us know in time and 10 days after I hear from you I will call a meeting.

Mr. Pollitt - Yes, sir, all right, sir.

Dr. Crum - Keep the bi-weekly reports coming.

Mr. Ailes - The next thing - I'll give Larry a change to explain that.

Mr. Gonzales - I'd sent a letter and the back-up reports-I was receiving xerox copies. As a lawyer I do not file xerox copies with any court or Board so I was assuming that New River was sending the original and when I found out that they weren't that's when I got a letter to the Board explaining that fault. So it was not the fault of the New River Co. It was my fault, I guess, that you weren't getting reports. I was getting copies and assuming the originals were being filed with you.

Fran Hunter - Mr. Gonzales - We have not received any reports since you submitted the last ones on March the 8th .

Mr. George - I would move that we authorize the Chairman to sign such a motion for a period of not more than 60 days and if you all need more than that, the Board will be meeting-- I am sure, late in May or early June and you can come back and ask for more time.

(Mrs. Watson requested the above be repeated and Mr. George stated - I move that the Board Chairman be authorized to grant such a stay of agreement of the two parties involved for a period of no more than 60 days.

Mrs. Watson - May I comment on that, Pollitt - we..

Mr. Ailes - This is in the event that you do agree.

Is there a second?

Mr. Kirkpatrick - I second the motion.

Mr. Ailes - All in favor - Crum, Kirkpatrick and George responded with 'aye'
Opposed? (no response)

Mr. Kirkpatrick - I would like to comment that I think this should be rescinded if we don't get the reports regularly . I think it is unexcusable that we are not getting these reports on time.

Mr. Ailes - The next report is on the status of Fayetteville.

Fran Hunter - I will give that report if it's all right with the Board. I spoke to Pravin Sangani a short time ago. He does not have the information on paper. He relayed this to me by telephone. Construction will start soon

on this development. In 1977 Prime Builders, Inc.'s permit was transferred to Pinewood Apartments Limited. They will put in a treatment system as it was stated in the Board's record. I think that you all have a copy of the document. The Wolf Creek Public Service District is in the Step II stage - it will take 3 to 4 years to complete and in the permit it does state that when the PSD is extended out, this Pinewood Apartments, Ltd. will connect to it. (Mr. Sangani is Section Leader of the Municipal Permit Section)

Dr. Crum - Now, I'm not sure what was the case..

Mr. Ailes - That was the case involving Prime Builders, now another outfit was going to put in an apartment unit and they had a package sewage treatment plant on an unnamed tributary of Wolf Creek, I believe, which eventually runs into some other stream which eventually becomes the water supply of the City of Fayetteville. Fayetteville appealed the terms and conditions of the contract much like the Parrish Manor. It was that type of case. The Board held the hearing and told the - we upheld the Chief in the granting of the permit, just as we did in the Parrish Manor Case.

In the testimony which came out in the case, the Prime Builders had not started construction yet of the apartment complex - they estimated a year before they would get it built and the first unit occupied. So that this was a year in the future. Testimony in the case also indicated that within a year and a half, the public service district interceptor would go by on the other side of the property and at that time, the permit requires that they cease the operation of this sewage treatment plant, if indeed, they ever got it into operation and transfer it over to the public service district and so the operation of the plant and the effluent from that plant going into the tributary was at least a year away.

As a matter of fact, it has been more than that. The Board, at that time, agreed that we would wait and see if - which happened. Because of the time element involved, there was a very good chance that the plant would not even be built at all. It still hasn't been built.

I have the - all the exhibits in that case and the transcript at home and I have all the notes to draw up the findings of fact and conclusions of law. One other element that incurred at that time, was the Neeley Opinion came down declaring that the findings of fact be prepared as we did in the Parrish Manor Case. It used to be relatively simple to do them.

You did not have to go through all that rigamarole that we do not so because of all of those factors and agreement of the Board. At that time, we did not file the final Order in that case and obviously, the plant still has not been built although it appears it will be.

I will prepare those notes - it is just a matter of having it wrote up and entering the Order. The case has long since been decided - it's just that no action was going on up there one way or the other and we have never gotten a complaint from the City of Fayetteville. Any further questions about that?

Now where did Pollitt go (he will be right back). You can see that Item 5 - the adoption of additional rules - that's Bob's Rules of Discovery and so forth, so let's get to what I have here. Karen, do you have anything, do you want to amplify your..

Mr. Kirkpatrick - Where do we stand on the revision of the regulations?

Mr. Ailes - That's what I am about to say. You are getting a letter from Karen summarizing the last meeting and since then, Bob and Dennis have been up there and they will be able to fill us in on what..so this is the answer to your question on the regulations.

Mrs. Watson - That's intended to be our first memorandum - the first on our suggested revisions that is taking in the legal factors, but I have to add again, this is strickly legal review - that there are many technical issues that we are finding from reading the Division's comments that need to be addressed by the Board.

Mr. Kirkpatrick - I have a question. How does the Division staff get cranked into this because it seems to me that all of the technical information

we have to get from the Division. Are these people in the Division being considered?

Mrs. Watson - Well, as far as our legal review, Mr. Kirkpatrick, we are considering the comments which the Division submitted which are rather lengthy. We are reading those and often times, those comments do raise legal issues - things that the Division thinks might be legal issues. They are flagging them for the attorneys and for the Board so we are not addressing purely technical questions and I would suggest to you, that the Board should somehow set up the mechanics since I think I somehow indicated this at the last meeting on March 3rd that Dave Robinson had indicated that he is ready and willing to assist the Board but he needs some kind of further direction from the Board on what technical issues they want to see comments on.

Mr. Kirkpatrick - Well, I should think that Robinson should be writing the basic part of the regulations with the lawyers as a secondary input. We can keep Robinson and the Board out of jail. These are technical matters. The Board has no expertise. Professor McGinley has no expertise. Why don't we start with Robinson first?

Mrs. Watson - That's certainly the Board's option to do that if the Board feels that way. I would suggest you let the Chief know because as things stand right now, it is his understanding that the Board is carrying the responsibility...

Mr. Kirkpatrick - I don't know how we can carry the responsibility when we don't have the technical staff to do it.

Mrs. Watson - I believe, Mr. Kirkpatrick, that if you recall - the whole thing stems from the former Chief Hall's desire to take a different role than he did in the 1977 regulations with the Division entirely preparing the set of regulations and being on the defensive and I believe a decision has at least basically been made for the Board this time...

Mr. Kirkpatrick - As I said, I believe or think - I'm stupid - but that was the simplicity perhaps.

Dr. Crum - I think what needs to happen is that the Board and the Department of Natural Resources need to set down for a series of meetings - 3 or 4 days continuously to work on the technical problem.

I do not think I or Larry will have time until about May sometime - 3 or 4 days then right for instance, there are some technical problems I can see that the public health service - and its on the regulations, for instance - like chlorine - they want everything chlorinated. Well, I think that is going to upset some of our standards - for trout streams particularly. So I think that somehow, the Board, health service, Department of Natural Resources - should all set down together and get all that stuff hacked out before we do anything. I think it takes a big meeting with everybody present so that everybody knows how the decision was made and they can say well we had our input and the Board decided to do or not do whatever we wanted them to do because they accepted someone elses input. I think that needs to be done before we go to the public.

I think that all the State things have to be satisfied. We as the Board, have to be happy, the State has to be happy. They we are ready to go to the public.

Mrs. Watson - I think that you are right. It is going to take more than one meeting. There was a meeting about a month ago in which Mr. Ailes, Mr. Kirkpatrick, Pat McGinley, Bob Pollitt, the Chief and myself were there, but there was no more time to go through any more than the comments that they had already submitted.

If the Board is going to be in the position that they will not be able to handle it, you are going to try to have some other route. I know that until you sit down and talk with the Chief, the Chief's position is that his resources are limited and that until he gets further direction from the Board as specifics, he is not going to do anything.

Mr. Kirkpatrick - I agree with Dr. Crum. I would start with Robinson's comments. He's got more of the structure that's involved; then get all the

other people involved. We don't have the staff to do the stuff that has to be involed. Robinson is the only one that has the staff.

Mrs. Watson - May I suggest something. In my opinion, the Board -- from my experience with this subject over the last couple of years, the Board could at least take the subject of Water Quality Standards and all of EPA's concerns over the last two years as what is efficient in the current set of regulations and at least pinpoint those areas with the understanding that as EPA is anxiously awaiting - there should be some priority set on those divisions and I don't believe the Division now knows as well as the Board what the problems are with the mixing zones, anti--degradation statement, all the correspondence the Board should have in its file with EPA - in particular with Jerry Pollis from Water Quality Planning of Region III. I think that an area to start to ask the Division - to assist the Board in those issues.

Mr. Kirkpatrick - I think the Division has to be the start of it and we have to get busy on it. I think we've been dragging our feet on it. When I say "we" I am talking in the whole collective Statehouse. I think the basics have to come from the Water Resources Staff.

(At this time, Karen introduces the report on two sections - with the Board's approval - she is planning to give this to the Chief and let them further comment for the most part - suggestions or comments incorporate the Divisions comments also).

Mrs. Watson - The attorneys will -- not be able to continue the kind of memo they have right now because the memo takes into account both technical and legal aspects and do not believe they can finish up the regulations in that manner. They are going to need technical assistance.

Mr. Pollitt stated he and Pat McGinley spent 6-8 hours on Friday working on only the smaller sections - 5, 6, 18 & 19 - and they came up with five technical questions on what they considered minor problems in review of the NPDES requirements on water quality standard problems.

Mr. Ailes - The Board can't answer a technical question. That's got to

go to the Division. The Board can consider two schools of thought and can consider the arbitrator and decides which way to go, but as far as answering a technical question, there is nobody on the Board individually qualified and certainly, as a group, we are not qualified to give you a good answer on a technical question.

Mr. Pollitt - I suggest the same as Karen; that you all sit down - must sit down with Dave and decide and do it shortly. We fully realize the time constraints with everybody on the Board but we all face it ourselves. Until the legal people get some direction from you all as to who we go for technical answers and how that's going to be solved for us to go up there and beat our heads together...

Mr. Ailes - Let me say. We will talk to Dave about this and come to an understanding and I think we should concentrate all of our efforts at the moment, from what I hear on Water Quality Standards and Criteria and those sections that do not pertain to NPDES at this time, because I do not know how far down the road the rest of the NPDES takeover is proceeding, because, Skip, as you know, there is a hell of a problem on manpower to take over that program. It is a huge organization - about like when the surface mine boys jumped when that thing went through and where they are going to find the manpower and all the technical angle of it; they may even change their mind and decide that the State does not want to take the NPDES program after all.

Mr. Abrams - If I can make a statement, in that regard, Article 5A essentially requires the Water Resources Division to begin implementation to begin steps to take over the NPDES permit program. I do not know if there has ever been a formal declaration by this Board or the Division that they are moving in that respect. We, as attorneys, are expending a great amount of time on a project that we would like to see implemented and I am not sure in the absence of a committment that our work will be in vain...

Mr. Ailes - I do not know what you mean by a formal declaration, Dennis.

A year or more ago, we went through a horrifying experience of coming up with a set of regulations and holding hearings on them and getting double-crossed by EPA on the date of the last hearing and we had to simply suspend because they said no matter what you do we will not accept until our own regulations come out and their own regulations did not come out until June effective in August, which meant a complete re-write - we had to wait until EPA's came out before we could even start re-writing.

Mr. Abrams - Then perhaps what I may be suggesting, is a letter from the Board to the Director and the Chief that it is the Board's intention...

Mr. Ailes - Yes, so that's - our effort should be first on the Water Quality Standards for this reason. EPA has never accepted our 1977 regulations and we are still in the process of revising them in connection with this, so that the effective regulations - Federal regulations in West Virginia right now are the 1974 ones which were accepted.

EPA is - we are up to 1980 and we should be coming up with a revision for 1980. So we should catch up on the Water Quality part first. We should expend our efforts there - we can even promulgate those - those parts of it - of the regulations, and do our NPDES ones as a promulgation later.

Mrs. Watson - Mr. Ailes, if I might add to that - I suggested that some priority be put on the Water Quality Standards because I attended a meeting last week with in which none of the Board members was present (the Board was not notified or aware of this meeting) but EPA was present and we discussed the Board's March 3rd meeting in which a sort of flexible time frame was discussed as far as having the entire set of regulations ready to go in the - at the end of the summer. I believe, and Jim Burke who is the State Program Coordinator indicated that that might cause EPA some concern and that perhaps he was informally advising me to advise you all and I in turn suggested that he send a letter but he indicated if it is going to be that long, that perhaps the Board should consider doing the Water Quality Standards first.

Now, I might say, I would assume the reverse of that. If the Board can put the speed on the entire set of regulations, then come out with something sooner than that, I think that EPA might be willing to accept the entire package, and as Dennis was saying, I think that the Board should fully understand that it's not a discretionary thing whether they promulgate regulations for the NPDES program. That is our informal opinion that the Board and the Division are under a mandatory obligation.

Mr. Ailes - Yes, we are under a mandate from the Legislature. There is no question about that...

Mr. George - I think the only reason that EPA has not come in and taken over the State program so far, is that they have been misled as to the Board's progress in this area, the Board's progress in this area is non existant. I have discussed this matter with Philadelphia...

Mr. Ailes - Are you...

Mr. George - officials and they have a completely different picture of what has been going on down here and I am about on the verge of requesting EPA to come in and take over the State program...

Mr. Ailes - You may do so as a private citizen, Mr. George.

Mr. George - As a Board member.

Mrs. Watson - The meeting between the Division and EPA was an annual meeting and they talked about every subject, pre-treatment, etc. Briefly status reports of each thing, NPDES, etc., and it so happened I was probably the most familiar person there on what the Board had been doing and perhaps the Division should have requested someone be there; I don't know but it was not a meeting just to discuss NPDES.

Mr. Kirkpatrick - Is it not on the Board record that we should ask Mr. Robinson to set up a task force to work with his people and the Board so that we can get started--so that we can get started as soon as we can on the regulations?

I think we have been leaning heavily on Pat McGinley, but we can lean so far and Pat has gone so far and can't answer the questions that will be

technical questions.

Our delay in the regulations -- we don't look very good.

Mr. Ailes - Well, part of it is our fault but a hell of a lot of it is EPA's fault...

Mr. George - None of it is EPA's fault.

Mr. Ailes - All right, Mr. George. EPA told me that they would not accept anything that we adopted in January of 1979 regardless because they wanted to wait until they came out next month, they said - with their regulations. Their regulations...

Mr. George - You went ahead and made a decision on your own. You went ahead and sent out that letter - the day after Christmas, saying that the regulations would change and the next thing I knew about it was when I got it in the mail.

Mr. Ailes - The regulations were not changed.

Mr. George - Yes, they were. They were amended to the old existing Federal standards. There was nothing wrong with going through the proposed Federal standards. I discussed that with EPA officials in Philadelphia. They were ready for the Board to go ahead and implement those standards.

Mr. Ailes - The trouble with that is...

Mr. George - You talked with EPA and you mislead at least me...

Mr. Ailes - It depends on who you talk with EPA as to what answer you get.

Mr. George - And I think that when EPA really finds out what is really going on down here, they are going to be VERY unhappy.

Mr. Ailes - I suggest you invite them down here and tell them of what you are complaining.

Mr. George - Why did you wait five weeks last summer to hand me a copy of that letter from EPA saying that they were getting ready to take over our system? Over our regulatory program.

Mr. Ailes - That 90 day letter - for the simple reason that Jerry Pollis

who wrote the letter, which was signed by Greene Jones, I believe I talked to the man who signed it, and he said that you have to talk to Jerry Pollis as he is the guy who wrote it for my signature and told me not to pay any attention to that 90-day thing - the purpose of the letter was to tell us how to take care of those four variances which was the second page of the letter.

Mr. George - I do not believe that.

Mr. Ailes - All right, you do not have to believe that.

But that happens to be the fact. You asked me the question and I gave you an answer. We will ask Mr. Robinson...

Mr. Kirkpatrick - I want a second to my motion.

Mr. Ailes - Is there a second to the motion?

Mr. George - I will second it.

Mr. Ailes - All in favor say 'aye' - "ayes" were heard. Motion carried.
We shall ask Mr. Robinson to set up a task force.

Dr. Crum - Now that we have Karen here and we are talking to Karen - I just got a letter dated the 19th in which you wanted to talk about variances.

Mrs. Watson - What I was saying in the letter is in the March 3rd meeting, I had to leave after a couple of hours, but Bob Pollitt stayed afterwards and told me what you all were discussing and also Ray George talked to me and they both told me the Board was considering using the State-EPA agreement to set up a procedure for handling variances and the reason Ray called, and he had not thought of it at the meeting, Bob was at the meeting, but he was not that familiar with variances to bring it up because he is just recently working on the regulations, but it was my understanding from talking with Mr. Ailes in the past and just being involved in this thing, that the variance question was a legal issue that the Board was interested in. In fact, if I remember the meeting was a year ago - all the Board members were present - EPA came down as you recall, there was an attorney there - Bob Collins and also Jerry Pollis was there and we discussed the subject of variances and I believe the meeting was ended on

the note that the State, I believe, the Attorney General's Office, with Pat McGinley would be working on an informal opinion as to what the State law authorized as far as variances and also to see what the State law had to say about procedures for doing these variances.

We have been working, I am sorry, we have not had a report to this date. There's been an understanding - we are working on it and if the Board wants the opinion, I think we would put top priority on the matter and give the Board our opinion, I hope within a month, and then I think that's necessary for the Board to understand what the State law requires before you start to talk on how you are to implement procedurally.

Mr. Ailes - I think there was a little misunderstanding in generalities, Karen, we were talking about the problem of what we have discussed so many times of trying to see if we can't come up with a regulation that permits us to make variances without having each variance go through the Legislative Review Committee.

Mrs. Watson - Well, that is the legal issue that we were working on...

Mr. Ailes - That we were discussing and that...

Dr. Crum - Can you see anything wrong with us going concurrently with EPA ?

Mr. Ailes - No.

Mrs. Watson - EPA considers and this is why Ray called me and I am speaking strictly for EPA now - the Board should confirm this - talk with EPA - their attorney - Bob Collins and Ray indicated that if the State - they consider it a State issue and that they'll be happy if the Board does it in accordance with State law. Whatever that procedure is, so really there is not anything they can add. They can't give the Board the authority by entering into an agreement with the Board to...

Dr. Crum - Their protest was that anytime we changed anything we had immediately changed the whole entire law and in an agreement, they can say 'no' in a variance, we don't say that then we are free with EPA and that's what I assume we were talking with about with Ray George.

Mr. Ailes - Karen, the point was assuming - that we are able to get you and Pat and Dennis and everybody to come up with a regulation, that is of a blanket nature which would let us make these little variances which keep cropping up. They still have to get approval of EPA; now the stickler in the thing is and the reason that we have to get it in that form, if we can -- Dennis, is EPA - says every variance - every exception that we make - John Amos Plant wants 2.5 or .25 arsenic instead of .2 in Little Scary Creek - that is a violation of the standards to a tributary to the Kanawha River there.

They say anything like that is a 'downgrade' and when they take that attitude then they mean we are changing the regulations and they I don't know if they understand it; when they say you are changing the regulation and then that means we have to go through the Legislative Review Committee because we changed the regulation - that's what we are trying to get around; however, we do have provided in the regulation and we do not make any variance or exception of that nature without the concurrence of EPA. Now, that has been in the regulations since even before EPA - that happens, if they have to concur on this thing - the - all we were saying to Ray is that if we can work this thing out - that you all can tell us you think will work to get the Legislative Review Committee to approve this general regulation, EPA will then not consider it a 'downgrade' in the sense that we changed the whole regulation. We only changed that one little item.

This is what we talked possibly could be done. Ray is the one who actually said maybe we could do it in the next State agreement.

Mrs. Watson - And you are saying and I mentioned it in my letter, and we would still like to use that framework for procedure. I understand that I thought it might be premature. The way I got the story from Ray and Bob...

Mr. Ailes - But he was jumping way ahead - he was jumping the gun...

Mrs. Watson - And of all the legal mechanics-I do not want to get into

much detail on it now, but we have talked with EPA with Bob Collins, and we have talked of throwing around the idea of not considering these things as 'downgrades' and doing it through a general regulation and I think from the indication that they gave, if we think we can do it legally, then, they will accept it. That their position will be our position.

Mr. Ailes - That was just a misunderstanding at the time. In fact, the suggestion was made that which you are talking about as not considering as a 'downgrade' might be one of the elements in the State agreement. That might be one place that they might be able to put it in writing.

That's all that amounted to.

Mr. Ailes - Bob, do you want to take up your discovery today?

Mr. Pollitt - Not today, due to circumstances re: the civil service thing, etc., I am not prepared at this time.

Mr. Ailes - They are not - I know they are helpful but they are not critical.

Mr. Pollitt - I would like to bring up a point concerning the New River motion quickly. After discussion with Mr. Ware, and I tried to reach the Chief, but he had just left for Morgantown and discussion with Mr. Gonzales, they are going to prepare affidavits instead of presenting hearing testimony. They are going to present affidavits from people I would think, would be outside of their own organization to verify their position and after reviewing those positions and affidavits, we would be in a much better light to determine whether or not we will oppose their motion.

If we feel in that fact, that they are hindered not through their own actions but through actions of other people that we would probably consent to an extension. Again, we do not like it but we understand some of the technical problems that may have arisen, not through their own fault, but until we receive those affidavits, I would say we are not in a position to say we will agree to "X" number of days extension. After we receive the affidavits, we will notify the Board as to what our position is.

Mr. Chairman, I understand the motion is for 60 days anyway.

Mr. Ailes - No, only if the State agreed to it.

Mr. Pollitt - I don't believe we will agree to anything further than 60 days - we don't believe that 30 is sufficient if the fact is justified at all. We don't believe they can do it in 30, I mean, they can throw together an application and bring it in here and you all can deny it and we are right back where we started - and we are off to the races again - I mean bring it in to the Chief and he can deny it.

Mr. Ailes - This is what we are trying to prevent.

Mr. Pollitt - I want - I don't think the Department wants the same case as they were in again.

Mr. Ailes - Like the Borgman Coal case.

Mr. Pollitt - Like I say, Larry is going to have his people prepare these affidavits, I would assume, one from the photograph company who took the airplane pictures to determine the land space and (2) someone from the union saying they are not going to go across the picket lines; I would assume, and thirdly, possibly someone saying there is no one other than union people who can do the work on the pilot plant that has to be done-I would assume that's the type of affidavits we would have to get.

Mr. George - What's the problem in the strike?

Mr. Ailes - The problem there, Larry, is the location of where they want to put the pilot plant. They would have to cross the West Virginia Belt Plant and they are on strike and the employees of New River Co. are United Mine Workers members and so they will not cross a picket line.

Mr. Pollitt - So, if they can present evidence that that is the factual situation, then we will be in a better position to judge whether or not we're agreeable.

Mr. Ailes - O. K., our next item is status of cases handled by the Attorney General's Office.

Mr. Pollitt - Who do you want to start with?

Mr. Ailes - While we are waiting on this, at our last meeting you all instructed me to meet with the Chief to work a program where we could keep closer tabs on pending cases. Fran will give you the rundown on what we agreed to, the procedure that will be followed. In addition to that you will find in your folder a copy of the two letters I was instructed to write which have been delivered to the ladies.

Fran Hunter - We met on March 4th around 10:30 in the morning and for the specific reason to discuss a way or method of devising a way of communication between the division and the Board as it relates to appeals, variances, etc. and I think that this note - or memo - that I have handed to you is self-explanatory and I have not yet had a response from the Attorney General's Office on any of the cases that were discussed before the Board on March 3rd and thus an updated list of pending appeals, cases, etc. will not be provided by me at this time; but hopefully, we will have something more by May 1st. That's the date I am shooting for - we're going to devise a form to be circulated through the division, through the Attorney General's Office - I want it back to me as soon as possible, so in turn, I can get it back to you Board members.

Mr. Kirkpatrick - Isn't there a regular schedule for this?

Fran Hunter - Every four months.

Mrs. Watson - May I ask, will a copy be sent to the defense attorneys?

Fran Hunter - O. K. if you so desire.

Mr. George - I would note the Board adopted rules last October 5th that a quarterly docket would be prepared which wasn't delivered until March the 5th or whatever - March 3rd and I still feel that the Board adopted this rule we've got to stick with it.

Mr. Ailes - That's exactly what you got told. You are going to get it every four months. Do you want it every three months?

Mr. George - Yes.

Fran Hunter - Larry, I was unaware of this - I have not had the chance to even read the minutes of the October 5th meeting.

Mr. Ailes - I did not know that a month made that much difference.

But you can get it every three if you want it.

Mr. Kirkpatrick - That means every three months we'll get this and every quarter we'll get the docket - is that it?

Mr. Ailes - You'll get a status of pending cases, if they are still pending and what has been happening on them.

Mr. Abrams - Fran, when did you and I talk over the phone - when you and I tried to get our cases straightened up - was that a month ago?

Fran Hunter - I would say it was on February 9th or thereabouts.

Mrs. Watson - Fran talked to me, too, Dennis, and we did indicate to Fran we would try to by the end of February to give her a status of each of our cases and we did not follow through with that and I appologize and we did - all of us begin checking into each case, talking with the technical people, talking with the attorneys. It just took us longer. We do, now, I believe - each of us have an update on every case. I am sorry we did not get it to the Board by the end of February as Fran had requested it.

Mr. George - Well, starting at the beginning and looking back - what about Appeal No. 124 - Ashland Petroleum Co.

Mrs. Watson - Ashland Petroleum - well, now, that's mine. I talked with the attorneys for the appellant and we are going to get together within the next couple of weeks to see what facts that we might stipulate to and I discussed a possible hearing date thinking the Board might want to set all of these cases for hearing and they were agreeable and we are agreeable to having that case set again in 30 days-we would like 30 days notice to prepare for that.

It is a very similar case to one which has been filed before the Board which Bob Pollitt and I are working on that - the EXXON case, Appeal No. 119 and we have been ^{working} very actively on that case and feel that some kind of agreement

is quite close on that the facts of that case are very similar to the Ashland Case so I think that we can speed the Ashland one along as we worked - as we have worked on the EXXON one.

Mr. George - So Ashland does not want to negotiate? They want to go to a hearing?

Mrs. Watson - No, they are interested in sitting down with us to see what we might agree to. I just cannot give you any indication how possible an agreement is.

Mr. George - Are they currently causing a violation of State stream standards?

Mrs. Watson - Not to my knowledge. Now I have to check and see - I am not sure what stream this discharges into. The issue concerns technology based limitations for oil & grease and the issue ^{is} the State, in its permit has imposed a much more stringent limitation than the Federal technology limits which are 30 milligrams per liter of oil & grease on an average basis. The State in its permit, imposed a 50 milligram per liter on a maximum which is quite a bit more stringent and that, to my knowledge is not a water quality based limitation and so I do not believe they are violating Water Quality Criteria.

Mr. George - How soon will it be as to when you all know - you will have any good ideas or as to when you have finished negotiating and you are ready to fight?

Mrs. Watson - I would say that within 30 days that...

Mr. George - So that if the Board meets in late May - you all would know what do do?

Mrs. Watson - Sure.

Mr. George - O. K. will you get back to us then on that one?

Mrs. Watson - O. K.

Mr. George - Appalachian Timber Services, No. 123...

Ms. McQuade - This case is still pending. There has been no resolution of it. Appalachian Timber Services was issued a suspension Order and that is what the appeal is about.

They have since written a letter to the Chief of the Division of Water Resources saying that they have complied with the permit conditions and should therefore - the suspension Order should be removed. We are of a different opinion as to if they have really complied with the terms and conditions of the permit and so we have not chosen to remove the suspension of the permit. So that - this is a case that is still at issue, clearly at issue.

Mr. George - Are they operating?

Ms. McQuade - The suspension of the permit was to suspend the operation of their disposal system. They contend by letter, that they can both operate but not operate their disposal system.

Mr. George - Isn't that where they have a creosote system and subsequently to the soil and to the stream?

Ms. McQuade - That's our allocation.

Since the suspension Order was given to Appalachian Timber, they interpreted it as they did. They could continue to operate and treat their timber without violating the suspension Order. We have an EPA assessment of the facility. We had to do that by court order. We had basically, a search warrant issued by the Judge in Braxton County that allowed EPA to go in and drill four monitoring wells, take additional soil samples. We are awaiting on this data before we proceed so we do not anticipate at all in lifting the suspension of their permit.

Mr. George ^{or} - So they are not operating the creosote system but they are still running the mill?

Ms. McQuade - They are not operating they say their ponds - their disposal system, but they continue to treat timber.

Dr. Crum - What happens to their liquid?

Ms. McQuade - They always contend they have no discharge. It's a very

confusing situation.

Mr. George - I have heard a lot about this one. I think I have read about it in Skip's column and I think that some people from Sutton are very worried about this and I think that priority wise - will you know more in late May? Will EPA core drills be back?

Ms. McQuade - Excuse me, oh, yes, certainly.

Mr. George - Well, I assume if in late May this is not resolved it is not one of the priority items on our docket and that if you would inform them so that we may schedule a hearing on this in late May - at the next meeting.

Ms. McQuade - They, may in fact, request a hearing if possible before that date as soon as they learn we are not going to drop the suspension. Apparently, the suspension of their permit is very critical to a contemplated sale of the property and of the facility and so they are very interested in getting it resolved and I have the feeling they are going to be before the Board before that date.

Mr. George - Bethlehem Mines No. 122 - that's Leonard Kee's and he is on a much deserved annual leave right now (Mr. Abrams responds) - I'm not myself very familiar with the status of the appeal. I think that Fran has discussed it with Bethlehem's attorney - except the communication between Bethlehem and yourself.

Fran Hunter - I have heard nothing else from Bethlehem's attorney.

Mr. Abrams - Has a formal appeal been filed?

Fran Hunter - Yes.

Mr. George - Well, they are contemplating resolving the problems and withdrawing the appeal?

Fran Hunter - Yes, that is correct.

Mr. Ailes - Yes, they want to appeal a Notice to Comply and I told them there was no such animal - that's the last I ever heard of it as Chairman of the Board. Now they have never filed a formal Notice of Appeal - you see, they

were sent a Notice to Comply that is the only action that was taken in that case by the Division and up to that point, and the attorney did not understand that a Notice to Comply was not the same thing as the Order revoking a permit and he called Madge and Madge transferred him over to me and I explained to him that we could not accept an appeal on a Notice to Comply.

Mr. Abrams - So there is no pending appeal?

Mr. Ailes - There is no pending appeal.

Fran Hunter - They did file it on an appeal form, it's got a number.

Mr. Ailes - They did file it on an appeal form but I told him to withdraw it because we would ignore it because he cannot appeal on that basis. It doesn't....it's not a formal Order of the Chief.

Mr. Abrams - Have they formally requested withdrawal of the appeal?

Mr. Ailes - It does not make any difference because it's a nullity anyway.

Mr. George - What stream is it upon?

Mr. Abrams - I believe it goes into a tributary of the Kanawha River, that's at Kayford - I think it's on the borderline of Kanawha and Boone Counties - I believe.

Mr. George - Are you satisfied that they are moving ahead with this?

Mr. Abrams - I have not been involved in the case and we were not even involved in the negotiations between the Board and their attorney to know what was going on.

Mr. Ailes - No, I simply informed them that there is no basis of that appeal of a Notice to Comply - that's that a purely administrative document handled by the Chief and if he has any questions about it, he can talk to the Chief. We could not accept it so it's a nullity as far as I'm concerned and should not have been given an appeal number. At that time, Madge Hill was taking care of some of the secretarial work and she simply gave them an appeal number because it came in.

Mr. Abrams - I believe that preparation plant and all of the facilities

down there are subject to a recent circuit ruling downtown that was written up in the paper. Bethlehem, I believe, had violated their lease with the Shank Land Company and the court agreed that Shank owned the property now and I guess the ownership and, I assume they will appeal that to the Supreme Court on the ownership, I would assume...

Mr. Ailes - But this should never even have gotten onto the docket.

Mr. George - Could you talk to Leonard and get these people together to get a motion to dismiss on this?

Mr. Ailes - You do not need a motion to dismiss. You do not have any case.

Mr. George - Well, we have taken the appeal and I think ...

Mr. Ailes - We did not take an appeal.

Mr. George - It's got a number.

Mr. Ailes - That's right. The number was put down there purely as a clerical error.

Mr. George - Well, I think this would be a nice way of clearing this up and getting it out of the way.

Mr. Abrams - We will go ahead and prepare a motion to dismiss and send a copy to Mr. Feinberg.

Mr. George - No. 121 - Kingwood Water Works.

Ms. McQuade - I spoke with - not the attorney - the other side, but with Mr. Bill Miller, the person who filed the appeal for Kingwood Water Works asking him if there was any chance if he would either withdraw it or if there was any resolution to it and he said "no" it was still pending as far as he was concerned.

He was dissatisfied with his attorney's representation and that he also was dissatisfied with Patriot Mining and that he would continue the appeal.

Mr. George - Are they negotiating - are they...

Ms. McQuade - He said that they were not making the kind of modification he thought would be necessary.

Mr. Ailes - Is this one of those third party appellant things?

Ms. McQuade - This is Kingwood Water Works - Patriot Mining got a permit and they're appealing it - the merits.

Mr. Ailes - So they are appealing a State given permit to Patriot Mining - that is what I mean by a third party.

Mr. George - Well, can you talk to them and tell them that once again, at the next Board meeting we will start working out a schedule for resolving this; hopefully we can do it by June. Was it a case where they had existing pollution or threatening pollution?

Ms. McQuade - They felt that once Patriot Mining was given a permit to construct and operate a preparation plant, that it would effect their water supply which their intake is right below the treatment plant.

Mr. George - Is that plant built yet?

Ms. McQuade - I think it's very close to being completed.

Mr. George - So, it's about ready to go into operation?

Ms. McQuade - I think so.

Dr. Crum - How close is this facility - a mile?

Mr. George - What stream - if it's Kingwood it must be a creek.

O. K. No. 120 - Riverton Coal Co. - What we did in that case was contingent upon the (see footnote)--of the environmental task force and we sent that one over to Nick Johnson in the Environmental Protection Division. Nick got it last week and I do think we will have an updated report-status report of that at the next Board meeting. I really do not know his position (Karen Watson replied in answer to Mr. George's question).

Mr. George - Is that the case where the turnpike is being expanded--the guy did not want to build ponds, dikes - he thought they would be destroyed by the turnpike is that...

Mrs. Watson - I thought it had to do with abandonment.

Mr. Ware - It was something to do with abandonment.

Mrs. Watson - I believe an Order was issued requiring them to submit plans for abandonment.

(due to a conflict of interest)

Mr. Abrams - There is turnpike construction right next to it - he is working on it. Nick Johnson (Karen replied yes - Nick or someone in his - he will assign someone - out of his division to work it out - I don't know).

Mr. George - Do you believe we will hear something by late May?

Mrs. Watson - We will be glad to let Nick know that-we can indicate that you all would like a status report.

Mr. George - I would appreciate it if you all could send something to the Board on all of these things before our next meeting or at the next meeting (or at the next hearing) so that we can schedule something.

Mr. George continues with EXXON - Appeal No. 119 - do you want to talk or docket it?

Mr. Pollitt - Here's the situation on EXXON - the Attorney General's Office has entered into two options with them (the company) to settle the case and stated they had not discussed this with the Chief - but should have a resolution within 30 days.

Mrs. Watson interjected with the statement that EPA is considering the issuing of a general permit program for all bulk oil terminals and it is necessary for the State to "run its position by EPA" - this particular case pertained to a discharge to Ferry Branch, a small branch of the Kanawha River. The discharge is occurring across the river from the Holiday Inn.- Kanawha Blvd.

Mr. George - Well, that one sounds all right.

Monongahela Power Co. Appeal 118 - Mr. Pollitt stated that he has entered into a discussion with the attorney from the company (Ms. Polan) - technically they are in compliance with the permit - there are a few legal questions that have to be answered and it should be resolved by May 15th. The company sent the Attorney General's Office a letter requesting certain decision from the Department.

Borg Warner - Appeal No. 106 - Mr. Pollitt responded with this situation is the same as at the last previous meeting in that the State and Borg Warner --

all situations but one have been resolved and it is contingent upon a Federal judicial judicare administrative appeal that Borg Warner has filed with an Administrative Law Judge. In my discussion with Dave Flannery - Attorney for Borg Warner the case has been set for hearing and briefs and as soon as the Federal Administrative Law Judge makes his decision on that case, the State will accept the Federal limit put on Borg Warner for this one particular parameter and that case will be dismissed from the Board's docket.

Mr. Pollitt stated he could not advise the Board of a date this would occur and until we have a Federal decision on this - it should continue on the Board's docket.

Mr. Ailes - You missed # 118.

Mr. George - Wheeling Pittsburgh Steel # 57 - was it a matter of certification?

Mr. Ailes - No, it was another matter...

Mr. George - we did that on Monongahela Power.

Dr. Crum - No. we didn't.

Mr. Pollitt - continuing - with Wheeling Pittsburgh Steel - that he would check with Randy Sovic on this - there was a lack of communication between him and Randy again. The last check he had with Randy was that it was being worked and he thought it would be settled and if indeed it is settled, will enter a motion to dismiss - the State has been working with the company on this.

(Dennis Abrams then stated he would check with the Environmental Protection Division and a lot of cases I had read off to him - they had never docketed them).

Mr. George - Appalachian Timber Services, Inc. - Appeal No. 123 and Kingwood Water Works Appeal No. 121 - and Mr. George asked of Mr. Abrams if he had seen the water quality reports on the Elk in the area at Sutton where Appalachian is located. He replied that he had questioned if there

was a violation of water quality standards, etc. and the answer was negative or not that bad. He did state that monitoring was being done as the Elk is the source of the Charleston Water Supply.

Mr. George - Kingwood Water Works - re: Patriot Mining Co. - Mr. George stated it would be nice to know when and if the prep plant involved would be completed - the date hopefully will be known at the Board's next meeting.

Mrs. Watson stated that she had a question at this time about Chemical Formulators, Inc. Appeal No. 107 - all that remains of that case is a final Order to be entered by the Board and it was respectfully requested that the Board get to this as soon as they can (findings of fact, conclusions of law, etc.) as Chemical Formulators, Inc. is presently in Putnam County Circuit Court (Attorney General's action) in an injunction action, and that at some point it might become important to introduce the Order of this issue as in 1977 - it for certain reasons being ^{AW} active case (but not before the Board now) a denial of an - an Order denying a permit. **

A permit had been issued by the Division and Chemical Formulators appealed to the Board and an agreement was reached. The company agreed to withdraw the appeal without prejudice (I believe) and the Chief's counsel suggested a new application be submitted. If the new application is rejected, Chemical Formulators would have all the rights of appeal again to the Board. The Order of the Chief denying the application of Chemical Formulators was upheld as reasonable. Appeal No. 107 was disposed of by the Board on May 9, 1977.

An Order to dismiss will be prepared by Rick Earles or Chemical Formulator's counsel. This is to be ready by the Board's next meeting.

The question was asked "are there findings of fact and conclusions of law?"

Mr. George inquired would this be ready at the next meeting?

Mr. Ailes - The Monongahela Power - Fort Martin Appeal - he stated this was on an NPDES certification and this would be withdrawn upon a letter from the company attorney.

**This is one of the cases where a permit was issued and the Board not notified.

At this time, the Board Chairman, Mr. Ailes inquired of Karen Watson, Dennis Abrams and Robert Pollitt - I want to ask the three of you a few questions (1) if there had ever been a continuance of any of the "stack" of cases of any of these hearings that they did not have knowledge (from the onset of an appeal, during the continuance and until final disposition).

The answer was "no" with (from Karen) the exception of Borgman Coal which she had just inherited and in this case the Division did not correspond with the Attorney General's Office on it.

Mr. Ailes stated the Borgman case was continued - to give them a chance to comply - the Division was aware but possibly not the Attorney General involved.

Mrs. Watson stated we are not sure there was counsel, but certainly, it was not the Board's fault (Maryanne Kapinos was the Attorney General involved in this).

The second statement to the Assistantsto the Attorney General present were there any instances where the Board had granted a stay of execution over the objection of the Assistant Attorney General involved. There have been instances in which the stays of execution were granted with the consent of the Attorney General and thirdly - the question was put before the three - who have all worked with the Board and known them for a number of years was ' is there any way that the Board or John Ailes as Chairman could "hide a case" and prevent the Division from knowing the status of the case or knowing that a pollution problem was going on -- any way the Board itself or myself as Chairman - could "hide it" '.

(Dennis Abrams replies - are you sure you want to ask that question of a lawyer, John?)-I guess there are always ways, but not to his knowledge.

Robert Pollitt responded not to his knowledge over the six years he's been with the Attorney General's Office - he related how they got cases and also cited the Borgman being a lack perhaps of communication between the Division of Water Resources and their office but that was the only one

he was aware of.

Mr. Ailes then put a hypothetical question to the attorneys present - when an appeal arrives in Fran's office she immediately calls me. A date is to be set within 20 days - if an appeal came in today and you were assigned the case, could you be prepared to try the case on the 13th day of April?

Reply was - right now no. But perhaps in 6 months we will be able to handle an appeal in 30 days - now it takes 30 days just to go through the paperwork (Dennis responded).

Mr. Ailes then went on and related it has been the custom of the Board to generally continue a case to give the attorneys a chance to prepare and present the case before the Board.

It was also noted that in case of an emergency, a case could be handled immediately - if a priority existed. An example was given, if an appellant would get shut down and 5,000 persons would be out of work -- and he would state 'I want action immediately' which has never happened before the Board.

The statute requires the Chairman to set a hearing date within 20 days of receipt of the notice. Date is set with a Notice of Hearing form, etc. and accompanying the notice is a letter continuing the hearing on the motion of the Board, Appellant, Appellee, or a combination of the three - until further notice or until the Chairman hears from appellant or appellee's counsel - we are ready to go and the date is thereby set.

If a case came in 1975 and the Board never got to a hearing does not mean that nothing has been done in the interim - it simply means that we never got to a hearing - there is a difference in setting the date and the holding of a hearing. (Generally it is continued).

Mrs. Watson - One thing, Mr. Ailes, you have notified the Attorney General's Office on these cases which is a good practice.

Dennis Abrams then stated from now on, when they get the notice from the Chief of an appeal, they log it in, an attorney will be assigned and

then a letter will be sent to the Board advising of the attorney involved from the Attorney General's Office.

Mr. Ailes - That would be helpful, to be notified.

Mr. George commented (when the Chairman related the above instances to Skip Johnson) that "that was not the problem, he had not told the other Board members what was going on and that he refused to give them the docket and the documents and that they were hard for us to obtain".

(Mr. Ailes takes exception to the word "refused")

Larry continues with "you have had repeated requests from myself, Dr. Crum, to supply this data and at one point Dr. Brannon - to supply just this very document here and this document right here which only goes back to Appeal No. 50 is full of cases which have sit around for 6 and 8 years with nothing happening - they were just sitting...

Mr. Ailes - Now wait a minute, we will now take those cases up one by one - you start - name your case.

Mr. George - No, I am not going to go through it.

Mr. Ailes - All right, then, you withdraw that remark.

Mr. George - No, sir.

Mr. Ailes - I will explain to you...

Mr. George - You were responsible for sitting on these cases and you are a lobbyist for coal mining interests in the Morgantown-Clarksburg area and I want your people to stop calling me on the phone and threatening my life.

Mr. Ailes - My people! I don't know any coal people...

Mr. George - I've never had a threatening phone call in my life until last Thursday when these news stories came out...

Mr. Ailes - I did not put the news stories out.

Mr. George - No, you had nothing to do with it.

Mr. Ailes - I did not put the news stories out. Mr. Crum put one out and you put one out. I did not put any news stories out.

Mr. George - I am going to find out - I've got your number, and I know who you are tied in to...

Mr. Kirkpatrick - What's this?

Mr. Ailes - I don't know - he is accusing me of something.

Dr. Crum - Let's carry on with Board business.

Mr. Ailes - No, you have made the statement that these cases drag on for 6 to 8 years.

Mr. George - That's right.

Mr. Ailes - Now, I want you to name...pick out one of them so that we can tell you why that case dragged on for 6 to 8 years.

Mr. George - I think it's very obvious - the Board sat on the...the Board refused to...

Mr. Ailes - I don't think it's very obvious...you all have taken a document which was prepared in reply to your request as soon as Fran got back to work so that we could get somebody who knew how to go through the files and get this information for you.

Mr. George - I requested this information in October of 1978, and for the first time --it was not until March of 1980 that it was received.

Mr. Ailes - You were given a run-down verbally at the meetings.

Mr. George - I never heard of Borgman and Olga and several of these other companies.

Mr. Ailes - But you are accusing me of "sitting on cases" and that is your word - 6 to 8 months. Now, I want you to pick a case out of there that I "sat on" for 6 or 8 months so that I can - so that I can show you just exactly what happened for 6 or 8...

Mr. George - It was not 6 or 8 months. It was 6 or 8 years.

Mr. Ailes - All right, I will show you what happened in those 6 or 8 years if you will bring the case out of there; if you do not pick a case out of there, then I assume you do not know what you are talking about.

Mr. George - I am not going to do that.

Mr. Ailes - I am prepared to give you the data on every single case that is

on that list and if you do not want to name one, then...

Mr. George - I think the record speaks for itself.

Mr. Ailes - I do think the record speaks for itself; if you will look at the full record - not just a resume.

Mr. George - A little more importantly, I think the record also speaks that West Virginia currently has the weakest Water Quality Regulations in the Eastern United States.

Mr. Ailes - That's a matter of opinion.

Mr. George - Or the few states ever threatened by the Environmental Protection Agency -- with Federal takeover. EPA has been misled as to what the Board's progress is in this area and I'm going to make sure that EPA finds out down here; and I have the feeling that a takeover is just about going to be eminent and I guess the first time I ever realized the Board really had a big problem was in December of 1978 when I received this letter "*TO WHOM IT MAY CONCERN*" in the mail; that our regulations, which the Board had approved and had been sent out for public comment were being changed by mandate of the Chairman without consulting any other Board member and I was really shocked. You essentially changed...

Mr. Ailes - Did the letter say "mandate of the Chairman"?

Mr. George - It's got your name on it.

Mr. Ailes - I didn't ask you that - I know it's got my name on it. Does the letter say "*by mandate of the Chairman*"?

Mr. George - No.

Mr. Ailes - All right then, don't you use that term.

Mr. George - You didn't ask me about it.

Mr. Ailes - What?

Mr. George - The Board voted in early December to send those regulations out for public hearing. You apparently had some negotiations with EPA which I never heard about until months later and then sent out this letter and the result was in January of 1979, we had a lot of angry people; we had angry conservationists, we had-everybody was mad at us.

Mr. Ailes - Did you get a copy of that letter on the 15th of December or whenever?

Mr. George - No, I got this dated the 26th - I got it about New Year's.

Mr. Ailes - All right. You got it right after then. Did you raise any question about it?

Mr. George - It was too late by that time. This was before I really knew what was going on. I had only been on the Board three months. I did not know how screwed up things really were.

Fran Hunter - Larry, can I ask you the date of that October meeting in which you stated -- in October of 1978? I have no record of a meeting or a hearing held by the Board in October of 1978.

Mr. Ailes - We had a meeting.

Mr. George - I believe we had a meeting - the first meeting I attended was the first week of October of 1978 and I asked then about a hearing schedule.

Mr. Ailes - Well, that date is not material. You were explained the situation...

Mr. George - If I had known then what I know now, I would have never approved this letter being sent out - NEVER. It was a disaster - a change and a violation of the State Administrative Procedures Act to change regulations half-way through a public hearing period.

Mr. Ailes - We didn't change the regulations.

Mr. George - Yes, you did. You amended the existing Federal regulations; and supplementing what we were using which were the proposed Federal regulations which were implemented just about three months later verbatim. You had no reason to change them.

Mr. Ailes - It was a little later than three months. That letter was sent out the 26th of December. The Federal regulations were adopted on the 11th day of June 1979.

Mr. George - And there were no changes in the proposed ones that came out in September.

Mr. Ailes - I do not know.

Mr. George - And those that came out in the following June...

Mr. Ailes - I do not know. All I know is that the EPA informed me on the - just prior to the mailing of that letter, that we could not use their proposed NPDES regulations for ours because they were not final. They were subject to change and they were still working on them and they were making changes in them at that time and suggested that we ask for comments based upon the EXISTING EPA regulations.

Mr. George - For the first place, I do not believe they ever said that - someone else told me something quite different later on, but...

Mr. Ailes - At the same time? Did you talk to the same man who talked to me?

Mr. George - I spoke to the EPA people in Philadelphia...

Mr. Ailes - They have got quite a few people in Philadelphia...

Mr. George - I would like to read the excerpts from a letter here from which it took five weeks for me to receive, from Mr. Jones to Mr. Ailes and at one point it says:

"My staff has made a concerted effort in attempting to assist the State in establishing approvable Water Quality Standards. We have deferred official action on the 1977 revisions in order to preclude EPA disapproval and subsequent promulgation of Federal Water Quality Standards for the State of West Virginia. The time period for resolving this issue through State action has been more than reasonable and further delays cannot be justified";

and it goes on to say that we got 90 days or else.

EPA is liable to suit at this very moment because the Clean Water Act specifies that if the State does not adopt their revisions within 180 days the EPA has to come in and take over and any citizen groups that want to sue the Board and EPA can do this and very successfully, at this time.

Mr. Ailes - ...can put up that much money for attorney fees?

Mr. George - They can go back to 1974 - they are some of the weakest in the Nation - West Virginia's most critical water pollution problems are not even addressed and on occasion, the cases are completely ignored; something that every neighboring State has controlled for decades.

We have no policy on toxic chemicals which is about a decade behind the rest of the Nation. We have no policy or regulations on carcinogenic , toxic organisms; nothing on nitrates, sulfates, iron, copper, zinc, aluminum -- all of which are toxic; heavy metals and the most severe problems are coal mining, but yet every State around West Virginia has had such regulations for years.

Mr. Ailes - Currently the Federal regulations in effect in the State of West Virginia are the regulations that were adopted with a couple of exceptions were the regulations that were adopted by this Board in 1974.

The 1977 version, as you just read, have not been accepted by the EPA. Mr. Green Jones -- when I received that letter -- I called him, he referred me to Mr. Jerry Pollis who wrote the letter and their comment to me was as long as you are doing something - working on the regulations, that 90 days does not count and anyways that letter was written for the purpose -- you did not look at the back page of it or read the last paragraph -- for the purpose of suggesting how we might handle four variance questions which were before them.

Mr. George - I saw that.

Mr. Ailes - That was the purpose of the letter.

Mr. George - That is not certainly the important matter here - four variances compared to National Water Quality Standards.

Mr. Ailes - I am telling you what Mr. Greene Jones told me - or what Mr. Jerry Pollis told me.

Mr. George - Well, Mr. Pollis told me something quite different.

Mr. Ailes - Well, that's all right.

That's the status of the regulations at this time..

Mr. Kirkpatrick - Any other business before the Board?

Dr. Crum - Dennis, didn't you want to say something about surface mines?

Mr. Abrams - You had asked me the other day, I guess, to advise the Board of the present status of the State Surface Mining Legislation.

As the initial draft proposed by the Department of Natural Resources was sent over to the Legislature earlier or later in 1978 - the Department of Natural Resources' draft proposed taking all of the coal mining activities away from the Water Resources Division and giving them to the Reclamation Division and having one agency in the State of West Virginia issuing all environmental permits for coal facilities, deep mines, surface mines, prep plants and any other type of facility.

The Legislature vetoed that idea and came up with a bill which present now (Mr. Kirkpatrick requested that the above be repeated as the tape was being changed) and Dennis continued with - the bill that we have now for the Reclamation Division is that they issue permits for every coal mining facility in the State; also approve abandonment plans for every coal mining facility in the State of West Virginia.

The two Divisions - Reclamation and Water are kept separate - water retains all of its present duties, responsibilities, administrative, enforcement-wise or whatever. This Board retains all of its current duties related to coal and we will simply have another system set up to do the same thing.

There will be many areas of conflict in our job in the next 6 months as to coordinate at least on the agency's level; so there will not be mass confusion in the field.

We will be coming back to the Board -- I'd say within a month or two - after the bill has been reviewed by the Federal OSM people to tell the Board what types of thing you have to do in order to make our whole State program come up to par with the Federal requirements. One thing, I think in particular, we will be asking the Board to promulgate regulations pertaining to suspended solids, effluent limitations and certain other types of parameters that are not existent in State law at this time. Those will be necessary. They will have to

be done by a certain date in order to be part of our package with OSM. Without those types of water quality, effluent limitations, we cannot get the program approval from the Federal government..

I have not even read the bill fully to see what other aspects we will have to have supplemented by this Board, but we will present to you a list as soon as we can.

Mr. George - I see that we are down to Item 8 now.

Mr. Ailes - Item 7.

Mr. George - Item 7 which is your item.

Mr. Abrams - Are you all finished with the attorneys?

Mr. Ailes - Yes, thank you.

Mr. George - All I want to do with Item 7 is that I make a motion that travel expenses and per diem for the last Board meeting which was on March 3rd and today's Board meeting be limited to no more than \$275.00 per Board member.

Mr. Kirkpatrick - What...I do not understand the point.

Mr. George - Well, it will help us stay within our budget which is already shot (gone) for the year.

Mr. Kirkpatrick - Are you saying that our travel expenses have to be approved in advance?

Mr. George - No, I am saying that we would limit our expenses to \$275.00 for the past two meetings - the one that was March the 3rd and today's meeting.

Mr. Kirkpatrick - Don't we have to follow the travel expense procedures of the State?

Mr. George - Yes, as a minimum...

Mr. Kirkpatrick - Yes, I don't...

Dr. Crum - I'll second the motion.

Mr. Kirkpatrick - I don't know what it means at this point.

Mr. George - Well, it means with half of the fiscal year gone - travel budget of \$2500.00 ... \$4000.00...

Mr. Ailes - That is an estimate - it is not a budget.

Mr. George - Well, \$4,000.00 is a lot of money. We are spending too much. Somebody is spending too much.

Mr. Ailes - Now, you have taken it upon yourself - you and Mr.Crum, to go way beyond your authority as Board members to secure my expense account since 1976. I could have stopped that, but...

Mr. George - The hell you couldn't...

The State Code Freedom of Information Act guarantees that those are public information.

Mr. Ailes - O. K., but you are supposed to go to the custodian of those records, and Fran is not the custodian of those records and you are supposed to follow the procedure outlined for securing that. You did not do that; however, I did not stop that. I let you have my copies because I...

Mr. George - You could not stop that.

Mr. Ailes - because I had nothing to hide. It so happens I have to travel further than most of you do and I frequently have to travel a day longer than most of you do; at least one extra travel day and also happens if you went through those things there are occasions, as Chairman of the Board, I have come to Charleston to carry out things the Board has wanted me to do -- I've had to stay over an extra day to carry out what the Board directed me to do as late as March 3rd. I did not go home until March 5th because I had to stay over and take care of a meeting with the Chief in order to work out that program...

Mr. George - I haven't had a chance to pick through these but the one interesting thing that I found in them, was last year my travel expenses totaled a little under \$1,100.00 - I was second highest in the Board and yours were \$4,500.00 - now that's quite a disparity.

Mr. Ailes - I don't recall what the total was on mine, because I don't think I totaled it up that way.

Mr. George - I think that we must practice a little more discretion.

Mr. Ailes - Well, it's not a question of restraint. It's a question of carrying out the duties and the functions and as I say, I happen to live in a place that takes me half a day or better to get here.

Mr. George - Last January 22nd and 23rd - for the illegal Board meeting that you called, I notice that you were in Charleston for six days. What were you doing?

Mr. Ailes - I came down on Sunday...

Mr. George - You came down on Thursday...

Mr. Ailes - No, I'll tell you what happened - that was January 22nd - I came down on Sunday; Mr. Kirkpatrick came down on Sunday - we had a meeting Monday - no, we did not meet until Tuesday - because I had to get with Fran to get ready for the meeting...

Mr. George - According to your travel voucher here, you came down on January 20th for a meeting that started on the 23rd - on a Tuesday?

Mr. Ailes - No, sir, on the 21st.

Mr. George - Well, you signed it.

Mr. Ailes - The dates may be - the numbers may be wrong. I came down on Sunday...

Mr. George - Are you going to give the money back?

Mr. Ailes - Mr. Kirkpatrick came down on Monday - I worked Monday with Fran - no you weren't here then, but worked with Cherrie then in getting ready for the meeting we were going to have on Tuesday with Professor McGinley who flew down from Morgantown to go over the progress of the regulations they are working on and I started home on Wednesday, I believe, and I got caught in a big snow storm and I got to Morgantown - it took me about 5 hours to get to Morgantown and it was dark when I got there and they were recommending that you do not cross Rt. 48 on that night on account of the snow, so I spent the night in Morgantown at the Ramada Inn and went on home the next day...

Mr. George - For a two day Board meeting which consisted of about three hours each day...

Mr. Ailes - I beg to differ - the first day Mr. Kirkpatrick was there at the time called and we stayed there until 4 o'clock when the meeting broke up. You have copies of the minutes of that meeting.

Mr. George - According to this, you came down here on January 20th - on the travel vouchers which you signed, which is a Saturday - and excuse me, a Sunday...

Mr. Ailes - All right - that's what I said.

Mr. George - For a Board meeting that started on the 22nd and ran through the 23rd and you rambled around until the 25th which was somewhere in Morgantown.

I don't know what's been going on - I really don't care, but I think we are going to have to bring this to a stop because we can't afford it.

Mr. Kirkpatrick - I think we are getting into an awfully lot of nonsense. It appears to me it needs another word, but in the first place, how did you get these vouchers? Did you go to the auditor's office?

Mr. George - No.

Mr. Kirkpatrick - Well, I don't want anyone looking at my expense accounts on the request of any member of the Board. I've nothing to hide, I just think really, the right thing to do and I don't know who, Fran, did you give out these?

Fran Hunter - Yes, sir, at their request.

Mr. Kirkpatrick - I don't think you should have done it - I don't think Mr. Ailes should have...

Mr. George - It's public information.

Mr. Kirkpatrick - allowed it. If we are going to investigate travel expenses, then we ought to have an Order from this Board and get the Assistant Attorney General to subpoena the vouchers and go over them.

I think that individual Board members have no business going over travel expense accounts. I expect to come down here next week to see Attorney General Browning to talk about Ron Shipley and I expect to charge that to this Board

and I expect to be paid for it. That is Board business. If I stay two days to see the Attorney General, that's my business and I do not think it is any of yours. I don't know if Mr. Ailes has been padding his expense accounts -- he couldn't have padded them very much...

Mr. Ailes - Mr. Ailes made one mistake on that one...

Mr. Kirkpatrick - Well, I don't know. I don't want to discuss...

Mr. Ailes - I charged one day extra of per diem inadvertently and I have already made arrangements to reimburse the State in kind of that.

Fran Hunter - Mr. Kirkpatrick - I would like the record to read that at no time have I ever refused any material or documents to any Board member or any member of the public - all one had to do was to call me because I was under the assumption that it was public information...

Mr. Kirkpatrick - You may be correct, I don't know.

Mr. Ailes - It is. But Fran is not the custodian of our expense accounts. She does not pay them. She does not approve them - whoever files the original copy is the custodian of that record and under the Freedom of Information Act, that's the person you have to go to get this information; not that I give a damn...

Mr. Kirkpatrick - I think that your expense account would be less than Ailes' (to Mr. George) because you missed or did not attend some of the meetings.

Mr. Ailes - You see, I have never missed a meeting, Mr. George and you have missed several.

Mr. George - I would go to them, if they were scheduled at convenient times...

Mr. Kirkpatrick - That changes the tone of the expense accounts. I think that you are getting into a lot of fecal coliform from a fowl with this.

Mr. Ailes - The statute very clearly provides that the Board members are entitled to their actual expenses and that is the way that we use it. We could if we wanted to, adopt our own travel regulations and pay ourselves more money, not per diem but not be limited by the \$15.00 per day for food and for mileage and so forth.

Mr. Kirkpatrick - I think that we ought to follow whatever the State has to. I think the Governor told us what our travel expenses should be and I think that we should follow that.

Mr. Ailes - And for years we have followed the State travel regulations.

Mr. Kirkpatrick - I think if we don't do that we could get ourselves in real trouble.

Mr. Ailes - And to continue to do that because that it satisfied everybody.

Mr. George - Well, there is a motion on the floor and I'd like to get on with it.

Mr. Ailes - There's a motion on the floor by Mr. George that the expenses of any one individual for any one trip for the Board be limited to \$275.00.

Mr. George - For just this last meeting and today's meeting.

Mr. Ailes - Only for just the two meetings?

Mr. George - Yes.

Mr. Kirkpatrick - Does that include the per diem?

Mr. George - Yes.

Mr. Ailes - I have not heard a second, the motion fails.

Dr. Crum - I will second it.

Mr. Ailes - All right, the motion is seconded. All those in favor say aye - "ayes" were voiced - Dr. Crum and Mr. George voting 'aye'.

Mr. Kirkpatrick and the Chair vote 'nay' - motion fails for lack of majority.

Mr. Kirkpatrick - I think that we are going to get into a lot of trouble when we get into this. I should be glad to send my travel expenses around to have everybody look at them.

Mr. Ailes - I might mention, Mr. George, I have made four trips outside of the State in which I have not even submitted an expense account in the last two years. When you go to Washington, D. C. and stay in a motel for a couple of nights - then you are running into some "bucks".

Mr. Kirkpatrick - Well, I drive down and I drive back and I charge my expenses for those, as Fran well knows and that's all that...but I don't want people looking at them.

(Fran Hunter - to Mr. Kirkpatrick - you never fill out a per diem sheet).

Mr. Kirkpatrick - I don't?

Fran Hunter - No, sir.

Mr. Kirkpatrick - Well, I hope you do that for me.

Mr. Ailes - O. K. Now, anything else?

Mr. George - I guess we are down to Item 8. At this time I move that Dr. Edward Crum be seated immediately as Chairman of the State Water Resources Board.

Mr. Ailes - Is there a second to that motion?

Dr. Crum - I second it.

Mr. Ailes - Any discussion?

Dr. Crum - I think in all of the confusion that we have seen here today, about what has been going on for the past several years, it is part of the problem of the Chairman and I think we need a Chairman who will inform each and every individual member of this Board of what the hell is going on and you should not have to ASK for minutes, you should not have to ASK for documents pertaining to what's going on with the Board. I think that everyone should be informed.

Mr. George - I concur with Dr. Crum and I've entailed in the past what I feel are the problems of this Board. I see them getting only worse, not better to the extent that this Board is an embarrassment to State government, an embarrassment to the people of West Virginia and a major block to environmental protection of West Virginia.

This Board is the center of a part of environmental protection of this State and for the last several years, it is not functioning correctly. I think that the only way we will have a Board that will function for the best interests of the people of this State is with a new Chairman and I believe that Dr. Crum is quite qualified to fill this position and to carry out these duties.

Mr. Kirkpatrick - That's a pretty strong indictment for the Board, Larry, and I don't know if I can swallow it or honor it - at some time; I don't think that Mr. Ailes is the ideal Chairman. I have met very few ideal Chairmen in my life - about three if I recall - The Father, The Son and The Holy Ghost and I get very much provoked at a lot of things that do go on but I don't think we'll strengthen this position at this time electing a new Chairman, under such pressures as you have indicated.

One thing I wanted to say, I did not intend to is, Larry, you turned to Mr. Ailes and said "you are a coal lobbyist". I would like to ask Mr. Ailes, for the record -- are you a lobbyist for a coal company?

Mr. Ailes - I'm not a lobbyist for anybody.

Mr. Kirkpatrick - Have you been a lobbyist for a coal company?

Mr. Ailes - I have never been a lobbyist for anybody - I can't say for anybody - I have been a lobbyist one time and that was to get the Conservation Officers an increase in pay when I was a member of the Conservation Commission. That is the only lobbying I have ever done in my life.

Mr. Kirkpatrick - Larry, do you believe he is telling the truth?

Mr. George - I stand by my position, sir.

Mr. Kirkpatrick - I think, Mr. Ailes, if I were you, I would sue him for libel.

Mr. Ailes - The thought had crossed my mind.

Mr. Kirkpatrick - I just think that that kind of deportment in a Board, when you are supposed to be a responsible citizen is unconscionable. I think you have been a very, very disturbing influence on this Board. When you make charges like that of one Board member - it is inexcusable. You are not a responsible citizen when you speak like that.

Mr. George - I stand by my...

Mr. Kirkpatrick - I would not call a man a lobbyist unless I had absolute objective proof. If anyone did that to me, I would sue him.

Mr. George - I am satisfied what took place with Dr. Brannon's confirmation, what has taken place with the regulations, and appeals and I have made up my mind...

Mr. Kirkpatrick - I had nothing to do with Dr. Brannons's confirmation-- I don't know anything about it, but I would say this - I don't know if Ailes had anything to do with it, I am no defendant of Ailes. I am not in his camp or anybody else's camp. I don't know how anybody can be any more independent than I am and I expect to stay that way.

If anyone spoke against Brannon, you must remember, it is a free country. If I had come down and appeared before that Senate Hearing Committee and spoke against Brannon, but you know I didn't, I had nothing to do with it, I would consider it none of your business. It's a free country. I am entitled to have my opinion and if I would have said Brannon should not be on this Board, that is my right as a citizen. Now you know I didn't.

Mr. George - I know...

Mr. Kirkpatrick - I had nothing to do with it, but I am telling you that when Mr. Crum's position for confirmation comes up in June if I decide to come down and speak eloquently against him, that's none of your God damn business. It's a free country. I might even charge the Water Resources Board with the travel. I don't intend to come down but still...

Dr. Crum - Well, thanks -- I guess.

Mr. Kirkpatrick - I hope he stays with the Board. I think he's a good Board member. I'll be glad to say that, but when you tell people they cannot speak out on an issue, you are getting into a very dangerous position. I don't know if Ailes did or not. I do not give a damn. I never asked him. I don't know who spoke against Brannon, but all that I am saying; that anyone who did had to right to. You know, when you say you can't talk in a freedom of democracy -- if anyone says that Brannon shouldn't be on this Board, that's his privilege just the same as you would say Brannon should be on this Board. We have never shut you up on that. I don't know what kind of a democracy you are thinking about when you say people can't speak.

Mr. George - I think its more the case in where it was gotten than what was said.

Mr. Kirkpatrick - It's no matter how it's done.

Mr. Ailes - For your information, I did not instigate anything in connection with Brannon's confirmation.

Mr. Kirkpatrick - I do not want to hear about it - it's over.

Mr. Ailes - I answered...

Mr. Kirkpatrick - The man that took Brannon off is the Governor of the State.

Mr. Ailes - I answered questions - Skip Johnson called me on the telephone and asked me about a memorandum that was out. Skip...

Mr. Kirkpatrick - If Governor Rockefeller wanted Brannon he would have been on the Board.

Mr. Ailes - He asked me if the memorandum is true, and I said "Skip, I can't tell you much of it because it talks about his attitudes towards environmental subjects and I have not talked to that man 20 minutes in private conversation in my life and I do not know what his attitude is toward strip mining or any other thing.

Mr. Kirkpatrick - I personally like Brannon - I'd like to have seen him on the Board.

Mr. Ailes - Your accusation is totally unfounded. A motion is on the floor by Mr. George to elect Mr. Crum as the Chairman of this Board. Any further discussion. If there is no further discussion, all those in favor say "aye". "Ayes" were said - Mr. George and Mr. Crum voting aye. Those opposed "no" - Mr. Kirkpatrick and the chair vote no. The motion fails for lack of majority.

Mr. Kirkpatrick - Mr. Chairman, at the close I think it very, very important that this Board close ranks. I think we ought to get on and along with the job that needs to be done. We have got regulations to push forward, we've got these cases to hear. We've got a real heavy workload - there are only four members of the Board right now. When the Governor will get around to appointing the fifth I don't know, but at least we have a heavy responsibility and I think it very important that we should work out a relationship with the Division so that we can push

these regulations and clean up this backlog.

I think that is what ought to be done - all of us cooperate and do our part. I want to make it very clear that I am not a party on either side of anything. I would simply like to have a good working Board. I think we've got a heavy responsibility and I think it very important that we are publicly charged.

Fran Hunter - Mr. Kirkpatrick - what days will you not be available after the 15th - are you still teaching on certain days?

Mr. Kirkpatrick - No. The 15th of what?

Response - of May.

Mr. Ailes - I have a couple of comments that I would like to make. I don't care what you say about me because you cannot hurt me in any way and I really constrict your with contempt when you make these accusations. You and Mr. Crum - but I want to point out to you, in the stories you gave out to the newspapers, that were designed to discredit me, you, by implication also are trying to discredit four Directors of the Department of Natural Resources that have served in this capacity since I have been on this Board - Dr. Warden Lane, Pete Samsell, Sandy Latimer and Dave Callaghan; now you are saying that those gentlemen will let me and the Board fall down in our duties without saying anything to us, you are maligning the character and performance of four Chiefs of the Division of Water Resources beginning with Bern Wright, Ed Henry, John Hall and the current Chief - Dave Robinson.

You are by implication...

Mr. George - I cannot agree with that at all.

Mr. Ailes continues - you know that there is no way, you have heard the Attorney General say there is no way that we can hide any of these things from you.

Mr. George - I did not say you hide them.

Mr. Ailes - No, you didn't.

Mr. George - I said the Board was never informed, and I wasn't - as long as I have been on this Board. I asked for a docket and I was never informed.

Mr. Ailes - In addition to that, you are maligning every other member who

served on this Board since 1962. A curious thing is, we have never had any problems on this Board - we never had this kind of disagreement. We never had any complaints about minutes or expense accounts or anything else until you guys came on the Board.

Now, having said that, so that you know exactly how I feel, I am also going to say this, that I concur one hundred percent with Mr. Kirkpatrick. This job is a hell of a lot bigger than the four of us, and I believe that all of us can work together on the damn thing and not try to discredit each other.

I can play that game, too, if we have to do it, but I do not deal in those kind of doings. And I am perfectly willing to forget this stuff. Skip will tell you. He tried to get statements out of --not you but Rich Grimes and Debra Baker -- tried to get some statements out of me and in reply to the information you gave them and Skip will tell you how hard it is to get a statement out of me, because I simply will not play that game. I just don't believe in it. As far as I am concerned, this thing is in the past. It's over with if you are willing to get to work to try and work out these regulations and try to get to these cases, try to make the Board meetings...

Mr. George - It's hard to try to get to the Board meetings when the majority of the Board members tell you that they can't meet - that they can't attend and you call a meeting anyway.

Mr. Ailes - The Board members told me that they could not meet on January 20th...

Dr. Crum - That is not true, John.

Mr. Ailes - You did not tell me. You told Cherrie...

Dr. Crum - That's not true. You told me and Mr. Brannon at a meeting which we were the only other Board members there. We told you specifically we could not meet the week of the 21st - it did not get into the minutes; that reminds me, I want to get - clear up our minutes before we adjourn today. I would like to go back to the minutes of the meeting of October 5th. In those minutes, you said I concur to meet at 9 o'clock. I did not concur to meet at 9 A. M. October 5, 1979, because I

knew that Larry was coming in on an airplane. We discussed that over the phone that Larry was coming in on an airplane and I would obviously not submit to a meeting at a time I knew Larry could not be there and be on an airplane and I want the minutes of October 5, 1979, to show I did not concur with a 9 o'clock meeting.

Mr. Ailes - Let me refer you to the attachment of those minutes made in October.

Dr. Crum - I agreed to an earlier meeting - that earlier meeting being 11 A. M.

Mr. Ailes - September 24, 1979 - attached you will find a schedule that's not it - wrong letter. You wrote me a letter in which you said...

Dr. Crum - I said we could have an earlier meeting - I did not say we could have an earlier meeting - I did not say at 9 A. M. There's a difference.

Mr. Ailes - An earlier meeting would be...

Dr. Crum - If necessary we could meet on Saturday...

Mr. Ailes - O. K. with you all-the earlier time would be all right with you all...

Dr. Crum - But we discussed an earlier time which was around 11 o'clock.

Mr. Ailes - No, you did not discuss any such a thing. You wrote me a letter calling the meeting or asking me to call a meeting for 1 o'clock.

Dr. Crum - That's right.

Mr. Ailes - And I told you we would have to meet earlier than that because I did not want to keep the State employees late on Friday afternoon and ask them to work on Saturday because they do not get paid overtime.

Dr. Crum - All right. That's right - I agreed to an earlier meeting around 11 o'clock...

Mr. Ailes - You wrote me a letter.

Mr. George - We've got the letter right here.

Mr. Ailes - All right. What does it say?

Mr. George - It does not say anything about time.

Mr. Ailes - O. K. It does not say anything about time.

What does it say specifically? Read it - one paragraph.

Mr. George - "Attached you will find a schedule for Dr. Brannon and myself.

Both Don and I have arranged to give exams on October the 5th so that we can get someone to cover our classes. We therefore, can meet earlier on that particular date. We both prefer October 5th since arranging new exam dates is tough. If necessary, we can meet on Saturday, October 6th to finish up any unfinished business. Thanks."

Mr. Ailes - O. K.

Dr. Crum - So, I want the minutes to agree to meet EARLIER but not at 9 A. M.

Mr. Ailes - O. K. you wrote that letter.

Dr. Crum - At your request.

Mr. Ailes - And the meeting was called for 9 o'clock in the conference room and the necessary notice was put out under the "Sunshine Law" and - Mr. Kirkpatrick and I were present. You telephoned Madge Hill at 5 of 9 -...

Dr. Crum - I tried to get you at your office, I even called your wife at the motel and at the last resort, I called Madge to tell you...

Mr. Ailes - You called Madge at 5 of 9 to tell her you would not be there on time.

Dr. Crum - That's right because I could not reach you when I tried. I am sorry. Also, I wish the record to show that October 5, 1979 meeting with the fact that we started late, with the fact that the Chairman went out to interview a secretary for a half an hour and if you add up those minutes, if we would have started at the starting time 1:30 - we would have ended at precisely at 5:10. I want the minutes to show that.

(a few sentences were lost of this conversation while I (Fran Hunter) changed tapes)

Mr. Ailes - You said you were going to meet Larry at the airplane.

Dr. Crum - We discussed that on the phone before we wrote the letter.

Mr. Ailes - No, you didn't.

Dr. Crum - Yes, we did. I said we were going to pick up Larry at the airport.

Mr. Ailes - No, sir, you didn't tell me - I did not know where you were until Madge walked into the room at 9 o'clock and said "I just had a telephone call from Dr. Crum saying they were going to meet Larry at the airplane".

Dr. Crum - O. K. I have another correction to the same set of minutes - on Page 2 Paragraph 1, Line 3 -- we talked about Items 1, 2 & 3 and we then approved Items 5, 6, & 7 - 7 somehow got left out of the minutes.

Mr. Ailes - You did not approve them. You tabled them.

Dr. Crum - No, we did not table them. We tabled 1, 2 & 3 - page 3.

Mr. George - Oh...

Mr. Ailes - This was made that 1, 2 & 3 be tabled. It was also moved that numbers 4, 5 & 6 would await the hiring of a temporary replacement for the Board secretary.

Dr. Crum - We moved and passed numbers 4, 5, 6 & 7 and we should add to be - and 7 to be approved as we did approve them but they would await the hiring of a temporary replacement for the secretary. We passed all of them.

Mr. Ailes - You moved, unfortunately - I would have to ask Madge to get the notes out because she took the notes on this.

Dr. Crum - That's right, you could ask her to get them out. Do you recall that meeting (Dr. Crum inquires of Mr. Kirkpatrick and continues with - do you recall that list, and he responded with yes).

We tabled the first three and passed all the rest.

Mr. George - Mr. Kirkpatrick thinks that's true...

Mr. Ailes - We did not pass them, we just...

Dr. Crum - We passed them...

Mr. Ailes - I will remind you - I will remind you you talked about Numbers 4, 5 & 6 (Dr. Crum adds and 7) and we passed all of those...and 7 specifically and when we got to Item 7, I offered to show you the data that you wanted there and you refused to look at it.

Dr. Crum - I didn't refuse to look at any data, John.

Mr. Ailes - You did that day.

Dr. Crum - I think you are mistaken.

Mr. Ailes - You declined to look at it so you wound up saying, O. K., we'll move we adopt these (cannot make out who said what until)Dr. Crum moves that we should take another vote because we just assumed that something was going to happen. That is the reason that we should vote on every motion before the Board, John.

Mr. Ailes - You approved the motion as stated here.

Dr. Crum - That's right and we approved 4, 5, 6 & 7 and that approval -- wait until we had a permanent secretary.

Mr. Ailes - O. K. I'll put 7 in there. It doesn't make any difference.

Dr. Crum - Pardon?

Mr. Ailes - But you said they would await the hiring of a temporary replacement for the Board secretary, which we did not have at that time.

Dr. Crum - That's right and they have awaited the hiring of that secretary which is already gone. And on the December 12, 1979, list both Dr. Crum and Dr. Brannon told the Chairman they could not be present for the week of January 21, 1980.

Mr. Ailes - I will not agree to that because you did not tell me that.

Dr. Crum - Yes, we did, John.

Mr. Ailes - We had not even called the January 21st meeting. If you will recall...

Dr. Crum - We said we could not be present for January 21st - that whole week and we set up a date I forgot what it was -- January 9, 10 and 11th...

Mr. Ailes - You didn't say a word...

Dr. Crum - We set up a whole schedule, John, and at the end of the schedule we told you one week we could not be there.

Mr. Ailes - Now, wait a minute...

Dr. Crum - And that's when you called a meeting.

Mr. Ailes - Now, wait a minute...

Mr. George - I told Cherrie the dates we...

Mr. Ailes - Mr. Kirkpatrick wasn't present that day - in there, we discussed...

Dr. Crum - We discussed the schedule and here we go. Here's the schedule -- "before the conclusion of the meeting, Dr. Crum brought up a timetable for review and promulgation--all right, we were to start at Morgantown on January 8, 9 & 10 for a draft review. It goes on and on all right - at the end of that I told you, Don and I or Don maybe - told you...

Mr. Ailes - You didn't tell me...

Dr. Crum - We had registration the week of the 21st and we could not be there.

Mr. Ailes - No, you did not tell me, I beg to disagree. You went through that about the 8th, 9th and 10th because the college was closed down - because of the energy crisis.

Dr. Crum - And because we could not be there on the 21st.

Mr. Ailes - You did not say anything about the 21st - hell, if you would have told me that, I would not have called a meeting for the 21st!

Dr. Crum - You did call a meeting. You called everybody up. Nobody could be there. You called it the 22nd and the 23rd and still nobody could be there. You still called a meeting and like I said, and Brannon caught hell at the confirmations committee because of that and I don't think anyone would have known about that unless you told them.

Mr. Ailes - I told -- I informed you that we could not meet the 8, 9 and 10 - we could not meet your schedule because...

Dr. Crum - You did not inform me of anything, John, you told me the 21st we would have to meet...

Mr. Ailes - Because Professor McGinley was out of town.

Mr. George - I spoke with Pat McGinley and he said that he could be there at that meeting. I talked -- I talked with him five days before you called - he said he had no problem...

Mr. Ailes - Well, he told me, in fact, he was - he was in Arizona...

Mr. George - He was coming back that night and he could have been at all of those meetings....

Mr. Ailes - You talked to him after I did, if you remember, I've got to give a 10-days notice - minimum on this, and when I talked to him he was planning to go to Arizona to a conference of law school instructors and did not expect to get back that week.

Now, he may have changed his plans after that, but that is what he told me at the time. That's the reason I did not set the meeting up that day - that would have been a lot more convenient for me to have had that meeting in Morgantown at that particular time.

Mr. George - I also told Cherrie Kirk on two occasions and I told her I could not attend the 22nd and 23rd meetings; so you knew the majority could not be there and you scheduled the meeting anyways, to embarass us in front of the Legislature.

Mr. Ailes - Well, now you can put your interpretation on my actions -- your interpretation...

Dr. Crum - Well, if the three of us can't be there, John, you surely can't have a quorum can you - and I know the three members told you they could not be there and you called the meeting anyway.

Mr. George - Repeatedly.

Mr. Kirkpatrick - Let me ask a question that does not relate to any of this - we are on schedule to get minutes after every meeting, right?

Mr. Ailes - Yes.

Dr. Crum - That's what 4, 5, 6 and 7 said.

Mr. Kirkpatrick - Well, O. K. I think on the agenda we should have approval of minutes - as the first item of business. We are just trying to clean up some -- we are going to have a quarterly report on the budget, a quarterly report on the docket and a quarterly report on something else - that the docket, well, O. K., so Fran, you are going to send us the minutes after every meeting?

Fran Hunter - Yes, sir. Did everybody get a copy of the last minutes. Anybody have any changes or additions?

Mr. Ailes - Now, let me point out one thing. When we have a hearing in an

appeal case or the hearings for taking public comments on regulations there will not be minutes made of those because you will get a transcript from the court reporter which shows everything.

Dr. Crum - But, there should be minutes of any meeting afterward.

Mr. Ailes - All right, then - nobody is arguing about that. If there is other business to take care of, then we can put it in the notice; fine, we will give you minutes of that - no problem. I might point out to you that over the years, the reason that you have a problem over this minutes business, is the only time the Board ever met was to hold a hearing.

Mr. Kirkpatrick - One other thing, about Robinson getting this working task force...

Mr. Ailes - Well, I will consult with Robinson on that. It's better to sit down and talk with somebody.

Mr. Kirkpatrick - O. K. That's one way to get this thing onto dead center. I think the lawyers - I don't like to say this when they are absent, but they have done a pretty fair job in pushing about as far as they can on the regulations. I think that we ought to get some technical help in now, and as Ed said, we've got to bring the health people in now, all I'm saying is let's see if we can cooperate and move along or "goose" it along, but I think we should push the regulations as fast as we can. I know it's a terrible job and it's not only a weekend job or something.

Mr. Ailes - Karen alluded to it...

Mr. Kirkpatrick - My point is that Karen and her group are doing about all they can and we need some technical help...

Mr. Ailes - Karen alluded to it, but in the past the regulations have been prepared by the staff. The proposed regulations have been prepared by the staff. They have to come to the Board with them. We have set and discussed them and made some changes on the proposals, on the language and so forth, and I can give you the reason that there is no iron in our standards at the request of the old FWQA - because

of the fact the Federal law says that continuous States have to have agreed standards. O. K. at that time, Pennsylvania had a standard of iron of 7, Kentucky had a standard of iron of 5 - now, how in the hell can West Virginia get a standard that agrees with this contiguous state?

Dr. Crum - That was four years ago, John.

Mr. Ailes - That's right.

Dr. Crum - All right, so you don't have it in our State for 20 years ago, John...

Mr. Ailes - That's right, because, now Mr. Crum, if you would just listen a minute - you are a scientist and all this kind of stuff...

Dr. Crum - I have heard this same story 200 times, John.

Mr. Ailes - All right, what story - what am I going to say?

Dr. Crum - What are you going to say? Well, you are going to tell me the same thing that they told you - not to have an iron standard so you didn't have an iron standard.

Mr. Ailes - No, that's not what I was going to say - you guys...

Dr. Crum - All right.

Mr. Ailes - You guys have pulled assumptions here but what I was going to explain to you was that technical people explained to us that our regulations on toxic substances would cover the iron problem as well as the other problems which you mentioned earlier.

But that 96-hour medium tolerance limit requirement on toxic substances would not cover those things--when they are not toxic they are not detrimental--when they are in concentrations to be detrimental to the water quality, they are toxic so that having a standard which prohibits the introduction of any toxic material that is toxic under those conditions -- according to that test, you have a regulation to that effect.

You have a regulation of which blanketly covers all of those without specifically naming each one of them. Now, tell me if iron is a toxic substance. If it is a

toxic substance - depending on several other factors - there are certain conditions in which it is not toxic.

Mr. George - Now, I would now like go back and note as far as the corrections Ed made, I would like to have copies of those minutes sent to the Board members corrected before the next meeting so that we can adopt them as approved at the next meeting.

Mr. Ailes - Why don't you just correct your copy now?

Fran Hunter - All right, does anybody have any deletions, changes, additions, etc. to be made in the minutes of the March 3rd meeting of which you all have a copy, with the attachment I gave you to put onto it dated March 4th; you were all here on that date - we started a bit earlier.

Mr. Kirkpartick - I was just looking at the minutes of it - I was embarassed -- you included in there my tirade against - go ahead - I still agree with it.

Fran Hunter - Thank you.

Mr. Kirkpatrick - It's sort of embarrassing to read that Mr. Kirkpatrick bitched about...

Fran Hunter - Well, if no one has any additions, changes or deletions I would like someone to make a motion that they be approved.

Dr. Crum - I so move.

Mr. George - I second them.

Fran Hunter - Thank you.

Mr. Ailes - So ordered.

Fran Hunter - Now, I have another problem - these tapes of the last meeting of which you approved my minutes, I want to go ahead and use the tapes. We are in a financial bind. We have received notice from 'upstairs' to cut down on any purchasing or all purchasing as much as we can so that at the next meeting that we have, I want to use the tapes from the March 3rd meeting.

Dr. Crum - I move we adjourn.

Mr. George - I second it.

Mr. Kirkpatrick - Let me ask a question. When are we going to meet again? What's the plan for the next meeting?

Fran Hunter - Anytime after May 15th.

Mr. Kirkpatrick - We won't meet again until after May 15th? Won't there be the possibility of a hearing coming up?

Mr. George - That is the hearing.

Mr. Ailes - That is the hearing - the hearing on Borgman if they don't work it out will be set for sometime after the 15th day of May when I hear from counsel and when I can arrange for a date that suits everybody, which is an impossibility. I will - I might delegate that authority to Mr. George and let him set the date and let him find when he can have everybody - all the witnesses, the court reporter, all the lawyers, all the Board members - everybody else present.

Mr. George - I would just like to be asked.

Mr. Ailes - Sir? You are asked.

Mr. George - I've never been asked.

Mr. Ailes - You have never been asked?

Mr. George - I'll take that back. I've been asked on two occasions...

Mr. Kirkpatrick - I can't come on July the 5th or August the 9th because of two weddings.

Discussion was then about meeting on a Saturday and Mr. Ailes stated the point is that it is almost impossible to meet with having State employees to come in and it is not fair to State employees - to ask them to come and work on Saturday. They do not get paid overtime. The only thing they can do is use that day for comp. time.

Mr. George - Dennis said they would work on Saturday in an appeal hearing if we would want them to.

Mr. Ailes - Yes, but it is something I would prefer to avoid out of courtesy to them.

I am remaining as Chairman of this Board because I decline to resign but I

hope that I can count on you for at least some cooperation.

Respectfully submitted,

your secretary

NOTE - when you see ... it means unintelligible.