



STATE OF WEST VIRGINIA
STATE WATER RESOURCES BOARD

1205 Greenbrier Street
Charleston, West Virginia 25311

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WILLIAM PLASS
21 Grandview Drive
Princeton, WV

FRANCES E. HUNTER
Board Secretary

February 4, 1982

WATER RESOURCES BOARD TO MEET

The State Water Resources Board has scheduled a meeting for:

February 16, 1982 - 9:00 a. m. to hear Appeals No. 134 and
135 - Eastern Associated Coal Corp. vs
Chief, Division of Water Resources, State
Department of Natural Resources

1:00 p. m. to hear Appeal No. 150 Borg-
Warner Chemicals, Inc. vs Chief, Division
of Water Resources, State Department of
Natural Resources

Hearings to be held in conference room located at 1205 Greenbrier
Street, Charleston, WV 25311.

Also, the Board will hear any other Board business deemed necessary
at this time.

The meeting is being held pursuant to Chapter 6 Article 9A of the
Code of West Virginia, 1931, as amended. The meeting is open to the
public. Seating capacity of the conference room is 30.

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SECY. OF STATE

WATER RESOURCES BOARD

Tentative Agenda

February 16, 1982

- 9:00 a. m. - Eastern Associated Coal Corp. Appeals No. 134 & 135
Homer Speaker, Asst. Attorney General - *resolved*
~~BORG-WARNER~~ - APPEAL No. 106 - *resolved*
Discussion - Larry George's letter re: New River Company
" Rick Webb Appeal No. 143 - *cont 23 march*
- 11:00 a. m. - Borg-Warner Chemicals, Inc. Appeal No. 150
Karen G. Watson, Asst. Attorney General - *cont'd until 3 march 9 a.m.*
Freedom of Information Regulations - *agreed to accept*
pauper's oath
NPDES Regulations (Amendments/Revisions)
- lunch
- 1:30 p. m. Meet with Coal Association

Board meeting February 16, 1982 - 1205 Greenbrier Street, Charleston, WV.

Members present: Mr. John G. Ailes, Mr. Larry George, Dr. Donald Brannon and Mr. William Plass. Member absent: Mr. Forrest H. Kirkpatrick.

Homer Speaker, Assistant Attorney General, appeared before the Board and stated that he and Mr. Gordon Ikner, Attorney for Eastern Associated Coal Company had reached an agreement and an Order will be sent for his signature soon. Order to be entered on this date (Board in agreement Secretary to sign).

Discussion was then held on House Bill 1462 - Legislative Rule Making Review Committee.

Borg Warner Appeal No. 106 was resolved and an Order entered dismissing it on this date. Randy Sovic of the Industrial Section appeared and gave the Board members a review of the agreement reached between the Division and the Company.

Discussion was held on letter received by each Board member from Larry George on reopening the New River case. Letter attached along with copy of transcribed tape of this part of the meeting. This was requested by the Attorney General's Office - case was heard before Federal Judge Knapp on March 12, 1982 - Karen Watson to advise when she hears decision.

The Rick Webb Appeal 143 was briefly discussed but no date was set to decide case.

The Freedom of Information regs were a topic of discussion and the division's I & E representative, Dianna Messinger, is to come up with a cost figure to reproduce one page and the regulations to be rewritten to identify factors in setting a fixed cost.

In the afternoon the Board met with members of the Division, Attorney General's Office and Coal Association and the WV Surface Mine & Reclamation Association on problems incurred in the new water quality standards.

CHECK LIST CLASSIFICATION OF RECEIVING STREAM

I. Water Use Categories

Category with the most stringent criteria shall determine water quality standards.

B1 - Water Supply Public - Section 6-B1 (page 10)

Specific criteria for _____ only.

C1 - Propagation and Maintenance of Fish and Aquatic Life - Section 6

(page 10) - All waters not designated as trout waters and all criteria except _____.

C2 - Trout Waters - Section 6 (page 10) and Section 2(k) (page 4) -

All criteria except _____.

II. Exceptions

Natural Conditions - Section 4(b)(1) page 6 and Section 7(e) page 11.

Wet weather streams - Section 7(c) page 11.

Mixing zones - Section 7(d) page 11 and Section 5 pages 7 and 8.

7 Q 10 or lower flows - Section 7(b) page 11.

III. Variances

Irretrievable person induced conditions - Section 4(b)(2) page 6.



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February 9, 1982

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FRANCES E. HUNTER
Board Secretary

Mr. John C. Ailes
Dr. Donald G. Brannon
Mr. Forrest H. Kirtpatrick
Mr. William Plass
Members of the State Water
Resources Board
Charleston, W.Va.

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WATER RESOURCES BOARD

RE: Appeal No. 104, The New River Company

Gentlemen:

I am writing to request your consideration for re-opening the Board's decision of July 31, 1979 in The New River Company v. Chief, Division of Water Resources, Appeal No. 104, Case No. 284 for the reasons which will follow.

As you may recall, The New River Company filed an appeal in 1976 of a Division order denying a water pollution control permit for the abandonment of the Company's Cranberry Mine located between Mount Hope and Beckley. The Cranberry Mine was one of five individual mines located in the "Sewell" coal seam which were interconnected into a single complex to provide for the efficient drainage of groundwater from the mines. The first of the five mines was opened in 1903 and the last operating mine, the subject Cranberry Mine, was closed in 1958.

All five mines have a common discharge into Dunloup Creek from the abandoned "Price Hill Shaft", located approximately one mile south of Mount Hope, which fluctuates between 2.8 and 10.0 million gallons per day (mgd) and consists of alkaline, iron saturated water. From the record, it appears this condition has existed since the 1930's when the five mines were interconnected to facilitate drainage.

In 1966, the Company re-opened a portion of the Cranberry Mine and recovered 1.6 million tons of coal by removal of the supporting pillars, an operation completed in 1973. In 1969,

the State Water Pollution Control Act was enacted requiring a permit to abandon a mine and treatment of any permanent discharge. The New River Company applied for such a permit, encompassing its "pillar" operation of 1966-73, which was denied by the Division on the grounds that the Company must take responsibility for the entire discharge of all five mines from the Price Hill Shaft.

After the appeal was argued, the Board entered the stated order upholding the Division's permit denial and effectively compelling The New River Company take responsibility for permanent treatment of the Price Hill discharge.

Testimony at the hearing presented four alternative chemical and/or mechanical treatment proposals for this discharge which, considering construction and operating costs, represented a capitalized present value of between approximately 5.6 and 12.0 million dollars (Based on 1979 dollars, 10% interest per annum).

When the Board met to reach a decision in this matter, we acted on the legal advice that the Board had no discretion to consider the appeal on its merits, but instead, was required by law to find in favor of the Division of Water Resources and uphold the order denying the permit to abandon the Cranberry Mine. The entire Board relied on this legal advice in reaching a unanimous decision for the state and did not consider the evidence presented at the hearing in this appeal or attempt to make a decision upon the merits of the case.

I have recently reviewed this matter at length and it is my belief that our agency did have the statutory authority to consider this appeal on its merits and enter the order we found to be appropriate and just. My reading of the statute is that we were not required by law to find for the state and that in so doing the Board committed an error of law in this appeal. The relevant statutory provisions are W.Va. Code 20-5A-7(b) and 20-5A-15(g).

For the reasons stated above, I request the Board explore the following: 1) whether we had the statutory authority to decide this appeal on the merits, and 2) whether the Board can lawfully set-aside its order of July 31, 1979 and re-open this appeal to reach a decision on the merits.

Due to litigation in both state and federal courts, the Board's order has not been implemented and, therefore, we are provided with an opportunity to correct this error.

The state has prevailed in all such appeals to date which

have been based primarily on constitutional grounds. The error which I have identified has not been litigated in these appeals because the Board's order of July 31, 1979 does not indicate that we decided this appeal on the basis that the statute required a decision for the state without considering the merits of the case.

As I suggested in 1979, it appears a just manner in which to resolve this appeal would be to require treatment by the Company on a "waste load allocation" basis, i.e., they assume responsibility for treating that portion of the Price Hill discharge which can be reasonably attributed to the mining operations for which the permit application was filed, those of 1966-73 during the pillar recovery operation.

Such a decision would be consistent with public policy and the requirements of state law, including the above cited provisions, and would require the same responsibilities for environmental protection of The New River Company as are required for all other coal mining operations in West Virginia.

I hope that we will have an opportunity to discuss this matter at next week's Board meeting and appreciate your consideration.

Very truly yours,

Larry W. George

Larry W. George
Board Member

✓ cc: Frances Hunter
WRB Secretary

Transcript of the discussion held at 1205 Greenbrier Street, Charleston, West Virginia, on February 16, 1982 regarding letter send to Board from Board member Larry George (copy of subject letter attached). Board members present at this time were: Mr. John C. Ailes, Dr. Donald Brannon, Mr. Larry George and Mr. William Plass. Member absent - Mr. Forrest H. Kirkpatrick.

Mr. Ailes: O. K. Larry, you've got the floor on your letter you sent us...

Mr. George: New River.

Mr. Ailes: On New River.

Mr. George: It's a long story, you two have got, Don, you weren't involved in the New River...

Dr. Brannon: (replied in the negative).

Mr. George: I didn't think so. Well, unless you really want to hear it. I don't think I'll go through a long story of the New River Coal Company.

Mr. Ailes: Well, I just - let me ask you this, do you have these - have you seen these (holds up papers).

Mr. George: What do you have...I can't...

Mr. Ailes: This is the appeal document for ...

Mr. George: (replied "no").

Mr. Ailes: For the appeal from the first appeal to the Supreme Court from the Supreme Court of Appeals of West Virginia.

Mr. George: No.

Mr. Ailes: And this (holding it up) is the State's answer to that.

Mr. George: No, no, I have not seen that.

Mr. Ailes: Will Sullivan sent me these and then in addition to that, after the Supreme Court refused to review, he then brought suit in Federal Court.

Mr. George: Right...and so he's in Circuit Court now?

Mr. Ailes: He's in Federal District Court now...

Mr. George: Okay.

Mr. Ailes: And I don't know whether they...what the status of that is now, whether they granted a temporary injunction or what.

Dr. Brannon: Uh, hum.

Mr. George: I've got a copy of the pleadings here but that's...

Mr. Ailes: Have you got a copy of the Federal Court pleadings?

Mr. George: Yes. Federal pleadings. I don't have the State pleadings.

Mr. Ailes: Well, this...all this is the document that goes to the Supreme Court asking them to hear it.

Mr. George: Okay.

Mr. Ailes: And this is the State's reply to that.

Mr. George: Okay.

Mr. Ailes: And in this, incidently, it lists the... as Appendix B, the Findings of Fact and Conclusions of Law which the Board arrived at so there's a quick reference to the method. I can give you - probably as quick as you can that... that New River situation down there - it goes back until 1906?

Mr. George: 1903.

Mr. Ailes: Somewhere way back in...

Mr. George: Yes.

Mr. Ailes: There's a seam of coal and I can't remember the kind of coal it is now.

Mr. George: Sewell.

Mr. Ailes: Sewell coal and there are five mines in that Sewell Coal and they were at various times opened by various people but they all eventually came under the ownership of the New River Coal Company which may have been formed to own the, I do not know, but the...that...they are all inter-connected. The upper mine is Mabscott, if I remember right and then there are two Sprage Mines...

Mr. George: Right.

Mr. Ailes: Sprage No. 1 and 2 and then there's the Cranberry Mine and finally the Price Hill Mine and the seam dips from Mabscott down to Price Hill.

Mr. Plass: Uh huh.

Mr. Ailes: It's about 15 miles long from the upper end to Price Hill.

Mr. George: It's hugh - the complex.

Mr. Ailes: It extends all the way from Beckley down near to what is it, Oak Hill?

Mr. George: Mt. Hope.

Mr. Ailes: Mt. Hope, almost all the way--within a mile of Mt. Hope.

Dr. Brannon: Then it continues clear on down this side of Fayetteville.

Mr. Ailes: Well, the seam does, but this complex of mines -- all are inter-connected and when they mined them

they deliberately -- there is one area in there where they bypassed one of the Sprague mines and dug a tunnel from Mabscott straight under Sprague No. 2 just as a drainage tunnel and where they are all inter-connected for the purpose of draining and I think that the history was that they went into Price Hill first and gradually worked up.

Dr. Brannon: (agrees).

Mr. Ailes: But different openings and the result has been that the drainage has gotten down to the point where Price Hill Mine is completely flooded and about half of Cranberry is flooded and the...I have never seen an estimate of how much water is in there. However, the water comes up Price Hill shaft a vertical distance of 164 feet and comes out of the ground and when you see that down there (because the Board went down and viewed it) and when you see it, it jumps into the air about 2 feet and comes roaring down off that thing about 8 - 10 million gallons a day, which is the flow that is coming from that thing. That's the physical situation...

Mr. George: What happened...

Mr. Ailes: The way our case came up was that New River went back in in the late '60's.

Mr. George: Yes, 1966.

Mr. Ailes: To Cranberry, reopened Cranberry and went in and pulled the pillars and only incidentally did some pumping but the only purpose of that pumping was simply to furnish water to their prep plant. They weren't trying to pump the mine and they only pulled the pillars in the part that was not flooded, but even at that, they got about 1 1/2 million tons of coal out of that thing and then after they completed the

pulling the pillars and they pulled everything out of the mine and by then it was up to the middle '70's and in the meantime, the statute which requires a permit to abandon a mine had been adopted.

Mr. Plass: Ah huh.

Mr. Ailes: It (statute) was in existence at the time they went back down in to the pillars but it was passed while they were working in there and when they got ready to finish that up, they became good citizens and came in and got themselves in trouble by asking for a permit to abandon and in their application as I recall it now, they proposed, well they admitted that the drainage from Cranberry was coming down into Price Hill and was coming out that one area - that one place where it is coming out and they applied for a permit to treat or a permit to let the water come out of there with the idea of some kind of... I don't recall it...see there were two cases...

Mr. George: Yes, right.

Mr. Ailes: I don't recall the first one...the details of what their permit said in that one. The Board, and I don't think you were on the Board then (meaning Mr. George) when the first one was decided.

Mr. George: Yes, right.

Mr. Ailes: The first case was decided in favor of the Chief. The Chief denied the permit and the Board (and that was the second time when we went down there)...

Mr. George: No, I had been down there. You all went before.

Mr. Ailes: You didn't go with the Board?

Mr. George: No. But I've been there.

Mr. Ailes: Well, okay, the Board went down once as part of the hearing and went down to look at the situation down there. Anyway, we (Board) sustained the Chief and New River did not appeal that as I recall (first Appeal No. 86) but they did come back very shortly with another application and it was the second application which was again turned down and the second application contained the building of the dams in the creek as their method of treatment and it was again turned down by the Chief and the Board again sustained the Chief in the thing and that's the one (Appeal No. 104) which was appealed to the Circuit Court of Kanawha County and Judge McHugh, wasn't it, wrote the opinion...

Mr. George: Right, right.

Mr. Ailes: Judge McHugh wrote the opinion and sustained the action of the Board and the Supreme Court of Appeals refused to review it and that's the one then that was appealed then to the Supreme Court of the United States which refused to review it and after that refusal came down then, Will Sullivan, who is attorney for New River, brought this action before the... in the Federal District Court down here and it calls for a ... he asked for a temporary injunction and relief and I don't know what the status of the temporary injunction is and that substantially is the history of that thing, isn't it Larry?

Mr. George: That's it - that's the whole...

Dr. Brannon: My question is, if the Supreme Court, the United States Supreme Court refused to hear it, how could he go back to a District Court?

Mr. Ailes: Well, he went, he brought a Federal suit. The other was a State suit.

Dr. Brannon: Yes.

Mr. Ailes: So, then he tries to go Federal.

Mr. George: You have to appeal from a State Supreme Court directly to the United States Supreme Court, see...

Mr. Ailes: That's the only place you can appeal a decision of a State court is to the United States Supreme Court and it's damn hard to get them to review it, obviously, because they turned this one down. They did not review it which is the same thing as sustaining the Supreme Court of the State which is the ... and when they refuse to review that's the same thing as sustaining the Circuit Court...Judge McHugh...

Dr. Brannon: I understand that, but why are they going back to Federal Court?

Mr. George: That's their other option - to go back and start all over - their option...

Mr. Ailes: They start all over again in Federal Court and they ask Federal court to enjoin the execution of our ORDER and the Chief's ORDER for reasons stated. Here's a copy of the pleadings if you want to read it.

Dr. Brannon: Okay.

Mr. Ailes: I dont know what the status of that right now.

Mr. George: I don't either. I heard that, or I thought I'd heard or read that it had gone to Circuit Court and had been denied in Federal - in District Court.

Mrs. Hunter: That's what I heard, too.

Mr. Ailes: It could be. I don't know.

Mrs. Hunter: I can check with Karen (Watson).

Mr. George: I don't know - this was filed in September,

that's awfully fast. Anyways, this is my concern as I recall, when we sat down to decide that case, we pretty much proceeded on the assumption that we had no discretion, that under the law we were required to find for the State and to compel the New River Company to treat that discharge. Now, because of all the publicity this has gotten in the last 6 weeks there is an attempt to get them some relief through the Legislature which I assume is dismal as no bill has been introduced to do so. I went back and started reading through all this and it has become my belief that we did have the discretion to grant any degree of relief to the New River Company on two grounds and I cited the statutory support for that in the letter but I think as I suggested in the letter here, that a fair way to have resolved that would have been to make them treat the additional discharge caused by their mining operation between '66 and '73. The reason I think that is lawful is because of the language in 20 - 5A - 7(b) which I will get here in a moment...let's see...here in the new Red Book (meaning LAWS DEPARTMENT OF NATURAL RESOURCES STATE OF WEST VIRGINIA 1981) on page 117, the third line is the critical line. It says..."the departments permit shall be issued upon such reasonable terms and conditions as the Chief may direct if (1)"... and it goes on to say..."all discharges or releases, etc. etc. or the effluent therefrom, resulting from the activity or activities for which the application for a permit was made"... I think that's the critical language. The activity for which this permit was submitted was the activity of the pillar recovery operation not for a half-century of mining from 1903 to the early '50's and although that issue was never raised it was never...the case was never argued in

the sense that we should only be held responsible for the effluent from the pillar recovery operation. I think that the Board, if it had wanted to, could have decided for a portion of the discharge to the New River Company, saying, okay, we decided that although the ^{pillar} recovery operation added an additional 10% to that discharge and therefore go back and take care of that additional 10%. Another alternative would have been had the Board not wanted to sit down and try and determine, you know, 10%, 15%, 20% - whatever - would have been to remand it to the Chief and say, okay, you have the technical expertise you determine what the incremental increase in the discharge is and then have them go back and treat that in their abandonment permit. So, I think that idea bounced around at the time two years ago, but it was never really developed because we proceeded pretty much on the belief that we did not have the, you know, any discretion in this matter. So, that's the reason I sent this letter. I realize that it is sort of an awkward situation. I don't know the answer to the really critical question which is, can we reopen a Board decision?

Mr. Ailes: I was going to say...we got that...I'm not sure that we can on our own initiative. I'm not sure, I don't know.

Mr. George: That's the second issue...that's right. It's a real problem. It's not unheard of. It's done in several administrative bodies on Federal level. My cursory review has found no legal authority on the State level. Our State Administrative Law is not very well developed compared to the Federal Administrative Law system. So, it's an open question at best as to whether we could actually reopen a

decision. But, you know, the first decision is ... is this something we even want to consider and then we'll worry about the technical and legal aspects about how going about doing it. So, you know, that's pretty much an outline of what my concern is.

Mr. Ailes: I'm interested in one statement that you make in the letter...you just made it verbally, that we were given the impression that we didn't have any choice.

Mr. George: Well, at the time, as I recall, I thought you made a statement to the extent that we were pretty much hemmed in by the statute and by our own regulations that, you know, that we didn't have much choice in this whole matter but to find for the State.

Mr. Ailes: The only thing I can recall saying in that nature, Larry, is that and we put it in the ORDER, I think - the ORDER says and I'm reading the very end of it..." the appellant shall submit an application to undertake the above remedial action to the Division of Water Resources within 30 days from the date of this ORDER. The application shall not contain any proposal for treatment which requires any method of instream treatment.

Mr. George: Right.

Mr. Ailes: The only legal discussion that I can recall had to do with that and there is no provision in our law which permits instream treatment. In fact, the whole interpretation of our laws prohibits instream treatment - everything else not only common places but permits instream treatment but our law doesn't.

Mr. George: Well, maybe that was it.

Mr. Ailes: I grant you that the Reclamation Laws and the Surface Mine Act and Federal laws and...

Mr. George: Okay, I agree. That's correct.

Mr. Ailes: That was the only legal thing I ever remember saying.

Dr. Brannon: I disagree with your philosophy, Larry, if they only mined out 10% of the cotten picking water is still going through --- that general area and they went back in that whole mine complex and they went back in and got some coal, to me then the statute provides that the whole mine Complex because the drainage systems are totally...are all inter-related and there is no way you are going to tell where that water comes from, and besides if you treat 10% of it you still got 90% of it going down...out.

Mr. George: That's right and I think that all you can say that's one of the legacies of West Virginia's coal mining past, but...

Mr. Ailes: But treating even 20% of that is not going to help that situation a damn bit down there.

Dr. Brannon: Yes, and ah...

Mr. Ailes: I mean...you take your 10 million gallons a day. You're still going to have 8 million gallons of bad water.

Dr. Brannon: Yes, isn't it, if they go back in and mine, philosophically, to me, and the water from that whole complex, and if they go in you can treat that as one mine alright...the whole cotten picking thing.

Mr. Ailes: I'd have to go back and look at all of the ...at the whole case but my recollection is that they never

even requested and I don't ever recall it discussed that they would only have to treat a proportion of it.

Mr. George: They never raised that issue?

Mr. Ailes: They evaded it flat out...

Dr. Brannon: They never raised the issue themselves?

Mr. Ailes: They admitted they...evaded flat out and their whole evidence went, to the fact that you couldn't treat the whole amount, I mean, they didn't say we want to do only our part.

Mr. George: Yeah, they...

Mr. Ailes: They had old Dr. Erkin Esmer sitting in here and I was trying to understand what he was saying for 2 days telling us why they couldn't do it.

Mr. George: Yeah, I remember Esmer.

Mr. Ailes: And Charlie Holland sitting over there saying the hell they can't - I can show them how to do it.

Dr. Brannon: Well, the...

Mr. George: Well, there...okay, I agree. There also is an important policy question involved, maybe that's really... is, in the future there is probably going to be situations spring up where companies will want to go in and conduct a similar recovery operation which have similar serious iron or acid discharge problems and I think you're going to find yourself in a situation where companies will be discouraged from mining their reserves as they do not want to inherit this problem which, who knows, may have been there how many years. Do you see what I am saying? There isn't a whole lot that's going to be mined--if companies are forced...

Mr. Plass: Yes.

Mr. George: To treat historic legacies from a half-century ago...

Dr. Brannon: Well, yes. By the same token, Larry, is treating it ever going to clean it up?

Mr. George: Well, I think, what it comes down to in theory, is that you're going to have to say this is something not just left by individual companies but by the entire industry of the State and we have an abandoned mine tax on coal (15¢) deep mined; (35¢) surface mined and it may take a long time to get around to it but the proper way to deal with problems like this is to allow the abandoned mines fund to pay cleaning up these, you know, these legacies that have been left to us. For a policy sense that's what I think is fair. I don't think you can drop situations where, like this, I don't think you should drop into the lap of individual companies.

Mr. Ailes: Okay, here we go back to the "Ailes Committee".

Dr. Brannon: The "Ailes Committee - that's what I was thinking...

Mr. George: Yes.

Mr. Ailes: This was the basis that the "Ailes Committee" not New River, but the "Ailes Committee" problem that we studied was what are we going to do with the big mines which are operating today and maybe many of them will be operating for 50 years - they anticipate and as long as they are operating we have no problem because they are treating their water as it comes out and theoretically, they are doing an adequate job in treating it and as John Hall says, the only thing they're

doing is that one of these days there is going to be so many sulfates in these streams that you won't dare drink them because it will be like drinking epsom salts but other than that they are doing a successful job of treating but what happens when the 50th year rolls around and they cease operations and that water isn't going to stop?

Mr. George: Uh, hum.

Mr. Ailes: And the state of the art today is you still cannot seal a very big mine in such a way as to prevent a discharge. Now, obviously, you are going to have to treat it and what we went into in that thing (Ailes Committee) was looking into that...first that part of the problem was the idea that it could be expanded then to go back to pick up New River and other places like that. There was a tremendous amount of work done in that..Pat McGinley and Al Neeley (that's where I got to know them) at the Law School were "Ailes Committee" members. They had about 8 law students who they worked into their classes and got them class credits for working with us and they did research for us - legal research on constitutionality and what kind of statutes would be necessary to set up either through the West Virginia Water Development Authority or some other device a method of creating an agency if we had to create another one to take over and operate - own and operate these treatment plants and operate them indefinitely and maintain them and renew them as needed, and so forth. We had, I can't remember those names now, like you can Fran, who was the vice-president of Pittston who was our head of the economic group?

Mrs. Hunter: The Finance Committee - Ray Williams.

Mr. Ailes: Ray Williams who was Assistant Vice-President of the Pittston Group for finance was chairman of our Finance Committee and they actually worked out the finances on this thing. We had a Technical Committee which consisted of Paul Ware as Chairman and people volunteered or we assigned people to these committees and then they elected their chairmen. Karen (Watson) was chairman of the Legal Committee and Paul Ware was chairman of the Technical Committee. The Technical Committee surveyed the mining industry in the State with a questionnaire and they got a very good response their second try at it - the first try like most questionnaires, they didn't get an answer, but when they made the effort to explain to them what it was about they got the Coal Association and so forth explaining it, they got a good response that gave us some idea of the magnitude of the problem and what might be anticipated and we had that worked out to the point that they had figured out a special tax or assessment of 70¢ a ton would finance it, would create a fund that would in '71-72-73..

Mrs. Hunter: I'm not sure, but I have it down...

Mr. Ailes: The early '70's we came up with this...

Mrs. Hunter: It took nearly 2 years.

Mr. Ailes: They came up with the idea of 70¢ a ton would create a fund and the West Virginia Water Development Authority could handle it that the big Consol mine or Island Creek mine when they finished mining out could simply turn over to the Water Development Authority the treatment plant and they could pick it up as part of their property and they could either operate it themselves or they could lease it out to somebody and they even talked about they might even be able

to set up a regional treatment plant that could bring in the effluent from 4 or 5 mines up the hollow all into one treatment and do this with this fund and the coal industry was bitching a little bit about the size of that fund but the thing that killed the whole deal was the Surface Mine Act which initially called for a bonding...

Mr. George: uh hum.

Mr. Ailes: Which would take care of this and they initially set the bond premium at 25¢ a thousand gallons of water. The guy from Consol up in Morgantown whipped his calculator out and he turned kind of pale, gripped his calculator - made a few numbers - looked up at me and said -- that will cost Consol in Monongalia County alone \$3 million dollars a day for the water we are treating. Consol is treating a tremendous amount of water up there but they are reusing or recycling an awfully lot of it. They pump it out and treat it and run it out into a pond and then they have a pump on a float on top of the pond taking the clear water off the top of the pond and pumping it back down into the mines. They use it for the foggers on the mine face to keep explosions down. I don't know how many gallons they figure they use in that day. That's a pretty good idea of how much water they are moving each day and that stuff eventually -- that's going to be no problem on West of the Monon River because the Pittsburgh seam and all of those coal seams over there all dip to the South and West. Three miles West of the river West of Fairmont they are 800 feet down and it outcrops at Fairmont. It dips that sharp, so what they are doing is what is called protective pumping. They are just pumping the mine to keep it from flooding and when they

have mined it out they can just pull the pumps out and let it fill up as they can never fill up to the river. It's actually above the river level and that problem isn't going to exist when they get that all mined out, but we've got plenty of other drift mines that do -- that's the answer to it but it stopped as I said because of OSM. You see, the Surface Mine Act says not only the surface mine itself but the surface effects of deep mining to include water which is a...Congress absolutely conflicting with all of the EPA's Acts - the Clean Water Act.

Mr. Plass and Mr. George (agreeing)

Mr. Ailes: And it's still going to be years before that's straightened out to who's responsible really.

Mr. George: Well, I think the only thing I'd like to ask I think you can draw a distinction between mines that have opened since 1969 when the Act going into effect but when their financial managers sit down and start calculating the costs over the long-term of operating that mine they have the opportunity to figure in the cost of treatment and I think I have no qualms for holding them totally responsible financially but New River...

Mr. Ailes: I can see the New River situation and that kind of situation, a guy could say, hell no, we won't go in there - that amount of coal isn't worth it.

Mr. George: Yeah, as a matter of fact, the vice-president said if they had known that they were going to get stuck with this, they never would have reopened that mine.

Mr. Ailes: Well, they, of course, if they would of kept their mouths shut they never would have got stuck with it.

Mr. George: No body would have ever known.

Dr. Brannon: Well,

Mr. George: That that was their discharge.

Mr. Ailes: That puts them in the old position - a guy comes in and admits it - you cannot stand around and prove him wrong. They accepted the responsibility for it - even in their initial application...they never tried to distinguish it.

Dr. Brannon: Yes, but the courts have agreed with the original Board decision, Larry.

Mr. George: The courts have agreed on the constitutionality. See, we really didn't word our ORDER such as that, we said that we feel we don't have the discretion to provide any relief to the New River Company or to judge this on the merits.

Mr. Ailes: Well, here's our Conclusions of Law. There are 74 Findings of Fact.

Mr. George: Right.

Mr. Ailes: Reads "Upon consideration of the above findings of fact, the Water Resources Board makes the following conclusions of law:

1. That pursuant to West Virginia Code, Chapter 20, Article 5A, Section 5, Subsection b(6), the New River Company is required to obtain a permit for the treatment of the discharge from the Price Hill Shaft prior to abandoning the mine.

2. The discharge from the Cranberry Mine through the Price Hill Shaft is contributing the iron deposits to the waters of the State of West Virginia, which iron deposits violate Section 3.01(b) of the Administrative Regulations.

3. That the Chief acted reasonably and lawfully by

issuing the ORDER dated November 5, 1976, directed to the appellant.

THEREFORE, the ORDER of the Chief dated November 5, 1976, is hereby affirmed, with the following modifications, the appellant is directed to undertake immediate remedial action which is designed to treat the discharge at Price Hill Shaft to reduce the iron content to a level which will prevent further deposits in Dunloup Creek in violation of 3.01(b) of the Administrative Regulations of this Board.

The appellant shall submit an application to undertake the above remedial action to the Division of Water Resources within thirty (30) days of the date of this ORDER, and the application shall not contain any proposal for treatment which requires any method of instream treatment.

Mr. George: The cited statute, Section 5 subsection 6(b)(6) is the prohibition on opening, abandoning, reopening, operating any mine without a permit and I really don't think that's the place for...

Mr. Ailes: Its abandoning.

Mr. George: Yeah, it's abandoning. Why they say in which it says the permit to abandon would be applied for the effluent resulting therefrom the activity...

Mr. Ailes: Yes.

Mr. George: Or activities for which the application is made. I'll put it sort of on this basis. I think we, that we could have provided some relief for the New River Company. I think there's the possibility we could reopen this case some (could not make this out) research that's an open question.

So, it's up to you guys to decide what you want to do. If you decide you don't want to proceed with this then lets just consider this letter a descenting opinion or a belated...

Mr. Ailes: Second thought.

Mr. George: Second thought - belated descenting opinion.

Mr. Ailes: Well, my..I appreciate the problem you raised.

Mr. George: Um hum.

Mr. Ailes: Because I think it is a valid problem, a valid question - no question about that and its one we may have to face squarely one of these days as to how to allocate a discharge.

Mr. George: Yes, this is going to come back. This sort of problem that will come back.

Mr. Ailes: But, as far as this New River case is concerned, the, I don't like to establish the precedent of the Board reopening a case on its own motion unless it is -- there is some real obvious reason to do so.

Dr. Brannon: The company never brought it out did they?

Mr. Ailes: The company never raised this issue.

Mr. George: Not expressly, well, not explicitly. They kept saying, now look guys, this is all caused in the early part of the century - it was never expressed in the form that I expressed it but I mean all the essential elements of those thoughts was there. They proceeded on a different theory - they proceeded on the theory of let us build these

how many,

Mr. Ailes: A bunch of dams in the stream. That was the second proposal.

Mr. George: 10 dams - let us build these dams in the stream and have instream treatment and let us off the hook and we'll do something we don't think they said we don't have to do anything but we're going to be good guys and we'll offer to spend 50 thousand dollars at the time to build these dams. They just went off in a different direction.

Mr. Ailes: Well, they actually came in and said we can't do anything. That was Esmer's whole testimony was there was no way you can do this and they, in the second one, they did talk about the possibility of putting in settling ponds upstream.

Dr. Brannon: Well...

Mr. Ailes: And settling the water up there to be treated and bringing it back down.

Dr. Brannon: I was on the Board when the fellow from Huntington came in...

Mr. George: Olson. Gatty.

Dr. Brannon: Gatty. And I swear Larry, they didn't try anything down there that could work.

Mr. George: No, I was really disappointed.

Dr. Brannon: They didn't even have the ghost of a chance of it working that was the sickening part of that whole mess.

Mr. George: Well, you know I know Olson fairly well. I knew Gatty and they both have excellent reputations but they really bombed that one. Gatty has a world-wide reputation as

a mining engineer.

Mr. Ailes: He couldn't - he got off to a bad start and he couldn't recognize it or he couldn't admit it one...

Mr. George: I don't know what it was (could not distinguish here).

Mr. Ailes: See, in the original case, the whole thing was, their whole defense was - I mean their whole attitude in the whole case was this is impossible and here's Charlie Holland sitting on the Board who is no damn slouch as a mining engineer, saying the hell it is impossible - I can show them how to do it very simply.

Mr. George: Well, yes, if you're going to spend 10 or 12 million dollars I'm sure they will be allowed to...

Dr. Brannon & Mr. Ailes: No, Larry...

Dr. Brannon: It won't take that at all.

Mr. Ailes: No, they could put the same - they could put the same number of little dams right along side the stream.

Mr. George: Build a new stream.

Mr. Ailes: Build a stream for their own water down till they got the iron out of it then let it go into Dunloup Creek down at the lower end of their property - down where oh, what's his name - used to put the tile down there to show how much it would collect.

Mr. George: Yeah.- the ...

Mr. Ailes: There's enough room in there - their problem was and the thing that they were so reluctant about was that situation - there the iron would precipitate out in those little dams but they did not want to have to go in there to clean them out, which would have to be done periodically.

Dr. Brannon: Hum.

Mr. Plass: Right - would have to be done periodically.

Dr. Brannon: Let's see, there's one big asset coming out of that coal seam up there - the water is very alkaline.

Mr. Ailes: The pH is 8, isn't it?

Dr. Brannon: The pH is way up which means that all you'd have to do is possibly add another flocculent to the - to it then it's going to aerate for hydrogen peroxide, probably aerate...

Mr. Ailes: Well, what aeration they've got when we went down there it's about 100 yards from the Price Hill Shaft to where it goes over the bank.

Dr. Brannon: Un hum.

Mr. Ailes: And when it comes out of the shaft it's clear and when it goes over the bank it looks like blood going over the bank. Just that little stretch aerates it enough to complete the reaction and then it...

Dr. Brannon: I doubt that - and the reason I seriously doubt that is that over on Laurel Creek where they had the mine breakout at I had a couple of students on that and Esmer thought all the iron had reacted in the first hundred yards - I said no, the Department of Natural Resources Water Resources did go over and they took the iron in solution and the iron out of solution. I said it doesn't come out - out to 2 miles. Well, I missed it a couple hundred feet - it was 10,000 feet that it took for all of it to oxidize out.

Mr. Ailes: Yes. The deposits - the longest deposits they ever talked about if I remember that never got to Oak Hill.

Mr. George: Somewhere about three miles, four miles at the most - down to (could not distinguish).

Mr. Ailes: Sometimes and at other times, it's not there at all - it's way back up.

Mr. George: Yes, there's no public health hazard involved-it's just unsightly.

Mr. Ailes: But, it, but unfortunately, they put themselves in that problem and they came in and their application was for treating all of that mine water coming out of the Price Hill Shaft and that is sort of an estoppel for them to later come back and say, well, we only mean 1/10 of it. You know, when they have applied to treat the whole damn thing and then they come back in and say, wait a minute, we changed our mine, we decided we're only...

Dr. Brannon: Yeah.

Mr. Ailes: You know, we only are responsible for so much of this hell, their company was responsible for the whole thing but they might of, if they kept their mouth shut because they didn't change, actually, their pillaring - I think this is in their testimony - didn't change the amount of water appreciatively.

Mr. George: (agrees)

Mr. Ailes: It was already there. All they did in their pumping that they did while they were pulling the pillars had nothing to do with the water level in the mine or the water in the mine. All they pumped for was to use that as a water supply source for their prep plant.

Mr. Plass: Uh hum.

Mr. Ailes: For their processing of coal that came

out and as soon as finished pulling the pillars they, pulled the pumps and moved the prep plant out. So it wasn't any appreciable change, in fact, there's so damn much water down there that their 20 to 30 thousand gallons a day they were pumping for the prep plant never showed up. They couldn't tell - couldn't find the effect of it in the total flow.

Dr. Brannon: I fully agree that there needs to be some kind of a fund started for these abandoned mines.

Mr. Ailes: Yes, it might be worthwhile...

Mr. George: We've got one that could be used.

Mr. Ailes: We might ask the coal boys this afternoon what they think about that.

I, Frances E. Hunter, Secretary to the State Water Resources Board, do hereby certify that the foregoing is, to the best of my ability and skill, a true and accurate copy of the discussion had regarding letter sent to the Board from Board member Larry George (copy of subject letter attached) on February 16, 1982, at 1205 Greenbrier Street, Charleston, West Virginia.

Frances E. Hunter
Frances E. Hunter
Board Secretary