
Virginia Department of Mines, Minerals and Energy

Accident Investigation Report Surface Coal Mine Offsite Fatality August 20, 2004

Matt Mining Company, Inc.
CSMO Permit No. 1100877
A & G Coal Corporation
Strip No. 13 Mine
Mine Index No. 14595AA
Wise County, Virginia

December 17, 2004

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FOREWORD

In the early morning hours of August 20, 2004, the greatest tragedy that can befall a family happened to Dennis and Cindy Davidson of Inman, Virginia. Their three-year old son, Jeremy Kyle Davidson, was killed while sleeping in his bed. Jeremy was killed when a large rock crashed through his bedroom wall. The rock was dislodged during road reconstruction on a mining operation located above and behind the Davidson's residence. Jeremy's death has resonated throughout the coalfield causing all to grieve with the Davidson family.

The Department of Mines, Minerals and Energy staff wishes to express their sincere condolences and deepest regrets to Dennis, Cindy, and Zachary Davidson and to the rest of their families. Our prayers are that the Lord will give you His peace and comfort.

This report has been prepared in an effort to explain what happened that resulted in Jeremy's death. The report will discuss the Department's investigation findings as to the causes of the accident and failures that occurred leading to the rock being dislodged.

**ACCIDENT INVESTIGATION REPORT
SURFACE COAL MINE
OFFSITE FATALITY
MATT MINING CO., INC.
CSMO PERMIT NO. 1100877
A & G COAL CORPORATION
STRIP NO. 13 MINE
MINE INDEX NO. 14595AA**

INTRODUCTION

On August 20, 2004, shortly before 2:41 a.m., a fatality occurred as a result of a rock being dislodged or pushed out by road construction activities at the Matt Mining Company, Inc. (Matt Mining), CSMO Permit No. 1100877, A & G Coal Corporation (A & G), Strip No. 13 surface mine, Mine Index No. 14595AA. Jeremy Kyle Davidson, a three-year-old male child, was fatally injured when the rock penetrated the rear wall of the home where the child and his family resided.

The large rock, estimated at 1,000 pounds, was dislodged/pushed from an area adjacent to an existing mine access road that was being upgraded to a coal haulage road. The reconstruction work did not meet the primary road standards for a road being upgraded to haul coal. The road was also near the top of the steep slope directly above residences in the Inman community. The reconstruction work was not authorized by the company's surface mine permit No. 1100877. The rock rolled approximately 649 feet down a steep, wooded hillside and penetrated the rear exterior wall of the child's bedroom. After penetrating the exterior wall, the rock struck Jeremy's bed, fatally injuring him.

The Davidson home is located in the Inman community of Appalachia, Virginia, on State Route 160 and is identified as house No. 91 on the Water Supply Inventory Map dated September 28, 2001, submitted to the Department of Mines, Minerals and Energy (DMME) by Matt Mining. The Department of Mines, Minerals and Energy's Division of Mines (DM) and Division of Mined Land Reclamation (DMLR) were notified at 4:15 a.m. on August 20, 2004, and a joint investigation with the federal Mine Safety and Health Administration (MSHA) was initiated immediately. MSHA has independent regulatory authority in Virginia. While MSHA actively participated during the initial investigation and the interviews on August 21, 2004, MSHA did not assist in preparing this report.

The federal Office of Surface Mining Reclamation and Enforcement (OSM) has performed in an oversight role in Virginia since DMME was granted primacy in 1981 to administer the surface mining program in Virginia. OSM did not actively participate in the investigation or in the preparation of the report, however they did offer technical assistance and any other assistance needed by DMME. The OSM Big Stone Gap Field Office (BSGFO) was kept apprised of the DMME investigation progress and actions being taken. The DMLR enforcement actions along with this report were provided to the BSGFO for their ongoing oversight. Throughout the investigation DMME kept the BSGFO informed of developments and

progress being made, responded to questions, and provided aerial and on-the-ground photos for their review. DMME appreciates the assistance given by MSHA and the oversight review given by the BSGFO. The BSGFO typically performs oversight on a select number of sites, but due to the death of a child, they provided direct oversight and continue to do that for this investigation.

MINE PROFILE

Matt Mining, CSMO Permit No. 1100877, is a surface contour/area/auger mine located in part off of State Route 160 near the Inman community of Appalachia in Wise County, Virginia. The DMLR Permit No. 1100877, Strip No. 13 Mine, consists of three separate working areas-- Jobs 22, 22A, and 22B. An adjacent mining area is the A & G Looney Ridge Surface Mine No. 1, DMLR Permit No. 1101905. The permittee on 1100877 is Matt Mining and A & G is the contractor that actually conducts mining operations on the permit. This Matt Mining surface mine, hereinafter referred to as Strip No. 13, employs 135 personnel producing approximately 5,000 tons of raw coal per day, working two shifts in a 24-hour period, five days and often six days per week. The day shift works from 5:30 a.m. to 3:30 p.m. and the evening shift works from 4:00 p.m. to 3:30 a.m.

A & G Strip No. 13 employs two certified surface foremen, one each on the day and evening shifts. One job superintendent is employed to oversee all of the Strip No. 13 Mine. A general superintendent is employed to oversee all of A & G's surface operations. A & G also employs a full-time safety director and an in-house engineering department. A & G also employs several maintenance and support personnel assigned to perform maintenance work as needed on each shift on each of the three jobs.

Mining operations employ a benching method of overburden removal that utilizes highwall drilling machines, blasting, bulldozers, wheeled loaders, excavators, and off-road haulers to remove spoil and expose the various coal seams being mined. The surface of the coal is then cleaned in the pit, broken up and stockpiled in various pits, and loaded onto coal trucks using wheeled loaders.

Independent contractor companies primarily using eighteen-wheeled, tractor-trailer coal trucks then transport the coal to various load-out facilities. Most of the coal is hauled to the Airway Resources' load-out facility located on U. S. Route 23 Business near Appalachia, Virginia.

A & G is an independent, locally owned coal company with its main offices located in Wise, Virginia. The majority of A & G's employees come from the Wise County area. A & G received a mine license for this operation from the DM on July 20, 2000, and originally began mining operations off Route 68 West, two miles from Appalachia just above the Imboden community. The initial Strip No. 13 operation began with just a few employees and one loader spread of equipment and was identified as the No. 22 job.

Matt Mining is a part of what was once Fraley's, Incorporated, which contracted to conduct surface mining for Westmoreland Coal Company in the 1970s, 1980s and 1990s. The coal that was mined then and is being mined today is part of the Penn Virginia Resource Partners, L.P. (Penn Virginia) coal reserves in this area. When the A & G No. 22 job began, Matt Mining had only permitted 105.91 acres. As A & G began to expand operations, the Matt

Mining permitted area was increased through a series of acreage amendments to the current 2,066.50 acres. (See the map, Attachment # 1.)

The No. 22 job gradually increased in size, added an evening shift crew and more equipment, and began to mine toward the Lower Exeter community. Within a year, another job, No. 22A, was added to this mine and began mining operations on the Westmoreland Bullitt load-out refuse area site. The entrance to the No. 22A job is seven-tenths of a mile from Appalachia at the existing road leading to the former Bullitt refuse site. The No. 22A job began with two truck and loader spreads of mining equipment that were mining the Imboden and Kelly seams. Both seams had been deep mined during the 1920s. The No. 22 job gradually moved its operations toward the State Route 160 side of the mine and the company added another truck and loader spread of equipment, which became the No. 22B job. A & G then developed another access road into the operation from the Inman community side of the operation. The access road that was developed off State Route 160 West at Inman was a former haul road built by Fraley's during the 1980s used for access into Fraley's former Whitley Fork deep mine area. This access road extended to the other side of the permit and to State Route 68 in the Imboden community. This access road crosses through the center areas of the mine. It has been used as a service road for the Strip No. 13 operation. Eventually this access road was used as a coal haul road exiting on the Inman side of the mine site. This portion of the road exiting onto State Route 160 was designated as Haul Road C and classified as a primary road with designs included in the permit.

The No. 22A and No. 22B jobs are mining the Redwine, Wilson, Pinhook, Kelly, and Imboden coal seams while the No. 22 job is mining the Taggart and Taggart Marker coal seams. These various coal seams range in height from 12 to 84 inches.

The No. 22, No. 22A, and No. 22B jobs on the mine site currently utilize 68 pieces of equipment. The No. 22 job is comprised of one 992-G loader spread of equipment consisting of 18 pieces of equipment, including two D-11R carry bulldozers and one D-10R benching bulldozer. The No. 22B job, located on the Inman side of the mine, is comprised of one 994-F loader and truck spread of equipment consisting of 13 pieces of equipment, including three D-11R carry bulldozers and one D-10R benching bulldozer. The No. 22A job, located on the old Westmoreland Bullitt side of the operation, consists of one 992-G loader and truck spread and one 994-F loader and truck spread of equipment that includes 37 pieces of equipment, including five D-11R carry bulldozers and three D-10R benching bulldozers. Six highwall drills are used on the three jobs to provide sufficient blasted highwall material to keep the various loader spreads of equipment operating continuously on the two shifts. On a typical production shift, mining personnel will move approximately 85,000 cubic yards of material as they remove the coal overburden material to uncover coal from the various seams. Typical highwalls on these job sites range in height from 50 feet in places to as much as 300 feet for the Kelly and Imboden seams. The mine is approved for contour mining, area mining, and auger mining. There are no variances to the requirement that the approximate original contour be restored. The Kelly and Imboden seams located on this operation are unusual in that they were underground mined during the 1920s and 1930s and had not been surface mined before.

The latest A & G mining area began at the base of Black Mountain in Looney Creek, located off State Route 160. The new area was permitted by DMLR as Permit No. 1101905 and DM separately licensed the new operation as the Looney Ridge Surface Mine. A common service road has been built between the Strip No. 13 and the Looney Ridge Surface Mine to

accommodate moving equipment back and forth between the two mines. The same coal seams are mined on the Looney Ridge operation as are mined on the Strip No. 13 Mine. Twenty people are employed to work on the Looney Ridge Mine and utilize one 992-G loader and truck spread of equipment.

REVIEW OF MINE PERMITTING HISTORY

Matt Mining Permit No. 1100877 was issued on July 20, 1986. It was a 105.91-acre surface mine with a performance bond of \$103,500 posted by the operator, Mr. Christopher L. Fraley. Over the next 12-year period, only 27 acres of the permit were disturbed by mining operations. Since the year 2000 additional areas were added as listed below through acreage amendments, that required public notices. The public notices were four weeks of advertisements in local newspapers, which provided a period of public comment that ran from the first date of publication through 30 days after the last publication.

On September 1, 1998, A & G was added as a contractor to the permit.

On February 4, 2000, 904 acres were added to the permit for additional mining.

On October 15, 2001, 504 acres were added to the permit for additional mining.

On November 25, 2002, 759 acres were added to the permit for additional mining and reclamation of the Bullitt Refuse Impoundment. This revision also incorporated into the permit the area of the access road from the Redwine Seam mine pit to where the reconstruction work was being performed, including the area where the rock was dislodged and rolled down the hillside, causing the fatality that occurred on August 20, 2004.

There have also been some minor acreage deletions/relinquishments as part of these revisions. The current permit is 2,066 acres in size. The permit is incrementally bonded and currently has a performance bond of \$5,505,100.

The DMLR received comments regarding one revision. A citizen filed an objection to the October 15, 2001, revision that added 504 acres. The citizen requested an Informal Conference be held on the permit. The citizen did not appear for the conference but was allowed to submit written comments. By letter dated July 27, 2001, the individual provided comments relating to the proposed revision application. The comments are summarized below:

1. "The company has made ruin and waste to approximately one thousand acres of once well-forested and enjoyable land and streams. This area is no longer fit for anything, man or animal, and never will be again."
2. "The dust and mud (depending on the weather) is spread everywhere. ... This company has used toxic materials on their haul road which is deadly to animal and aquatic life. The company used this material knowing the potential harm it could do environmentally."

3. "The mountains being destroyed by this company will cause silt and other contaminants that will be very harmful to the environment to be carried by wind and water downwind and downstream."

In response to the concerns raised by the citizen, DMLR found in writing that:

1. There will be a temporary displacement of the existing populations of wildlife and vegetation during the coal removal phase of mining. However, the reclamation and revegetation plans provide effective measures to ensure the postmining land use is accomplished. As the vegetation and trees are re-established, the wildlife habitat will be used by a variety of species.
2. The DMLR Enforcement inspector will continue to monitor the entrance to the permit from State Route 68. Enforcement action will be taken whenever the company fails to properly maintain the haul road as required by the approved plans and regulations within the jurisdiction of the Division. Safety conditions of State Route 68 would fall under the jurisdiction of the Virginia State Police and the Virginia Department of Transportation. The company has submitted the material safety data sheet for the material used to control dust on the haul road. (A copy of the data sheet was previously provided to the citizen during a complaint investigation.)
3. This operation has a National Pollutant Discharge Elimination System Permit (No. 0080877) to discharge runoff from the disturbed areas through designed sediment/drainage control structures, which then would flow to the receiving streams. The permit has a set of technology-based effluent limitations that must be maintained for pH, iron, manganese, and total suspended solids. The Environmental Protection Agency (EPA) has assigned these effluent limitations to the coal industry. If the operator fails to meet the assigned effluent limitations, the Division will take enforcement action. Frequent inspections and a self-monitoring plan also help ensure that discharges from this operation are in compliance with applicable effluent limitations.

The concerns raised by the citizen were not related to the actions of A & G that resulted in the accident on August 20, 2004.

COMPLIANCE HISTORY – JANUARY 1, 2000, THROUGH AUGUST 20, 2004

DIVISION OF MINED LAND RECLAMATION COMPLIANCE HISTORY

The DMLR has issued 16 enforcement actions on permit No.1100877 since January 1, 2000, through August 20, 2004. There have been 15 Notices of Violation (NOVs) issued and one imminent danger to the public Cessation Order (CO) as follows:

- Five NOVs were issued for failure to submit required water monitoring reports;
- Three NOVs were issued for failure to adequately maintain the haul road;
- One NOV was issued for spoil down slope;

- One NOV was issued for failure to bond disturbed areas;
- One NOV was issued for disturbance off the permitted area;
- Two NOVs were issued for failure to distribute notices of blasting;
- One NOV was issued to repair damage to residence number 91 for disturbance off the permit area;
- One NOV was issued for destroyed perimeter markers; and
- One CO was issued for exceeding the permit in the area where the rock rolled off the hillside and resulted in the fatality.

The last two NOVs and the CO mentioned above were issued in response to the August 20 accident.

Additionally, one failure to abate Cessation Order was issued on September 22, 2004, for failing to comply with remedial measures for the NOV issued for permit markers.

There have been 54 citizen complaints from 23 different households registered on this operation since 2000 as follows:

- 28 of the 54 complaints were about mud being tracked onto the public road or dust;
- 24 of the 54 complaints were about blasting, vibration, and failure to submit notices of blasting to residents within a one-half mile radius of the proposed blasting areas;
- One complaint was about effluent limitation/water quality; and
- One complaint was for the fatality of the complainant's grandson.

Of the 54 complaints, 47 were registered prior to August 20, 2004, and seven were registered on or afterwards.

There were six enforcement actions (included in the total 15 NOVs and one CO enumerated above) issued as a result of the investigations of these 54 complaints.

This active mining operation has a required frequency of DMLR inspections of one complete (all performance standards must be inspected) and two partial (selected performance standards are inspected) per calendar quarter by DMLR. Since operations began in mid-2000, there have been 36 partial inspections and 18 complete inspections.

DIVISION OF MINES SAFETY COMPLIANCE HISTORY

The frequency of mine safety inspections is mandated for coal mines by the Coal Mine Safety Laws of Virginia. Section 45.1-161.81 requires that a surface coal mine be inspected not less frequently than once per year. Additional inspections shall be made when deemed appropriate by the Chief based on an evaluation of risk under the DM risk assessment program.

Since A & G Strip No. 13 was licensed on July 20, 2000, there have been four regular inspections and three spot inspections completed by assigned DM inspectors. In addition, there have been eleven other mine visits during the period, which included an initial five-day spot

inspection, one regular idle inspection, two walk and talk safety initiatives (winter alert), one walk and talk safety initiative (surface haulage), one Notice of Violation correction follow-up, one follow-up spot related to gas well and transmission pipeline safety, one follow-up spot related to a Virginia gas pipeline incident, one fire investigation involving a D-45 drill, and one follow-up spot to evaluate mine emergency preparedness.

The DM inspectors have issued 24 Notices of Violation to A & G Coal Corporation, Strip No. 13 Mine, from July 20, 2000, to August 19, 2004 as follows:

- 16 Notices of Violation were issued on equipment;
- One violation was issued on training due to an employee who was not certified as a surface general coal miner;
- Two violations were issued for failing to notify the DM before mining within 500 feet of a gas well;
- One violation was issued because the mine foreman failed to record pre-shift examinations for gas pipelines located within 500 feet of active workings;
- Two violations were issued on explosive magazines used for storage and distribution. One of the violations was issued for an unsuitable warning sign. The other violation was issued for combustible materials within 25 feet of a magazine;
- One violation was issued because the operator had not submitted a certified mine map showing where the Strip No. 13 Mine intersected old, underground mine works in the Imboden seam; and
- One violation was issued because a fire extinguisher was not provided for diesel water pumps being operated in the Imboden coal pit.

As part of investigation of the August 20, 2004, accident, an order of closure to secure the accident scene and a Notice of Violation for failure to establish and follow a ground control plan to ensure bank stability were issued.

ONSITE WORK -- AUGUST 19-20, 2004

On August 19, 2004, at 4:00 p.m., the evening shift crew began their shift by assembling at the area referred to as the lower parking lot. This parking area is where mining personnel are given directions on their work assignments and from where they depart enroute to their respective work locations. On this particular shift, Mr. Kenneth Stanley, evening shift surface foreman, was late arriving for work and Mr. Scottie Masters, dayshift surface foreman, assigned work duties to some of the evening shift crew.

Work assigned to the evening shift personnel included reworking the Redwine coal pit access road in order to haul coal the next morning. This access road had been severed approximately six to eight weeks earlier when the mining operation removed overburden material for a pit of coal in the Imboden seam located immediately adjacent to the lower parking lot.

This access road associated with the accident was originally constructed approximately twenty-one years earlier by Fraley's Incorporated as part of an Abandoned Mine Land (AML) project, the Inman Gob Pile No. 2 project. The coal refuse pile was located adjacent to State

Route 160 approximately one mile northwest of Appalachia in Inman. The refuse material was originally deposited near the site as a result of underground mining operations conducted by Virginia Iron, Coal and Coke Corporation. Mining began in the 1920s and was terminated in the 1930s. The material was upstream from and adjacent to the community of Inman.

In September of 1983 the Virginia Department of Conservation and Economic Development's DMLR, entered into a contract with the successful bidder, Fraley's, Incorporated, to remove the AML refuse pile and conduct reclamation operations in the area. The AML contract allowed the road to be left for Fraley's access to future mining operations.

In December of 1983 work began on a section of road leading from the coal refuse pile to the Coalbarb Energy, Inc. tipple site. This road was used to transport the coal refuse to be reprocessed.

On December 12, 1983, the DMLR office received a call from Gary Bush of the Inman Freewill Baptist Church (what is now the Looney Creek Memorial Baptist Church) stating that a rock had crashed through the back of the church. The rock had been dislodged from the road construction site located above the church. During construction of the switchback portion of the road, the contractor allowed material to be placed on the outslope portion of the road. As equipment worked in the area, the rock left the site, rolled down the slope, and damaged the church. The contractor repaired the damage. This 1983 accident occurred in the vicinity of the area where the August 20, 2004, accident occurred.

On September 23, 1985, the DMLR completed its final inspection of the AML contract. The inspection report declared the project complete.

The access road, which was left under the AML contract, was approved in the Matt Mining permit as an internal access road only. The Matt Mining permit contains the following two statements relative to this road in Section 10.1, General Operation Plan: (1) "Internal roads will be upgraded to provide adequate access to the mining area." (2) "Spoil will be hauled on internal haulroads of the strip mine area and to the refuse disposal area." The permit did not propose to haul coal on the "internal roads" (See Attachment # 2). The access road had been used by A & G mining personnel while traveling in maintenance and support vehicles and while moving mining equipment between active areas of the mine. Coal haulage, which requires larger trucks such as eighteen-wheeled, tractor-trailer coal trucks, associated with A & G's Strip No. 13 Mine had never occurred on this access road.

According to Mr. Ken Stanley, Mr. Greg Maggard, Job Superintendent, had instructed Mr. Scotty Masters to prepare this roadway for hauling coal on the next day shift and Mr. Masters had relayed these instructions on to Mr. Stanley. In order to prepare the road for coal haulage, it was necessary for the switchback curve area to be widened to allow the eighteen-wheeled, tractor-trailer coal trucks to traverse the road. Other work instructions provided to evening shift personnel included cleaning, breaking, and preparing coal in the Redwine pit for hauling by tractor-trailer coal trucks on the next day shift. Mr. Stanley had instructed Mr. Kelly Robinson, the operator of the Caterpillar D-10R bulldozer, and two hauler operators including Mr. Keith Davis to backfill the Imboden seam pit area as necessary to reestablish the Redwine roadway. As the evening shift progressed, mining personnel were hauling, dumping, and pushing rock and spoil material into the Imboden pit area where the Redwine access road had

been severed. Mr. Robinson and coworkers finished reconnecting the roadway between 1:30 a.m. and 1:50 a.m.

According to Kelly Robinson, the bulldozer operator working in the switchback at the time of the accident, it was a clear night with no fog; visibility was good from his bulldozer lights.

Upon Mr. Robinson's completion of reestablishing the roadway, Mr. Stanley instructed him to ensure good berms were present and adequate in height along the Redwine roadway. Mr. Robinson, while operating a Caterpillar D-10R bulldozer, proceeded to work the existing access road material as he graded and widened the roadbed on the highwall side for approximately 300 feet upgrade from the Imboden pit area toward the access road curve area associated with the accident. Mr. Stanley said that he reminded Mr. Robinson that a natural gas pipeline and homes were located down the slope from the roadway curve "switchback" area. Mr. Stanley in the August 21, 2004, interviews stated that he twice instructed Mr. Robinson to be extra careful and not to allow any material to go over the outslope toward the gas pipeline and homes. Mr. Robinson's statements in the August 21st interviews were that he did not receive any information or instructions about the natural gas pipeline or homes on the shift of the accident. Mr. Robinson dressed and smoothed the roadway while traversing upgrade to the curve "switchback" area where events occurred relating to the accident.

While reviewing the work at the Redwine access road curve "switchback" area at approximately 2:00 a.m., Mr. Stanley and Mr. Robinson discussed the required work to be completed in the steeply elevated, curve area. Mr. Stanley and Mr. Robinson observed that the inside of the curve was low, uneven and had ruts. They determined that additional rock fill material would be required to be hauled to the area and worked into the inside of the curve so that coal trucks could safely negotiate through this area.

Mr. Stanley then contacted Mr. Keith Davis, hauler operator, by CB radio and instructed him to haul two light loads of fine shot, rock material from the Pinhook pit area to the roadway curve area to use as a filler to build up the inside of the curve. Shortly after 2:00 a.m., Mr. Davis hauled two light loads (approximately 100 tons each) of rock material and dumped the rock on the inside of the curve area. Mr. Robinson, bulldozer operator, worked in these two loads of gray, shot rock material on the inside of the curve and then pushed the "excess material" up against and through the berm on the outside of the road toward the tree-line where the homes are located down the slope from the curve area.

Also at approximately 2:00 a.m., Mr. Stanley contacted Mr. Jimmy Vanover, wheeled loader operator, by CB radio and instructed him to bring his loader to the access road curve area at approximately 2:30 a.m. to "walk in" the inside of the curve where the fine shot rock "filler" material had been worked in by the bulldozer. ("Walking in" generally consists of a wheeled loader smoothing down an area, back dragging with the loader bucket, and then driving over the area with the loader tires to compact and smooth the area for truck traffic.) Mr. Vanover, while operating a Caterpillar 988F wheeled loader, had worked most of this shift in the Redwine pit preparing the coal for future loading into coal trucks. The Redwine coal pit was located higher on the mountain than the curve area involved in the accident.

At approximately 2:10 a.m., Mr. Robinson began working in the curve area by grading and smoothing out ruts in the access road. Mr. Robinson's initial work included pushing excess topsoil material toward the outside berm located immediately adjacent to the "tree line" – hillside area, up slope from the home involved in the accident.

At approximately 2:40 a.m., Mr. Vanover, while operating the wheeled loader, arrived at the interior access road curve "switchback" area and observed that Mr. Robinson had completed his assigned bulldozer work in the curve and was back dragging the road below the curve area toward the parking lot. Mr. Vanover began working the curve area by back dragging with the loader bucket and "walking in" the material on the inside of the curve. Mr. Vanover said that he never pushed or dumped any type of material on, near, or over the berm area on the down hill area of the roadway curve where the home was located. At approximately 2:50 a.m., Mr. Vanover completed "walking in" the rock/dirt material on the inside of the roadway curve area and departed this location while continuing to smooth the access road downgrade toward the lower parking lot as the end of his shift was approaching.

At 2:41 a.m., a call was received at the Wise County Emergency services "911" call center from the Davidson's residence located at 514 North Inman Road, Appalachia, Virginia. Emergency personnel, including the Appalachia Police Department, Fire Department, and Rescue Squad, were dispatched immediately to the residence. Emergency response personnel discovered that the Davidson's three-year-old son, Jeremy, had been injured when a large rock had crashed through his bedroom wall. Jeremy had been asleep in his bed at the time of the accident.

At approximately 3:00 a.m., Mr. Stanley returned to the access road curve "switchback" area and observed new dirt/rock material on top of the old, existing berm material on the down hill side of the curve where the Davidson's residence was located. At this time, Mr. Stanley said that he did not observe that the old berm had been disturbed and did not observe any material placed so as to present a problem. Mr. Stanley proceeded to the Redwine pit area while checking the remainder of the access road to ensure that it was ready for hauling coal on the next day shift. Mr. Stanley traveled to the parking lot area as evening shift personnel were parking equipment as their shift was nearing completion.

At 3:24 a.m. Appalachia Rescue Squad personnel transported Jeremy Davidson to the Wellmont Lonesome Pine Hospital located in Big Stone Gap, Virginia. Dr. Donald Dingus, emergency room physician, examined the victim and pronounced him dead. Dr. Maurice Nida, Wise County Coroner, later examined the victim.

At approximately 3:25 a.m., Mr. Bernard Mullins, Strip No. 13 Mine mechanic, was traveling along State Route 160 and came by the residence occupied by the Dennis Davidson family. Mr. Mullins observed emergency services personnel including police, fire, and rescue squad members at the Davidson's residence. After inquiring about the nature of the accident, he immediately notified Mr. Stanley that a rock had rolled down the hillside, penetrated a house, and injured a child. After being informed of the accident at Mr. Davidson's residence, Mr. Stanley immediately traveled to the residence arriving at approximately 3:30 a.m. and was informed by a member of the Appalachia Fire Department that a rock, apparently dislodged from the Strip No. 13 Mine, had penetrated the residence and injured a child. Mr. Stanley returned to the mine site where his cellular telephone would operate properly and called Mr. Joe Buchanan,

A & G Safety Director, informing him of the accident. Mr. Buchanan instructed Mr. Stanley to call Mr. Tommy McAmis, A & G Person Responsible for Health and Safety, and to inform him of the accident. Mr. Buchanan instructed Mr. Stanley to secure the suspected accident area where the rock may have been dislodged from the Redwine access road curve "switchback" area. Mr. Buchanan called the DMME office in Big Stone Gap and left a message on the answering machine at 3:37 a.m. advising of the accident. Mr. Buchanan's answering machine message was transcribed and is copied below:

"Hello, this is Joe Buchanan with A & G Coal Corporation. Uh, we've rolled a rock off of one of our strip jobs located there in Inman section of Appalachia. It's Strip Number 13, the mine index number is 14595 Alpha, Alpha and I'll follow up in the morning a little bit earlier. There's been notification that a house did, I mean a rock did hit a house so a, and that there may be a child that had been injured; I don't know any more details other than that, but I'll follow up as soon as I know more. Thank you."

At approximately 3:40 a.m. Mike Abbott, DMME Public Relation Manager received a call from the Wise County Sheriff's office who notified him that a rock believed to have come off a surface mine operation struck a residence in the Inman community, fatally injuring a three-year old boy. Mr. Abbott then immediately notified Ernie Barker, DMLR Reclamation Services Manager by phone so he could contact and dispatch an inspector to the site. Mr. Barker then dispatched DMLR Inspection staff to the site.

At approximately 4:15 a.m., Mr. Buchanan called Mr. John Thomas, DM inspector Supervisor, and informed him of the accident. Mine inspectors representing the DM and DMLR were dispatched immediately by DMME to secure the site and initiate an investigation. MSHA representatives also responded to the scene. DMLR Supervisor Mike Giles advised A & G officials at 7:10 a.m. that all operations in the vicinity of the accident were to cease immediately. A & G advised they had already ceased operations in this area. Company representatives present were: Jerry Wharton, Elsey Harris, Tommy McAmis, and Ken Stanley. Around 9:20 a.m. DMLR Managers Ernie Barker and Les Vincent arrived on site. At 10:00 a.m. DMLR Reclamation Services Manager Ernie Barker advised Joe Buchanan to additionally cease all other operations in view of the "switchback" curve where the accident occurred.

INVESTIGATION OF THE ACCIDENT

A & G, as required by the Mine Safety Act, promptly notified the DMME of the occurrence of a serious mine accident. The DMME immediately implemented established notification and response procedures. The closest DM and DMLR representatives were dispatched to the scene. The DM Emergency Response Team, which performs all mine fatality investigations, was contacted and dispatched to the scene. Coordination with the MSHA was promptly established.

Immediately upon arrival at the scene, control orders were established to cease operations and ensure that the scene of the accident was not disturbed. On Friday, August 20, 2004, DM, DMLR, and MSHA began a joint accident investigation consistent with a Memorandum of Agreement between DMME and MSHA. Teams were formed to investigate the scene for all physical factors and other evidence, which could be identified as causal factors related to the

accident. Photographs, video, Global Positioning System (GPS) measurements, physical measurements, and other information were developed for the mine site, the hillside area from the mine site, and the affected areas of the Davidson's residence.

On Saturday, August 21, 2004, interviews of A & G Mining personnel were conducted separately with questioning by DMME and MSHA lead investigators. These interviews were conducted consistent with the joint accident investigation agreement, were taped recorded, and have since been transcribed.

On August 24, 2004, the joint investigation team requested six A & G employees to give testimony under oath in an attempt to address conflicting statements given on August 21st. On advice of legal counsel, each of the mining personnel individually exercised their legal rights and declined to provide statements during the second scheduled interviews.

Following the review and analysis of the field investigation findings, the DM and DMLR issued orders and Notices of Violation to Matt Mining and A & G.

On September 10, 2004, a meeting was conducted with Wise County Commonwealth Attorney, Chad Dotson, and the findings of the investigation were presented.

On September 16, 2004, the same presentation was made to the Davidson family with their legal counsel present.

On October 18, 2004, the report was reviewed with representatives of A & G.

Prior to public release of this investigation report, the findings were presented and reviewed with the Davidson family.

STATEMENTS FROM MINE PERSONNEL AND OTHER FACTORS

Statements from mine personnel interviews and other factors determined during the investigation revealed the following.

On August 21, 2004, DMME's DM and DMLR staff and representatives of MSHA interviewed seven of A & G's mining personnel. The personnel interviewed were either working in the vicinity of the accident or were company management responsible for operations and safety. Mine personnel not involved in the accident were not interviewed. The interview statements provided by mining personnel while describing roadway/berm conditions and reconstruction work performed in the curve area associated with the accident were not consistent with the physical conditions as observed by the investigation team. Due to unclear and conflicting information provided by mining personnel, the investigation team scheduled second interviews on August 24, 2004, in which six mining personnel were to be placed under oath and asked specific questions concerning the specific work instructions and extent of work performed in the curve area. Upon advisement by their legal counsel, each of the mining personnel individually exercised their legal rights and declined to provide statements during the second scheduled interviews. Mine personnel statement information contained in this report is based upon statements provided in interviews conducted on August 21, 2004.

There were no eyewitnesses to the accident. Jeremy Davidson was asleep, alone in his bedroom when the rock penetrated the rear wall of the residence. Mine personnel stated that when the accident occurred they had no knowledge that a rock had been dislodged, rolled down the steep hillside, and penetrated the residence until Mr. Mullins notified Mr. Stanley about the accident. In addition to the rock striking the Davidson's residence, a one-half-acre debris field was scattered down the hillside as a result of the road-widening activity.

The following four men were directly involved in the work being performed at the Redwine access road curve "switchback" area associated with the accident: Kenneth Stanley, evening shift surface foreman; Kelly Robinson, Caterpillar D-10R bulldozer operator; Jimmy Vanover, Caterpillar 988F wheeled loader operator; and Keith Davis, Caterpillar 785 hauler operator. Mr. Stanley, Mr. Robinson, Mr. Vanover, and Mr. Davis stated that they knew homes were located down the slope from the haul road curve "switchback" area. The additional men who had responsibility for overseeing and managing operations and safety for the mine were also interviewed, including Tommy McAmis, Person Responsible for Health and Safety, Greg Maggard, Job Superintendent, and Joe Buchanan, Safety Director. The following is a summary of their August 21, 2004, testimony.

Ken Stanley – Shift Surface Foreman Stated:

1. That he knew homes and a natural gas pipeline were located down the slope from the Redwine road curve "switchback" area associated with the accident;
2. That the Redwine road associated with the accident had been severed six to eight weeks previously as mining personnel mined a pit of coal from the Imboden seam;
3. That he instructed Mr. Robinson, bulldozer operator, to reconnect the Redwine road, to check the roadway berms, get good berms up to adequate height, and to start scraping the road while preparing for the safe travel of coal trucks the next day;
4. That on this shift he instructed Mr. Robinson, Mr. Vanover, wheeled loader operator, and Mr. Davis, hauler operator, to be careful and not allow anything to go over the berm in the Redwine road curve "switchback" area associated with the accident;
5. That between 1:30 and 1:45 a.m., he traveled to the Redwine road curve "switchback" area as Mr. Robinson was scraping the road in the curve area. At this time, he stated that he and Mr. Robinson observed the inside edge of the roadway curve (opposite from the outside berm) and determined that rock fill material would be required to level the inside area of the curve. Mr. Stanley stated that he observed the berm on the outside of the roadway where the homes were located at the bottom of the hill and that at this time, the berms looked sufficient. Mr. Stanley also stated that at this time, he reminded Mr. Robinson again that they could not allow any material to go over the berm and down the steep slope toward the homes. Mr. Stanley stated that at this time, he did not observe any rock being dumped or worked into the roadway;
6. That at approximately 2:00 a.m., he contacted Mr. Davis by CB radio and instructed him to haul two "light loads" of fine shot rock material to the Redwine road curve "switchback" area where Mr. Robinson, bulldozer operator, would "work in" the material;
7. That also at approximately 2:00 a.m., he contacted Mr. Vanover by CB radio and instructed him to bring his wheeled loader to the Redwine road curve "switchback" area at approximately 2:30 a.m. to "walk in" the material on the inside of the curve where Mr. Robinson had performed regrading work;

8. That he returned to the Redwine road curve area a little after 3:00 a.m., and observed what he described as an acceptable berm on the outside of the curve "switchback" area. Mr. Stanley also stated that at this time he observed some new material (fresh dirt) that had been pushed up against the old, existing berm for approximately four feet in one corner and that he did not observe whether or not the entire old berm had been disturbed or pushed out. While reviewing a photograph that showed the presence of both new and disturbed, old berm material and rock, Mr. Stanley verified the presence of new gray shot rock material that had been hauled to this area. He also verified the presence of yellow-colored, stained soil material and rock that had been located in the old, existing berm prior to being disturbed. While reviewing photograph Exhibit G, Mr. Stanley marked an area approximately 30 feet in length that he would describe the berm as being "disturbed." The yellow-colored, stained rock involved in the accident was consistent in color and texture of the yellow-colored rock that Mr. Stanley identified as being consistent with material in the disturbed, old berm material. Mr. Stanley stated that at this time that he did not walk up to or upon the berm material that consisted of a mixture of both new shot rock and disturbed old berm material;
9. That he was not aware of anyone that may have widened the Redwine road curve "switchback" area, removed any of the old berm in this area, or pushed any material through or over the old existing berm;
10. That he was aware of the accident between 3:30 a.m. and 3:35 a.m.;
11. That he traveled to the Davidson's residence between 3:30 and 3:35 a.m. to verify the accident;
12. That after leaving the residence and verifying the accident, he traveled back to the active mine site and called Joe Buchanan and Tommy McAmis, company officials; and
13. That he understood the mining permit boundary at the Redwine road curve "switchback" area was located approximately 50 feet down slope from the berm – tree-line area.

Kelly Robinson – Bulldozer Operator Stated:

1. That he knew homes and a natural gas pipeline were located down the hill from the Redwine road curve "switchback" area associated with the accident. Mr. Robinson said that he received this information about the location of the homes and natural gas pipeline at least a year ago and that the location of the homes had been discussed within the past year but he couldn't recall when this second discussion had occurred. Mr. Robinson also said that he did not receive any information or instructions about the natural gas pipeline or homes on the shift of the accident;
2. That he completed reconnecting the Redwine road between 1:30 a.m. and 1:50 a.m.;
3. That he did not perform any work on the Redwine road berm from where he reconnected the road to the curve area but did perform some work on the highwall side of the roadway;
4. That he began regrading work in the curve area at approximately 2:10 a.m. and completed this work at approximately 2:35 a.m.;
5. That to his knowledge, he did not contact, push out any of the "old existing berm", or push any material over the top of the "old existing berm" material in the Redwine road curve "switchback" area with his bulldozer blade. Mr. Robinson said that the

- old berm did not need to be reinforced or made higher and that it was fine the way it was. While reviewing a photograph that showed the presence of both new and old disturbed berm material and rock, Mr. Robinson verified the presence of new gray shot rock material that had been hauled to this location. Mr. Robinson said that the photograph showed the location of new shot rock material where it was located when he departed the curve area after completing his assigned work. Mr. Robinson said that the new shot rock material shown in the photograph was "excess material" that he did not need for reconstruction work on the inside of the curve area and that he pushed this "excess material" up against the old existing berm material located at the "tree-line" downslope side of the curve. Mr. Robinson said that he "just laid the new gray shot rock material on top of the old berm material" and he described the work as "pushing it up there and then backing off with his bulldozer. Mr. Robinson said that while pushing the new gray, shot rock and excess material "up toward the tree-line, down slope side of the curve area "that he did not raise his bulldozer blade. Mr. Robinson said that none of the excess material that he pushed from the inside area of the curve to the "tree-line" berm side went over top the old, existing berm material;
6. That the only material hauled to the Redwine roadway curve area was grayish colored, shot rock and that no type of dirt spoil material was hauled to this location;
 7. That two loads of grayish colored, fine rock material were hauled to the Redwine road curve "switchback" area to use for filling in the area located on the inside of the curve;
 8. That Mr. Stanley did not give him any instructions to reconstruct or alter the berm located on the down slope side of the Redwine road curve "switchback" area. Mr. Robinson further stated that "there was no reason to widen or alter" this berm;
 9. That Mr. Stanley instructed him to "build up" the inside of the Redwine road curve area to provide for safe coal truck haulage scheduled for that day from the Redwine coal pit located higher on the mountain from the curve area;
 10. That Mr. Stanley did not tell him not to disturb the old, existing berm, but that Mr. Stanley did inform him to "beef up the old berm" and to be sure that he left a berm in the Redwine road curve "switchback" area;
 11. That he departed the Redwine road curve "switchback" area between 2:35 a.m. and 2:40 a.m. and the wheeled loader being operated by Mr. Vanover was the only equipment present in the "switchback" area when he departed;
 12. That while Mr. Vanover was located in the Redwine road curve "switchback" area that he did not observe him dump or push any type material over top the old, existing berm on the down slope side of the curve. Mr. Robinson said that Mr. Vanover, while performing work in the curve area, had the wheeled loader bucket in a raised position for the entire time that he was performing work on the inside of the "switchback" curve;
 13. That on the shift of the accident, it was a clear night with no fog; visibility was good and that all his bulldozer lights were operating;
 14. That he did not dismount from his bulldozer to look at the berm on the downhill side of the road curve "switchback" area associated with the accident. Mr. Robinson said that he dismounted his equipment one time to evaluate the fill-in work that he had completed on the inside of the "switchback" curve, which is opposite the side from the "tree-line" berm side of the road;
 15. That this was the first time he had been asked to help construct roads, that he normally works in the "shot" area;

16. That this was "the first time that's happened, you know, that we've worked on that road at night;" and
17. That he normally operated a D-11R bulldozer and that the D-10R he was operating on August 20th wasn't his dozer; he was filling in for someone who had taken some days off.

Keith Davis – Hauler Operator Stated:

1. That he knew homes were located down the hill from the Redwine road associated with the accident;
2. That Mr. Stanley contacted him by CB radio shortly before 2:00 a.m. and instructed him to haul two "light loads" of fine shot rock material to the Redwine road curve "switchback" area where Mr. Robinson, bulldozer operator, would work in the material;
3. That he hauled two loads of fine shot, gray rock material from the Pinhook pit area to the Redwine road curve "switchback" area;
4. That he dumped the two loads of fine shot, gray rock material on the inside of the road – the first load a couple minutes before 2:00 a.m. and the second load a couple minutes after 2:00 a.m.;
5. That each load of the shot rock material hauled to the road curve "switchback" area weighed approximately 100 tons – classified as a "light load" by mining personnel. The hauler has a 150-ton haulage capacity; and
6. That when shown photograph Exhibit B, he said that the curve area at the "switchback" looked like this when he was in this area. Photograph Exhibit B verified the presence of both new and old disturbed berm material and rock.

Jimmy Vanover – Front End Loader Operator Stated:

1. That he knew homes and a natural gas pipeline were located down the hill from the Redwine road curve "switchback" area associated with the accident;
2. That Mr. Stanley contacted him by CB radio at approximately 2:30 a.m. and instructed him to start "working" the road out of the Redwine pit area and to proceed to the curve "switchback" area to "walk in" the material that Mr. Robinson had regraded and built up on the inside of the curve;
3. That he arrived at the "switchback" curve area at approximately 2:40 a.m., completed his assigned work, and departed the curve area at approximately 2:55 a.m.;
4. That when he arrived in the curve area, Mr. Robinson, bulldozer operator, had completed his assigned regrading work and was back dragging the Redwine road from the curve area toward the parking lot;
5. That he performed back dragging and smoothing work only in the inside area of the curve;
6. That while located in the "switchback" curve area, he never pushed or picked up any material in his loader bucket;
7. That while located in the curve area, he never had his loader near the material on the "tree-line" outer berm – down hillside of the curve area where the rock was dislodged; and

8. That he could not say if he observed any evidence of fresh material being pushed over the berm because when running equipment at night "you can't see the best in the world."

Tommy McAmis – Responsible for Health and Safety Stated:

1. That job sites are over flown with helicopters and that all foremen were made aware that homes were located down the hill from where road reconstruction work was being performed on the Redwine road curve "switchback" area;
2. That the company had received dust and blasting complaints from the residents of the Inman Community. He stated that he was not aware of any complaints about rocks rolling down the hillside slope and landing in the yards of residents;
3. That he does not give any instructions to workers as to how to perform their job assignments. He stated that the shift foremen are responsible for job assignments and construction projects;
4. That Kenneth Stanley had informed him that he was improving the berm in the "switchback" curve area and was trying to widen the berm on the inside;
5. That Kenneth Stanley called him sometime after 3:30 a.m. and informed him that a rock had rolled through a doublewide home and that someone had been injured; and
6. That he called Joe Buchanan, safety director, and the foreman to make sure the areas were secure. He then called Mr. Jerry Wharton, owner of A & G, and informed him of the accident.

Greg Maggard – Job Superintendent Stated:

1. That mine maps are reviewed monthly with shift foreman and the maps show where houses are located;
2. That he was aware that the Redwine road would be used as a haulroad for coal trucks and would need some reconstruction work;
3. That he had no knowledge that the "switchback" curve area of the road would be widened;
4. That when he observed the berm area, it appeared that something had been dislodged;
5. That no one contacted him about any safety concerns for the road reconstruction work;
6. That he and the foreman are familiar with the permit boundaries and that there is flagging underneath the hill below the berm; and
7. That safety talks are held once a month.

Joe Buchanan – Safety Director Stated:

1. That he, foremen, and superintendents use a helicopter to fly over job sites and review maps in order to make everyone aware of the location of homes;
2. That he was aware that homes were located below the area where the work was performed on the road and berm associated with the accident;
3. That he does not have a lot of interaction with foremen concerning day-by-day operations of the mine;
4. That he had no first-hand knowledge of the work being performed in the Redwine road curve area where the rock rolled down the hillside;

5. That he preferred that crews not work outer perimeters at night due to reduced visibility;
6. That he had not received any complaints concerning Strip No. 13 Mine about rock rolling down the hillside;
7. That he was made aware of the accident at 3:15 a.m. and told Kenneth Stanley to secure the area;
8. That he traveled to the Lonesome Pine Hospital and met with the family of the victim where he was informed that the child had died; and
9. That he then traveled to the job site.

DESCRIPTION OF SITE CONDITIONS

The investigation of site conditions revealed the following:

1. The accident occurred at the residence of Dennis and Cindy Davidson located on State Route 160 in the Inman Community of Appalachia, Virginia. GPS Virginia. State Plane Coordinates – NAD 27, NORTH: 239005.304 US FT., EAST 741222.707 US FT.
2. The accident occurred when material including a large rock was dislodged as roadway reconstruction work was being performed on the Redwine interior access road at the A & G, Strip No. 13 Mine. GPS Virginia. State Plane Coordinates – NAD 27, NORTH: 238511.903 US FT., EAST: 740988.574 US FT.
3. The mine plan approved in Matt Mining Permit No. 1100877 was not followed. The mining operation did not follow the sequence of mining as shown in the approved mining plan (see Attachments #3 and #4). The road area involved in the accident was to be mined according to the approved plan; instead, the road area was skipped and the Redwine seam was mined above the "switchback" curve area. If the road area had been mined, then the solid barrier required by 4VAC25-130-816.99(a) would have been in place. This regulation states: "An undisturbed natural barrier shall be provided beginning at the elevation of the lowest coal seam to be mined and extended from the outslope for such distance as may be determined by the division as is needed to assure stability. The barrier shall be retained in place to prevent slides and erosion." If the mine plan had been followed, this barrier would have been in place and the road would not have been reconstructed as it was and the rock would not have been pushed from its resting place.
4. The Redwine interior access road reconstruction work involved in the accident was not authorized under the company's surface mine permit.

The reconstruction of the road to haul coal would have to have been in accordance with 4VAC25-130-816.150. Roads; general and 4VAC25-130-816.151. Primary roads. Under 4VAC25-130-816.150(a)(2) any road that is to be used to transport coal is classified as a primary road.

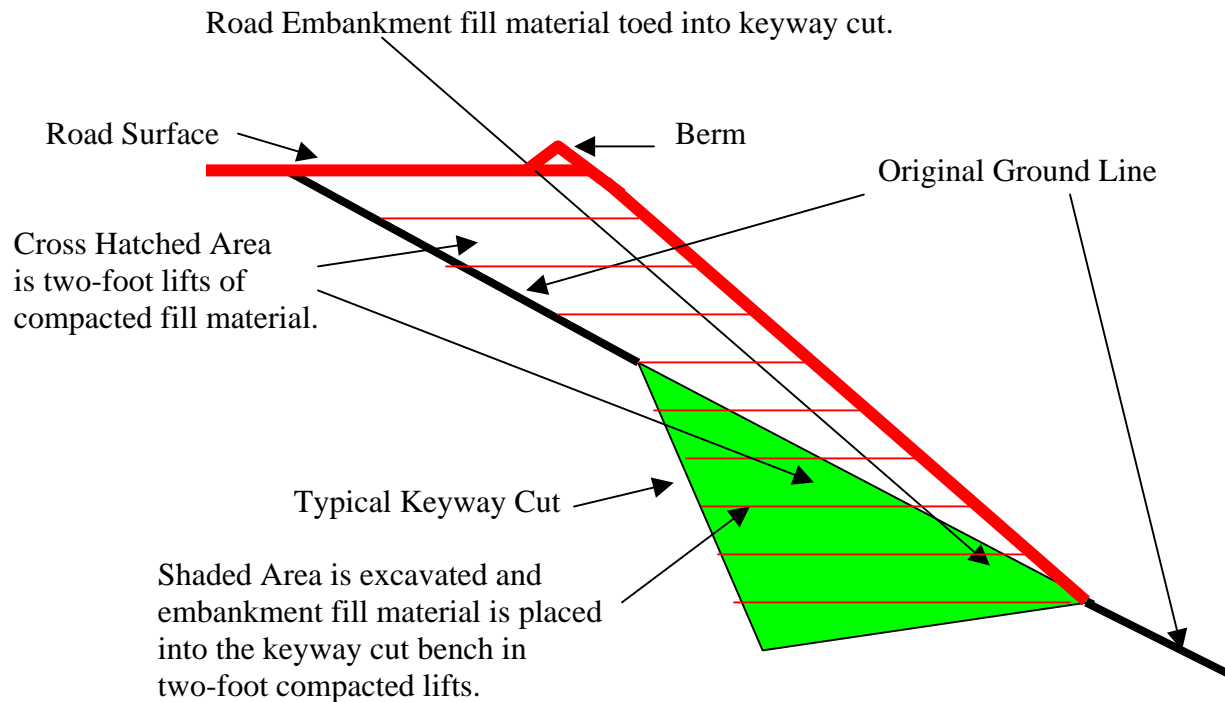
Under 4VAC25-130-816.150(b)(6) the road would also have to have been located, designed, constructed, reconstructed, etc. so as to prevent or control damage to public or private property.

As a primary road, the design standards of 4VAC25-130-816.151 would apply, which would have required under section (a) for the road construction or reconstruction to be certified in a report to the division by a qualified, registered professional engineer. The report should have indicated that the primary road had been constructed or reconstructed as designed and in accordance with the approved plan. There was no approved plan.

Under section (b) of this regulation, the road embankment construction would have had to have:

- (1) All organic material and topsoil removed from the embankment foundation and no organic material, topsoil, or other unsuitable material placed beneath or in any embankment. Loose material was pushed into the trees in violation of this requirement;
- (2) The embankment slopes could not have been steeper than 1v:1.5h, but the downhill side of the material pushed over or through the berm exceeded 1v:1.5h; and
- (3) Because the road embankment was placed on side slopes exceeding 36% (the slope downhill was in excess of 50% - See Attachment #5), the following additional conditions would have been required:
 - (i) A keyway cut constructed at the toe of the fill to ensure stability; the keyway cut had to be at least 10 feet in width and sloped inward. This keyway cut was not installed.
 - (ii) The embankment should have been constructed in uniform compacted layers not exceeding two feet in thickness. This was not done. Loose material was pushed over the downhill side with no attempt made to place it in controlled two-foot compacted lifts. If the keyway cut had been constructed, this would have provided a solid inward sloping base for placement of fill material preventing any from being rolled down the hillside. If the keyway cut had been in place and the material then placed in two-foot lifts of uniform compacted lifts, an adequate safety factor would have been achieved to prevent material from going down the hillside. These performance standards are designed to allow road embankments to be safely constructed on steep hillsides like that behind the Davidson's residence and to prevent tragic accidents such as the one of August 20.

The sketch below demonstrates how a keyway cut would be used and how road embankment fill material would be toed into the keyway cut.



5. Examinations of the Redwine access road curve "switchback" area associated with the accident revealed that the old, existing berm had been disturbed for the entire radius of the curve area and extended upgrade along the entire length of the berm material.
6. Examinations of the Redwine access road curve "switchback" area associated with the accident revealed that the actual width of the roadway had been substantially widened. Approximately 27 feet to 32 feet on the downhill side of the switchback and approximately 18 feet to 19 feet on the inside curve portion of the switchback. (See Attachment #6)
7. Examinations of the Redwine access road curve area berm associated with the accident revealed at one location near a tree that the entire old, existing berm had been either "cut completely through or pushed completely out" over the hillside – down the hill toward the house involved in the accident creating a one-half acre debris field.
8. Examinations of the Redwine access road curve "switchback" area berm, where the approximate location of the dislodged rock was determined, contained a mixture of old, disturbed berm material and new, gray shot rock that was hauled to this location.

9. Examinations of yellow-colored, dirt material and rocks observed in the Redwine access road curve "switchback" area were consistent with material verified to have been part of the old, existing berm before the berm was disturbed.
10. Examinations of yellow-colored, dirt material and rocks observed down the slope from the hillside berm of the Redwine access road curve "switchback" area verified that dirt spoil and rock material contained in the old, existing berm had either been pushed through or over the hillside above the Davidson's residence. The outside existing berm had been pushed through or out for a distance of approximately 115 feet in the area of the "switchback". (See Attachment #6)
11. The yellow-colored, stained rock that penetrated the house causing the fatality was consistent in color and texture of other rocks observed in disturbed berm material around the perimeter of the Redwine access road curve "switchback" area.
12. Many other yellow-colored, stained rocks similar in nature to the rock that penetrated the house were also observed down the slope from the old berm that had been disturbed.
13. The rock that penetrated the Davidson's residence appeared to be "sandstone" in composition, measured 2-1/2 feet by 2 feet by 1-1/3 feet and weighed an estimated 1,000 pounds. The rock was never officially weighed. The rock traveled approximately 649 feet from the area where it was pushed out to where it struck the residence.
14. Examinations of the wooded area down the slope from the Redwine access road curve area to the residence struck by the rock revealed indentions in the ground and damaged tree bark. It appears that these marks and indentations were made by the rock that struck the Davidson residence as it rolled down the hillside.
15. The last visible impact of the rock with the ground before striking the home was 34 feet from the rear wall of the residence.
16. The rock struck the residence approximately 3.9 feet above ground level at the location of the child's bed.
17. After the rock penetrated the rear wall of the residence and struck the child's bed, it struck the floor, went airborne again, traveled through two interior closet walls, and came to rest against a bed in which the Davidson's eight-year-old son, Zachary, was asleep.
18. The Caterpillar D-10R bulldozer operated by Mr. Robinson while performing the roadway reconstruction work has a blade that measured 7 feet-1 inch in height and 16 feet – 9 inches in width. The average height of the remaining old existing, undisturbed berm was 5 feet-1 inch. The blade height will obstruct the bulldozer operator's view of a berm that is 5 feet in height when the blade is approximately 6 feet-9 inches from the berm and while the operator, located in the bulldozer

operator compartment, is 23 feet-7 inches from the berm. Additionally, a rock guard consisting of metal bars that measured 15 inches in height was constructed on top of the blade. The primary headlights for the bulldozer in the forward direction are mounted between the blade and the machine operator and illuminates through openings between the rock guard metal bars. The bulldozer operator's view of a berm 5 feet in height is completely blocked from vertical view when the blade is 6 feet- 9 inches from the berm and blocked 21 feet-8 inches in a horizontal direction by the width of the blade. Visibility was limited due to near complete darkness.

CONCLUSION

On August 20, 2004, shortly before 2:41 a.m., Jeremy Kyle Davidson, the three-year-old son of Dennis and Cindy Davidson of Inman, Virginia, was fatally injured by a large rock that was pushed from the Matt Mining Company, Inc. Permit No. 1100877, A & G Strip No. 13 Mine. The rock penetrated his bedroom wall and struck the bed in which he was sleeping. The rock, weighing an estimated 1,000 pounds, was pushed from its resting place during reconstruction of a mine access road that was not authorized under the company's surface coal mine permit. The rock rolled approximately 649 feet down a steep, wooded hillside, penetrated the rear exterior wall of the child's bedroom striking the bed where the child was sleeping, and caused fatal injuries. The rock was likely pushed out by the Caterpillar D-10R bulldozer while pushing out the old, existing berm on the access road as it was being upgraded (widened) to haul coal out of a nearby Redwine coal seam pit the next morning. Interviews on August 21, 2004, with Kelly Robinson, the Caterpillar D-10R bulldozer operator and Jimmy Vanover, the Caterpillar 988F wheeled loader operator, indicate that Mr. Vanover kept the wheeled loader bucket raised while “walking in” the material Mr. Robinson had graded. In addition, photographs taken at the site indicate that the loader tracks do not show the loader working in close proximity to the point where the rock appears to have been resting before it was pushed out (See Attachment #7). The bulldozer blade would have limited visibility for the operator causing him to operate by feel. The only source of lighting would have been from the headlights on the Caterpillar D-10R bulldozer.

The Matt Mining permit did not authorize the road being upgraded to a coal haul road. The reconstruction was in violation of the road performance standards found in 4VAC25-130-816.150 Roads; general and 4VAC25-130-816.151, Primary roads. The existing berm was pushed out into the tree-line below the access road, allowing material to fall down onto the steep hillside endangering the residents located below the road. The dozer operator was operating alone at the time that the berm was being pushed out. The dozer operator was inexperienced in constructing roads but was assigned to reconstruct the road in conditions of near complete darkness. The dozer operator was operating a D-10R bulldozer and not his usual D-11R bulldozer, though he was trained on both.

There was no evidence or testimony that adequate permit markers were in place or any limits for the road-widening activity had been marked to prevent material from being pushed over the hillside. Greg Maggard, Job Superintendent, stated that he and the foreman are familiar with the permit boundaries and that there is flagging underneath the hill below the berm. If flagging were present, it would not have been visible to Mr. Robinson, the bulldozer operator.

Mine personnel interviewed indicated they were aware that there were residents below the road, yet no precautions were taken to avoid material from being pushed over or from being dislodged. August 21, 2004, interview statements indicate the mine and company personnel were aware of the potential hazard. The workers were instructed to perform the road reconstruction work at night in conditions of near complete darkness with only the equipment lights available. The dozer operator was not provided additional lighting such as mobile spot lighting, nor provided a spotter to watch how close he was getting to the berm of the road. No visible markers were placed to delineate the extent of safe areas to work.

Statements made by the mine personnel contradict conditions observed on the ground at the site. For example Kelly Robinson, bulldozer operator, stated that to his knowledge he did not contact, push out any of the "old existing berm", or push any material over the top of the "old existing berm" material in the Redwine haul road curve "switchback" area with his bulldozer blade. Mr. Robinson stated that while pushing the new gray, shot rock and excess material up toward the tree-line, down slope side of the curve area that he did not raise his bulldozer blade and that he "just laid the new gray shot rock material on top of the old berm material. In order for a dozer operator to just place material on top of the berm, he would need to raise his blade at the end of the push allowing the material being pushed in front of the dozer blade to be carried up the berm and then fall onto the top of the berm. If Mr. Robinson did not raise his blade, the material being pushed in front of the dozer blade would have pushed out the berm including the rock that rolled down the hill and struck the Davidson residence. Mr. Robinson stated that he did not dismount from his bulldozer to look at the berm on the downhill side of the haul road curve "switchback" area associated with the accident. While the reconstruction work was being performed, no one working on the site ever checked to see if material was pushed over or through the berm down onto the hillside above the Davidson's residence.

Based upon these cumulative failures of the company to take prudent precautions in an area known to be a potential hazard area for the residents below, it is the conclusion of the Department of Mines, Minerals and Energy that the unauthorized actions of Matt Mining Company, Inc. and A & G Coal Corporation include:

- conducting the reconstruction work at night above occupied dwellings;
- assigning a dozer operator inexperienced in road construction to perform the work in an area of known potential hazard to residents below;
- widening the existing access road to haul coal;
- reconstructing the road without an approved plan;
- failing to visually monitor the placement of material to prevent placing material over the hill side on the steep slope, over 50%;
- constructing the road embankment on a slope greater than 36% without the required keyway cut and two-foot compacted lifts; and
- causing a rock to be dislodged that then rolled down the hill side and entered the residence of Dennis and Cindy Davidson, striking their son's bed and resulting in fatal injuries to Jeremy Kyle Davidson.

Taken together, these unauthorized actions and failures constitute gross negligence on the part of Matt Mining Company, Inc. and A & G Coal Corporation.

ENFORCEMENT ACTION – DIVISION OF MINES

The following enforcement actions were taken as a result of the investigation:

1. An order of closure, No. SDF0004003, was issued under Section 45.1-161.91.A. (ii), REF. 45.1-161.91.A. (ii) of the Coal Mine Safety Laws of Virginia, to preserve the scene of the accident pending an investigation. The order of closure was modified to allow equipment to be operated in order to stabilize loose material along the Redwine interior access road curve area where a rock traveled down a hillside striking a residence.
2. A notice of violation, No. SDF0004009, was issued under Section 45.1-161.287.A. of the Coal Mine Safety Laws of Virginia. On August 20, 2004, at approximately 2:41 a.m., a "dislodging of material" fatal accident occurred as a result of mining activities at the A & G Coal Corporation, Strip No. 13 Surface Mine. Jeremy Kyle Davidson, a three-year-old male child, received fatal injuries when a rock penetrated the rear wall of the home where the child and family resided. The rock was dislodged from an interior access road as mine employees were performing haulroad reconstruction work, rolled down a steep slope of a wooded area approximately 649 feet, and struck the home. The home is located in the Inman Community of Appalachia, Virginia, on State Route 160 and is identified as house No. 91 as referenced in the Matt Mining - Water Supply Inventory Map dated September 28, 2001. The mine operator failed to follow safe mining methods to ensure adequate bank stability in the area where the rock was dislodged. The Coal Mine Safety Laws of Virginia, Section 45.1-161.287.A., requires that mining methods shall ensure wall and bank stability, including benching to obtain a safe overall slope.

ENFORCEMENT ACTION – DIVISION OF MINED LAND RECLAMATION

The following enforcement action were taken as a result of the investigation:

1. A cessation order, No. CDB0004310, was issued under 4 VAC 25-130-843.11 (a) (i) (ii) of Virginia Coal Surface Mining Control and Reclamation Act of 1979.

Violation Location and Description: While working at approximately 2:00 a.m. in pitch darkness and above several homes, the equipment operator proceeded to push spoil down slope. A rock was dislodged, rolled down the steep slope, and entered the rear wall of a home causing a fatality. In view of the aforementioned, the inspector considered this to be gross negligence on the part of the equipment operator and justified the Cessation Order. The location of the accident was approximately 600 feet above and southwest of house No. 91 as described in the Water Supply Inventory Map dated 9/28/01.

Operations Were Ordered To Be Ceased Immediately: All mining areas within drainage area of pond No. 19 and/or any mining area visible from where the spoil was pushed over the slope.

Affirmative Obligation(s)/Remedial Action Required: The operator was instructed to remove all material, down to baseball size, from the downslope, seed, and mulch the affected area. The operator was further instructed to certify that the stability of the slope below the old trail was not any less than was previously and that the slope from the top to the trail approximately 20 feet below was to performance standard (1.3 safety factor). Certification was to be prepared by a professional engineer and submitted to the DMLR. Work had to be performed in accordance with the MSHA and the DM approved plans.

2. A Notice of Violation, No. CDB0004312, was issued under 4 VAC 25-130-816.11 (b) and (d) of the Virginia Coal Surface Mining Control and Reclamation Act of 1979.

Violation Location and Description: The area was approximately 600 feet above and southwest of house No. 91 as shown on the Water Supply Inventory Map dated 9/28/01. The perimeter markers were destroyed by pushing spoil off the permit and down slope.

Affirmative Obligation(s)/Remedial Action Required: The operator was instructed to reestablish the permit boundary in the affected area and reestablish perimeter markers in the affected area and all other areas of the permit where markers were absent. The markers had to be such that they would be visible by all shifts.

3. A Notice of Violation No. CDB0004313 was issued under the under 4 VAC 25-130-773.16(c)(1)(vi); 4 VAC 25-130-773.16(c)(12)(v); 4 VAC 25-130-816.150(b)(6) of the Virginia Coal Surface Mining Control and Reclamation Act of 1979.

Violation Location and Description: Spoil was pushed off the permit on an area approximately 600 feet above and southwest of house # 91 as shown on the Water Supply Inventory Map dated 9/28/01. A rock rolled down the slope and through the rear of house # 91 causing a fatality and considerable damage to the home and contents.

Affirmative Obligation(s)/Remedial Action Required: The operator was instructed to take whatever measures necessary to restore the house and contents to as good or better condition than they previously were in before the accident occurred in accordance with Title 45.1, Chapter 19, Section 45.1-245(A), of the Code of Virginia.

RECOMMENDATIONS

As a result of this accident investigation, the Department of Mines, Minerals and Energy (DMME) has several recommendations for actions that should be taken by coal mining companies, and for changes to the laws and regulations governing coal mining in Virginia. DMME is offering these recommendations to help ensure that this type of accident will not happen again.

Full Compliance With Virginia's Existing Mining Laws and Regulations

Virginia's coal mining safety and reclamation laws already contain requirements to ensure mining is conducted safely and is protective of the public health and safety. The existing requirements pertinent to this accident and to maintaining safe mining located on slopes above occupied houses and buildings include the following.

1. In accordance with the Virginia Coal Surface Mining Reclamation Regulations, 4 VAC 26-130-774.13, all revisions to a surface mining permit must be submitted to the DMME, DMLR for approval. Construction or reconstruction of roads on a permitted mine site that would have a potential for adverse impacts on individuals or their rights, changes to operations or reclamation plans that may have adverse impacts not considered in the original permit approval, or changes to any issue that was subject to public controversy or citizen or other agency objections are considered significant revisions. The reconstruction of the road on the A & G Strip No. 13 was not addressed in the permit or any revision to the permit. Significant revisions require newspaper notice to be published for four consecutive weeks with a public comment period that extends from the initial publication date through 30 days after the last date of publication. An application for a permit revision cannot be approved unless the applicant demonstrates and the DMLR finds that the revised operation will meet regulatory requirements.
2. In accordance with the Virginia Coal Surface Mining Reclamation Regulations, 4 VAC 25-130, Sections 816.99(a), 817.99(a), 816.102(a)(3), 817.102(a)(3), 816.150, 817.150, 815.151, 817.151, and 824.11(a)(6), all operations must ensure adequate slope stability and provide effective protection from dislodged material that could impact public safety and private property. Prior to disturbance of a slope area above a private residence, the permittee/operator must have obtained the necessary approvals from the DMLR. The operations must be conducted in accordance with the performance standards in the regulations cited above and in accordance with the DMME, DM approved ground control plan.
3. In accordance with the Virginia Coal Mine Safety Act, Section 45.1-161.287, all surface coal mining operations must establish and follow a ground control plan that ensures a safe work area. This plan must be consistent with prudent engineering designs, ensure wall and bench stability, and maintain a safe overall slope. The plan must address how loose hazardous material from the tops of banks (and other areas) is to be handled. This plan should include a map showing the location of private dwellings and other occupied buildings, public and other roads used for vehicle travel, gas wells and transmission lines, and any other locations where ground-disturbing mining activity could affect worker and public safety and private property. When work is planned in these locations, the foreman

should provide clear instructions for work procedures and safety precautions and ensure that these procedures and practices are followed.

4. In accordance with the Virginia Coal Mine Safety Act, Section 45.1-161.269, equipment must be operated in a prudent manner and consistent with the conditions that exist in the area and the type of equipment being used. When work is planned on slope areas, this means that operators should use equipment and processes that are properly designed to perform the work and prevent accidental dislodging of materials.
5. In accordance with the Virginia Coal Mine Safety Act, Sections 45.1-161.256, 45.1-161.257, and 45.1-161.258, a certified person at a surface coal mine must complete an on-shift examination of the work area of the mine to identify any hazardous conditions. The surface foreman at the mine must take prompt action to have any hazardous conditions corrected, barricaded, or posted with warning signs. Any imminent danger that cannot be removed within a reasonable time must be reported to the Chief of the DMME Division of Mines by the quickest available means.

Proposed Amendments to Virginia's Coal Mining Laws and Regulations To Increase Public Safety Protection

There are some areas where DMME has found the Virginia Coal Mine Safety Act, the Virginia Coal Surface Mining Control and Reclamation Act, and the Virginia Coal Surface Mining Regulations should be amended to increase the safety of operations that are located on slopes above occupied houses and buildings. These changes are part of a wide-reaching proposal to amend the Acts that DMME had already developed in response to a review of the Acts and of lessons learned from this and other accidents and fatalities since the Coal Mine Safety Act was last updated. Statutory changes will require legislative action. DMME will form a working committee to address any regulatory amendments recommended as a result of this investigation.

Virginia Coal Mine Safety Act

1. Section 45.1-161.287 of the Virginia Coal Mine Safety Act should be amended to require mine operators to submit more detailed ground control plans for approval by the DMME, DM. In addition to current requirements, the ground control plans should address (i) how residents or occupants of private dwellings or other occupied buildings down slope from ground disturbing operations will be notified when ground-disturbing work upslope from the buildings will take place and any actions required to protect the residents or occupants during the work, and (ii) how areas with ground-disturbing work up slope from residences, other occupied buildings, roads, or other areas in which persons will congregate, work, or travel will be controlled to protect the public safety.

Mine operators could take a number of actions to comply with this new proposed statutory requirement. For example, mine operators could notify the residents or occupants located down slope from the work at least three hours before ground disturbing work is to begin of (i) the type of work to be performed; (ii) the types of precautions being used to prevent material from becoming dislodged above their residence, and (iii) the length of time that the work is expected to last. The mine

operator would need to maintain a written record of the notifications, including the names of the individual(s) who made the notifications, the persons notified, the time of the notifications, the time that the work is to be started, and the method(s) used to notify each individual. As for control of the work, mine operators could mark along the perimeter of any area to be disturbed located above the private dwellings or occupied buildings with visible markers (separate from permit boundary markers) indicating the limit to which material could be pushed, hauled, or otherwise disturbed. Such markers would need to be distinctive and of adequate size and height to be visible to the operator of any type of equipment to be used in the area. In lieu of using such markers, the work could be monitored by a spotter to prevent accidental dislodging and travel of material down the slope; or the operator could notify and evacuate affected residents or occupants at all times that material is being pushed, dumped, loaded, or otherwise disturbed.

2. Sections 45.1-161.12, 45.1-161.14, and 45.1-161.21 of the Virginia Coal Mine Safety Act should be amended to authorize the Chief of the DMME Division of Mines to require individual miners to complete training to abate individual violations and require coal mine operators to implement action plans to address hazardous conditions or practices.
3. Section 45.1-161.21 of the Virginia Coal Mine Safety Act should further be amended to empower the Chief to compel attendance of witnesses and administer oaths during investigations of accidents and willful violations of the Coal Mine Safety Act. This authority is currently vested with individual mine inspectors in Section 45.1-161.80.
4. Section 45.1-161.64 of the Virginia Coal Mine Safety Act should be amended to require operators of surface coal mines to annually submit an updated map of each surface mine. Currently, operators of surface coal mines only must submit the map when the mine will intersect with underground workings.
5. Section 45.1-161.257 of the Virginia Coal Mine Safety Act should be amended to strengthen the requirements that mine examination records be countersigned by a person responsible for safety at a mine. The amendment should require that the supervisor of the examiner creating the records, or another person with equivalent authority to the supervisor, promptly read and countersign the records and ensure that action necessary to eliminate or control any hazardous condition found during the examination has been taken.

Virginia Coal Surface Mining Control and Reclamation Act

The DMME, DMLR operates the coal surface mining reclamation program under primacy (federal approval and oversight) from the federal Office of Surface Mining Reclamation and Enforcement (OSMRE). In order to maintain primacy, Virginia must maintain its law and regulations as effective as the federal Surface Mining Control and Reclamation Act and federal surface mining regulations. The Virginia General Assembly, in passing the Virginia Coal Surface Mining Control and Reclamation Act, stated, as described in a court decision related to the Virginia Act, that its "intent was clearly to enact a statute that conformed to the federal act, but that was no more

restrictive than the federal act." (See the Virginia Coal Surface Mining Control and Reclamation Law 1996 Edition Editor's note in Article 1, § 45.1-226). Based on this federal and state legislative direction, DMME is limited in its ability to amend its program. While the following legislative proposal would make the Virginia Act more restrictive than the federal act, DMME believes that actions that cause injury to the public are sufficiently different from other violations of the Act and that a higher level of penalty is called for.

1. Section 45.1-246.A of the Virginia Coal Surface Control Mining and Reclamation Act should be amended to provide for a two-tier civil penalty assessment. For violations that result in personal injury or fatality to the public, the civil penalty ceiling should be raised to \$70,000 per violation. All other violations would remain subject to the existing \$5,000 dollar limit. The new tier of penalties would use a similar point system to the current system used to determine the actual amount of the civil penalty. The DMME, DMLR would be given the ability to waive the point system and assess the maximum \$70,000 penalty if circumstances warrant.

Virginia Coal Surface Mining Reclamation Regulations

1. Amend 4 VAC 25-130-816.11, Signs and markers, to require permanent permit boundary markers be placed around the perimeter of a permit. Each marker should be visible from the adjacent markers. Permit markers that are located on steep slopes above private dwellings or other occupied buildings shall be made or marked with fluorescent or reflective paint or material to increase the markers' night visibility.

SIGNATURE SHEET

This report was jointly prepared by and hereby submitted by the Department of Mines, Minerals and Energy, Divisions of Mines and Mined Land Reclamation.

FRANK A. LINKOUS, CHIEF
DIVISION OF MINES

DATE

LESLIE S. VINCENT, PE, CHIEF ENGINEER
DIVISION OF MINED LAND RECLAMATION

DATE

POSTSCRIPT

There is solid evidence that failure to follow Virginia's existing mining laws and regulations in the area where the road reconstruction took place on the Matt Mining Company/A & G Strip No. 13 Mine resulted in this accident. There was nothing discovered to indicate Virginia's mining laws and regulations were not adequately enforced. In fact, the mine had been inspected more often than what is required by Virginia's mining laws.

Even given these facts, the Department of Mines, Minerals and Energy (DMME), as part of its continuous quality improvement efforts, looked at what can be learned from the accident and looked internally for ways to improve its system and processes. DMME has historically completed this type of review any time there is a serious accident such as this. This internal review began immediately after the accident and is still ongoing. To date, the following actions have taken place in addition to the direct investigation of the accident.

- The Division of Mines (DM) revised its Guidelines for Ground Control Plans required of all surface mines to address the ground control issues raised with this accident. DM inspectors have conducted special on-the-ground inspections of every surface mine and are working with operators to improve the effectiveness of their ground control plans.
- The DM is incorporating an overview of this accident and the strengthened guidelines for ground control in the 2005 continuing education training that surface foremen are required to take for re-certification.
- The Division of Mined Land Reclamation (DMLR) inspectors have completed on-the-ground reviews of all permit areas where operations are being conducted or proposed on slopes above occupied dwellings.
- The DMLR supervisors and inspectors flew over every surface mine operation, taking photos from a helicopter. They looked for any existing or potential violations or hazards. No additional violations were found during this flyover.
- The DMLR is preparing a special bulletin to operators advising them of the extra precautions that need to be taken where mining takes place near or above occupied dwellings.
- Information was presented to Wise County Commonwealth Attorney Chad Dotson on September 10 for consideration of criminal prosecution associated with this accident. The information developed during this investigation also will be made available to the special prosecutor assigned to review this case.
- A multi-disciplinary team of DMLR staff conducted a complete inspection of the Matt Mining Company/A & G Coal Corporation Strip No. 13 Mine on September 28, 2004. The inspection included a comprehensive review of the approved permit and of the actual mining activity on the ground. Two additional Notices of Violation (NOVs) were written for violations of the reclamation law and regulations. (NOV # CDB0004395(SM) was

assessed a civil penalty of \$425 and NOV # CDB0004396(WM) was assessed a civil penalty of \$425 and both have been paid)

- The information from the investigation of this accident is being used not only to enhance Virginia's mine safety training program but will be shared with other states with surface mining activities.
- DMME has reviewed the types of citizen complaints about surface coal mining operations to identify the most frequent areas of complaint. This review shows that the most frequent area of complaints relate to blasting on mine sites. In response, DMME is proposing two actions.
 - a) DMME will propose amendments to 4 VAC 25-130-816.64 (Use of explosives; blasting schedule) to require that blasting operations occurring within 1,000 feet of a private dwelling or other occupied building be required to conduct seismic monitoring of all blasts. Currently, a mine operator is not required to conduct seismic monitoring if a blast is sized using the scaled distance equation to determine the weight of explosives to be detonated in any eight-millisecond period.
 - b) The limits for use of explosives on coal mines (and other mineral extraction sites) in Virginia and the federal Office of Surface Mining Reclamation and Enforcement are based on studies performed in the 1950s by the United States Bureau of Mines. These studies addressed the level of ground vibration and air blast from detonation of explosives that may take place without causing damage to structures. There have been considerable changes in construction practices since these studies were completed. Additionally, the studies did not address issues such as whether vibrations from blasting may dislodge rocks from slopes near the blast. Due to the nature of the old studies, DMME recommends that Virginia's congressional delegation seek funding and provide direction for a National Academy of Science study of the effects of blasting on property and an update of the United States Bureau of Mines' reports. The study should review the original Bureau of Mines' work, more recent studies of the effects of blasting on structures, the effect of blasting on ground control, control of flyrock, and related issues. DMME would use the result of this study to determine whether amendments to mineral extraction blasting laws or regulations are necessary.

The Department of Mines, Minerals and Energy (DMME) is also implementing the following process changes to strengthen its ability to provide for the protection of public health and safety around surface coal mines.

- The DM and DMLR will jointly review ground control plans to better ensure they will provide for proper control of materials disturbed on coal mine sites.
- DMME inspectors will more thoroughly document conditions and actions in their inspection reports to ensure that both violations and compliance with performance standards are properly documented.

- DMME inspectors will spend more time with the public who file complaints with the objective to improve the public's understanding of laws and regulations, especially where the current law or regulations do not address their complaints.
- DMME inspectors will complete additional reviews of steep slope areas for potential hazards based on lessons learned from this accident.
- DMME inspectors will take additional steps to ensure that the responsible persons at permitted sites are using the most current approved permit plans. The inspectors will review the plans with the individuals on a regular basis.
- DMME will take additional flights over surface operations, as funding is available, to identify areas with potential impact to the public.
- DMLR will continue to use technical assistance from the federal Office of Surface Mining on complex technical issues that affect the public and environment.

APPENDIX

- VICTIM DATA SHEET
- MINE LICENSE INFORMATION
- PERSONS PRESENT DURING THE INVESTIGATION
- OTHER DM/DMLR INFORMATION, MAPS, PERMIT INFORMATION, ETC.

ATTACHMENTS

1. MATT MINING CO., INC. P.N. 1100877 PERMIT BOUNDARY MAP
2. EXCERPT FROM MATT MINING CO., INC.'S APPROVED PERMIT REGARDING HAULROADS
3. MAP DEPICTING APPROVED MINE PLAN OF OPERATION FOR MATT MINING P.N. 1100877
4. CROSS-SECTION K-K OF MINE PLAN OF OPERATION FOR MATT MINING P.N. 1100877
5. CROSS-SECTION OF HILLSIDE FROM THE LOCATION WHERE THE ROCK WAS DISLODGED TO THE DAVIDSON'S RESIDENCE
6. SKETCH OF "SWITCHBACK" IN ACCESS ROAD
7. 8/20/04 PHOTOGRAPH OF OUTSIDE EDGE OF ROAD AT "SWITCHBACK"

VICTIM DATA SHEET

Name:

Jeremy Kyle Davidson

Mailing Address:

514 North Inman Street
Appalachia, Virginia 24216

Date of Birth:

March 3, 2001

DM MINE LICENSE INFORMATION

Official Corporation:	A & G Coal Corporation
Official Business Name of Operator:	A & G Coal Corporation
Person With Overall Responsibility:	Tommy McAmis
Person in Charge of Health and Safety:	Tommy McAmis

DMLR CSMO PERMIT INFORMATION

Matt Mining Company, Incorporated CSMO Permit No.1100877

Operator/Permittee:	Christopher L. Fraley, Sr.
Share Holder:	Christopher L. Fraley, Sr.
President:	Christopher L. Fraley, Sr.
Director:	Christopher L. Fraley, Sr.
Secretary:	Christopher L. Fraley, Sr.

Contractor:	A & G Coal Corporation
Owner:	Jerry W. Wharton
President:	Jerry W. Wharton
Director:	Jerry W. Wharton
Secretary:	Jerry W. Wharton
Treasurer:	Jerry W. Wharton

PERSONNEL

The following is a list of persons providing information and/or present during the investigation. Those who were interviewed are designated by * after their names:

A & G COAL CORPORATION

Tommy McAmis*	Person Responsible for Health and Safety
Joe Buchanan*	Safety Director
Greg Maggard*	Job Superintendent
Kenneth Stanley*	Evening Shift Surface Foreman
Kelly Robinson*	Bulldozer Operator
Jimmy Vanover*	Wheeled Loader Operator
Keith Davis*	Hauler Operator

**MULLINS, HARRIS & JESSEE
ATTORNEYS AT LAW**

Elsey A Harris, III

Attorney for A & G Coal Corporation

MINE SAFETY AND HEALTH ADMINISTRATION – DISTRICT 5

Edward R. Morgan	District Manager, District 5
Norman Page	Assistant District Manager, Inspection Division
Bob Clay	Inspection Supervisor
Jim Poynter	Inspection Supervisor
Russell Dresch	Electrical Engineer
Arnold Carico	Mining Engineer
Allen Skeens	Coal Mine Inspector
Gary Farmer	Coal Mine Inspector
James Hackworth	Educational Field Services Specialist

**MINE SAFETY AND HEALTH ADMINISTRATION – PITTSBURGH SAFETY AND
HEALTH TECHNOLOGY CENTER**

Mike Superfesky	Civil Engineer
Steven Vamossy	Civil Engineer

VIRGINIA DEPARTMENT OF MINES, MINERALS AND ENERGY

Frank Linkous	Chief, Division of Mines
Carroll Green	Mine Inspector Supervisor, DM
Daniel Perkins	Coal Mine Technical Specialist, DM
David Asbury	Coal Mine Technical Specialist, DM
Randy Moore	Coal Mine Inspector, DM
Danny Mann	Coal Mine Inspector, DM
Sammy Fleming	Coal Mine Inspector, DM
Mike Giles	Reclamation Program Manager, DMLR
Dan Barney	Reclamation Specialist, DMLR
Ernie Barker	Reclamation Services Manager, DMLR
Les Vincent	Chief Engineer, DMLR
Daniel Kestner	Information Technology Specialist, DMLR
Eddie Varner	Reclamation Specialist, DMLR

DMME Response to November 4, 2004 Public Meeting Comments

The Department of Mines, Minerals and Energy hosted a public meeting on November 4, 2004, to present its draft Accident Investigation Report on the August 20, 2004 surface coal mining offsite fatality at the A & G Coal Corporation's Strip Number 13 mine, and to hear public comment about the accident and report. Numerous people commenting at the November 4, 2004, public meeting identified concerns relating to surface coal mining and what they believe are needed changes to the regulation of surface coal mining operations and coal haulage on public roads. Some of these comments are directly related to the Inman accident, while others are related to surface coal mining in general. We at the Department of Mines, Minerals and Energy (DMME) have heard directly and carefully read the comments. We appreciate the effort of the people who provided comments to bring their views forward. We are addressing all comments related to the Inman accident as part of the final accident investigation report.

As part of our response to the accident in Inman, we are committing to work even harder to provide high quality mine safety and reclamation services. We at DMME operate under and are guided by our strategic plan. This plan sets out written values that we strive to live up to and establishes goals and objectives for our activities.

The following values have been in place at DMME for more than 15 years and guide our actions when dealing with our customers. These customers include, coal miners, coal operators, and the public affected by mining operations.

In dealing with these customers, we value:

- Operating with a high sense of ethics, honesty, and integrity.
- Demonstrating fairness, respect, responsiveness, straightforwardness, and deliberateness in our actions and communications.
- Functioning in a competent and knowledgeable manner, which emphasizes such principles as: consistency in service provision; attentiveness to customer's needs and their organizational and operational requirements; and being firm, yet flexible, in delivering services which focus on safety, energy, the environment, and economic development.
- Operating in a seamless manner to deliver quality customer services.

DMME also has, as its first goal under its strategic plan, "**To provide for safe and environmentally sound mineral and fossil fuel extraction**". This requires that we consistently and fairly enforce the state's mining laws and regulations, provide assistance to mining operators and miners to enhance their ability to mine safely and meet environmental and reclamation regulations, and fully investigate and respond to health, safety, and environmental issues, concerns, and complaints.

We believe it is important to publicly enumerate these values and goals as part of our commitment to providing quality services related to mine safety and reclamation in Virginia.

Philosopher George Santayana famously remarked, "Those who do not remember the past are condemned to repeat it." This tragic accident will not be forgotten, and DMME is making the recommendations and taking the steps outlined in this report to prevent a recurrence.

We also concur with the remarks of Senators Phillip Puckett and William Wampler, Jr at the November 4, 2004, public meeting. Senator Wampler correctly pointed out, "... when people don't follow those laws and safety is not adhered to 24 hours a day, seven days a week, and you put people with inexperience at very difficult positions, guess what happens? Accidents happen at that particular point, and that's what makes me angry, that we perhaps have not learned our lessons from the past." We at DMME understand that even the law and regulation changes proposed in this report will not change a thing if they are not adhered to. We must stress the requirement that Virginia's mining laws and regulations must be followed.

Senator Puckett said, "One of the things that I sense when I talk to people about mining in general is I am very disappointed that there is a lack of trust in what I find in our communities, whether it's with a tragedy like we have experienced or it may be a simple thing of, you know, a boundary line, but there is an element that we must restore here and procedures. For you see, there are plenty of laws out there on the books and we can have all the inspections that we want, but we cannot have 24 hour inspections and being with someone every time that they are out performing their duties." ... "So we have to instill in our workers, our inspectors, our operators and the general public some trust that you will do, you know, the right thing as best you can do."

Senator Puckett further stated, "That's a commitment that I would make to all who are here tonight in whatever area you represent, that I want to try to help restore that trust that we need in our communities to see that whatever changes we make here, and I believe they will be positive, but there will be changes that all of us are willing and committing to follow. I believe if we do that then we will see some good things come from what is a very sad and difficult occasion that we have experienced."

We agree with Senator Puckett, and all of us at DMME are presenting this report as one step of a positive effort to enhance trust in the coalfield communities between coal companies, citizens, and DMME, and we pledge our commitment to that effort.

The following responds to the oral and written comments received at the November 4, 2004, meeting and written comments received since that date.

Commenters to Legislative Panel

Delegate Clarence E. Phillips Senator William C. Wampler, Jr. Senator Phillip P. Puckett Harold Greer Conner McCoy Belinda Couch Pat Jervis Larry Bush Carl Pete Ramey	Dink Shackelford Barney Reilly Judy McKenny David Rouse Richard Falin Bruce Riggs Ronnie Willis Marlene Bush Dorothy Taulbee	Walter Crouse Ronald Peters Jerry Hamilton Brenda Porter Gerald Gray James Gill Kirby Cox Wesley Lawson
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LEGISLATIVE PANEL MEMBER RECOMMENDATIONS/COMMENTS MADE AT NOVEMBER 4, 2004, PUBLIC MEETING

The following is a transcript of the comments made by the legislators in attendance at the meeting. The DMME responses to comments and recommendations are inserted at the end of the respective legislators' comments.

Mr. Schewel: Thank you.

We are now going to turn to members of the panel. I think that's the last of our presentation. Thanks.

First, I guess perhaps the first thing we should do is does the panel have any questions of DMME regarding the report and then perhaps Delegate Phillips, Senator Wampler, Senator Puckett may have some comments they want to make of a general nature.

Senator Wampler: Secretary Schewel, I have one question if I could.

Mr. Wampler, I would like to ask a question and also for Steve. You all said that you would propose certain regulations that the department would initiate or promulgate.

The question I was asking Secretary Schewel was, many times promulgating regulation takes a long time and I'm wondering if it would not be appropriate or in the best interest if we would not run a parallel track and perhaps we would offer a bill with an Emergency Provision so the enactment would take place sooner rather than being caught up in the Administrative Process Act.

Mr. Walz: We would be glad to work with you to make that happen.

Senator Wampler: Senator Puckett and Delegate Phillips, maybe we want to think about the timing of that that we would run a parallel track on both of those recommendations. One never knows what may happen in the legislature, but I think it would be smarter, perhaps wise, if we offered both of those.

Thank you, Mr. Chairman.

Mr. Schewel: Delegate Phillips.

Delegate Phillips: Thank you, Mr. Secretary.

I want to thank the Department of Mines Minerals and Energy for the thorough investigation that they have undertaken in this tragedy. I know it's been difficult for all parties involved including the Department of Mines Minerals and Energy, the family, the community as well as the coal mining community, and particularly those who, those coal miners who were on the job on that particular night.

This room is full tonight. There are citizens parked all over the campus. There is a broad representation of the public here tonight. There are citizens, there are governmental employees, there are coal miners and a lot of other individuals who are interested in this process.

I think, Mr. Secretary, that that shows that there is indeed a strong public interest in this issue from many perspectives and from many perspectives we all have different viewpoints. One of the things I think that there is about a democracy is that we respect each other's viewpoints, we respect each other as individuals, but at the same time try to resolve and to come to grips with a possible solution to the problems that have been presented with this particular tragedy.

The role of government, the primary role of government is to protect public safety and protect citizens and families all over the Commonwealth of Virginia. It's the role of coal companies and the role of government to provide and to protect the public's safety when there is danger to the public safety.

There is no other individuals or companies or no other way to protect the public from harm or danger other than through the responsible role of coal companies and the Department of Mines Minerals and Energy.

Public safety has to be the paramount responsibility of coal companies as well as the Department of Mines Minerals and Energy, otherwise there are no other avenues to protect the public from any injury or harm or damage of their property.

Coal mining as we all know is important to our region. It's important from an economic development standpoint, it's important for jobs, but at the same time we have to balance that need for coal and jobs with public safety. Public safety has to be paramount to all undertakings in the coalfields.

The tragedy that brought about this public meeting tonight has to be very difficult and very painful for the community, for the family involved, for the coal company involved and the coal miners involved. There are no winners in this process tonight. There is no one in this room tonight who wanted to see that child's death. And there's no one in this room who couldn't change this process wouldn't change it in a minute to turn it around and to bring back the child.

The child's death has focus and I think rightly so in the role of government, the role of citizens and the role of coal companies in seeking to pursue a goal that any children, any families, any resident, any citizen who is down slope from a coal mine, we should pursue a goal of

guaranteeing a 100 percent safety to that family. That should be our goal, providing 100 percent safety to that family, to that community and to those individuals who are down slope.

Now there may be some who say that this was a mere accident and that it will never happen again. Well I hope it never happens again and I hope this panel and I hope this community and I hope legislature can make strides in putting together a legislative framework which is workable and which will hopefully prevent such a tragedy from ever happening again.

This process tonight, this public involvement, this openness, this ability to come and speak from any perspective on this issue tonight is a good and it's a necessary process in trying to heal the community, to heal the wounds that are there and to bring about a process to resolve the problems that may exist. Even though it is painful, even though some folks may not like the process, even though some individuals may not want to see any changes in the process or the laws. There are many points of view, but we all should come together regardless of what side we're on or what our perspective is with one goal in mind and that should be the goal of everyone in this room tonight, everyone who will read the papers tomorrow in Southwest Virginia, everyone who may see the news tonight and in the morning.

It ought to be our resolve whether we are citizens, Department of Mines Minerals and Energy, coal companies, coal operators, coal miners or concerned citizens. The single unifying responsibility that we have tonight is to see that this tragedy never happens again anywhere in the coalfields.

Mr. Secretary, looking at this and looking at the recommendations I commend the Department of Mines Minerals and Energy for their recommendations. I think they have made a good effort to look at this tragedy and to learn from it.

The second point I want to make, I hope that all of us look at this and learn from it as well and that we all have a legal and a moral responsibility to the family that was involved and the child who was killed to work together in a unified effort to ensure public safety.

I would hope that after tonight's meeting that once we have heard the public and public input that this panel along with DMLR get together to go through the recommendations of the public or any concerns that they have; that we further discuss the recommendation that you made tonight plus any recommendations that any of these panel members make tonight, and any recommendations that the citizens may make tonight. I think for continuity I think we need to do that.

From a personal point of view just listening and looking and trying to reflect on this and trying to find some common issues that need to be addressed and looked at, these are some of the things that I, personally, would like to see, and I think I've heard these from other individuals as well, would like to see considered. First of all, I would like to see the Department of Mines Minerals and Energy schedule more frequent inspections of mine sites, mine site permits in those areas where downslope exists homes and families. You pointed out tonight that, I think if I recall correctly, that you have one required a year and one a quarter possibly, I will have to go back and look at that, but if there is a potential danger or imminent threat of danger there should be more frequent inspections to look at these issues to make sure the public has and is being protected.

DMME Response: DMME inspectors already are inspecting more frequently at coal mines as staffing and funding allow. DMLR reclamation inspectors conduct at least 12 inspections per year, including a complete inspection once per quarter and two partial inspections the other two months of each quarter. This is the minimum number of inspections. Additional inspections are conducted in response to complaints and as follow-ups on any enforcement actions that may be issued. DM safety inspectors inspect a surface coal mine no less frequently than once per year. Additional inspections are scheduled based on a risk assessment process covering all coal mines in the state. This results in additional inspections at mines with higher than average accident rates or those where there have been injuries or fatalities.

Based on these schedules, DMLR inspectors have conducted inspections at the A & G Strip No. 13 at least 53 times since it was licensed on July 20, 2000. DM inspectors have conducted four regular inspections and three spot inspections during that same time period. In addition, there have been eleven other mine visits by DM staff during the period, which included an initial five-day spot inspection, one regular idle inspection, two walk and talk safety initiatives (winter alert), one walk and talk safety initiative (surface haulage), one Notice of Violation correction follow-up, one follow-up spot related to gas well and transmission pipeline safety, one follow-up spot related to a gas pipeline incident, one fire investigation involving a D-45 drill, and one follow-up spot to evaluate mine emergency preparedness.

This means that DMME inspectors either inspected or were at the mine 71 times since it was licensed on July 20, 2000. However, DMME inspectors cannot be at a mine continuously. Compliance with Virginia's mine safety and reclamation laws must be the responsibility of the mine operator and mine employees.

DMME also does not have the staff to schedule more frequent inspections at coal mines. Should the General Assembly wish to increase inspection frequency, DMME must be provided additional inspection staff and budget.

Delegate Phillips: Secondly, the permit, before the permit is granted there should be a detailed plan of how the coal company plans to protect the public that can be and will be possibly impacted from the dangers of the mining adjacent to them or above them. And this process should include prior notice and written approval to make any changes in any of the mines and the mine permit which is above a residence. And they should give the owners and the occupants of the dwellings prior written and adequate notice of any changes in the permit and any changes that's taking place above their home.

DMME Response: The DMLR permit and the DM ground control plan incorporate measures to demonstrate how the mine operator will conduct activities in a way that is protective of the public and miners. DMME is proposing a law change that mine operators add additional detail to the ground control plans to further detail measures to be taken when mining on slopes above residences and occupied buildings. The ground control plan would be required to include information concerning how mine operators notify residents or building occupants when ground-disturbing work will take place above their buildings. Prior written agency approval is already required for changes to DMLR permits. Significant changes to a permit already require public notice and a 60-day public comment period.

Delegate Phillips: Number three, there should be no mining above homes at night which could potentially impact public safety.

DMME Response: DMME does not believe it is necessary to ban mining above houses at night. Residents may be home during daylight hours as well as at night while mining takes place. The key to ensuring the public's safety is to have plans that provide for the public's safety and to help ensure that the coal companies and all of their workers understand and follow those plans whenever mining is taking place.

Delegate Phillips: And, fourth, the Department of Mines Minerals and Energy should deny a portion of a permit in a permitted area where the coal companies cannot demonstrate that there is a 100 percent surety of safety to the citizens who are located beneath the coal mine operation.

DMME Response: DMME requires permit applicants to demonstrate that the safety of all the public is protected and no plan is approved until these provisions are addressed within the scope of current laws and regulations. This includes not just those people who are located beneath proposed mining operations but all people located adjacent to proposed mining whether below, above or at about the same elevation.

Delegate Phillips: Number five, when the permit for mining is submitted for evaluation by the Department of Mines Minerals and Energy you should require that the coal companies make a thorough evaluation both geologically, by civil engineering, by hydrologists and other experts submitted to DMLR, that public safety will be protected by looking at all surface workings, old underground workings, slide potentials, water and flood potential and vibration damages for loose or uncontrolled rocks or debris.

The Department of Mines Minerals and Energy then, in my opinion, should go out and verify this information to ensure that this information is accurate and all this information is taken into account before a permit is granted to mine above a home when any or all these issues are encountered.

DMME Response: DMME requires applicants for surface mining permits to evaluate any existing surface or underground workings, slide potential (as part of assessing ground stability), control of water discharges (erosion and sediment control, stormwater runoff, and National Pollutant Discharge Elimination System (NPDES) permitting) as part of the application for a DMLR permit.

While vibration potential for loose rock is not specifically evaluated, the management of loose or uncontrolled rock or debris must be addressed in the DM ground control plan. DMME is recommending that the National Academy of Science study blasting issues, including the potential for blasting vibration to dislodge rock materials outside of the blast area. Currently no studies have specifically addressed this issue.

Delegate Phillips suggested that DMME should field verify information submitted by coal mine permit applicants before any permit is granted to mine above a home when safety issues are encountered. DMLR regulations require professional engineers to complete and certify critical designs to ensure their adequacy. DMME does not, as a permitting agency, re-calculate this engineering but DMME does review the designs as part of its permit review. Permit applicants

must remain responsible for the design of their mines. The DMLR inspector conducts a field review when applications are received to verify the plans match actual field conditions. Other DMME technical staff review the plans to ensure they meet the required design/performance standards. DMME conducts an extensive technical review of all permit applications, often requiring four or five technical reviews before the plan is approved. This double level approach, requiring professional engineering certification of critical plans and DMME verification (which is in accordance with the standards established by the Office of Surface Mining and used by OSM and other primacy states), is used to ensure the permit plans comply with regulatory design and performance requirements. What is critical, and what was not done in the Inman accident, is that mine operators must complete and submit these designs before undertaking any critical activities.

Delegate Phillips: Next, when there is any danger above a home, any imminent danger of harm above a home there should be at all times present supervisors who have the responsibility to protect the public in the homes for potential danger.

A coal company should have sufficient personnel at all locations where mining is being performed. Workers should be sufficient to monitor and control any work activities where there's a threat to public activity and to the public as a whole.

DMME Response: Mine supervisors and workers should be aware of potential hazards not just to the public but to workers as well. Mine supervisors and workers have responsibility for not only performing their work duties but ensuring public and worker safety as well.

The Virginia Mine Safety Act already requires mine foremen to be present on any mine where three or more persons work during any part of a 24-hour period. The mine foreman must conduct on-shift safety inspections during each shift on a surface coal mine. DMME believes additional steps may be needed for certain critical ground-disturbing tasks. Therefore, we are recommending, as part of an expanded ground control plan, that the mine operator address practices such as the use of spotters or having limits of construction delineated.

Delegate Phillips: Civil penalties should be of such a nature that they will be a deterrent to the violation of the regulations or the laws. I commend DMLR for their proposal to increase the penalties.

DMME Response: DMME believes that the proposed increase to \$70,000.00 maximum civil penalty per violation that results in an injury to the public is reasonable. It is equivalent to the Virginia Occupational Safety Program and is \$10,000.00 more than the maximum penalty that can be assessed by the federal Mine Safety and Health Administration.

Delegate Phillips: The Department of Mines Minerals and Energy must also undertake to improve their complaint process from citizens and other individuals. There needs to be a set process where citizens are given follow-up, where they are explained in terms of the process that they must go through and help resolve those issues with coal companies and with citizen complaints.

DMME Response: DMME agrees to an extent and is committed to improving communication with citizens. DMLR already has established procedures for handling citizens' complaints

including follow-up with the citizens. At the conclusion of a complaint investigation, DMLR reviews the complaint process with citizens and explains their right of appeal if DMLR finds that the nature or facts of their complaint does not constitute a violation. DMLR inspectors act as a liaison when there is a disagreement between citizens and coal companies whenever they have difficulty reaching an agreement on what is a satisfactory water replacement or a subsidence repair order. Citizens receive a written explanation of what they must do to appeal a DMLR decision. It is the identical process that companies must go through to appeal DMLR decisions.

DMME cannot resolve all problems and complaints citizens may have against coal companies. Many complaints pertain to issues that do not fall within the agency's jurisdiction. The transcript of the November 4, 2004, meeting and the following section that details the public comments and DMME's responses illustrate the agency's legal limitations in this regard. Many citizens expressed concern over truck traffic, speeding trucks, trucks not properly covered with tarps, noise from the truck traffic, diesel fuel odors, etc. DMME believes that it is obligated to explain to citizens that these concerns are not within the agency's authority to address and to direct them to the proper authorities. Other issues that DMME receives complaints about relate to items such as royalty payments, private agreements regarding erecting fences after mining, and surveying property lines. These types of complaints are also outside the authority of DMME.

At times DMME determines that a citizen's residence has in fact suffered damage or that a water loss has occurred, but it is obviously not related to mining. In such cases, DMME does not have the resources available to provide consultative service to citizens to determine what has caused the damage or water loss. For example, a common water quality problem found by DMME is iron bacteria contamination in wells. This results in a black discoloration of plumbing fixture sand sinks. It is the result of wells not being properly maintained and cleaned periodically. When DMME encounters this problem the citizen is advised to contact the county health department. It is not appropriate for DMME to provide well cleaning advice.

During water loss investigations, DMME also encounters situations where the well water supply has not been lost or diminished due to mining, but instead, the storage capacity of the well has been reduced as a result of the well bore being filled in with sediment over time. This results in the well not being able to store an adequate amount of water, and the well runs out of water much sooner than it used to, thus appearing to the citizen as if the mining had impacted the well. These wells need to be cleaned out. DMME advises the citizen that the well bore has filled in and it is up to the citizen to have the maintenance work done in both of these types of problems.

In other situations, while DMME can determine that a water loss is not mining related, it cannot determine the cause of the problem. We understand that this often frustrates the complainant, but DMME has no jurisdiction or the resources to make such determinations. In such situations it is the well owner's responsibility to seek other expertise to resolve the problem just as do well owners living outside the coalfield area.

Delegate Phillips: There must be a look to see if there needs to be primary and secondary barriers constructed. Currently, I believe that only one barrier is constructed. If there is a primary and secondary barrier constructed with various signs between the primary and secondary barrier above homes or above other areas where there's imminent danger, I believe that will provide an extra measure of security, and extra measure of safety for the public to make sure that public safety is not jeopardized.

DMME Response: DMME believes that implementing the recommendations made in the report and strict adherence to mine plans and design and construction standards are the key to maintaining safety around mines located above occupied buildings. A secondary barrier is not recommended. Construction of a secondary barrier would require that a large cut be made into the hillside between the mining permit and the residents. The cuts would need to be at least 25 to 50 feet wide and possibly more depending upon the elevation differences between the permit and residences. This would require significant disturbance much closer to the residence than the mine permit itself. Previously, Delegate Phillips recommended this barrier be placed prior to any disturbance. That is not possible as noted above. DMME believes that constructing a secondary barrier would create an additional hazard that would have to be controlled to ensure public safety. Even if such a barrier is safely constructed, its effectiveness is not guaranteed. A rock or boulder could strike the barrier bench, then bounce over the edge and roll down the hill. In the fatal accident, there was a small flat road below the area where the rock was pushed off the A & G Coal Corporation Strip No. 13 Mine, and the rock easily passed over that area.

Placement of a barrier fence at the rear of a residence is not feasible either. Such fences depend upon deformation of the fence to absorb the energy of the rock or boulder striking the fence. Placing such fences on the hillside would require large disturbances and cuts similar in size to that discussed above.

For the reasons above DMME cannot support this recommendation. The key to ensuring public safety is controlling the material on the permit, not placing large rocks in berms, and not trying to catch the material after it has been dislodged.

Delegate Phillips: These are just some of, I think, the many, many concerns of the public and many concerns that may be raised here tonight.

The process that we're going through tonight, ladies and gentlemen, it's not perfect, the government is not perfect and the solutions are not perfect, and no legislation will be perfect. But we must make an attempt to move in the right direction to ensure the public safety, that lives are protected, homes protected and that this tragedy never again happens to any citizen in the coalfield.

In my closing remarks, I don't know how many of you are parents in this room tonight or how many of you are grandparents in this room tonight, I suspect most of you are. But until you have a child many of you will never know the pain that one feels to have a child sick or injured or killed. And there's not a miner in this room tonight, there's not a citizen in this room tonight who doesn't want to stop any future pain from ever occurring again, and that's what it should be all about.

It shouldn't be about pointing fingers, I guess, you know it shouldn't be about who was wrong or who was right, it should be about fixing the problems and finding a solution to prevent another tragedy from occurring in the coalfields.

Thank you very much.

Secretary Schewel: Senator Wampler.

Senator Wampler: Thank you, Mr. Secretary. And to everyone who showed up tonight thank you all for your interest.

I have served in the Senate and had the honor of serving in the Senate for 17 years and I will tell you all that I come to this meeting with a heavy heart tonight. I told my wife where I was going tonight and what we would be doing and I said this is probably one of the toughest meetings I have been to in the 17 years where I have been discharging my duties as your Senator.

As a father of a 16 year old and a 13 year old, I have to follow on what Bud said, that there could be no harder tragedy for any family to overcome than what was experienced during this August.

Words of legislators or the governor's representatives or anyone else can't undo what has been done or turn the clock back.

I think what Bud says is entirely accurate, that we have to learn from this experience and tonight is the beginning of that process where we receive the report from the Department of Mines Minerals and Energy and from Governor Warner's administration as a starting point of where we move from here.

And one thing I do know about this Southwest delegation, whether you are Republican, Democrat, Independent matters not, we all find a way to do what we believe is right for this region. I predict that when this session of the legislature adjourns that we will indeed have found a way to try and address the many concerns.

I give you this perspective, and I will do it as quickly as I can, but I remember having been re-elected in 1991 when I sat foot on the property of the South Mountain Coal operation where some miners were killed from a methane explosion. Perhaps many of you all knew them. I remembered the charred vehicles at the mouth of the mines, those folks who had been on shift at that given day.

And the one thing that was good that came out of that was we had a major revision of the Mine Safety Laws and it took us about four months to go through a very exhaustive process of trying to address what many of the problems were at that particular operation, but we learned. And I think today the mines are a safer place than they were before the South Mountain experience.

As Bud says government is not perfect. In fact many of us, no matter whether we are part of it or not, get very frustrated with it. But what we do know is we have to work to make this a better place to live and a safer place to live.

I wasn't going to use this example or this analogy but I'm going to do it anyway. I am also an officer in the United States Army. In every operation that we have safety is briefed as part of that operation. It's briefed into the operations order, you understand before you go out on an operation what your responsibilities as an individual and as a supervisor or as a commander of that operation is.

And during that operation you always talk to people to make sure that they understand what the safety precautions are and what the risk assessment is, because it changes every day or every

hour that you're on that operation, whether it's even in a classroom or whether it's the most complicated live fire exercise, but you make safety a part of every bit of training that you do.

We have plenty of laws on the books today but when people don't follow those laws and safety is not adhered to 24 hours a day 7 days a week, and you put people with inexperience at very difficult positions guess what happens. Accidents happen at that particular point. And that's what makes me angry that we perhaps have not learned our lessons from the past.

It doesn't matter how many inspectors you have on the job or the frequency of inspection. If someone is underground is working beyond an unsupported roof and the roof collapses we will have a tragedy. You hope that there was proper supervision, you hope that there was proper safety briefing and that the individual person knew better than to do that, but experience tells us that that doesn't happen all the time.

My point is that we need to place more emphasis, we can write all the laws we want to but you have to practice safety 24 hours a day 7 days a week. And that's where I think we're going to have to address through the budget some additional positions for the Department of Mines Minerals and Energy to accomplish the frequency of schedules that we have.

I will reflect on this just for another moment beyond the South Mountain tragedy. We established a safety program for small mines because many of the larger coal companies and operators have safety programs, and they have people that monitor those and they have pre-shift and on-shift and after-shift safety meetings. But what we found was in the smaller mines many times that's where you had a lot of the incidents of the accidents that were occurring and some actually turned into fatalities.

If you had a piece of equipment that was de-energized but you had people working around it and didn't follow the proper procedures, you know, we will find people that will die from electrocution as a result of that. So we need to focus on safety as much as we can and we will also try to address these many other points.

Let me close by saying this, Mr. Secretary and Mr. Wampler, I appreciate you all presenting this report to us.

I look on Page 28 where I find where you start to initiate the various proposals. We have talked too long tonight but we need to hear from the citizens tonight and that's really, I guess, why we are here, to listen to your all's comments and we will incorporate those as best we can into this legislation.

And my colleagues would tell me I shouldn't do this but I am going to do it anyway. I've had a rough week. I was a pallbearer at my Uncle Jim's funeral yesterday, he was 81 years old, he was born in Norton. At the funeral home Tuesday night I heard my dad tell a story and it was about Uncle Cicero. Uncle Cicero was from up on Guest River and Uncle Cicero worked both for non-union and union operations back in the '20's and '30's, and he said when the union came to town and he became a union miner he was going to get paid \$5.00 a day regardless of how much coal he was going to produce on that given day and he thought the heavens had opened up on that given date.

But the story that I want to leave with you is that Uncle Cicero also, during the depression, couldn't work as much as he wanted to and at \$5.00 a day and a family it was hard for him to raise a family. Some folks up on Guest River said, now Uncle Cicero did you ever make any of that corn liquor and he said, yes, I did and I'm not too proud of it. They said, Uncle Cicero, was there any bad liquor that you made and he said, no, never bad just some better than others.

I guess what I would say with Uncle Cicero is times have changed, we will learn from this tragedy, we will move forward and we will find a way to adopt the recommendations that are discussed here this evening.

Thank you, Mr. Secretary.

DMME Response: DMME agrees with Senator Wampler's statement that. "when people don't follow the laws and safety is not adhered to 24 hours a day 7 days a week, and you put people with inexperience at very difficult positions guess what happens, accidents happen at that particular point." We also share the Senator's belief regarding the need to "practice safety 24 hours a day 7 days a week."

Secretary Schewel: Senator Puckett.

Senator Puckett: Thank you, Mr. Secretary.

I want to say first thank you to Benny and the people at DMME. I know this has been a difficult time for you also and I appreciate the report that you have prepared, I think it's very thorough. It addresses issues that we are concerned about and it also offers some solutions. I'm not sure that's the only solutions or that that's the only answers, but I want you to know I appreciate the effort that you have put into this.

And as I look through this I am reminded that as many times in my own life I take some shortcuts and I do some things probably that I shouldn't be doing, and what I have observed in this report is what I think is a breakdown of procedure that is clearly established.

You have already heard that if we could do something and correct this and make things like they were before August 20th we certainly would all do that. Life is not as forgiving as we would like for it to be.

You have heard Bud and William both talk about the issues that are out there and we certainly want to consider every recommendation that's been made in this report. We want to take a hard look at the reason for the breakdown in procedure and one of the things that William said that's exactly correct and one of the things that I sense when I talk to people about mining in general is I am very disappointed that there is a lack of trust in what I find in our communities, whether it's with a tragedy like we have experienced or it may be a simple thing of, you know, a boundary line, but there is an element that we must restore here and procedures. For you see there are plenty of laws out there on the books and we can have all the inspections that we want, but we cannot have 24 hour inspections and being with someone every time that they are out performing their duties.

So we have to instill in our workers, our inspectors, our operators and the general public some trust that you will do, you know, the right thing as best you can do. And even when you do that sometimes things don't work like they should.

But it's clear to me in this report when you can look at the 30 odd pages of this report and you find a statement in here that indicates to me the unauthorized actions and failures constitute gross negligence we have done something wrong, and we need to fix that. And I want you to know I am committed to fixing that.

I am not just sure that it's more laws on the books but I do think that it has to begin with being willing, for whatever the cost is, to do the right thing and follow the laws that we have and follow the procedures that are out there.

That's a commitment that I would make to all who are here tonight in whatever area you represent, that I want to try to help restore that trust that we need in our communities to see that whatever changes we make here, and I believe they will be positive, but there will be changes that all of us are willing and committing to follow.

I believe if we do that then we will see some good things come from what is a very sad and difficult occasion that we have experienced.

I look forward to hearing from the public tonight and I want to say, thank you for your time tonight and your interest in being here. I want you to know that your interest here tonight will not be in vain and it's important that you participate in a process like this.

Thank you, Mr. Secretary.

DMME Response: DMME agrees with Senator Puckett's comment that "we can have all the inspections that we want, but we cannot have 24 hour inspections or be with every mine operator every time that they are out performing their duties. There must be compliance by mine operators and their employees for there to be a safe mining environment for the public and workers."

DMME also agrees with Senator Puckett about the need to build trust in the coalfields between citizens, coal companies and DMME. We will work together with the legislature, the citizens and the coal industry in an effort to build trust. Part of this trust building needs to be a clear understanding by the parties of the laws and regulations and the role of both mining companies and DMME. We hope this report helps bring clarity to the issues that were raised.

RECOMMENDATIONS/COMMENTS MADE BY CITIZENS AT NOVEMBER 4, 2004 PUBLIC MEETING

To better understand the comments received and the agency's responses to them, it should be noted that the Department of Mines, Minerals and Energy has two divisions that regulate coal mining operations in Virginia. The Division of Mines (DM) is responsible for administering the Virginia Coal Mine Safety Act and regulations. DM is primarily responsible for worker health and safety at coal mining operations. The Division of Mined Land Reclamation (DMLR) is responsible for administering the Virginia Surface Coal Mining Reclamation Act and the Virginia Coal Surface Mining Reclamation Regulations. DMLR is primarily responsible for regulating the surface impacts from coal mining operations, including public health and safety, minimizing adverse impacts to the environment and administering the National Pollutant Discharge Elimination System (NPDES) program for coal mining in Virginia. As with all DMME divisions, DM and DMLR work seamlessly together on activities such as the investigation of the Inman fatality and other citizen complaints. However, their primary roles are distinctly separate and they can only take separate enforcement actions under their respective programs.

The following is a summary of recommendations and comments received from the general public followed by the Department of Mines, Minerals and Energy (DMME) response. The summary provides excerpts of each commenter's statements taken directly from the transcript. The transcript contains typographical errors and misspelling of some names. DMME has chosen not to correct the errors to ensure that this section matches the transcript. DMME has tried to ensure that the speakers names are spelled correctly in the heading to their respective comments, however some speakers referred to other individuals in their comments and these names may be misspelled as the comments are taken directly from the transcript. The speakers' comments are edited only by removing general statements and retaining statements relative to the report, recommendations made, or concerns expressed. The statements are in the order that the individual made them. Some individuals switched back and forth between some concerns such as blasting and trucking. DMME has not grouped their comments by similar topics, therefore the topics will be somewhat scattered in this respect. DMME believed it better to leave the comments in the order that they were made so that they better match the transcript of the public meeting.

As noted at the November 4, 2004, public meeting a complete transcript of the legislative comments and public comments is available from the Department of Mines, Minerals and Energy office at Big Stone Gap, Virginia.

Harold Greer Comments: I come from a family that was involved in mining for many years. I have long been interested in conservation issues and I've been interested in local politics.

What I would like to state is the recommendations for change that I've heard tonight are well needed and they're well taken, but I simply don't think they go far enough in some cases.

My family has had a relationship with the Department of Mines that has not exactly inspired our confidence. In the course of mining in the Mill Creek section of Pound the mining practices at A&G were the source of numerous complaints.

As a person who came from a family long engaged in surface mining I knew instinctively that the blasts were excessive, complaints were made. The Division of Mines responded by putting up monitors to survey the levels of the blasts. The moment the measuring devices were gone the blasts would resume their former levels and in many cases they would increase in intensity. As observed by the people in whose yard the monitoring apparatus was placed, the Division of Mines employees placing them drove immediately over to the strip mining operation. None of us had the slightest doubt they were telling A&G that they were being monitored.

Now there has been a proposal that would correct this and I think it's good, but it shows that the Division of Mines has done favors in the past for certain companies and that needs to be looked at. Because that has led to the situations of this tragedy we've had at Inman now.

I would make some recommendations that I think would help the public participate more actively in the enforcement of the laws. First, the owners of property who have suffered from blasting be permitted to obtain an emergency injunction prohibiting the blasting or the mining and that this injunction be effective from the moment it is delivered by a process server and that no bond be required. This would lower the expenses on the people who are seeking it.

Secondly, all nighttime blasting should be prohibited unless a special permit with a public hearing is conducted.

DMME Response: Regulations on blasting levels are based on research conducted by the former United States Bureau of Mines (USBM). The federal Office of Surface Mining (OSM) adopted these levels nationally and the DMME's Division of Mined Land Reclamation (DMLR) did the same when the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) were promulgated.

Mr. Greer stated that the Division of Mines has given favors for certain companies. DMME takes charges of special treatment or special favors very seriously. Such actions are in direct opposition to the values we set out for our work, and will not be tolerated. If Mr. Greer has evidence to substantiate his claim, he should give the evidence to DMME management so an investigation can be undertaken.

There are three ways acceptable under the mining regulations that a company can monitor its blasting activities. A company may use a monitoring device called a seismograph to measure the air blast vibration and ground vibration, it may choose to use the scale-distance equation or it may develop a modified scaled-distance method. The company may also use a blasting-level chart. If a seismograph is used, each shot must be monitored and a record provided by the company for each blast. The allowable blast ground vibrations are based upon the distance to the closest dwelling, public building, school, church, or community or institutional building outside the permit area. The allowable ground vibrations are 1.25 inches/second for 0 to 300 feet, 1.00 inches/second for 301 to 5,000 feet, and 0.75 inches/second for 5,001 feet and beyond. If a company chooses to use the scale-distance formula then the amount of explosives that may be detonated per delay is limited based upon the distance to the closest residence. As required for all blasting, records must be kept on each shot that is detonated. Information required includes weight in pounds of explosives used in each shot, the number of delays used, distance in feet from the blasting site to the nearest protected structure and the scaled distance factor. The scaled-distance factor is a predetermined number that relates to the distance in feet the blasting

site is from the nearest residence. In addition to using the scale-distance formula, DMLR often requires a company to conduct periodic monitoring if the scaled-distance factor is used. If a company wishes to use a modified scale distance formula authorization from the DMLR is required. The company may also choose to use the blasting-level chart. This method uses seismic monitoring and the vibration frequency levels (the harmonic frequency of the energy wave as it passes through the ground/rock) to establish the allowable ground vibration limits. DMLR inspectors must check all blasting records at least quarterly. DMLR may periodically monitor, using a seismograph, blasting at a surface mine site, especially if complaints are received. A company must retain a record of all blasts for at least three years. Upon request by DMME, copies of the blasting records must be made available to DMME and to the public for inspection.

If a complaint is received concerning blasting, or any other activity from a surface mine, the DMLR inspector must conduct an investigation that includes talking with the complainant and company officials. In the case of a blasting complaint, blasting records are checked for compliance with the regulations. DMLR complaint investigation procedures also provide the opportunity for comment from company officials about any alleged complaint. DMME can upon agreement with the citizen delay reviewing the company's blasting records for a period of time while DMME monitors blasts with an agency seismographs for a few days. We hope citizens understand that this will delay the investigation by a similar time period. When DMLR conducts seismic monitoring at a complainant's residence it does not notify the company.

DMLR cannot conduct comprehensive blasting investigations in secret. The company must be contacted in order for DMLR staff to review blasting records. The fact that a DMLR inspector contacts the company to review blasting records and to obtain comments about the complaint from a company spokesperson does not mean that DMLR is doing favors for the company. Most blasting violations issued by DMLR are the result of reviews of the blasting records.

There is no basis for the allegation that DMLR was doing favors for companies "has led to the situations of this tragedy we've had at Inman now." The Inman accident was the result of unauthorized actions of the company and failure to follow the approved plan, and failure to follow prudent safety precautions.

DMME is proposing amendments to require blasting operations occurring within 1,000 feet of a private dwelling or other occupied building to conduct seismic monitoring of all blasts. DMME is recommending that the Virginia congressional delegation seek funding and provide directions for a National Academy of Science study of the effects of blasting on property. The study should review current technologies in relation to those used as compared to those addressed in the 1950's USBM studies.

Mr. Greer has recommended that a property owner be able to obtain an emergency injunction to prohibit blasting when effects have occurred. Citizens already have the ability to petition the court system and obtain an injunction if he or she chooses. Mr. Greer does not indicate the level of vibrations that should be exhibited before an injunction could be obtained. However, blasting damages must be proven using the science that is currently available. USBM studies have determined maximum blasting levels below which vibrations should not cause damage. Many citizens filing complaints about blasting are concerned that the vibrations are excessive and do not allege blasting has caused damage. DMME does not believe it is appropriate to try to

prevent all blast vibrations, but rather to prevent blasting damage. The threshold for feeling vibrations, including blasting and other types of vibrations, is extremely low, well below the levels at which damage may occur.

Mr. Greer stated that nighttime blasting should be prohibited. Blasting at night is already prohibited except when needed to protect health and safety and for emergency blasting actions. Section 4 VAC 25-130-816.64(a)(2) and (3) of the VCSMRR, states:

(a) General requirements. (2) All blasting shall be conducted during daylight hours. The division may specify more restrictive time periods for blasting.

(3) Unscheduled blasts may be conducted only where public or permittee health and safety so require and for emergency blasting actions. When a permittee conducts an unscheduled blast, the permittee, using audible signals, shall notify residents within ½ mile of the blasting site and document the reason for the unscheduled blast in accordance with 4VAC25-130-816.68(p).

If Mr. Greer is aware of any company blasting other than in daylight hours, he should notify the DMME immediately.

Harold Greer Comments: "Thirdly, right now in order to check on the violations of a company you have to go to the, you have to look up the permit number of that company. Those violations and those complaints should be done under the name of the company, this would make it much easier to track down so people would know if a road company, a company with a history of abuse is operating in their community."

DMME Response: A person is not required to provide a permit number to check on violations. A person may contact the DMME Customer Assistance Center at (276) 523-8235 with the mine name, permit number, or location of a coal mine to obtain available information about the particular mine. The permittee, address, permit number, state mine index number, and the Mine Safety and Health Administration (MSHA) index number must be posted on the sign at the entrance to each mine. All information concerning a permit, including violation history, may be found on file at the DMME office. The VCSMRR requires that the violation history be tracked by permit. When a permit application is submitted to DMLR the application must contain a statement of whether the applicant or any subsidiary, affiliate, or persons controlled by or under common control with the applicant has (1) Had a Federal or State coal mining permit suspended or revoked in the 5 years preceding the date of submission of the application; or (2) Forfeited a performance bond or similar security deposited in lieu of bond at any time and include a violation history for the three year period preceding the application date.

Harold Greer Comments: "Also, all blasting, not just blasting around houses, needs to be constantly monitored because if you don't you will have more and more problems. That I think is something that just has to be done."

DMME Response: DMME has recommended additional monitoring requirements for blasting. DMME proposes to require seismic monitoring of all blasting operations occurring within 1,000 feet of a private dwelling or other occupied building. This proposal will help ensure that blast vibrations closest to dwellings and occupied dwellings are within the limits prescribed in the regulations.

Harold Greer Comments: "Also, more protection needs to be made for employees that fear that they could lose their jobs if they're doing something illegal, and they know it's illegal but they know the company might discharge them, they need further protections."

DMME Comment: There are already protections in place in both federal and state law to protect the rights of employees making a claim of illegal activities on mines. Section 105(c)(1) of the Federal Mine Safety & Health Act of 1977 states:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act

This regulation applies to all coal mines under jurisdiction of MSHA. Under the Virginia Mine Safety Act, DMME holds confidential the identify of any person making a safety complaint on a coal mine. This is to protect the person making a complaint from retaliation by the mining company. Mine employees already have the protections recommended by Mr. Greer.

Harold Greer Comments: "And last of all, a company that has a history of repeated infractions of mining law or whose actions have resulted in death or injury due to violations of the law shall and should be denied the renewal of existing mining permits, and should be denied the issuance of new permits. Stockholders and corporate officers of such companies should be barred from participating in the affairs of companies seeking mining permits.

Now a common felon is prohibited from certain business affairs. If a doctor deliberately kills someone in malpractice there's a good chance he would be denied the right to practice his profession. If a lawyer drug a judge off the bench and beat the heck out of him, I dare say they would not be permitted to practice law. If a drunken driver kills someone they would be prohibited from continuing."

DMME Response: Coal mine operators listed on permit applications are entered into a database maintained by the federal Office of Surface Mining - the Applicant Violator System (AVS). During the initial review of a permit application, DMME checks the agency database and the federal AVS for any outstanding violations, unpaid penalties or AML reclamation fees against the permit applicant. If violations are not corrected and penalties are not paid, the AVS will recommend a "deny" and these persons are prohibited from obtaining a permit. Virginia and other coal producing states rely on this system to track persons who have outstanding violations of the mine reclamation laws. For example, anyone who has had a bond forfeiture and has outstanding violations or unpaid civil penalties in any state cannot receive a permit in Virginia

by forming a new company. The individuals and not just the companies are tracked in this system.

In addition to the federal AVS, DMME maintains its own database to track violations, penalty payments, and related information. If a person has owned or controlled a company that forfeited a permit in Virginia, then in order for that person to be able to receive another permit in Virginia they must pay all outstanding penalties, fees, costs of reclamation, etc. and pay a \$5,000.00 re-instatement fee. This \$5,000.00 re-instatement fee is unique to Virginia's coal surface mining regulatory program.

Harold Greer Comments: "The surest way of seeing that you all have obedience to the laws is to increase the penalty and make certain that the people who in the end, not the workers, but the people who own the companies, the people who derive the profit from these companies are not permitted to operate in Virginia. That's the honorable thing to do and it ought to be done."

DMME Response: DMME is proposing that section 45.1-246.A of the Virginia Surface Coal Mining Reclamation Act be amended to provide for increased penalties. For violations that result in personal injury or fatality to the public, the civil penalty ceiling should be raised to \$70,000 per violation. The DMME response to his prior comment addressed the blocking of permits through the AVS and the DMME database.

Harold Greer Comments: "An investigation needs to be conducted as to whether any company has received special favors from the Division of Mines.

Certainly the past mining practices and complaints of the company in this incident at Inman needs to be looked at. I think the press and I think the public will find that they have a very interesting history, and it's gone on for a long time; this is not an isolated instance.

I hope this will just merely be the tip of an iceberg for an investigation, not just the death of that poor child that's being conducted by the Commonwealth's Attorney down in Scott County, but that the whole situation be looked at in great detail."

DMME Response: Mr. Greer raised issues earlier in his comments regarding favors given companies. As discussed above, if Mr. Greer has any evidence to substantiate his claim he should present it to the management of DMME for investigation.

Mr. Greer has filed two complaints with DMME regarding mining. DMME investigated these complaints and provided Mr. Greer the results of the investigations.

Conner McCoy Comments: My name is Connor McCoy. I live at 9820 Bold Camp Road in Pound, Virginia and am a student here at Mountain Empire.

When A&G Coal Company was conducting mining operations on Bold Camp, debris from night blasting came into our yard several times. Several pieces slightly larger than cinder blocks were scattered in the yard below the area that was being stripped.

DMME Response: Mr. McCoy stated that A&G Coal Company mining on Bold Camp detonated a blast at night that deposited debris in his yard on several occasions. Blasting

complaints records for Permit No. 1101537 operated by ANR Coal Company, LLC (A&G Coal Company was the contractor at this site) were reviewed. A total of seventy-nine (79) complaints were registered against the permit. Of the seventy-nine (79) complaints, forty-four (44) were blasting complaints. Two (2) of the forty-four (44) complaints were for fly rock. Investigation by the DMLR inspector into one complaint revealed that the material appeared to be yellow mud that could not have originated from the blasting activities of Permit No. 1101537. The second fly rock complaint investigation found no evidence of fly rock on the complainant's property. Both complaints were closed with no enforcement action taken. There was no record of Mr. McCoy having filed any complaints with DMME.

Mr. McCoy was contacted by phone on December 7, 2004, concerning the statements made dealing with debris deposited in his yard by blasts that were detonated at night. Mr. McCoy stated that he did not file any complaints with DMLR concerning flyrock from the mining operations in the area. DMME cannot investigate flyrock complaints long after they are alleged to occur. DMME encourages citizens to contact DMME at the time they believe that flyrock has been caused by a mining operation.

Mr. McCoy has stated that blasting activities were conducted at night on Permit No. 1101537. As noted in the DMME response to a similar comment from Mr. Greer, blasting at night is already prohibited except when needed to protect health and safety and for emergency blasting actions.

Conner McCoy Comments: Also, in the early morning of August 13, 2001 my family and over 20 of our neighbors were the victims of a flash flood that was unleashed when two strip mine sediment ponds constructed by A&G Coal Company broke loose above our house. If my grandparents had known to what extent our property and home would be damaged by the strip mining, they would never have signed a contract with VICC to strip the property. At the time the contract was signed both of my grandparents were sick. My grandfather was bedfast from a stroke and my grandmother suffering from cancer of which she later died.

DMME Response: On August 13, 2001, five inches of rain fell in a 2-hour period in the Bold Camp and Birchfield Creek areas of Wise County. This amount of rainfall caused heavy localized flooding. Several homes and property were damaged as a result. Complaints were received from citizens in the area about flooding implicating surface mining activities in the area.

As a result of a technical investigation of the storm event, DMME determined that the storm exceeded the design capacities of the ponds on this permit. The DMME investigation also found that, water from pond #4 Permit No. 1101537 was draining into an abandoned underground mine. It is believed that this drainage into the underground mine contributed to a blowout of water from an underground mine portal located in the area. The situation compounded the flooding that was already taking place. DMME issued a notice of violation (NOV) to the company requiring the cessation of the discharge of water into the mine. Another NOV was issued to stabilize the permit area to prevent further erosion and clean up sediment and debris deposited off the permit area. The investigation found that no ponds other than pond #4 on Permit No. 1101537 failed causing flooding to homes or property in the area of Bold Camp and Birchfield Creek. The investigation did find that field conditions at some ponds on the permit did not match the designs in the approved plans. Based on this finding, DMME issued a NOV requiring the operator to correct the discrepancies in the approved plans dealing with ponds 3, 7,

9, 10, 11, 12, 13, 15 and 16. These ponds were functional and had adequate drainage controls and they did not cause problems associated with the flooding problems.

Conner McCoy Comments: I believe that the stockholders of companies responsible for damages should be made personally liable for those damages. In too many cases companies do not have the assets for proper compensation, and only by making stockholders liable can the good behavior of companies and the decent compensation for victims be achieved. If this is done there will be less incentive to violate the laws.

DMME Response: Directors, officers, or agents of a coal mine operator already may be assessed individual civil penalties if the violation resulted in a cessation order that remained unabated for 30 days and there is proof that the director, officer, or agent knowingly and willfully authorized, ordered, or carried out a violation. This is provided for at 4VAC25-130-846.12 When an individual civil penalty may be assessed.

(a) Except as provided in Paragraph (b) of this section, the division may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out a violation, failure, or refusal.

(b) The division shall not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until a cessation order has been issued by the division to the corporate permittee for the violation, and the cessation order has remained unabated for 30 days.

Stockholders that are not actively involved in management of the company cannot be held individually responsible for actions of the company, and as such DMME cannot assess penalties against stockholders.

Belinda Couch Comments: I do not believe that Delegate Terry Kilgore should be sitting on this panel because of the conflict of interest involved. He cannot be objective in any viewpoint considering he is the lawyer for the Davidson Family.

DMME Response: As noted by Secretary Schewel, after Ms. Couch finished speaking, Delegate Kilgore declined to sit on this panel because of a potential conflict of interest as counsel to the Davidson family.

Belinda Couch Comments: Furthermore, I believe Delegate Bud Phillips should not be on this panel as well. After reading his slanderous comments about the mining agencies in this area and his feelings about the coal industry, he too would present a lopsided view.

DMME Response: This comment was directed to Delegate Phillips regarding his membership on the panel at the public meeting.

Belinda Couch Comments: I believe any report coming from the Division of Mines Minerals and Energy and DMLR cannot be fair and unbiased considering that the child's grandfather retired from DMLR. I believe this matter should be further investigated.

DMME Response: Jeremy Davidson's grandfather retired from DMME in April 1995. He was not involved in the investigation, nor has he been involved in any DMME activities since he retired. The DMME employees involved in the investigation and preparation of this report are

professional and not affected by any past relationship between the family and the agency. The conclusions reached in this report are based upon results of the investigation, a review of the permit files, on the ground evidence, and statements from A & G personnel interviewed on August 21, 2004. Additionally, the special counsel appointed to consider this case will make any decision regarding criminal prosecution for any violations of the mining laws or regulations. This decision will be made independent of DMME actions.

Belinda Couch Comments: In conclusion, I believe when this investigation is finished it will determine that this was a very tragic accident and not one of gross negligence.

DMME Response: DMME has not seen any new evidence to change the draft report conclusion. The final report concludes that the accident was the result of unauthorized actions and failures that constitute gross negligence on the part of Matt Mining Company Inc. and A & G Coal Corporation.

Pat Jervis Comments: "Well it's my opinion that there's three parties to blame for this accident and I think it could have been prevented. And Mr. Kilgore's lawsuit brings out two of them, there's actually more than two but let's just say the mine operator and the landowner. And there's some individuals that are named but they're actually with the mining company, too.

Let me say first of all I don't think anybody intended to hurt anyone but I think it -- the people mining the coal that's their job to mine coal, but you have to do it safely. And that's where I bring in the third party here, and I think it is the Department of Mines Minerals and Energy, because for the past five years myself and a lot of old people have been coming up here on the hill presenting our doubts that mining can be done safely around communities.

But, you know, we live in an area that's got very steep terrain and there's already laws on the books that address those. But one of the problems we've got with laws on the books, and I think Mr. Puckett said that pretty good, you can have all the laws you want and you can add more laws but if they're not enforced they're not going to do anybody any good.

DMME has the power to grant variances. Now if you've got a law and you could be granted a variance that law is no longer going to protect anybody. I think there's too many variances that are given to particular mining jobs that are around communities."

DMME Response: Mr. Jervis has taken Senator Puckett's statement out of context. "I am not just sure that it's more laws on the books but I do think that it has to begin with being willing, for whatever the cost is, to do the right thing and follow the laws that we have and follow the procedures that are out there."

Senator Puckett correctly noted that the laws must be followed. Enforcement actions take place after a violation occurs.

Mr. Jervis stated he believed too many variances are given to particular mining operations around communities. Mr. Jervis has not identified any specific examples where variances were improperly approved or how these variances have endangered the public. DMME has no record of any person being injured as the result of a variance being granted.

Variations may be granted to waive certain performance standards. For example, in steep slope areas variations can be granted for the requirement to restore the area to the approximate original contour (AOC). This type variance does not present a safety hazard to citizens or adjacent residences. In an AOC variance the slope is restored to a flatter grade, which presents no hazard to the public and can reduce peak runoff during storm events. There are no provisions in the Virginia Coal Surface Mining Reclamation Regulations for granting variations that can adversely affect citizen's safety. The speaker is implying that the granting of a variance endangers citizens and that is unfounded. Variations can also be granted for mining closer than 100 feet of a road and within the 100-foot stream buffer zone. For these variations to be granted, written findings must be made in accordance with the applicable regulations. The variance to mine within 300-feet of a residence requires a written waiver from the resident. DMME cannot grant this variance unless the citizen signs the written waiver.

Pat Jervis Comments: I'm sure everyone remembers the very steep hillside going down to the houses and the church that was there. And we've got a record from 1983 that a rock rolled off of that mountain, went into the church and no one was hurt. And then we have a rock that rolled off of the hill and a child was killed. Now people shouldn't be mining up above residences and churches.

Do you think that's the only two rocks that rolled off that mountain? No. One of them went into a church and one of them went into a house, but a lot of rocks roll off and they don't hurt anybody and you don't ever hear about that.

I used to jog up in that hollow and I saw the mountainside come off and block the road from the strip job about the time that -- the early 1980's there. So, yeah, lots of things come off these steep mountains and nobody can help it at certain times if you get a lot of water or if you get a blast that shakes that mountain something's liable to shake off.

I have a list here, and I'm not going to go through it one for one because of time, but I have a list here of eight different instances where either fly rock or rocks rolling off of jobs accidentally came into people's yards or into their houses.

DMME Response: DMME did not receive a list from Mr. Jervis. The 1983 rock incident was in relation to the construction of the original road as part of an Abandoned Mined Land (AML) project and not to mining activities. As such the road was not constructed in accordance with the primary road design/construction standards required by current permit applications. Neither the 1983 rock incident nor the August 20, 2004 incident had anything to do with blasting or variations. DMME discussed this incident in the draft report.

Pat Jervis Comments: It began about the time I got involved with looking at the strip mining operation that was going to come to Andover and at that time there was already one at Dunbar. There were a couple ladies up there, if I can find the names, Ms. Lois Barnette and Ms. Violet Boyd. Both ladies were elderly ladies living alone, had lived there all their lives and they had fly rock come, from where I understand, about a quarter of a mile and hit their houses. One of them the size of a brick at the window where this one lady has her favorite chair. She could have easily been killed.

DMME Response The agency investigated the complaints (#9900269 and 9900270) and issued enforcement action to the permittee of Permit No. 1101655 by way of imminent harm Cessation Order No. RDS0001250. A civil penalty of \$2,770 was assessed for the cessation order and was subsequently paid in full. Since December 29, 1998, Meg-Lynn Land Co./Matt Mining Co., Inc.'s Permit No. 1101655 has been issued 15 enforcement actions with final civil penalties totaling \$9,190.

Pat Jervis Comments: No one hears of that because there's not an accident involved with it, but that's -- that's on DMME's records.

DMME Response: The DMME records are public information and available for public review, inspection, and copying pursuant to the Virginia Freedom of Information Act, as amended. DMME is not required to advertise all violations or prepare accident investigation reports on all violations.

Pat Jervis Comments: The company came and repaired her house, but again like the little three year old if it would have hit her there wouldn't have been any repairing done for her. But up in Roda you're going to hear, probably hear some people come up here and tell you about fly rock and other things coming into their yards. When you're on these steep mountains trying to mine and you're blasting I think, to me is kind of like forecasting the weather, a lot of people do a very good job of it but it's not an exact science.

DMME Response The Roda Resources, L.L.C. permits were subsequently transferred to Nally and Hamilton Enterprises, Inc. (Permits No. 1101817 and No. 1101820). These operations were cited for 18 violations from August 2003 to the present and assessed civil penalties totaling \$22,210.00. The five violations associated with blasting were assessed final penalties of \$14,280 all of which were paid. In addition, a settlement agreement was executed on September 7, 2004, whereby Nally and Hamilton Enterprises, Inc. had taken corrective actions to address the blasting violations, withdrew its appeal of the DMLR enforcement action/penalties, made a \$5,000 donation to Appalachia Elementary School, and made a \$30,000 donation for watershed restoration.

Pat Jervis Comments: And, in fact, the person who was with Austin Powder a few years ago told me that he was with his group and they were putting off a demonstration blast with a lot of dignitaries. They were about a quarter of a mile from what they were going to watch and they all had to hit for cover because the blast threw fly rock over on them.

So nobody can do this exactly. And when you're doing it above a community with those steep mountains coming down either fly rock or something jarred, rolling off of that hill, it's an accident, yes, but it can be prevented if you'll get the operation away from the communities. Now one of my arguments with DMME when we come up here is if they can grant variances, and they can, to let someone strip mine closer than 100 feet to a road, then they also when they get a permit they can say look this is above a community and we're not going to allow this; we're going to back it off a quarter of a mile or more beyond the other side of the ridge, because we're afraid we're going to get somebody hurt or killed.

DMME Response: Blasting is not an exact science, however, in most instances the cause of fly rock can be attributed to failing to follow the blasting plan. DMME cannot guarantee that there

will never be flyrock or a violation of the regulations. Topography has no bearing on flyrock problems. Flyrock can occur in any surface mining operation. Flyrock has occurred in the Illinois coal basin where the terrain is almost completely flat. Flyrock at these sites has traveled just as far as that in the Appalachian coalfields. Flyrock also can and does occur at any type of blasting operation, including highway construction, site construction for commercial developments, etc. Flyrock has occurred during highway construction when blasting for storm drainage drop inlets, with excavations of four feet square and five or six feet deep. Flyrock is no greater hazard in steep slope areas.

Mr. Jervis again alleges that granting of variances creates a hazard to the public and that simply is not the case. No variances are required for mining above residences. The 100-foot distance variance to a public road requires a public notice and opportunity for hearing in the locality, and that a written finding be made that the interests of the public and landowners affected thereby will be protected. There is no legal provision for a reverse variance, as has been discussed by Mr. Jervis and others at prior public meetings. A permit applicant must demonstrate that the proposed mining operation will be in accordance with the required performance design standards and that the public health and safety will be protected.

To arbitrarily require significant offsets from residences without any legal or technical basis would be inappropriate and beyond the legal authority granted under the Act. Mr. Jervis's proposal would in effect cause the agency to venture into rendering property decisions and potentially subject the State to claims of unconstitutional "takings" of property rights. If a "takings" claim is upheld in court then the government is required to reimburse the owner of the property that is "taken" or prohibited from being used or developed by the owner.

Mr. Jervis and other speakers have asserted that DMME contributed to this accident by issuing the permit above the residents. Contrary to that assertion, if the company had followed the plan approved by DMME the accident would not have occurred. When any company (either coal or another type of industry) violates regulations designed to protect or fails to follow approved plans, violations will occur, accidents may happen, and the public can be adversely affected. That is not a failure of the regulatory agency but of the company.

Accidents and injuries happen daily because people fail to obey laws and regulations. Just as it is not the fault of the agencies that regulate various activities when these injuries occur, it is not the fault of the Department of Motor Vehicles or the State Police when drunk drivers have accidents and injure or kill people.

Pat Jervis Comments: I have come up here personally and participated in three formal hearings, and to be honest with you in some cases I think the citizens' side were almost literally gagged. Now it's a court type hearing and when the coal company has their lawyers and DMME has the Attorney General's Office, Deputy Attorneys and, you know, they don't allow certain witnesses and they do allow other witnesses.

DMME Response: Mr. Jervis was involved in a formal hearing objecting to the Division's approval of a permit application of Meg-Lynn Land Company (Application # 0102301). Hearing Officer Edward G. Stout held by decision of July 19, 2000,

"At the hearing, Patton L. Jervis failed to offer any proof that he has an interest which might be adversely affected by the mining in question. He lives more than a mile from the

permitted area. Consequently, he has failed to meet his first burden of proof. In so finding, I reject his claim that he had an interest because he is a contingent beneficiary of property owned by his mother, Maude S. Jervis. Such an interest is simply too remote and I find it is not one contemplated by the regulations."

While Mr. Jervis was not granted standing, he was allowed to present his mother's case on why she believed the permit was issued incorrectly. The denial of standing by Mr. Jervis did not prevent him and his mother from presenting their argument against the permit issuance.

At the hearing Mr. Jervis was allowed to act as his mother's representative, in essence as her attorney. He provided testimony and questioned DMLR permit review staff under direct and cross-examination. The formal Hearing Officer went to extraordinary lengths to allow Mr. Jervis to present his mother's and his concerns. It is unprecedented for a non-attorney to be allowed to represent another individual at a Formal Hearing. Neither DMME nor the Assistant Attorney General objected to this arrangement. Two articles about this hearing appeared in the Coalfield Progress on July 18, 2000 and July 25, 2000 (see Attachments A and B).

Some excerpts from the July 18, 2000 article are copied below:

"Pat Jervis argued Monday that Mining-related blasting near Andover could damage homes and the Appalachia landfill ..."

"Jervis, of Appalachia, testified during a hearing at Virginia Department of Mines, Minerals and Energy's office that blasting ... causing flyrock ...and could release toxic materials from the landfill site."

"Jervis also argued blasting could damage 80-year old terra cotta sewer pipes in Andover ..."

"Didn't Matt Mining have a blasting plan for the Dunbar site? Jervis asked... Carter was allowed to answer. He testified Matt Mining had a blasting plan but was required to change it when the flyrock problem occurred."

"Could flyrock hit Ms. Jervis house? Jervis asked."

"Has flyrock ever killed someone? Jervis asked."

These two newspaper articles clearly show that Mr. Jervis was not "gagged" but given every opportunity to present his arguments against the permit and to question DMLR permit staff under oath.

Mr. Jervis was also present at formal hearings requested by Carl "Pete" Ramey. At one hearing, Mr. Jervis attempted to provide expert testimony but could not be qualified through examination that he was an expert in any field such as geology, engineering, hydrology, etc. that was relevant to the review and consideration of a permit application (under the Act and regulations). Mr. Jervis testified that he was a high school geography teacher, but that did not qualify as expert credentials in this technical hearing. Mr. Jervis was advised that he could provide factual testimony but could not offer expert opinion. Mr. Jervis was not prevented from testifying, but

only limited to testifying to factual matters and not offering expert opinion on matters of geology, engineering, hydrology, etc.

In the last formal hearing requested by Mr. Ramey, the rule excluding potential witnesses (from being present during the testimony of others) was invoked and the witnesses were excluded from the hearing until they had completed their testimony. Mr. Jervis, along with all of the other witnesses including the DMLR staff who were to be called as witnesses, were asked to leave the room where the hearing was being held until such time they were called as a witnesses. During the course of the hearing Mr. Jervis re-entered the room without being called as a witness and sat down and listened to testimony of other witnesses. Mr. Ramey's attorney then called Mr. Jervis as a witness. Counsel for the other parties objected since Mr. Jervis had been sitting in the room in violation of the Hearing Officer's instructions to leave the room and not return until he was called as a witness. The Hearing Officer ruled that Mr. Jervis could not testify as a witness because he entered the room after being told that he must wait until he was called to testify. Mr. Jervis was unable to testify because he failed to follow the Hearing Officer's instructions and not because of any actions by DMME or the coal company or the land company.

Formal hearings are adversarial in nature and a party requesting the hearing is informed of the burden of proof. Hearings are conducted in accordance with the applicable Rules of the Supreme Court of Virginia and Virginia Administrative Process Act.

The following information is provided to a person requesting a formal administrative hearing:

*"Please be advised that formal review would be conducted pursuant to Section 2.2-4020 of the **Virginia Administrative Process Act**, as amended. The agency would be represented by the Virginia Attorney General's office.*

If you will have legal counsel representation in this matter, please provide that person's name, address, and telephone number.

*The permittee or other persons would have the right to petition to intervene in a formal hearing, under Section 4 VAC 25-130-789.2 of the **Virginia Coal Surface Mining Reclamation Regulations**.*

As the moving party (Applicant) in a formal public hearing, you will have:

- *to show the Hearings Officer that you have an interest which is or may be adversely affected by the Division's decision; and,*
- *the burden to show that the Division's decision was improper, under the **Virginia Coal Surface Mining Control and Reclamation Act of 1979**, as amended, and the regulations promulgated thereunder.*

*The following definition is found in Section 4 VAC 25-130-700.5 of the **Virginia Coal Surface Mining Reclamation Regulations** –*

"Person having an interest which is or may be adversely affected" or "person with a valid legal interest" shall include any person:

(a) Who uses any resources of economic, recreational, aesthetic, or environmental value that is, or may be, in fact adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the division; or

(b) Whose property is, or may be, in fact adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the division.

The term "adversely affected" is further defined as meaning perceptibly harmed.

"Aesthetics" means the consideration of that which is widely regarded to be a visibly beautiful element of a community or area.

The formal hearing is an administrative review proceeding of specific limited jurisdiction. If a hearing request does not reveal a material issue in dispute, no hearing is required. Consequently, either (1) the failure to state a claim, or (2) stating a claim for which relief is not available within the limited jurisdiction of this administrative review, would make it unnecessary to conduct a formal hearing."

Pat Jervis Comments: You come up here and you sort of realize that if you're just an ordinary citizen you're fighting a dead-end battle, period. We do not have the funds to fight Penn Virginia and the coal industry and the Attorney General's Office all at one time.

One of my good friends is Pete Ramey and he brought his concerns up here three separate times with three different mining permits. After the third one in cahoots with the whole outfit that we have to deal with up here, they charged him with harassing and embarrassing the coal company, and found him guilty.

DMME Response: Mr. Ramey was not charged by DMME with harassing and embarrassing the coal company nor was he found guilty as stated by Mr. Jervis.

In regards to the hearing Mr. Jervis refers to, the applicable statute and regulation are -

§ 45.1-249E.

The Board is authorized to promulgate regulations providing for the award of costs and expenses, including attorney fees, to any party to any administrative proceedings under this chapter, incurred by such person in connection with his participation in such proceedings and to assess such costs and expenses against any other party, as may be proper. For the purpose of this subsection, the term "party" shall include the Commonwealth or any of its agents, officers or employees.

4 VAC 25-130-789.1. Petition for award of costs and expenses under Section 45.1-249E of the Act.

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in--

(1) A final order being issued by a Hearing Officer, or

(2) A final order being issued by the Director or division.

On January 27, 2003, in conjunction with Mr. Ramey's third failed appeal opposing the permits, Penn Virginia Operating Company, L.L.C.¹ and Roda Resources, L.L.C.² asked the Hearing Officer to award costs, expenses and attorney fees as set out above. DMME did not make such a request. A formal hearing was held on the petitions on April 17, 2003, and a final decision was rendered in favor of the petitioners on May 23, 2003. The hearing officer's decision awarded the petitioner Penn Virginia Operating Co., L.L.C. \$400 in attorney fees and \$117.01 in expenses. Petitioner Roda Resources, L.L.C. was awarded \$400 in attorney fees and \$78.00 in expenses. Of the costs and expenses awarded from the hearings officer, the Deputy Director of the DMME re-apportioned a total of \$200 in attorney fees and \$48.75 in expenses against Mr. Ramey and the balance against his counsel for misrepresentation of the record. The amount of the award was determined through an independent hearing officer and subsequently modified as noted above and affirmed by the designated representative of the Department Director.

Pat Jervis Comments: And this is a guy that is President of the Lions Club, is also a family member of a hospice and he's with the RAM project. You couldn't find a better citizen in this United States and they made a criminal out of him, and all he was doing was trying to defend his home and his wife.

And by the way his home is up at Roda, it's abandoned because he and his wife couldn't live there things got so bad. A fly rock hit his house, it had the paint on it and was laying in his yard, but when DMME comes up there and looks at it one of their geologists says, well, this is a surface rock, there's no way it could have been blasted down here or rolled down here, we don't know where this rock came from. But his siding has a whole in it and the rock has paint on it and this fine upstanding gentleman is basically called a liar just like my mom was up at Andover by the people who are supposed to be enforcing the laws.

DMME Response: DMME did not call Mr. Ramey a liar or question his character. Mr. Jervis's mother was not called a liar by DMME either.

Mr. Ramey filed a complaint with DMLR regarding a rock having hit his house in Roda. Mr. Ramey never once stated that he or anyone else saw the rock hit the house or that anyone knew for certain that it was flyrock from any mining operations near Roda. The DMME investigation determined that the rock was not the type of rock expected from flyrock and that the distance from any blasting operations was too great for the rock to have been flyrock.

DMME conducted an investigation (#CEV0003616 of Complaint #0400091) in April and May 2004. DMME prepared Technical Report Number 2423 of Mr. Ramey's flyrock complaint which concluded:

"In early April, Mr. Ramey discovered that the house in Roda had been struck by a rock since his last visit, perhaps up to a month prior. Mr. Ramey found the rock lying in the yard in two halves. The larger half, which had struck the house, has paint scraped from the aluminum siding clinging to it. ... also noticed some of the paint was also on the underside of the rock, where it would have fit to the smaller half. Thus, the two halves would have to have separated prior to the larger half striking the house. The smaller half

¹ Penn Virginia Operating Co., Inc. sought \$6,345.01 in costs, expenses and attorney fees.

² Roda Resources, L.L.C. sought \$8,590.50 in costs, expenses and attorney fees.

was found just outside of the chain-link fence that separates the front yard from the shoulder of the road.

The rock is a micaceous quartz sandstone, typical of most sandstones within the Wise Formation, or any other sandstone from the Pennsylvanian-age stratigraphy of the Virginia coalfields. The precise source of the rock would not be determinable. The rock exhibited both iron-oxide-staining and a degree of surficial rounding of edges from weathering, which would not be present on a freshly-blasted specimen.

From blasting, the furthest that a rock has been thrown in Virginia is approximately 3,000 feet. The rock in question struck the front of the house, and could not have come from behind the house. On the accompanying location map, ... illustrated a 3,000-foot zone to the front of the house. For the rock that struck the house to be a flyrock from blasting, the blasting would most likely have to have occurred within that zone. No blasting has occurred within that zone. The nearest blasting to the house, to the east on Permit 1101817, is approaching 5,000 feet distant, almost a mile away. However, given the angle that the rock struck the house and then landed, that blasting is from the wrong direction. The nearest blasting from the northwest, the direction from which the rock appears to have struck the house, and also could coincide with the date that the house was struck, is approximately two and one-quarter (2 ¼) miles away on Pinnacle Resources, LLC's, Permit Number 1101854.

The rock that struck Mr. Ramey's house cannot be a flyrock, considering the available data. While in Roda, the significant amount of swiftly-moving haul-truck traffic was quite noticeable. I can hypothesize that the rock may have bounced from a passing truck, or was flung at the house by an unknown person. However, we have no further means to forensically determine the manner in which the rock came to strike the house."

Pat Jervis Comments: The only other thing I've got to say is about yesterday's local paper, The Big Stone Gap Post, of course it has about the death of this child, it has about our meeting and it's continued on Page 5. Of course it says what you've already seen up here; a rock weighing over 800 pounds pushed and dislodged out of the berm went down the hill 649 feet toward the plaintiff's double-wide manufactured home, of course we know the end to that. But on the same page we've got another new news item, Blasting Plan Near Exeter and Inman. Now that said it rolled 649 feet, this article reads that A&G Corporation --

A&G Corporation is about to start blasting roughly a football field's distance from Lower Exeter according to a blasting notice provided to Appalachia Town Council. A&G was issued surface mining permit for an operation 310 feet from Lower Exeter. Now this again is a small community down in one of these V-shaped valleys. We've just had a child killed that a rock rolled 649 feet, so DMME is granting a permit that comes within 310 feet of people's houses.

DMME Response: As noted previously there is no provision to prohibit mining beyond 300 feet of a residence. No waiver is required for mining or blasting beyond 300 feet of a residence. The blasting limits such as vibration levels and or pounds of explosives per delay will apply. DMLR is not failing to follow the law and regulation in permitting this site. There are many instances where citizens have signed waivers and allowed companies to mine within 300 feet of their residence. This is the citizen granting the waiver. DMLR does not grant the waiver.

Larry Bush Comments: I live in the Exeter community right above where Mr. Jervis was just talking about them granting that plan to blast. I have asked for formal conferences on that same permit, been denied. I've asked for conferences on that permit, and Fork Ridge permit and Middle Branch Coal, been denied.

DMME Response: Formal hearings are adversarial in nature and a party requesting the hearing is informed of the burden of proof. Hearings are conducted in accordance with the applicable Rules of the Supreme Court of Virginia and Virginia Administrative Process Act. The same information cited in the response to Mr. Jervis was given to Mr. Bush.

Since February 2001, Mr. Bush has requested several informal conferences and formal hearings as noted below:

2/12/01 – requested informal review of the complaint investigation findings of Complaints #0000235 and 0000238. The informal review decision of 2/23/01 held the DMLR complaint investigation finding was proper.

3/7/01 – requested formal hearing to review the complaint investigation findings of Complaints #0000235 and 0000238. The formal review decision of 6/20/01 held the DMLR finding to close the investigations was proper.

4/27/01 - requested an informal conference to object to Matt Mining Co., Inc.'s permit renewal application #5101897. The public conference was held on 5/27/01. Mr. Bush did not appear but was given ten days to submit additional written comments. Mr. Bush failed to submit written comments when he was given the opportunity to do so after failing to appear.

8/01/01 – requested an informal conference to object to Matt Mining Co., Inc.'s permit application #9108681. The public conference was held on 9/28/01, but Mr. Bush did not appear or submit additional written comments.

11/14/01 – requested formal review of DMLR decision to approve Matt Mining Co., Inc.'s permit application #9108681. Mr. Bush did not submit information to show he had standing – a valid legal interest that could be adversely affected by approval of the application.

2/6/02 - requested informal review of the complaint investigation finding of Complaint #0200014, Sigmon Coal Co., Inc. PN 1201680 and Matt Mining Co., Inc. The informal review decision of 2/6/02 noted that enforcement action had been taken against Sigmon Coal Co., Inc.

3/12/04 – filed written objections and requested an informal conference regarding coal exploration notice filed by Alliance Coal Corporation near Exeter, Virginia. DMLR notified Mr. Bush by letter dated 3/15/04, that an application for permit had not been submitted; once filed, an informal conference could be requested.

5/21/04 - requested an informal conference to object to Meadow Branch Coal, L.L.C.'s permit application #1001920. The public conference was held on 7/30/04, but Mr. Bush did not appear or submit additional written comments.

8/13/04 - requested a formal hearing to object to the approval of Meadow Branch Coal, L.L.C.'s permit application #1001920. DMLR response requested information as to how Mr. Bush would be adversely affected and what error(s) did he allege was made by DMLR in approving the application. After failure to identify any error(s) by DMLR in approving this application, Mr. Bush's request for a hearing was denied 9/22/04.

8/26/04 - objected to company's application (#1002197) to change contractor on permit. DMLR letter of 9/2/04 explained that application was not to relinquish any permit rights to contractor. The contractor, Fork Ridge Coal Corp., would be acting as a contractor under the permittee, Meadow Branch Coal, L.L.C.

As can be seen from the list of informal and formal hearing requests above, DMME has given Mr. Bush numerous conferences and hearings, but he has either failed to show or failed to present any evidence other than his objection to the proposed mining operations. DMME has given Mr. Bush the opportunity to submit written information to DMME after he has failed to appear, but he did not avail himself of that opportunity.

It should be noted that when formal hearings are held, DMME contracts with a Virginia Supreme Court appointed Hearing Officer in private practice to preside over the hearing and to render a decision. DMME must pay the Hearing Officer for these services even if the citizen does not appear or does not submit any evidence. These costs are borne by the taxpayers. Abuse of this system costs taxpayers unnecessarily and ties up DMME resources that could be used in administering the DMME program.

Larry Bush Comments: Again, I'm just like Mr. Jervis, I have nothing but contempt for the Division of Mines. They serve no purpose whatsoever in this part of the state because they don't enforce the laws that are there already.

DMME Response: DMME is enforcing the law and Mr. Bush has provided no basis for his assertion. Mr. Bush cites his experience as a former federal mine inspector as a basis for making this judgment. DMME reviewed the federal Mine Safety and Health Administration (MSHA) records and found that during the same time period MSHA issued 23 violations, 13 of which were for equipment. DM has issued 24 violations under the Virginia Mine Safety Act to this operation. Some of the MSHA violations were in areas not regulated by DM. MSHA also inspects surface mines on a more frequent basis than DM and uses more inspectors than DM or DMLR during their inspections. These statistics speak for themselves.

Since June 2000, the DMLR has issued 17 notices of violation and 2 cessation orders to Matt Mining Co., Inc.'s Permit 1100877. Civil penalties totaling \$21,052 have been assessed and paid.

Larry Bush Comments: They've not enforced them for so long that it's not enforceable any more I don't believe. Because if you don't enforce the laws to start with and a coal company gets in that mind set that it won't be enforced then you can't enforce it, because you've lost all

credibility, and I think that's what's happened to the Division of Mines. I have some recommendations here. The first and foremost this panel needs to look at is to get those mining companies out of yards, get them out of our yards mining coal. 300 foot of a house mining coal and they're destroying everything around these communities.

DMME Response: Mr. Bush makes allegations without providing any support for such allegations. DMME has consistently enforced the existing laws and regulations. Mr. Bush appears to want surface mining banned and laws enforced that do not exist. Surface mining removes trees and temporarily affects the wildlife population but it is legal and it does not destroy everything around the communities. Numerous communities have had mining in close proximity during the last couple of decades and the communities still exist. The surface-mined areas have been successfully reclaimed and vegetated. Most of these communities were adversely affected by abandoned mine lands from pre-law mining. Spoil was pushed down slope, blasting was not subject to vibration limits or scale distance factor. There is no provision to prohibit mining beyond 300 feet of a residence. No waiver is required for mining or blasting beyond 300 feet of a residence. The blasting limits, such as vibration levels and/or pounds of explosives per delay, will apply. DMLR is not failing to follow the law and regulations in approving a permit at this site. There are many instances where citizens have signed waivers and allowed companies to mine within 300 feet of their residence.

Larry Bush Comments: Laws are fine if you enforce them. They're not enforcing the laws. Sixty-eight pieces of equipment, I'm a former mine inspector, 68 pieces of equipment and 24 violations over four years is laughable, absolutely laughable.

DMME Response: DMME is enforcing the law. Mr. Bush's experience as a federal MSHA mine inspector does not qualify him to judge whether or not 68 pieces of equipment and 24 violations over four years is "laughable, absolutely laughable" without ever setting foot on the job. It should be noted of the 24 violations issued by DM 16 were issued on equipment. As previously noted, DMME reviewed the MSHA records and found that during the same time period MSHA issued 23 violations, 13 of which were for equipment.

Larry Bush Comments: I would also suggest that no mining, blasting or running of equipment after a certain time of day. Noise all night long. I don't know where you've ever been around it, but bull dozers are like tanks. You say you're a military man, they're like tanks all night long going around these communities. People can't sleep, they live in fear of being killed now and their houses being damaged, and it's just a mess and the Division of Mines is to blame for it for letting them do it.

DMME Response: Blasting operations may only be conducted during daylight hours as previously discussed per 4 VAC 25-130-816.64(a)(2) and 4 VAC 25-130-817.64(c) of the regulations. Most of what Mr. Bush is complaining about are aspects of mining operations that constitute a nuisance and over which DMME has no authority. State mining laws and regulations governing noise are based on preventing hearing damage from the noise, not nuisance issues. Federal mine laws and regulations also address prevention of hearing loss and not nuisance.

DMME is not failing to enforce the law or regulations but rather is constrained by the laws and regulations that grant the agency authority to act. DMME like MSHA, has no authority to require companies not to operate at night.

Larry Bush Comments: Make them enforce the laws. Make them do their jobs. You call about a complaint, you complain to the Attorney General's Office about the Division of Mines and they'll say, well we'll take your complaint but we'll defend them against you, you know, when it comes to a hearing, you know, we'll be the ones defending them so why complain, how can you get any satisfaction from it?

DMME Response: Mr. Bush is correct in that the Office of the Attorney General will represent the DMME case in a formal hearing. If a coal company or a citizen appeals an agency decision through a formal hearing, then the Office of the Attorney General will represent DMME. Coal companies and citizens are treated equally in this aspect. DMLR currently has several formal hearings pending that have been requested by coal companies that are appealing DMLR enforcement actions, bond forfeitures, and permit bonding decisions.

In each instance an Assistant Attorney General will represent DMME/DMLR. The Office of the Attorney General provides such services to all Virginia state government agencies. The Attorney General's web site includes a page that outlines the duties and powers of the Attorney General and the Office, also called the Department of Law, as defined in state law. The first item in the list of duties reads: *"Provide legal advice and representation to the Governor and executive agencies, state boards and institutions of higher education. The advice commonly includes help with personnel issues, contracts, purchasing, regulatory and real estate matters and the review of proposed legislation. The Office also represents those agencies in court."* At the bottom of that page the following statement is made, *"One thing the Attorney General and the other attorneys on our staff cannot do is give legal advice to private citizens. If you have a private dispute, this Office cannot intervene."* Mr. Bush and other citizens who appear at formal hearings are afforded due process and are not discriminated against by the Office of the Attorney General representing DMME.

Larry Bush Comments: The same way with complaints, I've filed probably 50 on haul roads on them hauling coal on the roads and mud and dust. And every time you file they'll take your complaint and they'll call you a day or two later, looked good to me buddy, looked good to me. This haul road was in fine shape, the best I've ever seen it, them people do a good job. They're raping everything around us and they're holding our hands while they do it and we have absolutely no defense, the people don't. It needs to stop.

DMME Response: Of the 55 complaints filed against Matt Mining Co., Inc.'s Permit 1100877, 28 were filed by Larry or Marlene Bush. The DMLR investigated each of the 28 complaints. The division issued enforcement action for haulroad maintenance violations on three occasions. The company took remedial action upon notification of haulroad problems.

Mr. Bush and his wife combined have filed eight complaints on other mines for a total of 36 complaints filed with DMME regarding mining. DMME investigated each of these complaints and provided Mr. and Ms. Bush the results of the investigations.

Larry Bush Comments: They need to limit blasting conditions. You can limit the shots that they fire. Make them fire more shots with less aftershock. You can obtain the same goal of downing whatever material you're want to shoot down, just use more shots with less powder and less shock from the blast.

DMME Response: DMME is recommending that the National Academy of Science revisit the USBM blasting standards in consideration of the numerous concerns/complaints regarding blasting operations. If the study finds a scientific basis for changing the blasting limits in the DMME regulations, DMME will implement the process to amend the regulations.

Larry Bush Comments: Respect people's rights, the Division of Mines is completely, totally out of tune with the public in this area. You go down there, you call in a complaint it's laughed about. I've talked to Gene Dishner in Richmond, I've called him I don't know how many times. I told him one time, I said make them drive their vehicles, make them drive their personal vehicles up to check my complaint and he laughed about it and thought it was funny.

I've got a home, I've got pictures here of my vehicles, my house with yellow mud running off of it when I have to scrub it down twice a year. My vehicles, you can't tell what color they are -- I'm going to give them to you. Other people here are suffering the same thing.

DMME Response: DMME respects citizens' rights and investigates every complaint. Every complaint investigation report given to citizens explains their right to appeal the results of the investigation if they are not satisfied with the investigation findings. When DMME does not take enforcement action, it does not mean DMME is not respecting citizens' rights. It means that no violation was found. If DMME were to cite a company on the sole basis of citizen complaints without having factual evidence that violations exist, then companies would easily have the violations and resultant penalties overturned on appeal.

Larry Bush Comments: Laws are fine if they enforce them. You cannot get the Division of Mines to enforce the laws. Like I say, I've asked for conferences on this very permit that Mr. Jervis was talking about. I cited, I'll give you this too, eight or ten ways that I'm being adversely affected.

They denied my request for a formal hearing saying that they didn't err legally in issuing that permit. They might not have erred legally but that's not what the thing says. It says if you are adversely affected or could be adversely affected. I said I never said you erred legally in issuing that permit, I'm saying I'm adversely affected by it and I want my adverse concerns addressed in this permit.

DMME Response: In response to Mr. Bush's latest request for a formal hearing to contest the approval of a permit application, the following information was provided to him –

"This is to acknowledge receipt of your letter of August 9, 2004, requesting a formal hearing to contest the Division's decision to approve permit application number 1001920 of Meadow Branch Coal, L.L.C.

Please be advised that as the moving party (Applicant) in requesting formal review of the Division's approval of the permit application, you will have:

- *to show the hearings officer that you have an interest which is or may be adversely affected by the Division's decision to approve the application; and,*
- *the burden to show that the Division's decision to approve the application was improper, under the **Virginia Coal Surface Mining Control and Reclamation Act of 1979**, as amended, and the regulations promulgated thereunder.*

*The following definition is found in Section 4 VAC 25-130-700.5 of the **Virginia Coal Surface Mining Reclamation Regulations** –*

"Person having an interest which is or may be adversely affected" or "person with a valid legal interest" shall include any person:

(a) Who uses any resources of economic, recreational, aesthetic, or environmental value that is, or may be, in fact adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the division; or

(b) Whose property is, or may be, in fact adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the division.

The term "adversely affected" is further defined as meaning perceptibly harmed.

"Aesthetics" means the consideration of that which is widely regarded to be a visibly beautiful element of a community or area.

*Your August 9th letter may be adequate for the hearings officer's determination as to whether you have a valid legal interest that may be adversely affected by the Division's decision. However, your letter does not specifically state what you allege the Division has failed to do in its review and approval of the permit application (i.e., that is contrary to the requirements of the **Virginia Coal Surface Mining Control and Reclamation Act of 1979**, as amended, and the **Virginia Coal Surface Mining Reclamation Regulations**). As you are the applicant (in requesting this hearing), the agency is asking for a more definite statement of the claim upon which you seek administrative relief be granted.*

The formal hearing is an administrative review proceeding of specific limited jurisdiction. If a hearing request does not reveal a material issue in dispute, no hearing is required. Consequently, either (1) the failure to state a claim, or (2) stating a claim for which relief is not available within the limited jurisdiction of this administrative review, would make it unnecessary to conduct a formal hearing.

For your information, the agency's position in this matter is similar to the requirements set forth under the federal regulations governing formal administrative hearings under the Surface Mining Control and Reclamation Act of 1977, as amended. Specifically, under 43 CFR Subpart L (Special Rules Applicable to Surface Coal Mining Hearings and Appeals), Section 4.1363(a),

The request for review shall include:

1. *A clear statement of the facts entitling the one requesting review to administrative relief;*
2. *An explanation of each specific alleged error in OSMRE's decision, including reference to the statutory and regulatory provisions allegedly violated;*

3. *A request for specific relief;*
4. *A statement whether the person requests or waives the opportunity for an evidentiary hearing; and,*
5. *Any other relevant information.*

Please provide information that specifically states what you allege the Division of Mined Land Reclamation has failed to do (i.e., regulatory or statutory requirements) in its approval of Application Number 1001920. You will have until the close of business on August 27, 2004, to submit the written information.

Also advise this office by August 27, 2004, as to whether legal counsel in this matter will represent you. If you will be represented, please provide that person's name, address, and telephone number."

Mr. Bush's response was that while the DMLR may not have erred in approving the application, he still wanted a hearing simply because he felt he would be adversely affected. A person requesting a hearing must meet both of the standards, showing an interest that may be adversely affected and in addition showing what the department failed to do in its review and approval of the application. As Mr. Bush did not meet both requirements, his request for a hearing was denied. Any future timely request for a hearing that meets the both of the requirements will be heard.

Larry Bush Comments: I asked that they -- well I can read it to you here if I've got time. The main thing that I'm concerned with right now is the possibility of my house sinking. Because my house in the Exeter Community was mined under before the law back in the '30's and the '40's and they give this company a permit to mine under it again.

Now that can be done and it has been done, and it can be done successfully if engineering is near exact. If the engineering is off from the '40's and '50's and who knows what it's like under there right now. There's natural streams that run through that camp in different places that can affect that underground strata in various ways. It could be a mess under there right now and probably is.

But if the engineering is not exact, I ask that they leave a barrier between my house and the mining operations, that's been denied, they denied my hearing.

DMME Response: The DMLR regulations do not require a barrier be left under houses. They require that the permit application contain a subsidence control plan. The plan either demonstrates that subsidence will not occur (normally this is done by limiting the percent of coal removed and maintaining adequate pillar size to ensure an appropriate safety factor) or the application can propose planned and controlled subsidence (this normally requires recovering over 80 percent of the coal). If subsidence causes damage then the regulations require repair, compensation, or replacement of covered structures.

Carl Pete Ramey Comments: My name is Carl Pete Ramey from Big Stone Gap, Virginia, formerly from Roda. I'm 75 years old and I worked in the coal industries for 37 years. From 1949 until retirement in 1985 all of my financial and health benefits have been provided by the coal industry. I have no desire to damage the coal industry, however I do not want to be damaged by the coal industry.

Due to the fear for the safety and lives of my family, I was forced to move from Roda where I had resided for 30 years. Not everyone can move away from strip mining.

Citizens of the coal camps have lived in fear of blasting that has bombarded our homes with fly rock, flooding, dust, noise, open silos, thousands of tons of stockpiled coal are dumped in different places in our community. There is an open silo and a haul road within a 1,000 feet of the Appalachia Elementary School.

DMME Response: Mr. Ramey stated he and other citizens of coal camps live in fear of the effects of mining operations. Many of these concerns, such as noise, location of coal silos and coal stockpiles, and are similar to concerns raised by others. Some concerns are nuisance issues and not regulated by DMME. Other issues are traffic related and are subject to jurisdiction by local governments and the state police.

It should be noted that other Roda residents remain and while the nearby mining creates a nuisance many residents continue to live in close proximity to mining in Roda, as well as other Virginia coalfield communities.

Not only coal related features are near homes and schools but also railroads, busy highways, rivers, natural bluffs, etc. If the public does not take precautions around these features then accidents do happen. Regulated coal mining sites have plans and procedures in place to prevent accidents, and DMME and MSHA inspectors routinely inspect these sites. Members of the public can be frequently injured and even killed when they are on or around these other non-mining features. As noted in the DMME presentation at the November 4, 2004, public meeting there have been two fatalities involving members of the public from regulated coal mining and two fatalities from AML mine sites.

Carl Pete Ramey Comments: For four years I've tried to get DMME to give us, the people, who live in the coal camps or the mountains of Southwest Virginia protection from surface mining.

I legally asked the DMME for an informal and formal hearings. According to their guidelines on three different surface mining permits within 400 feet of our homes on three sides. And on the third permit I had trouble getting the formal hearing,

DMME Response: Mr. Ramey requested formal hearings without alleging any specific reasons as to why the permit applications were improperly approved. In the previous two formal hearings Mr. Ramey had presented no evidence supporting his claim that the two permits should not have been issued. In order to expedite the third hearing and minimize expenses to all parties and the Commonwealth, Mr. Ramey was asked to provide information as follows:

"Please be advised that as the moving party (Applicant) in this matter, you have:

- *to show that you have an interest which is or may be adversely affected by the Division's decision to approve the permit application; and,*

- *the burden to show that the Division's decision to approve the application was improper, under the **Virginia Coal Surface Mining Control and Reclamation Act of 1979**, as amended, and the regulations promulgated thereunder."*

"Your July 8th letter states that you are a homeowner in Roda but does not set out how you may be adversely affected by the Division's decision concerning Application No. 0102314, or what specifically the Division failed to do in its review and approval of the permit application (i.e., that is contrary to the regulatory and statutory requirements).

Please provide information that sets forth the valid legal interest(s) you have in this matter (that is or will be adversely affected by the application approval), and what specifically the Division of Mined Land Reclamation failed to do (i.e., regulatory or statutory requirements) in its approval of the application."

Mr. Ramey's Attorney originally resisted providing this information to DMME, but after she finally did respond, he was granted a formal hearing.

Carl Pete Ramey Comments: The coal industry then sued me and I was convicted of acting in bad faith and harassing and embarrassing the landowner and the coal company.

DMME Response: Mr. Ramey stated that he was sued and convicted. This is not the case. After the third formal hearing resulted in the DMLR decision to issue the permit being upheld by the Hearing Officer, the coal company and the land company, who were also parties in all three of Mr. Ramey's unsuccessful formal hearings, petitioned for an award of attorney fees and costs under § 45.1-249E. and 4VAC25-130-789.1 as previously discussed in the response to Mr. Jervis's comment on this matter. A formal hearing was held to consider the petition for award of cost and fees and the Formal Hearing officer granted an award of a portion of the parties' costs and fees as noted previously.

Carl Pete Ramey Comments: The DMME, the Attorney General's Office approved this lawsuit.

DMME Response: As noted before, there was no lawsuit. The petitions for awards for attorney fees and costs were part of the third formal hearing held at Mr. Ramey's request. Neither DMME nor the Attorney General filed a petition for an award of costs, expenses, and attorney fees. The parties who filed were within their rights to do so (per the statute and regulations mentioned above). The DMME's position was to ensure the record was correctly maintained. Neither the DMME nor Attorney General had any role in the filing of the coal company or land company's petitions for costs, expenses, or attorney fees. When a petition such as this is filed a formal hearing must be held to consider the merits of the petition. DMME scheduled the formal hearing, as required by the Act and regulations. The DMME Deputy Director modified the award granted by the Formal Hearing officer as noted previously and apportioned part of the award to Mr. Ramey's attorney for misrepresentations she made during the course of the hearing and filing of subsequent briefs. This modification actually resulted in a lower amount assessed against Mr. Ramey personally than was originally awarded.

Carl Pete Ramey Comments: I feel that many people are afraid to express their concerns because of the lawsuit that was filed against me. This shows some of the concerns that people from DMME care about the citizens in our communities.

DMME Response: Mr. Ramey is the only citizen since DMME's regulatory program received approval from OSM known to have had a petition for expenses and fees filed against him. Citizens routinely appeal DMME actions and have not had petitions for award of costs filed. Anyone making a good faith claim or complaint would not be subject to such action. It was only after three formal hearings all unsuccessful and all without evidence, that bad faith sufficient to warrant the award of expenses and fees was found according to the Hearing Officer decision in Mr. Ramey's instance. If a coal company were to file petitions against a citizen and demonstrate bad faith then the citizen would have the same right to seek an award of costs against that company.

Carl Pete Ramey Comments: Two spokespersons from DMME made these remarks, one said about blasting, citizens will get frustrated because their homes are shaking or slightly damaged. And then another person said, about the landslide from a strip mine in between Coeburn and St. Paul, where two families had to be evacuated it was said like this, it is not a particularly unusual situation.

DMME Response: Citizens do express concerns when they feel vibrations from blasting. However they do not always allege damage but just "hard blasts". See the November 10, 2004 e-mail from Kirby Cox and the DMME response to the e-mail immediately after the last speaker's comments are addressed in this section.

The landslide referenced by Mr. Ramey was cited by DMLR. The inspector issued two enforcement actions a Cessation Order - CO# HGC0003639 and a Notice of Violation - NOV# HGC000363. It is true that landslides are one of the most frequent complaints received by DMME. These landslides are usually associated with AML areas, however, landslides can occur on either non-mined areas and on active mining areas. The DMME spokesperson was misquoted in the press about the landslide. When asked about the landslide, the spokesperson stated that the settling of the road and road repair that was taking place at the head of the slide before the slide occurred was not particularly unusual. Road repair is a common maintenance issue on mine sites. Unfortunately this was not explained in the article. DMME cares about citizens concerns and did not trivialize the landslide situation. In this case the company purchased both of the residences.

Carl Pete Ramey Comments: Then comes August 20, 2004 when three year old boy asleep in his bed was killed when a boulder was pushed from a strip mine above his home. Based upon the cumulative failures of the DMME to take action upon at least 48 complaints that came from not only the residents of the Inman community but also from other communities like Roda, Osaka, Derby, Stonega, Exeter, Dunbar, all the mining camps around, a huge gamble was being taken that no one would suffer injury and the Davidson Family was the loser of a gamble that they had no control over.

DMME Response: In the accident investigation report, DMME described in detail what contributed to and caused the accident. Each complaint involving the A & G Strip No. 13 Mine has been investigated and the complainants informed of what action(s) were taken by DMLR.

Enforcement actions were taken for all actions found to be in violation of the mining laws and regulations.

As noted in the report "28 of these complaints were about mud being tracked onto the road or dust". It is not reasonable to attempt to link a dust complaint or mud tracking complaint to the events that led to the death of Jeremy Davidson.

Many of the speakers at the November 4, 2004, public meeting expressed concern over speeding trucks, noise from trucks, and inadequate covering of truck loads with tarp. DMME does not regulate traffic. Mr. Ramey has expressed similar concerns in his formal hearings and has been advised that DMME does not regulate these types of issues.

Carl Pete Ramey Comments: Other citizens in communities have not suffered death of a loved one, but daily they are tormented by mining operations. Now DMME wants to change the laws and regulations governing coal mining. Without going into details about the proposed things that needs to be changed, it is my opinion it's just a smoke screen. They have not enforced the ones they have, we do not need to tamp around the edges of current surface mining laws we need to overhaul the whole system.

DMME Response: Mr. Ramey never provided any evidence to substantiate the claims that DMME has not enforced the laws and regulations under its authority. The nuisances endured by the residents near mining cannot legitimately be compared to the death of Jeremy Davidson. The two situations are at the extreme opposite ends of the spectrum. DMME does not have the authority to regulate nuisances such as noise, dust on highways, speeding trucks, etc. DMME does regulate the mining related activities that caused the death of Jeremy Davidson and has taken appropriate enforcement actions as outlined in the report.

Carl Pete Ramey Comments: The people and the coal mines need to coexist. If the Federal Office of Surface Mining is not concerned about the environment then they should declare the homes of the people being threatened by surface mining as an imminent domain or put a moratorium on mountaintop or contour mining until an agency can be formed to protect the people in our communities.

I have some pictures of damages and stuff, it might be a little long, we might could set them out and let you look at them if you want to.

I also have some documents of proposals of over a hundred people in our communities signed a petition that I would like the panel to have. And some things that is relevant to this, if I can give them to you.

DMME Response: This is not a mountaintop removal operation. There are only a handful of mountaintop mining operations in Virginia.

The document referred to by Mr. Ramey is not a petition to designate lands unsuitable for mining although it is written as if it were intended to be one. It is a brief statement that says residents are opposed to surface mining operations in their community. It then lists the criteria for a petition to designate lands unsuitable for mining. Areas already under permit cannot be designated as lands unsuitable for mining. The document does not include any of the necessary

information for a petition to designate an area as lands unsuitable for mining. Many of these same criteria were offered in a petition for lands unsuitable that was submitted by Mr. Jervis several years ago. The Jervis petition was determined to be incomplete and many of the criteria proven to not be applicable.

The criteria that must be proven in a petition for designation lands unsuitable are:

- (a) Upon petition an area shall be designated as unsuitable for all or certain types of surface coal mining operations, if the Director determines that reclamation is not technologically and economically feasible under the Act and this chapter.*
- (b) Upon petition, an area may be (but is not required to be) designated as unsuitable for certain types of surface coal mining operations, if the operations will:*
- (1) Be incompatible with existing Federal, State or local land use plans or programs;*
 - (2) Affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, or aesthetic values or natural systems;*
 - (3) Affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products; or*
 - (4) Affect natural hazard lands in which the operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.*

Mr. Ramey just restated these criteria but did not submit any facts to be considered but only the names and addresses of the individuals signing the petition.

When Mr. Jervis submitted his petition to designate lands unsuitable it was determined that some of the criteria was not applicable or Mr. Jervis did not provide any scientific or factual basis for his petition claims. For example, Wise County land use plans allow surface coal mining and, in fact, some areas are zoned for surface mining. Reclamation is indeed technologically and economically feasible as demonstrated by the numerous successfully reclaimed mine sites and in numerous research projects at the Powell River Research Project.

There were no proposals in the document other than to prohibit surface mining based on the lands unsuitable petition criteria. DMME can take no action on Mr. Ramey's document.

Mr. Ramey has filed three complaints with DMME regarding mining. DMME investigated these complaints and provided Mr. Ramey the results of the investigations.

Dink Shackelford Comments: I'm Dink Shackelford, Executive Director of the Virginia Mining Association. I want to thank the committee for allowing me the opportunity to speak to you today concerning the Department of Mines Minerals and Energy Report and the issue of safety.

We in the coal mining industry ask that you work with us and assist us to ensure that nothing like this accident ever happens again. Our efforts here today must help us all ensure this type of accident never occurs again.

After reviewing the proposed changes we think that the intent of the report is a move in a positive direction. We ask that you further consider input from our industry and base any recommendations that you make on sound scientific principles as well as common sense.

DMME Response: DMME will consider input from any interested parties as it moves forward to implement changes in response to this accident.

Barney Reilly Comments: In the DMME press release of the 18th of October the DMME recommendations are quite benign and none of them would have prevented this accident nor will they prevent the next accident, since the coal operators may just choose to ignore them as well.

DMME Response: DMME believes that proposed law and regulation changes will strengthen current mine reclamation and mine safety laws. Some of these recommendations would indeed likely have prevented the accident. For example the recommendation that "As for control of the work, mine operators could mark along the perimeter of any area to be disturbed located above the private dwellings or occupied buildings with visible markers (separate from permit boundary markers) indicating the limit to which material could be pushed, hauled, or otherwise disturbed. Such markers would need to be distinctive and of adequate size and height to be visible to the operator of any type of equipment to be used in the area. In lieu of using such markers, the work could be monitored by a spotter to prevent accidental dislodging and travel of material down the slope; or the operator could notify and evacuate affected residents or occupants at all times that material is being pushed, dumped, loaded, or otherwise disturbed." If this had been in place then there either would have been a spotter or the extent of the disturbance would have been marked with the appropriate markers. This would have ensured that the dozer operator did not push out the berm as happened on August 20, 2004.

DMME certainly agrees that people can get hurt when laws, whether mining or traffic or any other public safety laws, are ignored. DMME, will continue to enforce the Coal Surface Mining Act and the Mine Safety Act to the best of its ability, as well as educate mine operators, coal miners, and the public where opportunity exists. Through these efforts, we can work together to prevent this type of accident in the future.

Barney Reilly Comments: And the press release also incorrectly identifies the appropriate regulations, they have 4VAC 26 rather than 4VAC 25.

DMME Response: This typographical error has been noted. However the press release is not the action document proposing changes. The final accident report is the basis for recommendations being presented to the legislators.

Barney Reilly Comments: Another thing, DMME makes it a point to highlight the fact that a previous General Assembly in Virginia stressed that no law, rule or regulation would be more stringent than any federal mandate when it comes to coal mining. Let's hope that the General Assembly convening in 2005 will not be under the same influence of coal operators like that General Assembly in the late '70's and early '80's, otherwise we are just spinning our wheels here tonight. That sort of an attitude change rests with the powers in Richmond not down here in Big Stone Gap.

DMME Response: This comment is directed toward the Virginia General Assembly.

Barney Reilly Comments: I have some comments about the press release referencing the Virginia Coal Mine Safety Act in paragraph one; why should people be so affected by mining that they are given three hours to either evacuate or ride out the coal operators above their house.

DMME Response: The Coal Surface Mining and Safety laws do not currently require notification of pending mining activities to nearby residents, except for blasting. DMME is proposing to amend the Coal Mine Safety Act to require mine operators to submit more detailed ground control plans and believe that notification of nearby residents is appropriate. The example in the report of requiring mine operators to notify residents (located down hill from ground disturbing work three hours before work is to begin) is simply one thing that operators could do to comply with the amendment. DMME is not suggesting that people would be "so affected by mining that they are given three hours to either evacuate or ride out the coal operators above their house". The purpose of the notification is to make the residents aware of the pending activity. This is similar to the regulation that requires permittees to publish blasting schedules in order to inform citizens of the times they can expect blasting to occur.

Barney Reilly Comments: Nothing is allowed off a permit area so the operators should be restricted from the perimeter for a considerable distance, maybe 100 foot or more. The same distances from slopes. And then if the suggested markers aren't used how will the spotter know where the perimeter is.

DMME Response: Current regulations require that mining operations not take place within 300 feet of an occupied dwelling unless the dwelling owner signs a waiver. Upon obtaining a waiver from the owner, the operation may mine closer to the dwelling. If the company has legal rights to the mineral, to further prohibit mining could constitute a mineral "takings" on the part of the DMME and the Commonwealth. DMME can only restrict surface mining in areas where environmental performance standards cannot be met or where mining is currently legally prohibited, such as within 100 feet of a cemetery. There is no basis to require the operator to stay 100 feet from the permit boundary.

Mr. Reilly asks what would happen if permit boundary markers are not used. As part of routine inspections by DMLR, permit boundary markers are checked and violations can be written for inadequately marked permit boundaries. This inspection and enforcement action will help ensure that markers are in place. Mr. Reilly also questioned the usefulness of spotters if permit boundary markers are not in place. Spotters will be useful to ensure that the work is safely completed and the material is not pushed or placed where it is unsafe, as was the case with the accident in Inman. Even if permit markers had not been in place at the Inman accident site a spotter would have been able to determine that the dozer was about to push the berm out and could have prevented the dozer operator from doing that.

Barney Reilly Comments: Then in paragraph two to sub-paragraph three and section 45.1-161.21 speaking about the authority of the chief. Why didn't the inspector exercise that authority since he has it? It's obvious that the company lawyers is not going to let anyone talk under oath and will it make any difference if the chief enters the picture.

DMME Response: The inspector did exercise his authority to compel attendance of witnesses and administer oaths during the investigation of the accident. As the report states on pages 13-14, "On August 24, 2004, the joint investigation team requested six A & G employees to give testimony under oath in an attempt to address conflicting statements given on August 21st. On advice of legal counsel, each of the mining personnel individually exercised their legal rights and declined to provide statements during the second scheduled interviews."

The amendment to empower the Chief to compel attendance of witnesses and administer oaths during investigations of accidents and willful violations will strengthen the Coal Mine Safety Act. The proposed amendment to the standard will broaden the power to compel witnesses to include investigations for willful violations, and will place this authority appropriately with the Chief. Further, the amendment would allow the Chief to better coordinate such requests with MSHA, the Office of the Attorney General and local Commonwealth Attorneys.

Attorneys do not always advise their clients to assert their fifth-amendment right to remain silent. DM has conducted numerous interviews without workers invoking their legal right to not answer questions. To state that workers will not answer questions in interviews is unfounded.

Barney Reilly Comments: Then under the Virginia Coal Surface Mine Control and Reclamation Act penalty assessment should be realistic. In an event of a fatality off the permit area the penalty should equal the performance liability bond of the permittee, those are around a million dollars. Normal mine fines cause no concern, it's just the normal course of doing business. We suggest to DMME we revisit that decision.

DMME Response: The DMME selected this proposed civil penalty maximum amount based upon the civil penalty now provided in the Virginia Occupational Safety Program. The Department of Labor and Industry may impose a civil penalty of up to \$70,000.00 for willful or repeated violations of general worker safety laws. The \$70,000.00 proposed by DMME is the same amount. DMME is not proposing to establish a civil penalty that presumes to be the value of any human life, but rather addresses the underlying violation that resulted in the loss of life. This penalty also is \$10,000.00 more than the maximum allowed under the MSHA.

Mr. Reilly appears to be mixing performance bonds with liability insurance. There is no "performance liability bond". The purpose of liability insurance is to cover accidents and bodily injury. Civil penalties are to address the underlying violations that caused the accident. DMME cannot presume to assign a value to a human life.

Barney Reilly Comments: Section 45.1-246A is referenced in the report but sub-paragraph G should apply to the Department of Mines Minerals and Energy inspectors and their supervisors. This talks about fining people who don't do their job. And if the DMME people won't uphold the law they should pay for it as well. The citizens suffer when the regulators don't do their job. The worst part is our taxes pay their salaries and that shaft us.

DMME Response: §45.1-246A refers to permittees who violate the Act or permit conditions. DMME inspectors are already held accountable for their actions. Any disciplinary actions against a DMME employee must be in accordance with state laws and regulations and personnel policies governing state employees. Allegations such as these are serious and should be addressed. If Mr. Reilly is aware of any specific situations where DMME has not upheld the mining laws or regulations, he should inform DMME management. Vague unsupported statements that DMME won't uphold the law without supporting documentation is not fair to DMME staff or to the citizens who look to Mr. Reilly as an advocate. DMME employees are hard working, conscientious, responsible, and loyal employees of the Commonwealth. DMME believes that there is always room for improvement in our jobs but also believes that our inspectors are, as one speaker said, "...the most qualified, best trained of any state mining coal." Over the years Mr. Reilly has not documented a single instance in which "DMME people won't

uphold the law...or don't do their job." If he has any information of such, he should provide it now so that an investigation can begin.

Mr. Reilly is aware that DMME does in fact take enforcement actions in response to citizen complaints as he has been present at formal hearings requested by companies appealing enforcement actions taken by DMLR.

Mr. Reilly's opinion is based on a limited interaction with DMME, consequently his perspective of DMME lacks an overall knowledge of the DMME enforcement actions. In response to these type of allegations, DMME has prepared a summary of all DMLR and DM enforcement actions since 1992 and it is included at the end of the responses to the comments.

Mr. Reilly has filed 31 mining related complaints with DMME. These complaints were investigated and the investigation findings provided to Mr. Reilly.

Barney Reilly Comments: Now the other comments on the Investigative Report, after working rotating shifts for many years with the military it was obvious that any work after nine hours on the job was dangerous to proper job completion. The shift at the mine was eleven and a half hours long and the accident happened after ten and a half hours on the job. Perhaps those shifts should be shortened.

DMME Response: DMME has no authority to limit shift hours at mines. Twelve-hour shifts have become routine for nurses in hospitals and workers in other industries. DMME has not found evidence that use of twelve-hour shifts increases the risk of mining accidents.

Barney Reilly Comments: And it was unclear in the report, are there two certified surface foremen on each shift as it was stated in the report or just one on each shift? And if the two who besides Mr. Stanley worked on that night shift.

DMME Response: There is only one certified surface foreman on each shift. Page 4 of the report states, "*A & G Strip No. 13 employs two certified surface foremen, one each on the day and evening shifts.*" Page 9 further clarifies, "*On this particular shift, Mr. Kenneth Stanley, evening shift surface foreman, was late arriving for work and Mr. Scottie Masters, dayshift surface foreman, assigned work duties to some of the evening shift crew.*"

Barney Reilly Comments: The effluent limitation self monitoring plan rarely, if ever, shows an unlawful discharge. DMME needs to be more involved in this process and do the monitoring themselves since you have already issued five NOV's for that problem.

DMME Response: Mr. Reilly is mistaken about National Pollutant Discharge Elimination System (NPDES) permit requirements and the DMLR compliance monitoring. Federal regulations require that the companies self report. DMLR inspectors already conduct compliance sampling independent of the self-reporting by the coal companies.

The five monitoring violations issued to the company were the result of the contract laboratory used by the company failing to sample and submit the required reports. DMLR issued the five NOV's requiring that monitoring be reinstated and assessed civil penalties totaling \$1,452.00.

This same laboratory failed to perform the required work at other companies' permits during the same time period. DMLR also issued violations to those permittees.

The DMME's independent sampling of the mine discharges show that the NPDES reporting is quite accurate and companies do self-report violations. Company monitoring reports rarely show an unlawful discharge because non-compliant discharges are in fact rare. Virginia is fortunate in not having widespread geologic conditions that cause severe acid-mine drainage (AMD) problems that are prevalent in other coal mining states such as West Virginia and Pennsylvania and to a lesser extent in Kentucky. There are not a significant number of AMD discharges in Virginia, including AML AMD discharges. DMME has developed a complete, comprehensive AMD inventory. There are only 11 permitted AMD discharge points in the southwest Virginia coalfields. These 11 sites are monitored by DMME inspectors to ensure that the discharges are properly treated prior to discharge.

As an example of the enforcement by DMME under the Virginia Clean Water Act (CWA), during the past few months DMME took CWA enforcement actions against two coal companies. One company self reported numerous effluent violations and DMME assessed a CWA civil penalty in the amount of \$52,450.00 and obtained a \$15,000 donation to the St. Charles Elementary School. The company was also required to pay the Department of Environmental Quality \$831.22 for reimbursement of investigation costs and the Department of Game and Inland Fisheries \$211.46 for the replacement costs associated with a small fish kill. DMME also assessed a \$100,000.00 CWA civil penalty against a second company and obtained an agreement for the company to remediate an AMD site in the amount of \$20,000.00.

DMME is quite involved in monitoring water quality at mines. DMLR conducts comprehensive NPDES compliance evaluations in accordance with the NPDES regulations in which details about sample collection, preservation, analysis and reporting are reviewed with mine operators. During the compliance evaluations, the DMLR technical staff collects and splits water samples with the operator as a means of double-checking the company's ability to provide accurate data. The company's contract laboratory is also inspected to ensure proper sampling techniques are used, the proper sample preservation methods are used, the proper equipment is used and that approved analysis procedures and protocols are followed.

In addition to the compliance evaluations, DMLR has, for the past several years, routinely tested the results of company monitoring. In the first three calendar quarters of 2004 for example, DMLR inspectors collected 1,267 NPDES samples and had them analyzed at an approximate cost of \$21,000. This sampling by DMLR allows DMME to double check the companies' self-reported monitoring results. Consistent with historical trends and company monitoring, only rare samples show effluent violations.

Barney Reilly comments: The map provided with the report doesn't identify the lower parking lot or specify the road that's in question.

DMME Response: Attachment 1 has been modified to show the Redwine access road and the area of the lower parking lot.

Barney Reilly comments: Another problem is, what time did Mr. Masters leave the site, he is the day shift supervisor and what time did Mr. Stanley arrive? Did the mine operate without a

foreman for any length of time? Why isn't Mr. Masters asked for a statement since he provided the pre-shift briefing?

DMME Response: According to Mr. Kenneth Stanley, who is the evening shift surface foreman, he arrived approximately one hour late, at 3:55 p.m. on August 19th, and spent 45 minutes with Mr. Scotty Masters. (Mr. Stanley said his normal arrival time is about 2:55 p.m.). Thus, Mr. Masters, who is the Day Shift Foreman, departed at 4:40 p.m. and is believed to have left the job at that time. The mine did not operate without a foreman.

Also, Mr. Masters was asked for a statement. He and five others (Keith Davis - Hauler operator, Jimmy Vanover – End Loader Operator, Kelly Robinson – Dozer Operator, Kenneth Stanley – Night Shift Foreman, and Greg Maggard – Job Superintendent) exercised their legal rights and declined to provide statements.

Barney Reilly comments: And since the other three, Stanley, Robinson and Vanover all have different versions of what happened and won't say any more, now what happens?

DMME Response: The DMME has, with this report, completed its investigation of the fatality. The agency cannot force the mine employees to abrogate their constitutional rights against self-incrimination. Conclusions must be based on available evidence. All information has been shared with the Commonwealth Attorney.

Barney Reilly comments: Well, the workers left a few minutes early but Mr. Stanley checked the area and didn't see any problems. Since this was 3:00 o'clock in the morning what sort of light or illumination did he use so he could see? There was no moon to speak of that night.

DMME Response: The only illumination available to Mr. Stanley would have been the lights on his vehicle. Mr. Reilly is correct in that there was no moonlight that night.

Barney Reilly comments: And how did Mr. Mullins immediately notify Mr. Stanley?

DMME Response: Mr. Stanley stated in the first interviews that a mechanic "hollered" for him between 3:25 and 3:30 a.m. on August 20th. This is interpreted to mean that he used a company or CB radio.

Barney Reilly comments: Another problem we have is DMME has always been a problem after duty hours or contacting them after duty hours and weekends and holidays. Supposedly each police or E911 dispatch has a number to call in emergencies, but apparently they don't. They don't have it over in Dickenson County and apparently they didn't have it in Wise County. DMME needs to have a toll free number available 24 hours a day and this electronic switching equipment is far enough advanced that calls after duty hours and on weekends can be automatically switched to an individual on stand-by. To leave the message Mr. Buchanan left on an answer machine is awful to contemplate. Luckily he knew Mr. Thomas' number and alerted him. How he knew that number is never answered.

DMME Response: As required, the home and office phone numbers of DM personnel, including inspectors, supervisors, and the Chief, are posted by the operator at the site of every coal mine in the state. § 45.1-161.97C of the Coal Mine Safety Law states,

"The operator of every mine, or his agent, shall display on a sign placed at the mine office, at the bath house, and on a bulletin board at the mine site, a notice containing the office and home telephone numbers of mine inspectors and other Department personnel, and office addresses, which may be used to report any violation of this Act."

The company is required to officially notify DMME promptly in the event of any accident or serious personal injury, such as this one. The answering machine provides a mechanism to document the notification after hours and on weekends. The company also called Mr. Thomas, the mine inspector supervisor. It is clear that the company had multiple ways to notify the agency of the accident. A separate toll free number is not needed.

At approximately 3:40 a.m. Mike Abbott, DMME Public Information Coordinator received a call from the Wise County Sheriff's office who notified him that a rock believed to have come off a surface mine operation struck a residence in the Inman community, fatally injuring a three-year old boy. Mr. Abbott then immediately notified Ernie Barker, DMLR Reclamation Services Manager by phone so he could contact and dispatch an inspector to the site. Mr. Barker then dispatched DMLR Inspection staff to the site.

DMME routinely receives calls from the respective county sheriffs offices referring complaints. Town of Appalachia Police and Fire Department were at the scene along with EMS personnel. DMME was notified in a timely manner. It took several minutes for the responders and at the scene to sort out what happened. Their first priority and responsibility was to respond to the accident and transport Jeremy Davidson to the hospital.

Barney Reilly comments: Enforcement actions we feel should include suspension of Mr. Stanley's foreman certification per your 45.1-161.35, the chief should convene the board to consider this action.

DMME Response: Further actions are possible, however no additional actions will be taken until after the Commonwealth Attorney's Special Prosecutor decides how he will proceed.

Barney Reilly comments: He also operated another mine over in Dickenson County that we considered an awful mine and it also had lousy enforcement.

DMME Response: During the first interview, Mr. Stanley stated that he had been certified (surface foreman) since 1975 and that he had worked at the A&G job since 1998. No statements were made as to his specific experience with other companies. The mine in Dickenson County has no bearing on this accident investigation or on recommendations being made to the legislative panel.

Barney Reilly comments: And you ought to maybe consider others for disciplinary action, too. Because they were preparing that road for coal hauling and they weren't authorized to do it.

DMME Response: Applicable violations of the Coal Surface Mining and Coal Safety laws have been written to the company. No decision on further action will be made until the Commonwealth Attorney's Special Prosecutor decides how he will proceed.

Barney Reilly comments: I would like to make my last comments to you, Secretary Schewel. When you replied to my letter addressed to Governor Warner regarding this accident and my complaint about poor enforcement by DMME, you made reference to the Office of Surface Mining. Since OSM found no fault with DMME action you inferred they must be doing a good job.

DMME Response: The federal Office of Surface Mining continually evaluates the permitting, enforcement, and administrative functions of the Virginia coal reclamation regulatory program and issues an annual report. OSM similarly evaluates the regulatory programs of 23 other states and Indian Tribes. Virginia has consistently met OSM expectations and has often been cited as exemplary in their mining and reclamation programs. DMME has also received several notable performance based awards from the Commonwealth and has received the U.S. Senate Productivity and Quality Awards three times. These provide numerous independent evaluations of the DMME's work.

Barney Reilly comments: Well, this report graphically displays the level of OSM oversight of coal mining and the DMME in Virginia. There is only enough reference to OSM to acknowledge that it exists. In this report there is no recognition of the Big Stone Gap field office. There is no record of one phone call, not one iota of involvement, no coordination with or even any conversation with an OSM individual, MSHA was there. As far as coalfield citizens are concerned OSM is not a viable entity. That OSM office runs for cover when something happens. At the Big Stone Gap field office they have people who are paid good wages and even get bonuses to make sure DMME looks good in their reports, regardless of how DMME enforces the law just so OSM doesn't have to get involved. I'm afraid Mr. Dishner and Mr. Wampler gave you and the Governor a bum steer and some bad advice when you included that statement in your reply.

DMME Response: Mr. Reilly's comment assumed no involvement by OSM. OSM's involvement in the investigation is not relevant to the report or to recommendations being made to the panel. However, the report has been revised to address the role of OSM and that information is now included in the introduction of the final report. An excerpt of the amended Introduction is copied below.

"MSHA has independent regulatory authority in Virginia. While MSHA actively participated during the initial investigation and the interviews on August 21, 2004, MSHA did not assist in preparing this report.

The federal Office of Surface Mining Reclamation and Enforcement (OSM) has performed in an oversight role in Virginia since DMME was granted primacy in 1981 to administer the surface mining program in Virginia. OSM did not actively participate in the investigation or in the preparation of the report, however they did offer technical assistance and any other assistance needed by DMME. The OSM Big Stone Gap Field Office (BSGFO) was kept apprised of the DMME investigation progress and actions being taken. The DMLR enforcement actions along with this report were provided to the BSGFO for their ongoing oversight. Throughout the investigation DMME kept the BSGFO informed of developments and progress being made, responded to questions, and provided aerial and on-the-ground photos for their review. DMME appreciates the assistance given by MSHA and the oversight review given

by the BSGFO. The BSGFO typically performs oversight on a select number of sites, but due to the death of a child, they provided direct oversight and continue to do that for this investigation."

OSM performs oversight in primacy states like Virginia, thus the OSM Big Stone Gap Field Office is staffed for an oversight role with four inspectors and two Program Specialists. OSM does conduct regular inspections and investigations in Virginia other than those planned in the annual oversight workplan and special inspections/investigations. Congress intentionally crafted the oversight role of OSM with the intent of OSM having a specific role in primacy states. It is misleading to imply that the Big Stone Gap Field Office is failing somehow to fulfill their obligation under SMCRA, when in fact it is performing a role exactly as envisioned by Congress. This is in contrast to the MSHA offices in Virginia, which are fully staffed with inspectors and Safety Specialists and are required to conduct safety inspections and investigations at all mines on a regular basis under the federal Mine Safety Act, as opposed to conducting oversight as OSM does. OSM provides assistance to DMME upon request, including technical assistance.

It should be noted that as part of OSM's oversight of DMLR's approved program, OSM conducted a random inspection of Matt Mining Permit No.1100877 in May 2004. OSM spent nearly 100 man-hours reviewing the files, visiting the site, and writing a report on the oversight. OSM found no significant problems with the site. No violations were found during this oversight inspection.

Mr. Reilly also alleged OSM employees received "bonuses to make sure DMME looks good in their reports, regardless of how DMME enforces the law just so OSM doesn't have to get involved." DMME has no role in determining bonuses for OSM staff. The federal government has a policy of routinely providing bonuses to federal employees for their work. This is the practice for all federal agencies. Mr. Reilly has alleged this abuse of the federal bonuses before, but has failed to provide any documentation that OSM employees receive bonuses for making sure DMME looks good. If Mr. Reilly has specific information about occurrences of such practices, he should provide that information to federal officials. These comments are not relevant to the report or the recommendations being made to the panel.

Judy McKenny Comments: I have worked with a lot of citizens in our community trying to help them when they have problems like property rights or complaints that they make and everything.

And that's why I'm here to tell you that so often people make complaints but these complaints are just -- they say why should I even make a complaint nobody's going to listen to me.

Okay, you've got, for an example here tonight you had 54 complaints and only 6 Notices of Violations. Of those 54 complaints was 48 of the citizens or 48 of the complaints no good? It seems like too often the DMME or the -- whoever is over it, OSM, DMLR whatever you want to call it, they don't acknowledge what the citizens have to say.

It's just like if the coal company says it or if someone with money or power says it then okay, it's gospel, let's take it to the bank. But if a citizen says it and they don't have a pocketbook full of money to back it up their word isn't worth nothing they're a liar, they're automatically no good.

DMME Response: DMME investigates and responds to every complaint it receives about problems on coal mines. DMLR procedure requires the inspector make every attempt to contact the complainant the same day the complaint is received. Investigation of each complaint is to begin within five days, unless there is an emergency condition. In the event of an emergency, the DMLR inspector is to respond immediately. In addition DMLR management and technical staff respond on site to emergencies. Emergencies take priority over routine work including routine inspections, permit review, etc. This allows the inspector an opportunity to gather preliminary data about the alleged problem. Complaint records are available at the DMME office for review.

Statements such as these are contradicted by the actions that DMME does take. DMME acknowledges what citizens say. DMME takes enforcement actions when warranted regardless of a complainant's financial status. However, that does not mean that enforcement action always can be taken. If a citizen alleges that he/she observed a violation that is no longer occurring when the DMME inspector arrives on site, then the inspector cannot take enforcement action. An example would be a water quality violation. If the water was no longer discharging or was in compliance when the inspector sampled the water then no violation can be issued. DMME has also received complaints about water that the citizen believed to be in violation but samples taken and analyzed proved the water was in fact in compliance. Violations cannot be written solely on the word of a citizen without evidence to document the violation.

DMLR has issued enforcement actions in response to numerous citizen complaints. These actions include subsidence repair orders, water replacement orders, revision order notices, Notices of Violations and Cessation Orders.

DMME does not imply that a citizen's complaint is "*no good*" or they are "*a liar*" when no action is taken. DMME inspectors explain to complainants why no action is taken. In many instances DMME does not have the authority or jurisdiction to act. Citizens complain about numerous issues that are beyond the ability of DMME to act upon. DMME has had complaints ranging from failure to pay royalties, failure to replace fencing after the reclamation is completed, speeding trucks on public highways, etc. These types of complaints are often breach of contract issues that must be addressed between the property owners and the company or are issues subject to local government jurisdiction. Blasting is another area where persons making complaints often want DMME to take more action than is allowed under the mining laws or regulations. State blasting limits are based on national standards established by scientific studies conducted by USBM. DMME has recognized the concern over blasting and has recommended new blasting studies be conducted to review the blasting vibration limits.

If Ms. McKenny can provide specific examples of the failure of DMME staff to properly enforce the laws and regulations she should provide them to DMME management.

Ms. McKenny has filed one complaint with DMLR, which was related to a gas well. The DMME's Division of Gas and Oil and not DMLR or DM handles complaints regarding gas wells.

Judy McKenny Comments: These coal miners they don't dare say nothing, they don't dare do nothing that they're not supposed to do because they're going to lose their jobs, then what's going to happen to their kids. But if they don't say something their kids is going to get killed

like what's going on now. I can also say I've heard my husband, my brothers and a lot of people say, oh, this inspector is such a so and so he's a good buddy, he comes up here and sits outside with the boss out here at the mines and they BS and go on. We don't have to worry about him when he comes in and then if something goes on in the mines and they want to tell you something about it they say, well ain't no need to tell that inspector he's not going to do nothing."

DMME Response: DMME requests Ms. McKenny provide DMME management any specific information that she has regarding her allegations about DMME inspectors not doing their job.

As noted in a previous response to Mr. Greer, there are existing protections for mine employees to be able to inform DMME or MSHA of safety concerns or violations that may exist.

Judy McKenny Comments: "And then if you get one of these good field officers out here that's working for DMME or somewhere and they come out and they listen to these citizens complaints. And they start writing them up and they start believing these people and doing something about it, the next thing you know they're jerked out of the field and put in the office somewhere."

DMME Response: DMME has not moved inspectors into the office because they started "*writing them up*". Some inspectors have been moved into the office at their own request to fill vacant positions. Others have been asked to move into the office to fill a position based upon their qualifications. Some inspectors have declined to move into the office when asked and DMME has honored their request to remain in the field. If Ms. McKenny has any evidence to substantiate this claim, DMME requests that she provide it to the DMME management for investigation.

Judy McKenny Comments: "Now you've got to have somebody that's going to stand up and say, look, what's wrong, what's wrong here? Something's wrong and we need to fix it.

Okay, now we've got a small child that's been killed, how many others has been killed and now you want to come up and say, okay, let's do something about it, but maybe this is God's way of trying to show you all that something needs to be done. That we need to protect this earth that's here and not just destroy it. We don't need to destroy people's homes. These people pay taxes and that's what runs this country is the taxes that every one of us pays.

And whenever -- as a Grass Roots organization you know what we do, we go to CHD like the Catholic Dieses, we go to the Presbyterians, we go to other groups and we ask for money donations and what we do is organize us an organization so we can watch not only the coal companies and what's going on, but so we can protect the citizens rights. And not only that, we watch the officers that are put in there and being paid by our tax money to protect the citizens, we have to watch them to see if they're making a deal behind our back with somebody.

So I just want to ask you to please look at the whole issue here. Look at DMME, what and all they've done. Look at the coal companies, so many of them changes their name to get different permits after they get so many violations.

Do something about some of these things and then you'll help the people and you'll prevent stuff like this from happening."

DMME Response: In her comment Ms. McKenny asked "how many others has been killed". As noted in the presentation and discussed in a previous response there has been one other fatality involving the fatality as the result of regulated mining and two fatalities have occurred associated with AML areas.

Ms. McKenny states that she and others are watching DMME staff to see if "*they're making a deal behind our back with somebody*". If she has seen such activity then she should report it as requested in previous responses.

As for coal companies changing their names to get permits after they get so many violations, companies cannot change their name to avoid a history of violations. With the implementation of the AVS, permittees, including the individuals who own and control the companies, are tied to outstanding violations, penalties, etc. This is a national database maintained cooperatively by OSM and the states and it must be reviewed before a permit can be issued to any party, including existing companies. This has been addressed in greater detail in a previous response.

David Rouse Comments: I'm glad to hear that DMME is acknowledging that the criteria that it utilizes to control blasting is extremely outdated and probably worthless. That doesn't help those of us who have been inspected by Mr. Mooney as I was a decade ago where that standard was used to legitimate the kind of blasting you've heard described by many people tonight.

In revising those regulations let me suggest that one part of the revision be that a permit carried with it an obligation of strict liability. If damage occurs within a half-mile or a mile, I'm not sure of the distance, occurs within that radius of active mining then by law the damage is caused by the mining. This will force the operators to regulate their blasting in spite of what DMME does one way or the other.

DMME Response: DMME has recommended that the Virginia congressional delegation seek funding and provide direction to the National Academy of Science to study the effects of blasting on property and update the U.S. Bureau of Mine Reports from the 1950's from which the current state and federal regulations are based. This study will enhance the DMLR's ability to make informed decisions regarding the effects of blasting vibrations on property and structures.

DMME does not believe an obligation of strict liability for blasting is appropriate. While citizens should have blasting damages redressed, there should not be an automatic obligation for the company to redress damages based solely upon a complaint by a citizen. The facts of each case must be carefully evaluated to make any causal decision about blasting damages. DMME has reviewed pre-blast surveys that documented damage to dwellings that existed prior any blasting activity having taken place. Later, after blasting operations have commenced, the same documented damage has been attributed to blasting by the homeowners. There are also instances where damage was obviously not blasting related, but was due to faulty construction, such as lack of gutters that allowed roof run-off to saturate foundations resulting in uneven settling and damage to the structure.

Mr. Rouse has filed five mining related complaints with DMME. These complaints were investigated and the investigation findings provided to Mr. Rouse.

David Rouse Comments: The other thing we need is anti-slap legislation. There are two of us here tonight who were sued because we exercised our constitutional rights, that has to end, that has to be a high legislative priority. Restore our rights to us in the coalfields.

DMME Response: DMME is aware that a coal company sued Mr. Rouse, however DMME is not aware of and cannot comment on the merits of that lawsuit or the intent of the company that filed the lawsuit. Mr. Rouse is mistaken if he is referring to Carl Pete Ramey as the second person who was sued. As discussed in previous responses to Mr. Jervis and Mr. Ramey, Mr. Ramey was directed to pay attorney fees as part of an administrative proceeding but was not sued. This was not a slap lawsuit.

Richard Falin Comments: I live in the Derby community outside Appalachia.

We are in a position to be in worse shape now than Inman and Roda both. Our terrain is very, very steep in this community. There is no more than 300 foot between mountain to mountain. I would say it is a 70 degree slope. They have already logged around us in preparation for strip mining.

Derby recently was declared a State Historic District. That's how we got the money for the water and the sewer, and we also got three quarters of a million dollars for housing upgrades to put it back similar to what it was in 1920.

The strip mining, and I don't know what mine company is going to do it's Penn Virginia's lease, are going to destroy all of that. We cannot stand the blasting. Those houses are made of a one of a kind terra cotta tile, you'll find it in only one other place in Pennsylvania in an abandoned coal mine. It's a very unique place and the state wants to save it historically, but it's going to be gone because we cannot take the blasting.

DMME Response: Mr. Falin stated that he is concerned that blasting activities from a proposed surface mine will damage the homes made of terra cotta tile. Blasting standards are set in regulations and were developed to protect structures during blasting activities. DMLR inspectors must check all blasting records at least quarterly to ensure compliance with the regulations. DMME is proposing to amend current regulations to require seismic monitoring of all blasting operations occurring within 1,000 feet of a private dwelling or other occupied building. DMME is also recommending that the Virginia congressional delegation seek funding and provide direction for a National Academy of Science study of the effects of blasting on structures, the effect of blasting on ground control, control of flyrock, and related issues.

The slope in the Derby community is not 70 degrees. The slopes average around 45% to 47%, which is around 22 to 23 degrees. It is impossible to mine 70 degree slopes and backfill the highwall.

The Virginia Department of Historic Resources is consulted during the permit review process and provides recommendations regarding the protection of historic resources. The mining proposed near Derby is not as close as in Exeter and Roda. The closest permitted surface mining

is approximately 1,200 feet from the closest residence and is approved for auger mining. There is an underground mining operation located closer to the residences. DMME is unable to determine exactly what mining operations Mr. Falin is addressing. The permitted areas approved for surface mining around Derby are in previously mined areas with little or no standing timber. Remaining forest areas are not under permit. There have been and continue to be logging operations around the communities of Derby, Roda, Exeter, etc. that are not related to mining. Mr. Falin may be discussing a logging operation that is separate from any mining. DMME does not regulate logging operations. DMME recommends that Mr. Falin contact the DMME Customer Assistance Center at the Big Stone Gap office to determine if the area in question is under permit to be surface mined.

Richard Falin Comments: All these recommendations that the panel has made are all well and good, the laws do need to be upgraded, but one thing they did not address is how to prevent. They had all kinds of recommendations. There's only one solution to prevent -- stay one mile from a community or an inhabited place, one mile. That is reasonable.

They'll lose some coal. They won't make 100 million they might make 75, but I think they can live on that.

So I appreciate you gentlemen, the panel, everything you're trying to do, but the answer is move them back away from the communities that will settle it.

DMME Response: Current regulations require that a mining operation may not take place within 300 feet of an occupied dwelling, unless the dwelling owner signs a waiver. Upon obtaining a waiver from the owner, the operation may mine closer to the dwelling. To prohibit mining within one mile of an inhabited community would very likely constitute a takings on the part of the regulatory authority and the state. A one-mile offset could completely sterilize a reserve, not just reduce the amount of coal that could be mined. There is no basis to arbitrarily require a one-mile offset. Many areas could be mined within 300 feet or less of residences and pose no threat. For example, an area that only has a small amount of cover or overburden could be mined without blasting. Some residents have waived the 300 feet requirement and allowed mining within 100 feet or less of their residence with no adverse affects.

Mr. Falin has not filed any mining related complaints with DMME.

Bruce Riggs Comments: I speak from experience, I was in the coal business for ten years. And I never was so glad in my life to get out of anything. I found it to be excessively regulated like most segments of this country. I take my hat off to anybody that can mine coal in this country. I think the coal industry is grossly over-regulated. I think the United States of America is grossly over-regulated.

I do not think we need any more counterproductive laws. I think the logical course to go would be to do away with most of them and to start emphasizing education, cooperation and communication.

DMME Response: DMME does not agree with Mr. Riggs' assessment that current laws and regulations are counterproductive. The mining laws and regulations in place today were promulgated more than 25 years ago. Then and now, these laws and regulations are effective in

protecting the public health and safety, as well as the environment. DMME believes that some improvements can be made to enhance public safety.

Therefore DMME is proposing recommendations that will provide better protection for the public as well as the environment. DMME proposes to:

- Require seismic monitoring of blasting operations occurring within 1,000 feet of a private dwelling or other occupied building. Currently, a mine operator is not required to conduct seismic monitoring if a blast is sized using the scaled distance equation to determine the weight of explosives to be detonated in any eight-millisecond period;
- Recommend that Virginia's congressional delegation seek funding and provide direction for a National Academy of Science study of the effects of blasting on property and update of the United States Bureau of Mines reports;
- Require permanent permit boundary markers be placed around the perimeter of a permit. Each marker should be visible from the adjacent markers. Permit markers that are located on steep slopes above private dwellings or other occupied buildings shall be made or marked with fluorescent or reflective paint or material to increase the markers' night visibility; and
- Strengthen the requirements that mine examination records be countersigned by a person responsible for safety at a mine. The amendment should require that the supervisor of the examiner creating the records, or another person with equivalent authority to the supervisor, to promptly read and countersign the records and ensure that action necessary to eliminate or control any hazardous condition found during the examination has been taken.

These are only a few examples of the revisions or amendments being proposed by DMME. The entire list is contained within the Accident Investigation Report. Mr. Riggs is correct in saying that more education, cooperation, and communication are needed. This Accident Investigation Report outlines steps that will be taken to address each concern. Measures related to education include:

- Incorporating an overview of the Inman accident and the strengthened guidelines for ground control in the 2005 continuing education training that surface foremen are required to take for re-certification;
- Use information from the investigation of this accident not only to enhance Virginia's mine safety training program, but to share with other states with surface mining agencies;
- Continuing to place an emphasis on cooperation between divisions within DMME. Measures to enhance cooperation include the jointly review ground control plans by DM and DMLR to better ensure they will provide for proper control of materials disturbed on coal mine sites; and
- DMME will continue to use technical assistance from the federal Office of Surface Mining on complex technical issues that affect the public and environment.

DMME recognizes that communication is an important issue and is proposing changes that will better help citizens and the industry understand laws and regulations that govern the coal industry. Items contained in the report that address this issue include having DMME inspectors spend more time with the citizens who file complaints to improve the public's understanding of

laws and regulations, especially where the current law or regulations do not address their complaints. DMME inspectors will take additional steps to ensure that the responsible persons at permitted sites are using the most current approved permit plans. Inspectors will also review the plans with the individuals on a regular basis.

Ronnie Willis Comments: "Now blasting is one thing that's disturbing a whole lot of us people. Flooding is another thing. I've been flooded out four times since December. Back in December Nally Hamilton put off a shot and shot that whole mountain down into one of the ponds and their pond overflowed and come down Cress Hollow. It stopped that pipe up, it flooded out the whole hollow from there down.

Well, all that debris they cleaned it up and they wrote a violation, the coal company cleaned the mess up. Well the next time it busted again in the alley, they didn't clean it up this time and didn't write nothing on it, said it wasn't a violation. Well the next time we had three and three quarter inches of rain, it busted up in that yard up there and it flooded me bad then.

Well I was talking to the inspector and I said, well I'll tell you something about this, if I was an inspector I would write a violation on the mud and rock and this debris coming off that strip job. He said, buddy, the pond done what it was supposed to do. Well I said, the pond may have but the mud and stuff is still in my yard and in my basement and under my floor. I still have mud under my floor, you know, and it's still not dried up. And it could set up, you know, black mold or something.

I notice we have a lot more trouble with allergies and stuff since all the stuff's under there. I asked the coal company to clean it up and they told me they would, never did show up, said they'd come the day after Labor Day and they never did show up so I guess they ain't going to do it."

DMME Response: Mr. Willis has raised questions about flooding at his house. There have been three incidents of flooding in this vicinity. In two instances, DMME found that a blasting violation was a causal factor in the flooding (both instances were caused by the same blasting violation). Enforcement action was taken in these instances. The third event was not mining related, instead it was caused by an unusually heavy rain event.

On December 4, 2003, Nally & Hamilton Enterprises, Inc. (Nally & Hamilton) Permit No. 1101820 detonated a blast that caused a sudden surge of water to overtop the embankment of Pond No.13. This sudden release of water flowed down Cress Branch, overtopped the culvert at the mouth of the hollow and flooded several homes in the Roda community. Notice of Violation (NOV) #CEV0003410 was issued to Nally & Hamilton Permit No. 1101820 for allowing spoil material and debris to be placed on the downslope and for mud being deposited on private property of residences in the area. The remedial requirements of the NOV were:

- a) remove all spoil and debris from the out slopes southeast of pond #13 and to regrade and stabilize the area; and
- b) remove all sediment and debris from the inlet of the culvert located at the mouth of Cress Branch. In addition, the company was instructed to take all necessary measures to remove and clean up the mud and debris from all residences that were impacted by the flooding event. The NOV was terminated on January 13, 2004.

The DMLR inspector received a complaint on January 5, 2004, about flooding of homes in the Roda community. The inspector and his supervisor conducted an initial site investigation, which revealed that water was coming out of the ground approximately 60 feet below the headwall of a 36-inch culvert (which carries Cress Branch under private property, the state road, and the railroad siding where it enters the receiving stream of Mudlick Creek). The water appeared to be coming from the underground culvert. The DMLR inspector requested technical assistance to help determine the cause of the flooding.

The technical investigation concluded that the failure of the 36-inch culvert was due to the blast detonated on December 4, 2003, causing the embankment of pond #13 to be overtopped and deposited mud and debris in the culvert. NOV #CEV0003514 was issued on February 11, 2004, instructing the operator to take all necessary measures to repair/replace the culvert at the mouth of Cress Branch, so as to correct the drainage problem associated with the pipe. The date for abatement of the NOV was February 16, 2004. On February 12, 2004, the DMLR inspector returned to the area to check on the status of the required remedial work. The operator had replaced approximately 70 feet of the 36-inch culvert (beginning at the mouth of Cress Branch) and had seeded and mulched the disturbed area. NOV #CEV0003514 was terminated February 12, 2004.

On May 31, 2004, DMLR received several complaints about flooding in the Cress Branch area of Roda. The DMLR inspector conducted an investigation on June 1, 2004, which revealed that a heavy rainfall event occurred the night of May 30, 2004 and continued into the early morning hours of May 31, 2004. The storm water came down Cress Branch where the stream flow entered a culvert at the mouth of the hollow. The culvert conveys the drainage to the receiving stream, Mudlick Branch. Sometime during the peak flow of this precipitation event, the culvert at the mouth of Cress Branch became blocked and was unable to handle the storm water. This resulted in the hydraulic pressure becoming so great that it blew out in the front yard of one of the residences. The storm surge deposited mud and rocks in the yard and left behind a large delta of material. Storm water flowed down State Route 685 and overwhelmed all ditch lines and culverts crossing private driveways. Several homes along State Route 685 were flooded and mud was left behind in yards and gravel was washed away from driveways.

Nally & Hamilton Permit No. 1101820 had conducted surface mining in the area and had constructed sediment Basin #13 to control the surface drainage from their disturbed mining areas. The sediment basin functioned as designed during this precipitation event.

The culvert located at the mouth of Cress Branch was unable to carry the peak flow from this precipitation event. The failure of this pipe resulted in the flooding of several homes. Rain gauges in the vicinity of Roda recorded rainfall amounts of 3.5" to 4.0" from Friday, May 28, 2004 until Monday, May 31, 2004. Localized flooding was reported area wide, as a result of this precipitation event.

In addition to the failure of the pipe located at the mouth of Cress Branch, the flooding of area residents in Roda was attributed to heavy rainfall and the inability of drainage culverts and ditch lines along State Route 685 to carry this unusually high rain event. The failure of the pipe located at the mouth of Cress Branch originated on private property. There were no violations of the performance standards noted on Nally & Hamilton Permit No. 1101820 during the investigation.

Pond #13, located in the Cress Branch watershed, functioned as designed. There were no enforcement measures taken as a result of this complaint investigation. Investigation results revealed that the cause of the flooding was due to the large precipitation event and not the mining or reclamation activities that took place on Nally & Hamilton Permit No. 1101820.

Mr. Willis has filed two mining related complaints with DMME. The complaints were investigated and the investigation findings were provided to Mr. Willis.

Ronnie Willis Comments: "Well another thing too, I could talk a whole about this, but all this truck noise, if you're sitting on the porch or in the house talking to somebody and if one of them trucks go by you've got to shut up you can't hear. If you're listening to the TV, something you might want to hear on the news or something, you can't hear it. I would estimate there's 50 to 100 trucks, just estimating, running up and down that road every day. I've got pictures of what looks like a cloud of smoke following those trucks going down the road.

Well, if you get out there taking a picture of them they will slow them things down to a little bitty crawl like a turtle, but now when you're not taking pictures, buddy, they fly by there. And I've also seen those big trucks pass in that little straight up through Roda, pass each other and that's dangerous.

Now I think there ought to be some kind of regulation on these trucks and all this dust and stuff and this noise. You know, this noise hurts, it hurts people. If you listen to it so long a time it's going to mess your hearing up. I've already lost a bunch of mine anyway so I can't hear good anyhow. I lost 27 percent in them coal mines."

DMME Response: DMME has no jurisdiction over coal truck traffic on state maintained roads. This includes dust and noise that may be generated by trucks on state roads. Local governments may have authority to address these issues. The Town of Appalachia is exploring options it may use to control the effects of trucking within the town limits.

Ronnie Willis Comments: That was Nally and Hamiltons, they mined right behind my house, a big slope. I may be 200 foot from where the mountain starts out. If a big rock were to come off there, they're not mining there now they quit it after this last flood, if a big rock were to come off there or one of them ponds busted behind the house, that house would be gone probably and me with it. I worry about that.

What I think that the coal company ought to do, I mean the Virginia law makers ought to do is before they give a permit to these coal companies to mine behind these houses and around these hollers, they ought to make them come down in the community and check all the drainage and see how that water's going get back to it's creek, where they say it's supposed to go. It ain't supposed to go through your yard and under your floor and through your basement and fill your yard up, then to the creek. See they need to fix this ahead of time. There ought to be a law that requires them to come down and look at these communities and these drain pipes and fix them before they even start mining."

DMME Response: Section 4 VAC 25-130.816.99 of the VCSMRR requires that an undisturbed natural barrier shall be provided at the elevation of the lowest coal seam to be mined. The barrier shall be retained in place to prevent slides and erosion. The DMLR inspector reviews the barrier

at least quarterly to be certain that it is in place and functioning properly. A NOV may be issued to the operator if the barrier is not maintained.

DMLR conducts a review of all applications before a permit is issued. The review includes items such as drainage control. Sediment ponds are designed to control disturbed areas and must meet the requirements of 4 VAC 25-130-816.46 of the VCSMRR. Diversion ditches are also designed to handle anticipated flow and to direct surface water to ponds before it leaves the permit. These structures must meet the requirements of 4 VAC 25-130-816.42 of the VCSMRR. Sediment control structures must be inspected at least yearly and certified by a registered professional engineer. The certification must be submitted to DMLR annually.

DMME has no authority to require coal companies to repair or replace existing culverts that are already blocked, crushed or undersized and located off the permit site. Such problems will cause flooding regardless of whether mining occurs or not.

Marlene Bush Comments: I live in Exeter, Virginia. I don't believe that his death was an accident regardless of what anybody here says. I believe it was gross negligence.

DMME Response: The report by DMME concludes that the rock was dislodged and/or pushed off during the road construction was an accident and the result of unauthorized actions and failures, which constituted gross negligence on the part of A & G Coal Corporation

An accident can be either unavoidable or avoidable. A car striking a deer that suddenly jumps in front of car is likely an unavoidable accident, assuming the driver was not speeding or otherwise contributing to the accident. The driver in that instance would likely not be assigned a degree of fault. Avoidable accidents are assigned a degree of fault to one or more parties to the accident. For example, if there is a traffic accident involving two vehicles, one or both drivers may be assigned a degree of fault. One driver may have been driving impaired while the second driver may have not had any fault, thus only one driver contributed to the accident and a degree of fault is assigned to that driver based upon the circumstances. Gross negligence is a descriptive term that assigns a high degree of fault.

Marlene Bush Comments: Mr. Mooney made a statement that when complaints are filed that they're acted upon quickly. Well I'd like to tell Mr. Mooney that on September 24th I filed a complaint and I think today is November 4th, I still don't have a response to that complaint.

The dust at A&G was so thick you couldn't see and the time was about 20 minutes til 4:00, she said, well we'll check on it, and it was on a Friday. I said, I'm sure you will, I said, I bet by the time I get back out of here they'll have it watered down. Low and behold 15 minutes I left my house it was watered down, they got a call to water it down.

DMME Response: As acknowledged by Mrs. Bush the dust problem was resolved. The DMME inspector conducted an investigation of the complaint. Mr. Bush had previously informed the DMME inspector to not call him. The DMME inspector did not return Mrs. Bush's call based upon that request. Mrs. Bush called the DMME inspector on October 15 and informed him that her husband's statement did not apply to her. Mrs. Bush then requested to accompany the inspector on the next complaint she files with DMME. Mrs. Bush will be allowed to

accompany the inspector upon request, as is any citizen who makes such a request pursuant to 4 VAC 25-130-842.12 VCSMRR.

As noted in the response to Mr. Bush, Mrs. Bush and her husband combined have filed 36 mining related complainants. Each of these complaints was investigated and the investigation findings were provided to Mr. and Mrs. Bush.

Marlene Bush Comments: Another concern of mine, and I believe -- well it's my understanding that these coal trucks are agencies of the company where they haul the coal from. For example, if these coal truck drivers are hauling coal from A&G I think they're an agency of that coal company.

I personally believe that these coal companies on strip mining should be forced to install a washer system to wash these coal trucks before they come out on the main highways. I don't blame the coal truck drivers, it's not their fault. They're there for a job and they're trying to make a living and these coal operators should be held responsible.

DMME Response: DMME is reviewing washing systems and will provide details about these systems to the coal industry. DMME cannot directly require truck wash systems on mine sites, but can and does regulate haul road maintenance.

State and federal mining laws address coal truck haulers not owned by the mine operator as independent contractors while on mine property. As such, truck haulers are subject to the same provisions of law and regulations as the mine operator. When trucks leave mine property they are subject to the Virginia state police and local government jurisdiction.

An article in the December 8, 2004, edition of the Coalfield Progress (see Attachment C) discussed truck traffic problems in the Town of Appalachia. Town attorney Michael Abbott is quoted in the excerpts from the article copied below:

"Last month, the committee directed Abbott to research state law for any measures that address vehicles dirtying up streets.

Monday, Abbott said the state Division of Mined Land Reclamation has no authority to regulate coal trucks once they leave a mine site, according to reclamation services manager Ernie Barker.

Abbott also spoke with several Virginia Department of Transportation officials, who said VDOT has no mechanism to enforce road regulations.

However, there are Virginia laws that simply prohibit depositing soil, mud, sand, gravel or other substances on a highway when it creates a public hazard, Abbott noted.

Most local mines contract with about a dozen private trucking firms, Abbott said. A&G Coal Corp., one of the larger local operations, contracts all its hauling to outside truckers.

Contrary to a claim made during a previous committee meeting, mining companies are not responsible for coal trucks once they leave the mine site, Abbott said."

"A&G employee Darrell Grigsby attended the meeting simply to listen, but he made a few observations.

In the past year, A&G has paved the entrances to most of its surface mines, he said. At the Bullitt site, a man hoses down coal trucks before they leave."

"Drivers are responsible for cleaning their trucks, and A&G doesn't provide washing facilities, he said."

"Keokee resident Paul Bobrosky said he worked for decades in the coal industry, including several years with the federal Bureau of Mines.

Appalachia can use the law to stop coal trucks from speeding and running overloaded, he said."

This article confirms that this is a local jurisdiction issue and not a DMME enforcement matter.

Marlene Bush Comments: Another thing I think that needs to be stressed is these covers that go on these coal trucks, you can look up and you can see the frame where the cover's supposed to be but the tarp's not there.

I had \$1,000.00 damage done to my vehicle where a lump of coal fell off a coal truck and I couldn't report it because I couldn't see the tag to get the tag number. These trucks are carrying filth on the roads and right before Jeremy was killed, probably two weeks, I made a statement to one of the mine inspectors, nothing's going to be done until some kids are killed, and I figured it would be kids on a school bus. He said, well let's pray that don't happen.

DMME Response: DMME does not regulate trucking on public roads. If trucks speed, fail to properly cover their loads with tarps, etc. citizens should contact the Virginia State Police or local law enforcement authorities.

Marlene Bush Comments: The next concern I have is there's a new mines getting ready to open in Exeter and the residents of Exeter signed a petition for a pre-mining survey to be done on their homes. A copy of this petition was sent to Meadow Branch and to Gavin Bledsoe at the Division of Mines. Hadn't heard anything from him so I called to inquire about it. Mark Giles called me about two days ago and said he checked on it and said the lower part of Exeter is going to be pre-surveyed, pre means before mining, okay, going to be done by December 12th or December 15th. The upper part of Exeter is going to be done by February 15th, okay. I said, well when is the mining going to start, in about two weeks. Pre means before I thought.

DMME Response: Pre-subsidence surveys need not be conducted prior to commencement of any mining but only before mining in areas close to individual residents. Some underground mines may last for ten or more years. It would not make sense to conduct pre-subsidence surveys too long before the mining approaches a given residence.

It also should be noted that on April 27, 1999, the United States Courts of Appeals for the District of Columbia overturned the OSM rule requiring pre-subsidence surveys. The Appeals

Court held that *"the regulation as currently written must be vacated along with the first one discussed because it defines the area within the pre-subsidence survey is required by reference to the angle draw. The government did not argue that the survey requirement could be sustained independent of the angle of draw—and we do not see how it could."*

When OSM promulgates rules such as this one, then DMLR must amend its regulations to ensure its approved program is as effective as and no less stringent than the OSM regulations. DMLR promulgated similar regulations, but the OSM regulations were challenged and overturned by the Appeals Court as noted above.

The printed copy of the Virginia Coal Surface Mining Control and Reclamation Law 1996 Edition contains the following Editor's note in Article 1, § 45.1-226.

Editor's note. – Acts 1979, c. 290, cl. 6. as amended by Acts 1980, c. 364, provides: "If any provisions of the federal Surface Mining Control and Reclamation Act of 1977 be enjoined or declared invalid, in whole or in part, by any court of competent jurisdiction, or be repealed, deferred or amended by Congress, with the result that the requirements of the federal act for a regulatory program in Virginia are reduced or deferred, then the operation of the corresponding provision in Chapter 19 of Title 45.1 shall thereupon be likewise reduced or deferred in order to achieve a corresponding result."

Furthermore it also states *"The General Assembly's intent was clearly to enact a statute that conformed to the federal act, but was no more restrictive than the federal act."*

When the OSM pre-subsidence survey rule was overturned so fell the Virginia rule. DMME has continued to ask companies to conduct the pre-subsidence surveys but the companies are only doing it on a voluntary basis at this time. DMME will continue to ask companies to conduct pre-subsidence surveys but has no authority to require them.

Marlene Bush Comments: The Division of Mines I don't feel is doing their job. I feel they're holding hands with the coal operators and that's the way it's going to be until you get somebody in the Division of Mines who wants a job and who wants to enforce the law. We can have all the recommendations put down on paper but that's no good unless the laws are enforced.

DMME Response: DMME takes charges that it does not enforce the laws very seriously. However, it cannot respond to vague, unsubstantiated charges such as those made by Mrs. Bush. If Mrs. Bush or others have specific examples of non-enforcement, she should notify DMME management so that they can be investigated. A summary of DM and DMLR enforcement actions since 1992 is included at the end of the comments and response to comments.

Marlene Bush Comments: I noticed on the presentation they did A&G operates two shifts. The Division of Mines operates one shift. Why can't the law be changed to where instead of having Division of Mines inspectors working from 7:00 in the morning to 3:00 in the evening that they have two shifts, the day shift and the evening shift. Why can't they do spot inspections?

DMME Response: The Virginia Coal Mine Safety Act, at §45.2-262.85B, requires DM to schedule mine inspections at a variety of hours of the day and days of the week, including

evening and night shifts, weekends, and holidays. Consistent with this provision, DM personnel conduct some inspections on all shifts and on all days of the week. Additionally, DMME inspectors respond to incidents or complaints after hours during the week, at night or on weekends whenever they are needed.

Marlene Bush Comments: And another thing I have to say is after the death of Jeremy, it wasn't long after that, there were two families in St. Paul who were forced from their homes because of mud slides caused by the strip mining operations being so close to their homes. The incidents were being investigated by the Division of Mines.

Of course, a person named Zentmeyer started making excuses saying the coal operators weren't responsible. Well, before they can do -- she can say that it needs to be fully investigated. She kept saying oh, it's caused by heavy rains and unforeseen conditions caused the slide.

DMME Response: This is a misunderstanding of the DMME response to the slide referenced by Mrs. Bush. Mrs. Bush fails to mention that in response to the slide a DMME inspector issued two enforcement actions: a Cessation Order - CO# HGC0003639 and a Notice of Violation - NOV# HGC0003638. In any investigation DMME must determine any factor that may have contributed to the problem. There had indeed been heavy rains prior to the slide. That is simply a fact noted by DMME. It is also a well-established fact that heavy precipitation can trigger a slide. Determining what may be contributing factors to a violation, such as a slide, allows the company and DMME to determine what actions need to be taken to prevent future occurrences at the site. At this site it appeared that the spoil backfill and road fill had become saturated, and thus were contributing factors in the cause of the slide. The company will now be required to address the road fill and backfill drainage to ensure it does not happen again.

Marlene Bush Comments: Well, the fact that the coal operators destroyed all the vegetation and trees and all the other stabilizing agents around our homes is what let the rains come down to destroy them.

DMME Response: The surface mining process does involve removing vegetation, however, drainage controls are in place to prevent flooding. The federal government has conducted flooding studies and reviews of flooding complaints and has found no correlation that current mining practices cause significant additional flooding. When a five or six inch rainfall occurs within a 24-hour period, there is going to be flooding in a given area. Even rainfall of just one or two inches can cause flooding if it occurs in a very short time period, such as from one to three hours. There has been no documentation that mining has resulted in flooding that has destroyed homes as alleged by Mrs. Bush.

Marlene Bush Comments: Another point I'd like to make is if you -- well the Attorney General's Office has moved from the Division of Mines to Abingdon now, but before if you called, tried to call the Attorney General's office to file a complaint you went to the Division of Mines, you couldn't get through.

I am going to tell you something, you're not going to get any help from the Attorney General's Office. And if you don't believe me people you go on the Internet and you look on the contributions, campaign contributions made by people, look at Jerry Kilgore's contributors and see whose name is near the top, A&G Coal Company.

DMME Response: Some speakers at the November 4, 2004, public meeting appear to misunderstand the role of the Office of the Attorney General. Citizens believe that they can complain to the Office of the Attorney General regarding these type of issues and that the Office of the Attorney General should be helping them in hearings and not representing the agency. They also believe that when the Office of the Attorney General represents DMME in a hearing, they are representing the coal company.

As pointed out in the DMME response to Mr. Bush, the Attorney General's web site includes a page that outlines the duties and powers of the Attorney General and the Office, also called the Department of Law, as defined in state law. The first item in the list of duties reads: *"Provide legal advice and representation to the Governor and executive agencies, state boards and institutions of higher education. The advice commonly includes help with personnel issues, contracts, purchasing, regulatory and real estate matters and the review of proposed legislation. The Office also represents those agencies in court."* At the bottom of that page the following statement is made, *"One thing the Attorney General and the other attorneys on our staff cannot do is give legal advice to private citizens. If you have a private dispute, this Office cannot intervene."*

This is one of the education efforts that must be made to restore trust in the administrative review and appeal process.

Dorothy Taulbee Comments: My name is Dorothy Faye Taulbee. I live at 5705 Stonega Road Well this stripping, I don't care if it's -- it's just about a mile away from my house but the blasting you could come up there and the coal trucks they fly, they overload, they will run over you.

And you ought to see, I've got pictures on the camcorder. Like he said, when they see you camcording them they slow down.

But my home, I'm not against nobody making a living but they can wash these trucks, you can't see the tag numbers like you said. And when the train has them up there in Stonega there's 15 to 20 of them backed down the road, they know it, they run the whole time and I'm smelling that diesel oil.

They get out and clean their trucks off in front of my house and beat their mud flaps, this is before God, and their trash wherever they're going.

Now you can be respectful of people and it's enough that you ravish and raping the land, but hauling trucks, you ought to see my home. I've got pictures right there and pictures of them trucks on that camcorder. It's just awful how they disrespect you.

They water it down up there across the bridge where the tipple and stuff is and they drag all that mud back down, and like he said, it's a cloud of smoke, that dust.

You ought to see my home, it's filthy. I've had to throw away my cushions and everything, you can't sit out on your porch. I built a new porch last fall and you all can come and look at it if you don't believe me.

I think people ought to respect other people, too, it's all right to make a living, but you should be able to wash your truck. They should put these big things up -- I don't blame the coal truck drivers, but the ones that's disrespectful and makes all the noise they do.

Some of them, you know, they try to see how much noise they can make. They drive all night and then when they quit late they'll start at 4:00 o'clock in the morning. Like he said, you can't get no rest for all this noise.

DMME Response: DMME regulates the haulroad within the permit. As noted in responses to previous speakers, DMME does not regulate traffic on public roads, those situations would fall under the authority of the Virginia State Police or local government jurisdiction.

Ms. Taulbee has not filed any mining related complaints with DMME.

Dorothy Taulbee Comments: But they could at least wash their trucks down and this stripping, they shouldn't be allowed to strip in three or four miles of your home. Come look at mine, it's falling all to pieces where they're blasting. You can't stand that, nobody can.

Your homes, you take something and beat and them coal trucks when they go by the whole house sways. I just built that porch and it's done separated that far from the top of the house up there, and we built it good and put it in there. Me and my son had to built it because I don't have money to pay a contractor. I just built a new room on and you ought to see the damage and see my house, the dust. And you can take and wash it down and the next day you can't tell it. And your truck you can wash it and in 15 minutes it's covered up, you've got to clean your windows.

DMME Response: Ms. Taulbee has pointed out an issue that DMME has advised citizens of before. Truck traffic close to homes can cause vibrations exceeding those caused by blasting. This reinforces that numerous forces may affect houses, and the need to consider the evidence of each case when responding to blasting complaints.

DMME does not believe limiting surface mining to within three or four miles of residences is supported by technical evidence and would likely result in a takings case against the Commonwealth. Such limits would likely not alleviate problems associated with truck traffic described by Ms. Taulbee and others.

Dorothy Taulbee Comments: I think that we need a lot of changes around about the stripping and stuff. And you'd think people in years -- the equipment that's moving our earth now and destroying all of our water and our air, taking all of our trees then what are you going to do when everything's gone. You think about this. Think about -- look at the future.

I know you need to make a living, but they drive day and night. I know the coal truck driver's ain't making that much money, because I had a cousin got killed here last October, burnt up up here in a coal truck because they pushed him so hard. He told them that morning something was wrong with his truck. The other people that owns the truck they're making the money, these little coal truck drivers they're pushing them to drive too much and too fast and them vehicles is not kept up and not inspected. And they should be washed and stuff and inspected.

DMME Response: As noted in a previous response, DMME does not regulate traffic or trucking off the permitted site. DMME regulates the mining practices through permitting and enforcement.

Dorothy Taulbee Comments: I think that Virginia needs to look at a lot of stuff about ravishing our land and destroying the people. We have rights too, honey. I'm old and I'm sick and stuff and you have to breathe this dust. It's hurting people, not only your lungs, it killed that little boy.

I'm so sorry that this had to happen but I knew something bad was going to take place and it's going to be worse than ever people because we're going to have floods and stuff. You all may not believe that, but in '77 I lived through one because of stripping and stuff. And you think now they're taking away everything from us and destroying the land and so many lakes they've already drained and stuff.

But you need to wash coal trucks and I think mountain top removal myself should be stopped altogether. The deep mines they can have them, but these coal truck drivers they should wash their trucks. The people that owns them should furnish things to wash them down and they should respect people when you get close to their houses, not sound off like that. You shouldn't be disrespectful and drive so fast because if a child steps out there it's going to be gone or a grownup or anybody.

DMME Response: The 1977 flood occurred prior to passage of the federal surface mining law and the corresponding Virginia surface mining law. Current mining laws require permits to have protections in place that were not required in 1977.

Dorothy Taulbee Comments: And the other thing, I did want to bring out about the bears. They brought all these bears in here and turned them loose and now they're tearing up all the forests and honey, they come down to our houses trying to find food. They've come around my house and other people's.

DMME Response: DMME does not have any involvement in bear relocation programs. The Department of Game and Inland Fisheries (DGIF) handles these programs. DMME recommends that Ms. Taulbee contact DGIF at (540) 961-8304, if she has a nuisance bear problem.

Walter Crouse Comments: My name is Walter Crouse. I am a Chemistry Professor at the University of Virginia's College at Wise. I have spoken several times at these meetings ever time there is a public hearing about mining permits and it seems like nobody ever listens to us. They tore up the Hurricane and now they're getting ready to tear up all the area around Appalachia.

The Virginia and U.S. Laws are much too lenient as to punishment for careless mining activities which result in the loss of life. Out in the Hurricane a little kid could have been killed, a rock hit a woman's yard, she was babysitting. The rock hit the day before she had her granddaughter there. If it had hit at the time she had her granddaughter we'd had another child killed long before this accident.

DMME Response: Protection of public life and property is foremost in DMLR's enforcement of coal surface mining laws. The only reported finding of fly rock in the Hurricane community resulted on August 24, 1998 from the adjacent surface operation of A&G Coal Corporation Permit Number No. 1101352. A complaint investigation by the inspector revealed that the company had thrown material onto a complainant's property, damaging the roof of a shed and the complainant's dwelling in violation of 4 VAC 25-130.816.67(c) VCSMRR. The company was cited with NOV #98-86-06 and instructed to remove all fly rock and repair all damage caused by the fly rock.

Mr. Crouse has not filed any mining related complaints with DMME.

Walter Crouse Comments: Injuries result in loss of life, injuries to mine workers themselves and innocent bystanders and damage to property or properties nearby and distant from the mining site. The law should provide very substantial financial penalties and criminal penalties including 10 to 20 year prison terms in case of accidental deaths or serious injuries due to negligence or violations of State and Federal Laws.

The \$70,000.00 proposal proposed tonight is not anywhere near enough to get people to quit disobeying the law. Safety is priority number one. Ford Motor Company comes on TV constantly stressing they are building safe cars, which may or may not be true, but in all industry, whether it's chemical industry, mining industry or logging industry safety must be priority number one. Not the bottom line of A&G or any other coal company or any other business. Accidents do happen, but most are preventable and can be prevented by obeying laws.

DMME Response: As noted at the November 4, 2004 public hearing, the Department of Mines Minerals and Energy will submit to the legislative panel specific changes to the penalty procedures noted in the Code of Virginia. These changes include the ability of DMME to waive the current assessment formula and invoke a maximum penalty amount for violations. This narrow amendment would increase the civil penalty assessment to up to \$70,000.00 for any violations of the act that result in personal injury or a fatality to the public. The \$70,000.00 amount proposed matches the current Virginia Occupational Safety Program and is \$10,000.00 more than the maximum allowed under the MSHA regulations. This was addressed in more detail in a response to a comment from Barney Reilly.

Walter Crouse Comments: So laws must be enforced. When people make complaints they must be investigated, because there's a reason whether it's too much dust or too much noise.

DMME Response: DMME agrees that to prevent accidents and injuries, the laws must be enforced when violations are found, but it is of even greater importance that the laws must be obeyed and followed in the first place. While enforcement actions taken after a violation occurs may be a deterrent to future violations, it still remains after the fact. DMME inspectors work with coal companies to ensure the mine sites stay in compliance. However, inspectors cannot be present 24 hours per day. Mine operators and miners must bear the ultimate responsibility to ensure that mines remain safe and in compliance with the mine safety and reclamation laws and regulations.

Walter Crouse Comments: We need to cut down on the size of all blasting, you know, and the problem is most mining engineers they know no chemistry and they know no physics. You don't

realize how much damage and how far blasting will carry. So if we are going to blast we should be cutting down the size of the blasts, may have to do it more often but there will be less rocks flying long distances and causing potential injuries to people while they're driving along the highway or just living in their own homes.

DMME Response: Blasting in Virginia is conducted on a smaller scale than in Kentucky and West Virginia. Mine operators must submit blasting plans showing how they will conduct blasting operations. The geology and type of mining operation must also be considered in determining the pound of explosives. Harder rock and deeper holes require more explosives. Dragline operations used in Kentucky and West Virginia require increased number of blast holes and larger total pounds of explosives in a single blast. In West Virginia, 2 to 3 million pounds are typically used (4 million maximum). Nine hundred thousand pounds has been the largest in Kentucky. Virginia does not have any active dragline operations.

In Virginia, 40,000 to 60,000 pounds of explosives is typical of blasts. Only a small percentage of blasts exceed 80,000 pounds and only a very few exceed 100,000 pounds. In many cases, the amount of explosives used must be limited to ensure protection of homes, other dwellings, or underground mines and workers.

Any reduction in the size of blasting could be implemented based on the findings of the blasting study DMME is recommending be conducted by the National Academy of Science. This updated information is essential to the assertion that current blasting standards are inadequate to protect structures or the public. It would act as the new standard for modification of the current blasting regulations.

Walter Crouse Comments: In conclusion, human life and property come first, not the profits, the mining schedules and the mining companies. The mining companies should not be allowed to file for bankruptcy in case of accidents. We must keep very good records of who goes into bankruptcy and then reappears as a new mining company as was the case with South Mountain.

DMME Response: As discussed in responses to other comments, DMME requires submittal of information for each person who owns or controls the permit application, as well as including their percentage of ownership and location in the organizational structure of the proposed permit. DMME conducts ownership and control investigations within 60 days of permit issuance to determine who is exercising control over any and all active coal surface mining operations. This review is conducted prior to permit issuance as well as on each quarterly complete inspection. Upon issuance of any cessation order, all personnel in executive positions are reviewed and identified as well.

Ronald Peters: The only thing I need to say is that I agree with nine out of the ten that's been up here completely, because this terrible community we live in and what we have to smell. I was hurt at a coal mine and they waited until I turned 61 and then they wanted to take away my benefits. I've lived with this since '79.

But I go along with Mr. Jervis here and Ray and all these ones that spoke they're speaking the truth. I've been to their meetings and I agree with them.

Make somebody responsible. This child dying really hurt me. I agree with them wholeheartedly, but not the miner operator that talked up here.

DMME Response: DMME does not regulate odors or traffic, if Mr. Peters is describing diesel fumes from truck traffic. DMME has no authority over retiree benefits.

Mr. Peters has not filed any mining related complaints with DMME.

Jerry Hamilton Comments: As far as the hearing is concerned I think that we have got off track with it. I think it's turned into something that the panel doesn't want to hear. I don't want to elaborate on that but I have to interject that DMME, what they have done over the past years, the group that is against them, the group that's saying that they're on the take and the yahdah yahdahs.

DMME is one of the few agencies in our nation that will stand up for everybody concerned. The won't respond to frivolous capricious arbitrary complaints, they won't cotton to some of the things that come through.

A lot of the complaints that come through down there are frivolous and they do go through them. But people get upset when you get told no. I've got two little boys that get upset when they get told no. People get upset, it doesn't mean the division is wrong.

DMME Response: DMME does not decide whether any action is needed in response to any complaint until it has had the opportunity to investigate and talk to the complainant and a representative of the mine (if required) alleged to be the source of the complainant's concern. DMME has received complaints alleging damage from an underground mine prior to the mine ever opening. In another instance, DMME received several complaints from the same citizen that a water loss had occurred. An investigation by DMME revealed that mining could not have impacted the supply and DMME chose to not act. The citizen then complained to OSM. OSM issued a Ten Day Notice to DMME requesting DMME provide information as to why a violation did not exist. DMME responded by explaining the DMME investigation findings and why it declined to act. OSM then tested the well and found that it produced in excess of 30 gallons per minute. While these obviously non-valid complaints are a small percentage of the total complaints received, they serve to illustrate that DMME must make independent determinations.

Jerry Hamilton Comments: As far as the recommendations that have come out of DMME's report as a coal industry I think we will back those up. Better ground control planning, you won't hear us gripe. We will help, we will do our part.

The tragedy happened, God, let's not let that ever happen again. Let's not even let something like that close to happening again.

Virginia has the best mining laws in the nation. I mine coal, strip mine coal in two states and have mined in three states. We have the best in the nation. We have the best environmental law in the nation. We have the best administrators of our law in the nation.

And in working with Virginia and West Virginia right now, Virginia's inspector safety and environmental are the most qualified, best trained of any state mining coal.

The one thing that we would like to, myself as an industry person, as an ex-regulatory person preplanning, please help us involve preplanning more in the ground control planning, I don't

think you'll get any beef from us. That will involve public involvement as well as common sense involvement.

The blasting aspects, I don't know how blasting got in on this report that much. I'm not sure this was a blasting problem. If blasting needs to be looked at bring the explosive experts in, bring the Bureau of Mines in, bring in the society professional engineers, bring in these people that are experts, bring in industry people. Yes, you're going to say, oh, that's industry people, yes, it is, because most of us are the experts in what's going on with that. Bring these people in to help the committee. We have tons of those people that are willing to help with this type thing.

The same way with the monitoring, seismic monitoring has got to be an art. It's a very specific science any more. There's new things on the market that are unbelievable, we can help with that, we will help with that.

So we extend, from out part of the coal industry we extend an invitation or a hope that we are included in this process as it goes.

DMME Response: DMME will consider input from any interested parties.

Brenda Porter Comments: My name is Brenda Porter and I live in Coeburn.

I want to tell you that my grandfathers and my father worked in mining, and my family still does. I have worked for a deep mines, surface mines and trucking companies.

Now I want to tell you all about A&G Coal Company. In 1998 A&G Coal Corporation won an award for best completed surface mine. In 2000 A&G Coal Company won an award for best post-mining land use. 2001 A&G Coal Company won an award for excellence in mining and improving land re-mining in Virginia. Also in 2001 they won the yearly annual award for excellence feature award winner. In 2002 they won an award for the over one million ton club. In 2004 they won an award for environmentalist of the year.

I believe that this clearly shows that A&G Coal Company is a conscientious, dedicated company whose employees and management strive to be the very best. I also believe that we need the input of the mining companies before any recommendations are voted on, because the coal companies want to do the right thing and this does affect them.

And in ending, my prayers go out to the Davidson Family, but also my prayers go out to the A&G Coal Corporation and their employees.

DMME Response: DMME acknowledges the awards won by A & G, but they have no bearing on the report findings.

Gerald Gray Comments: Mr. Secretary, members of the legislative panel and fellow citizens. My name is Gerald Gray. I am a lawyer in Clintwood. I have represented many home owners over the last 30 years whose homes have been damaged by blasting, who lost their water from coal mining, who have had their right to enjoy their own interfered with by unreasonable noise and dust.

I represent some of the families who live in the communities that have been affected by strip mining in the Roda, Inman and Stonega areas. I am representing them because they came to me and asked me for help because of the dust and the noise and the blasting and the vibration that they've had to put up with since these mines started near their communities.

Now, the purpose of this hearing tonight is to see what we can recommend to the legislators and to the regulators to try to prevent this terrible death, this type of thing from occurring in the future.

I think it's unfortunate that there is a division in this audience between the people who live in the homes that are affected by the mining and the people in the mining industry who feel that we're at odds, but I want to assure you we are not.

As Delegate Phillips noted we do have to coexist, but I do not believe that anybody here in the mining industry wanted that child to die. I believe that very sincerely. I also believe that you all are just as interested in it as the people who have lived there in making sure that it doesn't happen again.

Now, it's not going to be easy to get that done. DMLR is started in the right direction but they don't go far enough. One of the serious problems that exist in both the law and the regulations is that they are not designed at all when they grant a permit to take into account the safety and the health of the citizens who live around the coal mine, they just don't do that.

DMME Response: DMME regulations do take into account the safety and health of citizens. The regulations do not require companies to prevent water loss or subsidence damage, but do require that the loss/damage be replaced/repared or the owner compensated. The regulations do not provide for punitive damages, which often are sought by citizens impacted by mining. Mr. Gray has participated in formal hearings on these issues. The regulations do not prevent nuisance problems, such as noise or odors. DMME does not recommend that these be added to the DMME regulatory authorities, as nuisance is highly subjective dependent upon individual tolerance for odor and noise and these issues are typically handled by courts of law.

The Act and regulations also provide avenues for the public to become involved in the permitting and enforcement processes. (45.1-239, 45.1-240, 45.1-243, 45.1-244E, 45.1-245, 45.1-246, 45.1-246.1, 45.1-247, 45.1-252, 45.1-254, 45.1-256, & 45.1-258)

Gerald Gray Comments: So, yes, when you complain about the blasting and the dust and you're ignored by DMLR well the reason is they're hands are tied.

DMME Response: DMME would like to clarify that we do not ignore any complainant. The agency may not have been able to cite a violation; however, each complaint is investigated and appropriate action taken provided for in the Act and regulations, and the DMLR complaint investigation procedures. The agency may not be able to effect the change the complainant may want for lack of jurisdiction or proof that a performance requirement is not being adhered to, however each complainant's concern is addressed and he/she receives a written response from DMME.

Mr. Gray has filed three mining related complaints. These complaints were investigated and the investigation findings presented to Mr. Gray.

Gerald Gray Comments: They've got regulations that say that unless they blast in excess of a certain inches per second as shown on the seismograph and unless they use too much weight per shot it's not a violation and they can't do anything. But the simple fact is whether that blast violates a regulation or not doesn't mean it hasn't damaged your home and it doesn't mean it hasn't interfered with your ability to enjoy your home.

The solution is going to be that if blasting is used that it has got to be done in a way that minimizes the interference with the people who have a right to live in their own homes. Think about it. I don't think any of you all who have been applauding so much when someone has said something in favor of the coal industry, I don't think any of you all would want to put up with the dust and the aggravation every day that these people put up with, I don't believe that you would.

So my suggestion is that DMLR should be given the power under the law and it's regulations to consider whether or not a coal company locates in a community, they're going to have to take an extra step to see to it that they don't cause harm to the people who live in their community.

DMME Response: DMME laws and regulations already contain provisions to protect public safety. This should not be confused with feeling blasting vibrations, hearing noise, or smelling diesel odors, etc.

§ .45.1-228B reads: *"Nothing in this chapter is intended, nor shall be construed, to limit, impair, abridge, create, enlarge, or otherwise affect, substantially or procedurally, the rights of any person in any dispute involving property rights, including interests in water resources, or the right of any person to damage or other relief on account of injury to persons or property, including interests in water resources, and to maintain any action or other appropriate proceeding therefore, except as is otherwise specifically provided in this chapter; nor to affect the powers of the Commonwealth to initiate, prosecute and maintain actions to abate public nuisances."*

Mr. Gray's proposal to have a blanket prohibition against mining in communities would in effect cause the agency to venture into rendering property decisions and subject the Commonwealth to potential "taking" claims.

Gerald Gray Comments: I also believe that there is a serious flaw in the institution and the process itself of public comment. And I say that because my friend, Pete Ramey, went to the Division of Mine Land Reclamation a few years ago and at his own expense, with great courage facing a lot of intimidation from coal companies, he tried to stop permits from being granted to coal companies that were threatening his neighbors and friends.

Let me tell you, if DMLR had listened to Pete Ramey and had realized and had agreed that mining should not take place in any situation where there is a potential danger to home the Davidson boy would be alive today.

DMME Response: This was a tragic accident, one that occurred due to negligence of the coal company. The regulations were not deficient. The accident occurred from human error and

failure to have a proper plan approved. If the approved mine plan had been followed the accident would not have occurred.

Gerald Gray Comments: You need to know that when Pete Ramey challenged these permits not only did the Division of Mine Land Reclamation not help him at all, they fought him.

DMME Response: Mr. Gray is an attorney who has represented parties in formal hearings that were held in response to appeals filed by citizens. This is not a DMME process but rather it is the process used by all state agencies. In fact, it is the same process used by the mining regulatory agencies in the other states and by the federal government and is similar to that used in the courts. Mr. Ramey's case was no different than when a coal company contests a violation issued by DMLR. The Agency does not help a coal company appeal a violation it has been issued nor does it help any other party that appeals an Agency decision. Mr. Ramey was given the opportunity to file written and oral objections to the various permit applications that concerned him. After consideration of his comments and other interested parties, the agency determined that the applications met the requirements of the Virginia Coal Surface Mining Control and Reclamation Act of 1979, as amended, and the regulations promulgated thereunder. Mr. Ramey and others were informed of the DMLR's determination and informed of the right to seek administrative review of such decisions. Once a party contests an agency decision, an administrative review process initiates. The agency (represented by the Attorney General of Virginia office) defended its decisions to grant approval of permit applications because the applications met the regulatory requirements. Mr. Ramey exercised his right to contest the application approvals. Therefore, in the formal hearings, Mr. Ramey was the party objecting to the agency's decisions and the agency in turn defended the decision to issue the permit. The characterization that DMLR fought Mr. Ramey is inappropriate given the administrative review procedures that apply to all appeals of Virginia state agency decisions.

Gerald Gray Comments: And the Assistant Attorney General who was assigned to the Big Stone Gap Office here at DMLR, I don't know the woman well, I have met her a couple of times, she led the charge against Mr. Ramey to fight him and ridiculed him when he complained about damage to his home by pointing out that, well your home wasn't worth very much to start with anyway; isn't that right, Pete?

DMME Response: The Assistant Attorney General's questions of Mr. Ramey were to clarify exhibits introduced by other parties at the formal administrative hearings. They were not to fight or ridicule him. At the second of four formal administrative hearings on May 2, 2002, an exhibit was introduced by Intervenor Penn Virginia Resources Corporation that was the deed to Mr. Ramey's property. DMLR's counsel asked the question, regarding the exhibit, if the deed stated, "*paid for this transaction was \$900, is that correct?*" In which Mr. Ramey replied, "*yes, yes*"

During the third hearing (October 29, 2002) on a different permit application approval, during cross examination, Mr. Ramey was asked what he thought his house and land was worth and Mr. Ramey responded, "*Well, I have modernized my home, but to say how much it's worth now would probably be a guesstimate of zero.*"

Gerald Gray Comments: Now let me tell you, that's not the way we look at things. We don't judge people by how big and fancy their home is. You and I, we're all the same, we've all got the same rights to enjoy our own homes. But the simple fact is DMLR doesn't recognize that,

the laws don't let them perhaps. But what they do not have to do is to attack citizens who have nothing more in mind than to protect their neighbors because that's all Peter Ramey was after.

Let me tell you what DMLR did, they didn't just stop in ridiculing him for challenging those permits they actually fined him, they ordered him to pay the attorney's fees for the multimillion dollar coal companies that he was threatening and harassing, and all he was trying to do was to protect his community.

DMME Response: The administrative record does not support his assertions. DMME/DMLR also does not judge people by their homes. DMME has issued subsidence repair orders and water replacement orders on residences that would have had a very low appraised value. These have included a 20-year old 12-foot by 60-foot singlewide mobile home damaged by subsidence, and a residence that had been purchased for a very low price because it was already damaged by subsidence and had a water loss. In the latter instance, DMLR issued orders to replace the water and to repair the subsidence damage. At formal hearings DMLR staff do not question witnesses but only respond to questions under direct or cross-examination from the respective parties' attorneys.

The agency and the petitioners (to intervene) conducted themselves in a professional manner. A review of the transcripts will show that all parties treated Mr. Ramey with respect. The coal companies requested attorney's fees and costs after three formal hearings at which Mr. Ramey did not present any evidence that the permits were improperly issued.

Gerald Gray Comments: Now that simply should not be the law in Virginia and I am going to recommend that we repeal that portion of the law that gives coal companies the opportunity to extract attorney's fees from individuals who make a good faith reasonable effort to try to protect the homes of their neighbors.

DMME Response: The law provides for an award of attorney fees to a permittee or permit applicant from a person where the permittee or permit applicant demonstrates that the person initiated an administrative proceeding under the Act or participated in such a proceeding in "bad faith". In the instance of Mr. Ramey's case the Hearing Officer found that:

"The attestations of character and statements of recommendation which were submitted at the very end, and admitted as Petitioner's Exhibit B, subject to the Intervenors objections to relevancy are not found relevant in this matter and Roda's/Penn Virginia's objections are sustained.

When Mr. Ramey filed his petition for formal review of the issuance of Permit No. 1101809, he asked for a formal hearing at which he testified that he thought "social justice" should ban any new mining in the area of his residence. His counsel then called Division employees as Mr. Ramey's witnesses and tried to elicit from them errors in the permitting process for Permit Number 1101809. She did not succeed. Mr. Ramey's purported expert witness became a non-witness when she was dismissed without cross examination after an objection. Mr. Ramey presented no evidence of error or impropriety in the permit application review process.

Having gone through two other formal review hearings in which his theory of "social justice" did not prevail and having been ruled against and having had his evidence struck, Mr. Ramey and/or his counsel knew or should have known that without evidence, this formal review hearing would not be successful.

Filing for review in this case without evidence in the hope of eliciting testimony of an error for Division personnel was costly, time consuming and harassing to the permittee and Roda is entitled to attorneys' fees and costs under 4 VAC25-130-789.1(a) and (e) and Penn Virginia is entitled to costs and attorneys' fees under 4 VAC25-130-798(a)."

The regulation for awarding attorney fees is found at 4VAC25-130-789.1. Petition for award of costs and expenses under Section 45.1-249E of the Act. The applicable paragraphs (a), (e) – (g) are copied below:

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in--

(1) A final order being issued by a Hearing Officer, or

(2) A final order being issued by the Director or division.

(e) Appropriate costs and expenses including attorneys' fees may be awarded--

(1) To any person from the permittee, if the person initiates any administrative proceedings reviewing enforcement actions, upon a finding that a violation of the Act, regulations or permit has occurred, or that an imminent hazard existed, or to any person who participates in an enforcement proceeding where such a finding is made if the Hearing Officer or Director or division determines that the person made a substantial contribution to the full and fair determination of the issues;

*(2) To a permittee or permit applicant from any person where the permittee or permit applicant demonstrates that the person initiated an administrative proceeding under the Act or participated in such a proceeding in **bad faith** for the purpose of harassing or embarrassing the permittee or permit applicant.*

(f) An award under these sections may include--

(1) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act; and

(2) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award.

(g) Any person aggrieved by a decision concerning the award of costs and expenses in an administrative proceeding under the Act may appeal such award to the division within 30 days, unless the Director or division has made the initial decision concerning such an award.

Awards by the Director or division are final for the purposes of judicial review.

Deleting this provision from law would make the Virginia program less effective than the OSM regulations. The issue is whether or not a petitioner initiated or any party to the proceeding participated in such a proceeding in bad faith, not good faith. To strike this provision would prevent any party, citizen or company, from being awarded costs, expenses, attorney fees, etc. in instances where there was bad faith by a party who either petitioned for review or participated in the proceeding. This provision applies equally to citizens and companies. For example, if Roda/Penn Virginia had participated in the proceeding in bad faith then Mr. Ramey could have petitioned for and potentially been awarded attorney fees and costs. It should be noted that Mr. Gray has filed a judicial appeal on Mr. Ramey's behalf and is aware of the facts in this case.

Gerald Gray Comments: What have we learned tonight about this terrible tragedy? We've learned that rocks roll downhill. We've learned that big rocks can injure and kill, but we knew that already. But why, if we knew that already why was this mine allowed to exist where it did in the proximity to where these homes were. And certainly the coal company has a right to mine its coal, but these people have rights, too.

I don't believe that the State of Virginia should tell homeowners the rights of the coal company are superior to your rights as a land owner, that should not happen. The law should be changed to protect the homeowners.

We don't have to mine every single lump of coal in Wise County, Dickenson County, Russell County, Buchanan County, Tazewell County and Lee County, we can leave some of that coal where God put it. We don't have to take it all out and damage other people.

DMME Response: DMME believes that primary lesson of this accident is that when companies fail to follow approved mine plans and the regulations designed to protect the public and fail to follow prudent safety precautions, accidents and tragic results can and do occur. DMME also believes that all parties need to acknowledge that regardless of the laws and regulations in place, if they are not followed, accidents can happen.

The permit was approved in accordance with Virginia's law and regulations. If the approved plans had been followed and the regulations complied with, the accident would not have occurred. The company constructed an unauthorized road, did not use the required road design/construction standards, and failed to provide prudent safety precautions. That is what caused the accident.

DMME requires all permit applications to meet the requirements of the laws and regulations including provisions for public safety. It must be noted that the legal authorized mining activity being conducted on the permit at the time of the accident did not cause the rock to be pushed over the hillside. It was the unauthorized road construction that caused the accident. To state that every earth disturbing activity above residences should not be allowed is unreasonable. It is not uncommon for private property owners to cut house seats above other residences, for logging companies to construct logging roads above residences, power companies to construct power lines above residences, and numerous other earth disturbing activities take place above private residences. If the companies or individuals performing these activities fail to take proper precautions then accidents can happen.

DMME does not adjudicate property rights. There have been some instances where Virginia courts have held that coal rights are superior to the surface owner's rights. DMME has been involved in instances where the coal severance deed did in fact grant superior rights to the coal/mineral owner and DMME could not order subsidence repair even though DMME found that subsidence had occurred. In that instance, the company and the citizen had to resolve the matter privately. The citizen's attorney withdrew the lawsuit that had been filed for damages after learning that the coal company did have superior rights by way of reservations in the deed severing the coal and transferring the surface property to a private individual. When such conveyances clearly state the superiority of the mineral estate over the surface estate, then it is impossible for DMME to usurp the property law.

Gerald Gray Comments: We can prevent injury and death in the future if we limit the size and the scope of coal mines and we do not let them mine in neighborhoods. People have a right to live and enjoy their own homes. The Constitution says we have the right to pursue happiness. Well you can't do it if you're worried about the dust, the noise, the blasting, the flooding and you can't enjoy your own home. That simply should not be happening in this country.

DMME Response: DMME does not agree that the size and scope of the mines necessarily contribute to the danger to the public. Those making these comments offer no support for the statement other than that mine size and equipment size have increased significantly since the time that the current mining laws were written. In regards to the Inman fatality, there is no correlation between equipment size or the mine size and the cause of the accident. The rock was dislodged as a result of the company not following existing regulations and design standards.

Suggestions that the 300-foot limit from houses needs to be increased because of larger equipment and mine size are not supported by a review of mining operations. Increased equipment size allows coal companies to mine higher ratio (Ratio of Bank Cubic Yards of Overburden to One Ton of Coal) reserves further back in the mountains. The contour cuts along the edge of the coal reserve can be mined with smaller equipment, as this is the lowest ratio coal. This is evident by the extent of Abandoned Mine Land (AML) highwalls existing above most coal camps and visible along highways such as US Business 23 and Alternate 58. These AML highwalls were in fact created by equipment in use prior to enactment of Virginia's coal surface mining act, all of which was of a smaller size than is currently being used.

The first cut mining above residences can be made by smaller equipment. Road construction can be made with smaller equipment. The only impact the larger equipment has is that larger areas are now being mined and thus the duration of mining is longer than if just contour cuts were taken. The larger area is made up of higher ratio coal reserves in the middle of the permit areas or second and third cut mining areas and are areas generally further away from the residences located around the perimeter of the mines.

Larger equipment has not resulted in significantly larger blasts in Virginia. The distance from a blast site to the closest dwelling typically determines pounds per delay. The depth and number of holes determine the total pounds of explosives used in a blast. When distances are less than a 1000 feet, the blaster will often approach using the maximum poundage per delay allowed by the scaled distance equation and when the distance is less than 500 feet, the poundage sometime exceeds the maximum. In this instance, a seismograph must be used to monitor the effect of the blast at the closest dwelling. At distances greater than ½ mile, the percentage of the maximum poundage drops. Operations that are 5 miles or more from the closest dwelling typically use between 3 and 15 percent of the maximum.

In order to obtain a surface mining permit, the applicant must demonstrate that it has a legal right of entry. The surface mining law is designed to protect the public health and safety. Not a single speaker has pointed out a single instance of anyone being injured when the coal company followed the law and regulations.

Mr. Gray's comment presumes that the laws should prevent any effects on surface owners. Virginia state law and federal law recognize that both surface owners and mineral owners have property rights. The laws allow certain impacts such as water loss and subsidence damage but

require that the landowners be made whole for the damages. Other impacts must be minimized but not prevented. To enact statutes that would prevent these impacts from occurring would in essence be a ban on mining.

Gerald Gray Comments: There are some immediate steps that need to be taken, certainly the proposals that DMLR has put on the table are a good start. I would suggest that if I were them I would be very embarrassed to tell you all that the maximum penalty for killing a child ought to be \$70,000.00

That won't deter a company like A&G. And sure, they've done some good things, certainly they have. And they've got some good people working for them, the vast majority of them are good people.

DMME Response: DMME has proposed a penalty that is consistent with that provided by the Virginia Occupational Safety Program and which is \$10,000.00 more than the maximum allowed under the MSHA regulations. DMME looked for precedent in other areas of Virginia law when proposing this amount and believe this is an appropriate amount for a civil penalty in these circumstances. This was addressed in more detail in a response to a comment from Mr. Barney Reilly.

Gerald Gray Comments: Well I am going to close out then by asking the legislators to take into account what I have just said. Certainly the coal operators have a right to mine their coal, but home owners have a right to live safe and secure in their own homes. Coal companies shouldn't get a permit that lets them cause harm to people.

DMME Response: DMME agrees that coal mining operations should not harm the public or mine employees. However, if a coal company fails to follow approved permit conditions or approved plans, then accidents can happen and injuries can result. The key is prevention through education, clearly understood detailed mine plans, enforcement, and recognition by the industry that these requirements must be followed to protect the public, mine employees and the environment.

James Gill Comments: My name is James Gill. I work for A&G Coal Company. I wasn't planning on speaking but some of the things that they've said and stuff I felt that I needed to come up here and speak.

I don't mean to be disrespectful to anything they've said, but on a few things like the coal trucks getting mud on the roads, we do wash the trucks. There's a certain amount of mud that's going to get on the road I don't care what you do. It's just like if you were driving out of your driveway and it was raining you're going to get some mud or some dirt or some rock on your roads.

We do take these precautions and we do -- I mean, just like Appalachia, people complain. It's been a coal mining nasty, dirty town for what, since the 1900's, that's where it started as a coal mining town. If it wasn't for the coal mining industry in Southwest Virginia where would we be? We'd all be unemployed.

Think of all the people, anybody that makes any decent money around here, and always has been, works at the mines. It's a tragic, tragic accident and what happened is terrible, but we can't change that now. But we can change some of the laws like you all was looking at as far as mining so close to a home or something, yeah.

But it's just like people complaining about the dust, there's been dust there since the 1900's. If you moved over -- like Terry Kilgore, he knows, if you move on Southern Street in Kingsport what are you going to smell? The Tennessee Eastman ain't you. If you go buy \$120,000.00 home there are you going to complain about it after you do? You can't do that.

And if it wasn't, like I said, for the coal mining industry where would we all be? That's all I got to say.

DMME Response: DMME agrees this was a tragic accident.

RECOMMENDATIONS/COMMENTS RECEIVED FROM CITIZENS AFTER THE NOVEMBER 4, 2004 Public Meeting

The following written comments were received after the November 4, 2004 presentation to the Legislative Panel. One e-mail is copied in entirety and direct quotes from the one letter are copied directly with no attempt to correct typographical errors or any misspelling in order to ensure the writers exact unedited comments were addressed by DMME.

November 10, 2004 E-mail from Kirby Cox to Governor Mark Warner

"Dear Governor Warner

First I would like to thank you for the Panel looking into over hauling the laws that govern strip mine laws I think that sodium nitrate should be reduced in each hole so it won't shake the people houses for miles around the coal mine site. I have complained to Division Mines Minerals and Engery several times over the years seems like they're more in favor for the coal companies than the people who live close to the site. Also need to replace Lowell Marshall he has been head of DMME in Big Stone Gap for several years need someone who is more responsible. The other day Saturday Nov.6 2004 @ 2pm there was a hard blast came from the direction of the Red Onion State Prison it rattled the windows in the front of my house it might have damaged the prison itself. Sincerely

Kirby Cox

P.S. I have written Senator Phillips and Puckett on this matter I hope there will be new laws govern surface mines."

DMME Response: As noted in previous responses DMME has recommended that Virginia's congressional delegation seek funding and provide direction for a National Academy of Science study of the effects of blasting on property and an update of the United States Bureau of Mines reports.

On November 23, 2004, a DMLR inspector contacted Mr. Cox and asked him if he wished to file a complaint on the November 6, 2004 blast (mentioned in the e-mail). Mr. Cox informed the DMLR inspector that he did not want to file a complaint, but he wanted to make the inspectors aware of the hard blasting that was going on. The DMLR Enforcement Unit has entered this as an inquiry into the computerized enforcement system.

Mr. Cox's e-mail and DMME's response to this as a complaint points out one of the issues DMME must address regarding complaints received on blasting operations. Many times DMME receives blasting complaints that do not allege damage, but address blasting that was excessively hard in the citizen's opinion. In those instances, DMME can only review the blasting records to see if the blasting plan was followed, blast vibrations were in accordance with approved limits, and if monitoring was conducted, etc. Not all blasting complaints allege damage, they are reported more as a nuisance or a general concern as was Mr. Cox's complaint.

Lowell Marshall was the Enforcement Manager for DMLR until his retirement in 1995. Mr. Marshall was never the head of DMME in Big Stone Gap.

Mr. Cox has filed 11 mining related complaints with DMME. These complaints were investigated and the investigation results provided to Mr. Cox.

November 12, 2004 letter from Wesley Lawson to Secretary Michael Schewel

Wesley Lawson Comments: "DMME's DMLR is not protecting the people. The department needs to be reworked from the ground up. All the laws, rules and regulations need to be re-written to protect the people of the Commonwealth, instead of protecting the coal companies from the people. The DMLR office needs to be fixed, rehiring people who understand, take citizen complaints and essentially do something about the complaints. This is not being done effectively. Should we be looking forward to preserving our land so that our children, grandchildren, and their children and grandchildren can have a backyard to play, without the threat of their life from a coal company. People get tried for murder, when they commit murder, except when dealing with the DMME DMLR."

DMME Response: Mr. Lawson's assertions that DMLR is not enforcing the regulations are not correct. As shown in some of the following comments from Mr. Lawson and DMME's responses, Mr. Lawson's allegations that DMLR is failing to enforce regulations are based on inaccurate interpretations of the regulations by Mr. Lawson.

Wesley Lawson Comments: "Over and over the DMME – DMLR has shown to all of us they simply do not care about the citizens of the Commonwealth. Attached: Enforcement Action – Labeled Document 1. A list of the Notices of Violations and Civil Penalty Amounts was received on March 26, 2003. The information is available via the Virginia Freedom of Information Act. The information was quite amazing. In five separate violations, the 'penalty amount' was a total of \$1160.00. The same five violations the 'final penalty amount' & 'receipt amount' was a total of \$342.00. From the calculations of the five penalties listed on the sheet attached, the coal company only paid 29.483% of their penalty amount.

DMME Response: The proposed civil penalties assessed under the Act and regulations are subject to administrative review. As a result of the company exercising its right for review and based upon all information, the civil penalties were reduced and those amounts became final (i.e., no longer subject to administrative or judicial review as provided by the Act and regulations). The company paid the entire proposed civil penalty amounts. Once the civil penalty became final the company was refunded the difference and 100% of the final civil penalty amount was paid.

Wesley Lawson Comments: "Just a Calculation & Real Life Scenario – In the accident involving the three year old, J. K. Davidson, DMLR assessed the 'highest' fine amount of \$15,000 for the life of a three year old. If the Division of Mined Land Reclamation stays true to their actions to the information that I received; the coal company will probably pay a mere \$4422.45 for the 'gross negligence' that ended the Life, Liberty and Pursuit of Happiness for that child, family and community."

DMME Response: This is speculation by Mr. Lawson. Mr. Lawson implies a value of \$15,000 was placed on the life of the child by DMME. The company was assessed the maximum allowable penalty of \$5,000.00 for each of three enforcement actions taken by DMLR. Mr. Lawson's speculation regarding the final penalty determination against the company is not supported by any facts. Matt Mining had requested an informal hearing to contest the violations and the penalty amount but later withdrew that request. Matt Mining instead has requested a formal hearing on the violations and the civil penalty amounts. If the formal hearing is held, the

Hearing Officer will either uphold the penalties or modify them depending upon his findings. In order for the Hearing Officer to modify the penalties he must find that DMLR either erred in determining the proposed civil penalty amounts or he must find that the underlying violation(s) did not occur. Since they are the maximum allowed under Virginia law, the Hearing Officer cannot raise them.

Wesley Lawson Comments: "I believe, if the Inspector(s) of the Division of Mined Land Reclamation should be held in part responsible. Because, if they were completing their job correctly, they would have known that A & G Coal Company, LLC was not on their permitted land and this child's life could have been saved. If this company was inspected correctly citing every violation that occurs on the permit, would this problem even occur?"

DMME Response: Mr. Lawson is incorrect in stating that A & G was not on their permitted area. The road being reconstructed was in fact on permitted area and was approved for mining. The road reconstruction work was not authorized in the permit and was not part of the approved plan. The DMLR inspector could not have known that A & G intended to perform reconstruction work at night and not contained in the approved plans. DMLR enforces the laws and regulations, however if a company conducts activities not authorized by their permit then DMLR can only act after the fact. As Senator Wampler correctly pointed out at the November 4, 2004 Legislative Panel meeting,

"We have plenty of laws on the books today, but when people don't follow those laws and safety is not adhered to 24 hours a day seven days a week, and you put people with inexperience at very difficult positions, guess what happens? Accidents happen at that particular point." Senator Puckett stated "For you see there are plenty of laws out there on the books and we can have all the inspections that we want, but we cannot have 24 hour inspections and being with someone every time that they are out performing their duties."

Wesley Lawson Comments: The following is posted on the Virginia Department of Mines, Minerals and Energy's Division of Mined Land Reclamation's web site at <http://www.dmme.state.va.us/dmlr/Default.htm> under the title of introduction as accessed on November 11, 2004:

The Department of Mines, Minerals and Energy's Division of Mined Land Reclamation (DMLR) is responsible for ensuring the reclamation of land affected by surface and underground coal mining activity. Major functions include regulating surface effects of coal mining, reclaiming abandoned mine lands, issuing permits, performing inspections, assisting small operators, and responding to citizen concerns. Through permitting, mine inspections, operator assistance, and training activities, the DMLR promotes an environmentally sound mining industry throughout Virginia's coalfield counties of Buchanan, Wise, Dickenson, Tazewell, Russell, Lee, and Scott

This one lone paragraph truly outlines the DMLR. One of DMLR's major functions is to only respond to citizen concerns. Another DMLR major function is to perform inspections, only perform. This introductory paragraph posted by DMME DMLR says exactly what the division is all about. Not one thing mentions enforce the rules and regulations of the Commonwealth of Virginia. DMLR does respond to citizens concerns, usually with an excuse of what happened

and why it happened... Saying it was not a violation. DMLR does 'Inspect' – that is with blinders, so they don't see any violations."

DMME Response: Mr. Lawson has taken a brief overview of the DMLR and termed it as a description of how DMLR fails to perform its duties prescribed by the Virginia laws and regulations. This paragraph provides a brief overall description of the DMLR program. It is impossible to capture all of the DMLR program activities and responsibilities in one short paragraph.

DMLR inspectors and technical staff also respond to a wide variety of actions besides inspections and enforcement on permitted mines. For example, they respond to Abandoned Mined Land (AML) complaints from citizens and complete inspections of AML reclamation construction sites. There is no law to enforce in the AML program so there are no violations to cite. Citizens and others routinely request information from DMLR regarding the location of AML mines, active mining, water quality and quantity data, etc. DMLR responds to these requests. DMLR and DM as well as the DMME Division of Mineral Resources, are actively developing a comprehensive digital mapping system that includes mine locations, gas well locations, geologic mapping, wind resources, etc. DMLR responds to requests for records in accordance with the Virginia Freedom of Information Act (FOIA). At the side of the DMLR web page are links to specific programs that provide more detail on individual program services and responsibilities.

Wesley Lawson Comments: "The Division of Mined Land Reclamation can not be trusted by the people because of their lies and their failures to adhere to their own administrative code.

Lies... On Thursday, February 8, 2001, an informal conference was requested by myself to be at Saint Paul High School Auditorium, I along with 50+ other concerned citizens, two newspapers and one radio station attended the conference. We were told all about the permit by different sets of DMLR officials. At one of the tables, I along with 10-20 other concerned citizens were told that the ponds that were to be constructed would be 100 year flood ponds. Meaning they would be designed to hold the water from a 100 year flood. It wasn't long before this was tested. The 'flood' was not declared / calculated to be a 100 year flood. I started asking questions and wondering where the violations were. I was then informed that the ponds were only 50 year flood ponds because they were only temporary. Temporary ponds are only designed to withstand ½ as we were instructed in the informal conference."

DMME Response: Mr. Lawson misrepresents what DMLR staff told citizens at the Informal Conference. Ponds are not designed to hold 100-year flood events or even 50-year flood events. Ponds must be designed to safely discharge certain sized storm events through their spillways, depending upon the required design storm event. The design events are 25-year six-hour storms or 100-year six-hour storms depending upon the size of the embankment and pool area. Thus a pond designed for a 25-year six-hour storm would be expected to safely pass the discharge resulting from that storm through the spillways without the embankment overtopping. Pond size or the amount they can "hold" is based upon the amount of disturbed area in the watershed above the ponds. Ponds are designed to store 0.125 acre-feet per acre of disturbed area. Ponds are not required to hold back flows from large storms as suggested by Mr. Lawson. The DMLR regulations that govern sediment ponds are listed below in part.

4VAC25-130-816.46. Hydrologic balance; siltation structures. (c) Sedimentation ponds.

1) When used, sedimentation ponds shall--

(i) Be used individually or in series;

(ii) Be located as near as possible to the disturbed area and out of perennial streams unless such location is approved by the division; and

(iii) Be designed, constructed, and maintained to--

(A) Provide adequate sediment storage volume and provide adequate detention time to allow the effluent from the ponds to meet state and federal effluent limitations;

(B) Have a minimum volume of 0.125 acre-feet per acre of disturbed area draining to it, of which 0.075 acre-feet per acre disturbed shall be sediment storage volume and the remainder shall be detention storage volume;

4VAC25-130-816.49. Impoundments.

(a) General requirements. The requirements of this subsection apply to both temporary and permanent impoundments.

(9) Spillways. An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(9)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(9)(ii) of this section, except as set forth in paragraph (c)(2) of this section. And section (a)(9)(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(9) of this section is:

(A) For an impoundment meeting the SCS Class B or C criteria for dams in TR-60, the emergency spillway hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60 or greater event as specified by the division.

(B) For an impoundment meeting or exceeding the size or other criteria of 30 CFR 77.216(a), a 100-year six-hour event, or greater event as specified by the division.

(C) For an impoundment included in paragraphs (a)(9)(ii)(A) and (B) of this section, a 25-year six-hour event, or greater event as specified by the division.

Wesley Lawson Comments: "Failures to Adhere to the Administrative Code..."

Several of my pages and pages and pages of complaints hit the subject of dust. Again, I am learning the system, so when my complaints don't do any good, I start asking questions. I was instructed by DMLR Inspector H. Glen Coomer that the ONLY time that a violation could be written for dust is when it comes from an internal roadway and leaves the permit. I said okay. I stopped complaining when the dust from the blasting would leave the permit area. Though, at times, was so bad, causing a zero visibility for traffic on portions of the roadways. I said, it's useless... they (DMLR) will not do a thing. I waited and waited, and finally was able to video the road dust from the internal roadways on the permit. But this was amazingly enough not a violation, even though I had captured it on tape. I was told they couldn't water the section of roadway because it would become too muddy for the trucks to haul coal. Internal roadways are supposed to use the 'best available technology' to prevent dust and erosion. Another department in the Commonwealth of Virginia has already figured this out. The Virginia Department of Transportation uses asphalt and concrete to surface the roadways to suppress dirt, debris, gravel, erosion and pollution. You make the decision. Inspector Coomer said that would be 'too expensive' to make them pave the internal roadways. Why would a state Inspector say that a way to become in compliance with the rules and regulations be 'too expensive' unless the Inspector is getting in my opinion supplemental pay and not protecting the people. I ask, that the

coal companies either pave the internal roadways or pay at minimum an extra carwash a week for every car of the citizens who live in a two miles from the permit for the duration of the permit."

DMME Response: Mr. Lawson's statement that the regulations require use of the best available technology is incorrect. DMME has no regulation requiring roads to be surfaced using 'best available technology' to prevent dust and erosion. The actual regulatory requirement is "in accordance with current, prudent engineering practices" and not 'best available technology'.

The DMLR regulation relating to surfacing roads is found at 4VAC25-130-816.150 and reads in part:

Roads; general. (b) Performance standards. Each road shall be located, designed, constructed, reconstructed, used, maintained and reclaimed so as to:
*(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with **current, prudent engineering practices**; ... (7) Use non-acid and non-toxic-forming substances in road surfacing. Furthermore the primary road standards at 4VAC25-130-816.151 require that the "Primary roads shall meet the requirements of 4VAC25-130-816.150 and the additional requirements of this section."*

And paragraph (e) of this regulation specifically states:

"Surfacing. Primary roads shall be surfaced with rock, crushed stone, gravel, asphalt, or other material approved by the division as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road."

The regulation clearly allows the use of gravel surfacing and does not mandate the use of asphalt.

There is no evidence whatsoever to support Mr. Lawson's allegation that the DMLR "Inspector is getting in my opinion supplemental pay and not protecting the people." Such a charge is very serious. Rather than leave statements such as these unresolved, Mr. Lawson should immediately provide any evidence he has of such conduct to DMME management, as no one can respond to this type of charge that lacks any supporting evidence.

Mr. Lawson and his grandmother, Janice Davis combined have filed 99 mining related complaints with DMME. Each of these complaints have been investigated and the DMME investigation findings given to Mr. Lawson and Mrs. Davis.

Mr. Lawson has filed numerous complaints on the haul road he is talking about, including complaints to the federal Office of Surface Mining (OSM), which in turn issued several Ten Day Notices alleging violations of the regulations. The latest Ten Day Notice No. XO4-130-157-002 TV1 was issued on August 4, 2004. This Ten Day Notice alleged a violation of 4VAC25-130-816.10(b)(1) and 4VAC25-130-773.17 in that the permittee failed to maintain the road surfaces to prevent tracking onto the state road and to prevent air pollution from road and haulage dust. Mr. Lawson alleged in his complaint to OSM that:

"According to the Virginia Administrative Codes, internal and haulroads must be maintained to prevent dust and other debris. I am stating that this is not happening."

"On many occasions the internal roadways are not obviously being watered or not being watered often enough because of dust being propelled in the air behind both vehicles and coal trucks. (Documented via Video – 8/2/2004).

The haul road at Greene Road (the permitted entrance to the permit) is having many of the same problems. Dust, Dirt, Gravel, Small Rock, and other debris is being carried on to US Alt 58 from the permitted lands. (Documented via Photos – 7/14/04).

"I am also asking the Virginia Department of Mines, Minerals and Energies Division of Mined Land Reclamation be investigated for my beliefs of their failure to make Paramont Coal Company Virginia, LLC / A&G Coal Company to comply with the laws of the United States of America and the Commonwealth of Virginia."

DMLR responded to this Ten Day Notice in part as follows:

"The term "air pollution attendant to erosion" is limited to wind borne dust particles and does not include dust resulting from vehicular traffic. Observations of dust plumes from vehicles in and of itself does not constitute a violation. "Other exposed surfaces" refers to such areas such as stockpiles or unvegetated areas of the permit."

"Haulroad H was originally surfaced with durable stone. In order to provide an improved haul road surface, the operator decided to pave the first 1200 feet of haul road H. Prior to the winter of 2001 that section of the haul road was paved, and it has been paved since that time. ... The surface of the haul road above the paved section is maintained with durable stone in accordance with the approved plans. The operator uses a water truck on a routine basis to clean the paved section of the haul road H. The operator has also modified his water truck to also have the ability to spray wash the wheels of the coal trucks prior to their entering the paved portion of the haul road, as needed."

"The DMLR regulations defines "Fugitive dust" as that particulate matter which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation operations; and other activities in which material is either removed, stored, transported, or redistributed. Fugitive dust does not include particulate matter emitted from a duct or stack.

DMLR inspectors have viewed this site numerous times and found no evidence of dust problems or of significant tracking onto the state highways. The DMLR response also noted that "No more than a minimal film has been observed on a short section of Alternate State Route 58 where the wet wheels first enter the road." (The wheels are wet due to the operator using water on the haul road to suppress dust.)"

OSM found the DMLR response to this Ten Day Notice appropriate and that no violation existed. OSM also found the DMLR responses to the four previous Ten Day Notices issued on this site as a result of complaints from Mr. Lawson to be appropriate as well with no violations existing.

In regards to the recommendation that all haulroads be paved or the companies be required to pay for an extra car wash per week for every car owned by a citizen within two miles of the permit for the duration of the permit, DMME has no authority to require the paving of haulroads or to require coal companies to pay for car washes.

Wesley Lawson Comments: Additional "Failures to Adhere to Administrative Code...

"When this battle started back in 2000, I was the only person to request an informal conference. I requested the conference to be held at Saint Paul High School Auditorium in Saint Paul, Virginia. The conference was scheduled at the DMLR office in Big Stone Gap at 4 o'clock in the afternoon, on a week day. The meeting was changed at my request to Saint Paul High School, at 7:00 pm. The meeting time/place was made by DMLR so it was inconvenient to the citizens of the affected area. Informal hearings are required to be posted in a newspaper of general circulation, at least two weeks prior to the event. The meeting was posted in the newspaper for the meeting to be held at Big Stone Gap two weeks prior to the meeting as prescribed by the administrative code. The meeting was changed during the two weeks, and republished the week prior to the meeting. The administrative code states, at least two weeks prior to the event, when the meeting place was changed, it had to be posted at least two weeks in the newspaper of general circulation by DMLR. This did not happen. The meeting date stayed the same; therefore the DMLR's own administrative code was violated by DMLR. When I found this out, I contacted DMLR complaining about the problem. I was told 50+ people attended the meeting, and that that was 'administratively correct'. I still believe, this was not 'administratively correct' because it was a deliberate and intentional violation of the DMLR rules, regulations and administrative code to protect the coal companies from the Citizens of the Commonwealth of Virginia.

DMME Response: DMLR scheduled the informal conference requested by Mr. Lawson for February 8, 2001 to be held at the Department of Mines, Minerals and Energy Big Stone Gap Office. Contrary to Mr. Lawson's claim that "*The meeting time/place was made by DMLR so it was inconvenient to the citizens of the affected area.*" DMLR routinely schedules informal conferences either at the DMME Big Stone Gap office or the DMME Keen Mountain Office. Formal hearings also are held at these two offices. Informal conferences and formal hearings are normally scheduled during the day as well. This usually does not limit public participation. However, in cases such as the one cited by Mr. Lawson and others with significant public interest, DMME does schedule conferences at other places and times to enhance citizen involvement.

On January 24, 2001, Mrs. Janice Davis, who stated that she was Mr. Lawson's grandmother, called the DMLR and requested that the informal conference be moved to the St. Paul High School. Mrs. Davis did not request that the date be changed but only that the location be changed. The DMLR agreed to this request in order to accommodate the citizens in the vicinity of the affected area. DMLR then ran a public notice advising that the February 8, 2001 informal conference would now be held at the St. Paul High School. The informal conference was held

per the notice and Mr. Lawson as well as numerous other citizens made comments relating to the pending permit application.

On April 21, 2001 DMLR received a letter from Mr. Lawson demanding a second informal conference because the company had made corrections to the application that that in his opinion was not an insignificant change to the application and that DMLR had failed to provide a two-week notice on the February 8 informal conference. In a letter dated May 11, 2001, DMLR denied Mr. Lawson's request for a second informal conference. The letter is copied below.

May 11, 2001

*Wesley Lawson
14250 Dry Fork Road
Coeburn, VA. 24230*

Dear Mr. Lawson:

Thank you for your April 21, 2001 letter requesting a second informal conference on application number 0602324 for a permit by Coastal Coal Co., LLC (Coastal). After due consideration I must respectfully deny your request as explained below.

In your letter you state two main reasons why you believe a second conference should be held, the first being that Coastal was required by the Division of Mined Land Reclamation (DMLR) to "submit new and additional information and maps" and that you do not think this is an insignificant change to the application.

The fact that Coastal was required to submit new and or additional information and maps does not provide a basis for a second informal conference. The Virginia Coal Surface Mining Reclamation Regulations at 4 VAC 25-130-773.13(a)(1) reads in part: "Upon submission of an administratively complete application, an applicant for a permit, significant revision of a permit under 4 VAC 25-130-774.13, or renewal of a permit under 4 VAC 25-130-774.15, shall place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least once a week for four consecutive weeks." At 4 VAC 25-130-773.13(c)(1) the process to request informal conferences is explained.

This process is based upon DMLR's receipt of an administratively complete application, which is defined at 4 VAC 25-130-700.5 as "...an application for permit approval or approval for coal exploration where required, which the division determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to (emphasis added) initiate processing and public review." A permit application need not be technically correct in order for it to be deemed administratively complete. The Coastal application which was the subject of the February 8, 2001 informal permit conference was administratively complete at the time of the conference.

The second reason that you give as a basis to request a second informal conference is your belief that the public notification for the February 8, 2001 conference was flawed because it was published on February 1, 2001, which was less than two weeks prior to the date of the February 8, 2001 informal conference.

A letter from Michael Witt, DMLR Review Inspector, dated January 19, 2001 notified you that the informal conference would be held on February 8, 2001 at the Department of Mines, Minerals and Energy (DMME) office in Big Stone Gap, VA. You were also advised that the informal conference notice would be published in The Coalfield Progress on Tuesday January 23, 2001. The notice was subsequently published as so stated. On January 24, 2001, Mrs. Janice Davidson, who stated that she was your grandmother, called the DMLR and requested that the conference be moved to St. Paul High School because more people could attend the meeting if it was held there. Mrs. Davidson did not request that the date be changed but only that the location to be changed. The DMLR agreed to this request in order to accommodate the citizens in the vicinity of the affected area.

Mr. Witt then notified you in writing on January 30, 2001, that the informal conference was to be held in the St. Paul High School auditorium on February 8, 2001 and that "Notice of the rescheduled informal conference will be provided by public notice published in The Coalfield Progress on Thursday, February 1, 2001." You were also advised to contact Mr. Witt at (540) 523-8170 if you had any questions. Mr. Witt did not receive any inquiries from you regarding the rescheduled conference.

The subsequent notice published in the February 1, 2001 Coalfield Progress reads in part, "The informal conference pertaining to permit application number 0602324 (publication number 00DXB020) has been rescheduled and will now be held on February 8, 2001 at the St. Paul High School auditorium in St. Paul, Virginia".

The February 1, 2001 notice was intended only to inform the public that the conference had been rescheduled to be held at the St. Paul High School. The change in location was only made to accommodate Mrs. Davidson's request on your behalf. Your rights in this matter were in no way prejudiced or abrogated by this change in location or by the February 1, 2001 notice concerning the rescheduling of the informal conference.

You were the only individual that requested the informal conference and you were notified in writing of the changes made based upon a request made upon your behalf. According to the sign-in sheet at the February 8 informal conference and the list of individuals who made comments, there were at least 62 people present at the informal conference. We believe that the public was properly and adequately notified of the conference.

Normally we respond to each individual who makes a request for an informal conference as you did in your April 21 letter. However, we are unable to respond to the 27 the individuals who signed your letter because they did not provide their addresses. Upon a final decision by the DMLR to either issue or deny the Coastal application and pursuant to 4 VAC 25-130-773.19(b), the DMLR will provide you with a written notification of the decision. At that time you will also be advised of your rights to appeal

this decision. You may request a formal public hearing pursuant to VAC 25-130-775.11(a), which reads: "Within 30 days after an applicant or permittee is notified of the decision of the division concerning an application for approval of exploration required under Part 772, a permit for surface coal mining and reclamation operations, a permit revision, a permit renewal, or a transfer, assignment, or sale of permit rights, the applicant, permittee, or any person with an interest which is or may be adversely affected by the decision may request, in writing, a formal public hearing to contest such action with the Director of the Division of Mined Land Reclamation, Drawer 900, Big Stone Gap, VA 24219."

By Mr. Lawson's own account, he "along with 50+ other concerned citizens, two newspapers and one radio station attended the conference." It is obvious that the informal conference was well attended and that the public and the press were aware of the conference location and time. Mr. Lawson appears to suggest the informal conference should have been postponed until two weeks after the February 1, 2001 public notice that advertised the location change, when in fact he was asking for a second informal conference. He believed that each time the company submitted a set of corrections in response to deficiency letters that he should be allowed to have another informal conference. Mr. Lawson was advised that the application was administratively complete at the time that the February 8, 2001, informal conference was held in St. Paul. The regulations do not provide for repeated informal conferences. However, Mr. Lawson and any other citizen can submit additional written comments prior to final approval of the application. Mr. Lawson also chose not to request a formal hearing on this application or on any of the numerous complaints that he and his grandmother have filed on this permit.

Wesley Lawson Comments: "My Proposal

- Either make DMLR make definite changes to its system or revoke ALL funding from the Commonwealth of Virginia's budget to DMLR.
- Make inspectors responsible for their actions or failure to act.
- Do Not Shake Homes by Blasting... Use Smaller Blasts.
- Roadways will be CLEAN, no dirt, dust, gravel, at anytime
- Increase Fines. Make the Penalty Amount and the Final Penalty Amount Equal
 - Make the fines so steep that the companies must comply with the laws, rules, and administrative code!
 - The Second Occurrence for a Violation the fees will be doubled, the Third – Tripled.
 - On the fourth occurrence for a violation, the permit will close.
 - Death of a Human - \$100,000,000
 - \$99,000,000 Paid to Surviving Family
 - \$1,000,000 Paid to DMLR
 - Death of an Animal - \$1,000,000
 - Family Pet
 - \$900,000 Paid to Surviving Family
 - \$100,000 Paid to DMLR
 - Endangered & Threatened Animal
 - Fines Increase (Multiplied by 100)
 - Entire Fine to Help Save the Animal
 - Wild Animal

- \$900,000 Paid to VA Dpt. Game & Inland Fisheries
- \$100,000 Paid to DMLR
- Failure to Stay on Permit - \$1,000 per Square Inch Off the Permit
- Failure to Control Fly Rock - \$1,000 per Inch from the center of all the blasting points to the location the Fly Rock landed. If the rock is greater than one pound – the weight in pounds of the rock is multiplied by the final fee. No limit on Number of Violations – One Violation for Each and Every Fly Rock.
- Failure to Control Water Erosion - \$1,000 per Part Per Million (PPM) above the standard per Hour of Occurrence, Limited to 1 Violation per Hour.
- Failure to Control Dust - \$500,000 per Occurrence, Limited to 1 Violation per Hour.
- Failure to Maintain Clean Roadways - \$1,000 per half-hour period the road ways have gravel, dirt, debris tracked from the haulroad onto the state-maintained roadway the final fee multiplied by the length of the tracking in feet. Limited to 1 Violation every Thirty Minutes.
- Failure to Prevent Environmental Disasters - \$100 per Minute from beginning until corrected. To include water, air, streams, wetlands, animals, the full ecosystem. Any Impacts that are not 'temporary' or 'fixable' within 5 years... fines will be multiplied by 10.

DMME Response: DMME fully enforces the state mining laws and regulations within its authority. DMME inspectors are held accountable for their actions and DMLR is subject to oversight inspections by OSM.

As indicated previously in the DMME recommendations, "DMME recommends that Virginia's congressional delegation seek funding and provide direction for a National Academy of Science study of the effects of blasting on property and an update of the United States Bureau of Mines reports. The study should review the original Bureau of Mines' work, more recent studies of the effects of blasting on structures, the effect of blasting on ground control, control of flyrock, and related issues. DMME would use the result of this study to determine whether amendments to mineral extraction blasting laws or regulations are necessary." It is unlikely that any blasting standard can be developed that will prevent residents from feeling the blasts. Studies show that people can perceive vibrations at extremely low levels such as what would be expected from environmental factors such as highway traffic, wind, sonic booms, movement in houses, etc. It is unrealistic to require no vibrations be felt. The goal should be prevention of damage from blasting, not the prevention of feeling a blast.

As noted in the previous road discussion, gravel is an allowed road surfacing material. Mr. Lawson's statement that pavement is required is not based on any law or regulation.

Mr. Lawson's suggestions regarding civil penalties are not appropriate and in some instances are contrary to law and case law as well. Civil penalties are proposed by the agency and are subject to change depending on the outcome of informal hearings and formal hearings as well a judicial appeal. This is set out in the Virginia Administrative Process Act and DMME does not endorse changing these provisions.

The proposal to double the penalty, then triple it for second and third violations, respectively, followed by revocation of a permit for the fourth violation is inappropriate. It does not take into consideration the severity of the violations or the time frame over which they occur. For example, in the past two years some coal companies experienced a problem with their contract laboratory and did not have their water quality monitoring reports submitted on time. This was the case in the five violations cited against Matt Mining for water monitoring which are listed in this report. Although the coal companies were not at fault, DMLR issued violations to the coal companies involved. DMLR inspectors conducted compliance sampling to ensure the companies were in compliance with their discharges. Under Mr. Lawson's proposal the permits would have been revoked because of "paperwork" violations that were caused by the contract lab submitting late reports.

The DMLR civil penalties are based on a point system that takes into account a history of violations at the operation, seriousness of the violation, operator negligence, etc. DMME believes the current system is fair and should not be changed as suggested by Mr. Lawson.

The amount of penalties recommended by Mr. Lawson is excessive and would likely be in violation of the ARTICLE [VIII.] of the United States Constitution which reads: "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*" Mr. Lawson's proposed amounts are not equitable with each other. For instance, Mr. Lawson proposes a \$100,000,000 penalty for the death of a human and \$1,000 per square inch of area off the permit. \$1,000 per square inch equates to \$6,272,640,000 per acre for off permit disturbance. One acre of off permit disturbance would be assessed a penalty approximately 63 times greater than what would be assessed for an accident that resulted in a death.

Mr. Lawson recommends for "Failure to Control Water Erosion - \$1,000 per Part Per Million (PPM) above the standard per Hour of Occurrence, Limited to 1 Violation per Hour." Under the Clean Water Act (CWA), the maximum penalty that can be assessed is \$25,000 per day per violation of an effluent standard. There is no standard for "Failure to Control Water Erosion" however DMME has assumed that Mr. Lawson means a suspended solids violation. Under Mr. Lawson's proposal if a company had a Total Suspended Solids (TSS) violation (the daily maximum level for TSS is 70 mg/l under the CWA) of 1,000 mg/l that lasted 24 hours, which can happen with a black water spill, the company would be assessed $(1,000 - 70) \times 24 \times \$1,000 = \$22,320,000$ which is \$22,295,000 more than allowed under the Clean Water Act. When a black water spill occurs the highest concentration of TSS occurs at the beginning with decreasing amounts over time. It would require continual monitoring and sampling by the agency starting at the time the event occurred until such time as the violation was no longer happening. The maximum daily limit of 70 mg/l is not ascertainable by visual observation. It would require monitoring and sampling for considerable time beyond the time the discharge came into compliance in order to establish the exact ending time of the violation.

Section 11(a) of the Endangered Species Act provides for a maximum civil penalty of \$25,000 for any person who knowingly violates any provision of the Act. Any person who otherwise violates any provision of the Act may be assessed a civil penalty of not more than \$500 for each such violation. Mr. Lawson's proposed penalty of \$100,000,000 for causing the death of a threatened and endangered species is \$99,975,000 beyond that allowed under the Endangered Species Act.

It is not technically possible to implement Mr. Lawson's proposal regarding wildlife. DMME would have no way of being able to establish the cause of death in most instances nor is it feasible to track all wildlife deaths in the area around mining. Wildlife would encompass field mice, voles, salamanders, reptiles, etc. A \$1,000,000 penalty for the death of a field mouse would likely be found to be unreasonable.

Mr. Lawson's proposed penalty system would be extremely complicated, with the need to be able to determine the exact time a violation started and ended down to the minute, with exact measurements to be made down to the inch, rocks weighed and counted, etc. This would all be subject to appeals and would require an enormous amount of resources to determine, verify, and track this information.

DMME RESPONSE: GENERAL CONCERNS REGARDING LACK OF ENFORCEMENT

Many speakers who cite a lack of enforcement or responsiveness are speaking from their individual perspectives and lack an overall awareness of the DMME regulatory program and DMME's actions in the enforcement of the laws and regulations. A citizen such as Mr. Lawson has experienced a great deal of frustration in dealing with DMME. However Mr. Lawson does not appear to understand the laws and regulations that DMME is enforcing and he (as are many citizens) is unaware of the actions that DMME takes in matters not relating to his concerns. Many citizens expressed concern relating to coal haulage by trucks through their neighborhood. DMME does not regulate coal truck traffic on public roads. If coal-haul trucks speed, fail to properly cover their loads with tarps, throw rocks that break windshields on passing/following vehicles, etc., DMME cannot take any action.

To help the legislative panel and citizens understand the extent of DMME's enforcement actions the following has been compiled.

- Since October 1992 through September 2004, the Division of Mined Land Reclamation Inspection staff has issued 3,327 Notices of Violations citing 3,995 individual violations. In addition 187 Cessation Orders were issued with 215 individual Cessation Orders issued. A NOV may contain one or more separate violations and a CO may contain one or more separate Cessation Orders (one CO may order more than one activity to cease).
- For the period of October 1, 1992 to September 20, 2004 DMLR civil penalty assessments and collections are as follows:
 - Initial Penalty Assessment \$1,369,553.00
 - Final Penalty Assessment \$2,889,127.00
 - Assessment Amount Collected \$1,015,787.64
 - Assessment Balance \$1,873,339.36*

Civil penalties collected by DMME are not used to offset administrative expenses of the agency. Pursuant to Section 45.1-246C of the Virginia Coal Surface Mining Control and Reclamation Act, as amended,

“All civil penalties shall be paid into a special fund in the State Treasurer's office to be used by the Director for enhancing conservation and recreational opportunities in the coal-producing counties of the Commonwealth. The Director shall transfer quarterly fifty percent of the fund balance to the Virginia Coalfield Economic Development Authority for the purposes of developing infrastructure and improvements at Breaks Interstate Park and fifty percent of the fund balance to the Tourism Development Authority for the purpose of developing conservation and recreational opportunities consistent with the provisions of Chapter 33.3 (§15.1-1399.18 et seq.) of Title 15.1.”

The assessment balance represents civil penalties that were assessed on permits that were eventually forfeited by DMME, the bonds collected, and the permit reclaimed under contract by DMME. This outstanding balance will likely not be paid since the companies are bankrupt. DMME has turned over these debts to the Office of the Attorney General for collection. DMME also uses the debt collection provisions of state law to try to collect these debts. For instance if anyone who owes these penalties has a refund of Virginia State Income Tax due then the refund is levied to pay the outstanding penalty. The individual permittees of these forfeited permits are prohibited from receiving another permit unless reinstated by paying all fees, penalties, costs of reclamation, etc. The individuals are tracked in the OSM computerized Applicant Violator System (AVS) national database. Each time an application is received the individuals listed as owners, controllers, officers, etc. are checked against the AVS database.

To date there have been a total 358 coal mining permits forfeited by DMME and their respective bonds collected by DMME. DMME has reclaimed all of these sites using the forfeited bond monies. DMME has taken actions against other companies who were determined to be owners and controllers of contract mines that had bond forfeitures. DMME required these owners and controllers to enter into settlement agreements to complete reclamation if needed, refund the Virginia pool bond for any expenditures incurred in reclaiming the forfeited sites and pay outstanding civil penalties on Notices of Violations that had been issued to the forfeited sites.

DMME and DMLR have taken enforcement action under the Clean Water Act (CWA) and obtained settlement agreements that have resulted in approximately \$1,600,000 being collected under the NPDES program administered by DMLR. Normally penalties collected under the CWA go to the Virginia Emergency Response Fund, but in the case of the major slurry impoundment spill in Lee County the money was used to help fund the St. Charles sewer construction project.

Since January 1992 through September 2004, the Division of Mines has issued 32,734 Violations and 1,106 Closure Orders. Civil penalties are not assessed for violations under the Virginia Coal Mine Safety Act. The Closure Orders are in themselves a financial penalty in that the mines or sections of mines are closed during the period the closure remains in effect. MSHA cites these violations as well and imposes a civil penalty, so the companies are fined through MSHA for violations.

Under DM enforcement, each violation of law represented a hazardous condition or practice identified and corrected and each order of closure represents the removal of equipment, the removal of personnel from an area or areas and/or closure of the entire mine for a period of time.

We are hopeful that our responses have helped to clarify how the current mine safety and reclamation laws and regulations apply to specific circumstances raised by the speakers at the November 4, 2004, public meeting. We also hope that this accident investigation report and the DMME responses to comments made at the November 4, 2004, public meeting can serve as a positive beginning in restoring the trust among coalfield citizens, the coal industry and DMME, which Senator Puckett spoke of in his remarks.

ATTACHMENTS

ATTACHMENT A – “Resident concerned about mining-related blasting damage”
Coalfield Progress, July 18, 2000

ATTACHMENT B - “Officer upholds DMLR decision to grant mining permit”
Coalfield Progress, July 25, 2000

ATTACHMENT C - “Appalachia seeks coal truck compromise”
Coalfield Progress, December 08, 2004