WV AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

JARRETT F. JAMISON, III **APPELLANT,**	)	
FORT MARTIN COMMUNITY ASSOC., **INTERVENOR,**	)	
FORKS OF CHEAT FOREST PROPERTY OWNERS ASSOCIATION, **INTERVENOR,**	)	
V.	)	**Appeal No. 04-02-AQB**
DIRECTOR, DIVISION OF AIR QUALITY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, **APPELLEE,**	)	
AND	)	
LONGVIEW POWER, LLC., **INTERVENOR**	)	

FINAL ORDER

Appeal No. 04-02-AQB was filed by the Appellant on March 31, 2004. The subject of the appeal is Permit R14-0024 which was issued by the Appellee on March 2, 2004, to Longview Power, LLC (hereinafter, Longview). The permit allows Longview to construct an electrical power generating facility near Maidsville, West Virginia. The issues in this appeal all relate to whether the Appellee followed proper procedures during the development of this permit. The procedures in question center around the public

notice and comment process including how the agency handled issues relating to its two public meetings on the draft permit.

The Appellant requests that the Board revoke the permit and subject it to a "full and proper rehearing in Morgantown, WV." In his appeal, the Appellant alleged that various actions taken by the Division of Air Quality during the permitting process were not proper. The Appellant states that the public was misled about a transcript of a public meeting, that the public was not provided with adequate opportunity to present their comments on the draft permit, and that comments from the first public meeting were not properly considered. Further, the Appeal states that misleading advertisements and articles about the permit process appeared in the local newspaper.

Longview requested intervention status as a party Appellee. Since Longview held the permit, the Board found that Longview had the legal right to intervene in this appeal in accordance with W. Va. Code §22B-1-7(e). Two other parties, Forks of Cheat Forest Property Owners Association and Fort Martin Community Association petitioned the Board to intervene in the appeal. The Board granted the requests of these two parties to intervene as party-Appellants but the Board restricted them to the issues raised in the original (Jamison) appeal rather than allowing them to expand the issues raised in this appeal.

The Appellant, Jarrett Jamison, III, represented himself in this appeal. Mary Anne Maul, Esq., represented Fort Martin Community Association. Dwayne Nichols, an officer in the Forks of Cheat Forest Property Owners Association was appointed by that Association to be its representative and primary contact for this appeal. Roland Huson, Esq. and Perry McDaniel, Esq., Office of Legal Services, Department of Environmental

Protection represented the Appellee. Leonard Knee, Esq. and Eric Calvert, Esq., Bowles Rice McDavid Graff & Love, represented Longview Power in this appeal.

The Board conducted an evidentiary hearing on the issues of the appeal on June 24, 2004, and July 18, 2004. On October 13, 2004, a quorum of the members of the Air Quality Board met and made a final determination on the issues presented in this appeal. The Board found that the Appellee did not violate any regulation or statute during the permitting process. While the permit process was perhaps less than perfect, the problems that arose did not merit the revocation of the permit or a new public meeting on the permit as requested by the Appellant and Intervenor-Appellants. In fact, the problems that occurred were appropriately addressed by the Appellee.

To prevail in the appeal, the Appellant must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supports such a finding, then the Appellee must produce evidence demonstrating that its decision was sound, regardless of the Appellant's evidence. The Appellant has an opportunity then to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set forth by the Circuit Court of Kanawha County in *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999.) While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here.

In this case, the Board found that the Appellant did not present sufficient evidence to demonstrate that the Appellee's decision was not appropriate. Therefore, the Board holds that the permit should not be revoked but should be affirmed.

The Board notes that at several points during the course of this appeal, including the hearing phase, the Board ruled that the Appellant and Appellant- Intervenors were limited to the issues filed in Appellant's original appeal. Thus these parties were not permitted to put on evidence concerning the substance of the permit, its terms and its conditions. The Board also prohibited the Appellant and Intervenor-Appellants from putting on evidence with regard to how the Appellee derived the terms and conditions in the permit. For instance, at several junctures in this appeal the Appellant and Intervenor-Appellants indicated their desire to put on evidence about how the Class II modeling was done by the agency. The Board ruled that this was not permissible since the issue was not raised in the original appeal and in fact, the Appellant had previously objected to pre-hearing motions on the basis that his appeal was purely about the procedural aspects of the permitting process and that his appeal did not pertain to the complex science behind the modeling and the substantive issues regarding how the actual permit limits were derived.

The Board limited the Intervenor-Appellants to the subject matter in the Appellant's appeal because they chose to intervene in that appeal rather than file their own appeals of the permit. Therefore, this final order is limited to the issues contained in the Appellant's appeal but certainly the Board considered all of the admissible evidence, as it pertained to these issues, put forth by all the parties. For brevity's sake, when this order refers to the "Appellant" and the "Appellant's arguments" the Board means

"Appellant and Intervenor-Appellants" and "Appellant's and Appellant-Intervenors' arguments."

DISCUSSION

The Appellant filed an appeal of Permit No. R14-0024 issued to Longview Power, LLC (hereinafter, "Longview") on March 2, 2004. Two parties, the Fort Martin Community Association and the Forks of Cheat Forest Property Owners Association intervened in the appeal as Intervenor-Appellant. The Board restricted the Intervenor-Appellants to the issues raised in the appeal as filed by the Appellant. Longview, the permit holder in this appeal, intervened as an Intervenor-Appellee.

The permit that is the basis of this appeal is a Permit to Construct an Electrical Power Generation Facility. The permit allows Longview to construct a coal-fired electrical power generating facility in Maidsville, West Virginia. The issuance of the permit was the culmination of a long permitting process that began with a permit application filed by Longview on August 15, 2002. The issues in this appeal concern the permit process and certain actions taken by the Appellee during the development of this permit.

Longview filed its application for a permit on August 15, 2002. Sometime after that, Longview had published in the Morgantown Dominion Post newspaper an advertisement stating that it had filed the application. As the permit process progressed, the Appellee developed a draft permit. The Appellee then published an advertisement in The Dominion Post newspaper announcing a September 15, 2003, public meeting regarding the draft permit. The Appellee hired a court reporter to record the September 15, 2003, public meeting. A transcript of the event was to be provided to the agency

some time following the meeting. The meeting was large and a number of commenters requested time to provide their oral comments on the permit to the agency. Due to the large number of people requesting to speak, the agency limited oral comments to three minutes per person. The director of the Division of Air Quality and several staff members were present at this meeting and heard the comments. Staff members took notes on the comments and a sign-in record sheet of names and addresses of commenters was kept by the staff. Unfortunately, the court reporter hired by the agency for this meeting failed to produce a transcript. The agency made many attempts to contact her and to obtain her tapes or a transcript but they were not successful in getting her to respond.

Meanwhile, the permit process continued. After the meeting on September 15, 2003, the agency made some changes to the draft permit. The agency decided to hold a second, thirty-day comment period and a second public meeting on December 18, 2003. Another newspaper advertisement announced the second comment period and public meeting. On December 11, 2003, the Dominion Post published an article about the public meeting. This article stated that a spokeswoman for the Appellee said that residents who had already commented on the issues did not have to repeat those comments at the second public meeting. On December 18, 2003, the Dominion Post published another article about the public meeting. Similar to the article of December 11, 2003, this article stated that "residents who have already commented on the air quality issue do not have to repeat their views today. They are already on record and can be reviewed in the copy of the application available at the Morgantown Public Library."

During the December meeting, citizens began questioning the existence of the transcript from the September 15, 2003, public meeting. At the end of this meeting, the Appellee's representatives acknowledged that they had not received a copy of the transcript from the court reporter. The representatives explained that the court reporter said she had experienced technical difficulties, and the agency representatives stated that they doubted that they would ever get a transcript.

Following the December public meeting, the Appellee extended the comment period on the permit by ten days. The Director of the Office of Air Quality sent a letter to everyone who signed up to speak at the first public meeting on September 15, 2003. The letter explained that the transcript did not exist and that they were invited to submit their comments in writing. The Appellant submitted written comments following his receipt of this letter. The agency also filed a lawsuit against the court reporter. As a result of the suit, in late January the agency received a partial transcript and tapes of the September public meeting. Copies of these were placed in the Morgantown public library and the Appellee's Fairmont office.

On March 2, 2004, the Appellee issued the permit to Longview. The Appellant filed this appeal on March 31, 2004. The Board granted a request from Longview to intervene in the appeal. The Board also granted requests by Fort Martin Community Association and Forks of Cheat Forest Property Owners Association to intervene in this appeal but the Board limited the issues to those contained in the appeal filed by Appellant Jamison.

In his appeal, the Appellant objected to the fact that the agency set a time limit of five minutes for commenters to speak during the September 15, 2003, public meeting.

Intervenor-Appellants and some testimony in the record of this appeal indicate that the agency actually set a limit of three minutes per speaker. Regardless of the actual time allotted, the Appellant argues that the people who spoke at that meeting did not have adequate time to make their full presentations. The Appellant also stated that the people who spoke were there to raise serious questions and objections to the power plant but their comments were cut short due to the time limit.

This first public meeting held on September 15, 2003, was very well attended. According to the record, approximately two hundred people attended. At the beginning of the meeting, some members of the agency's staff made presentations. Then the public was invited to speak. About forty-one people requested speaking time. The agency divided the time remaining in the scheduled three-hour meeting by the number of people who desired to speak. This is how the agency derived the three-minute time limit on speakers.

The regulations covering "Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration," 45 CSR 14, are applicable to the permit at issue here. Under these regulations, public meetings are addressed. The regulations state that the director shall "insure that all interested parties have ample opportunity to present comments" at public meetings. 45 CSR 14- 17.2. No minimum amount of time is stated in the regulation.

Public meetings during which a large number of people wish to speak must be managed in a manner that satisfies the requirements of the law and allows for the completion of the meeting in a reasonable amount of time. If there were no time limit imposed on speakers a meeting could last all night. Speakers signed up to speak near the

end may be discouraged enough that they leave and not provide their comments. Thus, time limits must balance the need to provide ample time to speak with the need to provide everyone with an opportunity to speak at a reasonable hour.

Under the circumstances, the Board finds that the Appellee's time restrictions did not violate the regulation. While it is clear that several speakers at the public meeting felt that they did not have adequate time to speak, the three minutes of time allotted to each speaker did not violate the regulation. The Appellee had to balance providing ample opportunity to speak with providing everyone who desired to speak an opportunity to do so at a reasonable hour the night of the meeting. Three minutes is long enough for a speaker to make comments on the major points he or she wishes to make. It was clear that all the speakers had an opportunity to provide written comments to the agency. In fact, the comment period in place at the time of this meeting did not end until September 29, 2003. So, the public had two more weeks in which to file written comments in addition to their oral comments. In this way, a commenter could submit more detailed comments to the agency. Thus, the Board cannot find for the Appellant on this issue. The Board finds that the attendees at the September public meeting were provided with ample opportunity to present their comments on this permit. "Ample opportunity" does not mean that attendees must be given unlimited opportunity to speak.

Another issue raised by the Appellant also concerns the September public meeting. A court reporter hired by the Appellee was present to record and prepare a transcript of all the comments made at the September public meeting. Unfortunately, the court reporter failed to provide a transcript or even give the tapes to the agency until much later after the agency filed a law suit against her. The Appellant charges that the

Appellee misled the public with regards to the transcript. Specifically, the Appellant argues that advertisements and newspaper articles about a second public meeting on the permit implied that a transcript existed and that it was available for public review with the other records on the permit which were on file at the Morgantown public library. The Appellant also claims that since the transcript did not exist at the time the agency prepared a second draft permit, the agency did not consider the oral comments it received in September in developing the permit.

Under the regulations, the Appellee does not have duty to provide a court reporter at a public meeting. Accordingly, the Appellee is not required to transcribe oral comments that it receives at a public meeting. In this case, the Appellee hired a court reporter in order to get a full transcript of the meeting and the comments made at the meeting. According to the facts heard by the Board throughout this appeal, the court reporter was derelict in her duties to provide a recording and a transcript of the meeting. According to all the facts in this appeal, the agency was in no way responsible for the failure of the court reporter to provide the transcript. For months, the agency attempted to contact the reporter in order to obtain the transcript, but was unsuccessful. By the second public meeting in December, the agency, by its own admission, was convinced that it would never receive a transcript. After filing a lawsuit against the court reporter, on January 30, 2004, the agency received a partial transcript and tapes of the meeting.

The Board cannot find fault with the Appellee's failure to receive a transcript when it is not required to do so by any law or regulation. However, the Board agrees with the Appellant and Intervenor-Appellants that the attendees of the public meeting had an expectation, upon seeing a court reporter at the meeting, that a transcript would be

produced and that the agency should have recognized that the public would have an expectation of a transcript. The Board further believes that the agency should have been more candid with the public regarding the failed transcription. However, the Board acknowledges that "hindsight is 20/20." Since the failure was in no part the fault of the agency, it should have been a relatively easy matter to disclose. Along with the disclosure should have been a public announcement inviting all of the commenters at the September meeting to provide comments in writing to the agency. While the Appellee eventually sent notices to the September commenters allowing them to provide written comments, this was not done until an angry scene occurred during the second public meeting in December. The Board believes that a proactive disclosure of the missing transcript would have been better than the reactive approach taken by the agency. This being said, the Board cannot find that the lack of a full transcript of the first meeting rises to a level that necessitates a revocation of the permit. This is true primarily because there is no legal requirement that a transcript of oral comments received at a public hearing be made.

A side issue regarding the transcript arose during the course of the hearing. Namely, whether its absence was purposefully concealed by the agency. Comments made at the December meeting by Mr. John Benedict, Director of the Division of Air Quality, were used by the Appellants as evidence that Mr. Benedict tried to conceal the fact that the agency did not have a transcript. Mr. Benedict's comments, contained in the transcript of the December public meeting, when read in context do not bear out the Appellant's assertion. The comments appear to be reflecting Mr. Benedict's desire to find out how the misstatements in the newspaper article occurred and who provided

information to the newspaper initially. In his comment he could not have been referring to who leaked information about the lack of a transcript since he had just heard Ms. McKeone, a staff member, tell the audience all about the missing transcript of the September public meeting. There was no mystery about who divulged this information. Thus, the Board does not find that Mr. Benedict's comments are evidence that the information about the transcripts was purposefully concealed.

The real issue with regards to the first public meeting is whether the agency did in fact consider the oral comments it received as required by the regulations. The Board found the Appellee's witness to be credible when she testified that the agency did consider the oral comments it heard during the September public meeting. The agency staff members that were key to the development of this permit were present throughout the public meeting and heard all of the comments made that night. Agency staff member Ms. McKeone took notes of the comments as they were being made. Later, once the agency received the tape recordings of the meeting, Ms. McKeone listened to them. The Appellant alleged that the tapes were inaudible as evidenced by the court reporter's partial transcript denoting "inaudible" many times throughout the transcript. However, the Board found credible the testimony from Ms. McKeone, who testified that she listened to the tapes and that she could understand what each speaker said.

The Board acknowledges that the Appellee did not have the audio-tapes of the September meeting when it issued the second draft permit which was the subject of the December public meeting. The Appellee did not receive the tapes of that September meeting until sometime in January. If there had not been a second draft permit, and if key agency staff had not been present at the September meeting to hear the comments

first hand, the Board may have seen this issue differently. Here, however, staff did have first hand knowledge of the comments and had even taken some notes on these comments. Regardless of this, the agency did have the tapes of the meeting before it issued the final permit. The agency is only required to consider the comments before it issues a final permit. There was no evidence that the agency did not in fact do this.

Some of the arguments regarding whether the agency considered the oral comments were based upon the agency's responses to comments. The commenters did not receive an individual response to his or her comment. Instead of writing individual responses to each comment, the agency broke apart individual's comments and grouped together similar issues contained in the comments. Then, it developed a general response to each grouping of issues.

The Board finds that there is no requirement that the Appellee provide a separate response to each comment. In fact, the agency is only required to consider the comments it receives before it makes a final decision on a permit. In this case, the agency's response to comments was evidence that it had considered the issues contained in the comments it received.

The Appellant also challenged the permit on the basis of a newspaper article written about the second public hearing held in December 2003. The Appellant alleges that major errors and misleading statements appeared in the article published on December 18, 2003, in the Morgantown Dominion Post. The article contained a statement that people who had already commented at the September public meeting did not need to repeat their comments because their comments were "already on record, and can be reviewed in the copy of the application available at the Morgantown Public

Library." The Appellant notes that since the agency had not received a transcript at the time that the article was published, there was nothing on record at the public library regarding the oral comments received at the September public meeting. The Board agrees that the newspaper article was inaccurate since the Appellee had not received the transcript or tapes by December 18, 2003, and it had not placed any record of the September meeting on file at the library. Importantly, this article does not identify any source for the statements in the article.

An article published on December 11, 2003, contained a similar statement to that in the December 18, 2003, article about residents who had already commented on the draft permit. This statement in the December 11, 2003, article is attributed to spokeswoman Jeanne Chandler. The article, however, did not contain any statement about the comments being on record and available at the library. The December 11, 2003, article merely stated that copies of the "permit application, preliminary determination, addendum and draft permit" were on file at the library.

The question becomes what is the agency's responsibility with regards to newspaper articles which clearly the agency cannot control. The Director of the agency had a duty to provide appropriate information to the media before it conducts a public meeting. The regulation states:

> 17.3. At a reasonable time prior to such meetings, the Director shall provide appropriate information to news media in the area where the proposed source or modification is to be located.

Apparently, spokeswoman Jeanne Chandler provided some information to a Dominion Post reporter for the December 11, 2003, article. This would be in accordance

with 45 CSR 14-17.3. This second article did not quote Ms. Chandler about previous commenters but it did attribute the statement to her and followed the statement with a quote from her. The second article did not mention Ms. Chandler at all. Some of the language in the second article is very similar to that in the first article, but the second article added the statement regarding the comments being on record at the public library. It would appear that a reporter for the Dominion Post combined some sentences from the first article and made a misstatement in the second article.

The Board finds that the agency cannot be held responsible for misstatements contained in newspaper articles. The agency is responsible for providing the media with appropriate information which the Board would interpret to include "accurate" information. Here, however, there is no evidence that the agency provided inaccurate information to the newspaper. It appears that the newspaper did misstate information about the records on file in the public library. Furthermore, since the misstatement was published on December 18, 2003, the same day as the public meeting, it was not possible for the agency to make the public aware of the misstatement prior to the public meeting that evening.

Ms. Chandler did apparently state that people need not repeat their comments if they appeared at the September meeting. Since there is no requirement that the agency have a transcript of the oral comments, her statement is accurate. In fact, agency staff was present at the September meeting and heard the comments as they were made. At least one staff person took notes on the comments at the meeting and the Board believes testimony from the agency staff person that the comments were considered prior to the final permit issuance.

However, the Board does believe that the agency missed an opportunity in December (before the public meeting) to disclose the problem with the transcript and to invite the public to repeat their comments at the second meeting. However, the Board does not find that this rises to the level that would necessitate revoking the permit. Again, the transcript was not required. Also, the agency later sent letters to everyone who spoke at the September meeting and invited them to send written comments to the agency. This action adequately resolved the issue of the statement regarding those who had previously spoken.

In addition to the newspaper articles, the Appellant also challenged some advertisements published in the Dominion Post. Some of these advertisements, the Appellant argued, were misleading. One advertisement alleged by the Appellant to be misleading appeared in the paper on August 23, 2002. This advertisement for "Robinson Run," the original name of the plant until it was changed to Longview, stated that the plant would provide energy for West Virginia and the United States. The Appellant argued at the hearing that the advertisement was misleading due to the fact that it appeared in the "World News" section of the paper and that the plant would not produce energy for use in West Virginia.

The advertisement in the August 23, 2002, Dominion Post gave notice to the public that Robinson Run (Longview's predecessor), had filed a permit application with the Appellee. The Appellant did not prove that the placement of the advertisement was either misleading or placed in the World News section of the newspaper in order to mislead the public. The Board does not find the advertisement's placement in the paper to be relevant. The advertisement stated that the plant will "provide for the future of

energy in West Virginia and the United States." It is possible that the statement simply meant that the plant will be part of West Virginia's future in energy production. The statement did not say that the plant would produce electricity for use in West Virginia. Regardless, even if somewhat misleading to some people, the Board does not find that this would merit revoking the permit.

Another issue in this appeal was whether the December public meeting was held "prematurely" because Class II modeling had not been addressed previously. The Appellant did not present evidence that proved that the Class II modeling had not been addressed prior to the December public meeting. In fact, the record indicated that Class II modeling information was in the "Preliminary Determination/Fact Sheet" dated August 23, 2003. Modeling analysis was included in this document. That document provided a basis for the September public meeting. The Appellant stated during the hearing that he did not believe that the Appellee had finished the modeling before the September public meeting. However, the Appellant had the burden of proof to this fact and he did not prove it. In fact, the evidence indicated that the Class II modeling existed and had been considered by the agency since it was included in the "Preliminary Determination/Fact Sheet which is a document prepared by the agency in accordance with 45 CSR 14-16.

It is possible that perhaps there was not much discussion of Class II modeling at the September public meeting. However, there is no requirement that certain topics be explained at a public meeting. A reading of 45 CSR 14-17 indicates that the primary purpose of a public meeting is to let the public comment. Since the information about modeling was in the agency's preliminary determination dated August 26, 2003, the public had notice of it and could have commented or asked questions about it at the

September meeting. The Board heard evidence from the Appellant that the modeling was not explained to the public in a manner that the majority of people could comprehend. Again, the agency did not violate any regulation by virtue of the fact that some members of the public did not completely comprehend how the permit was developed.

The Appellee does have the responsibility to make available all public documents that it used in writing the permit. Also, the agency is accountable to the public if the public wishes to ask specific questions in order to try to become more informed. This however does not mean that the agency is required to "school" every interested citizen on complex scientific technology used for various aspects of a permit. The agency would never be able perform its mandatory function if it had to ensure that every citizen knew exactly how each term and condition of a permit are derived. Interested citizens must themselves be somewhat responsible for researching the aspects of the permit in which they are interested. This research should include contacting the agency prior to the expiration of the comment period if they need further explanation of documents contained in the public record.

The Board heard testimony regarding some specific air quality modeling that Mr. Duane Nichols requested from the Appellee. Mr. Nichols requested modeling information for two specific coordinates but the Appellee never supplied that information to Mr. Nichols. Mr. Nichols also testified that a full analysis of the modeling was not available or presented at the September meeting. The Board finds that whether all modeling was available or presented at the September meeting is not a matter for concern here since another public hearing occurred in December before the permit was finalized. Any defect in the completeness of matters in September was cured by the second notice

and comment period and public meeting held in December. Furthermore, the agency explained that it did not rerun the model using Mr. Nichol's coordinates because its model had already demonstrated that the points of highest pollutant concentrations would not violate the regulations. The agency is not required to run separate modeling points for each individual who requests it and the agency was concerned with setting a precedent that would be too expensive, time consuming and unnecessary.

In conclusion, the Board finds that the Appellant and the Intervenor-Appellants did not prove that the permitting process was flawed to the extent that the permit should be revoked and a new public meeting held. While there were a few problems encountered by the agency during the permitting process, namely the unavailability of the transcript of the September 15, 2003, public hearing and the newspaper articles with incorrect information, these flaws were corrected to the extent that they could have been. Further, these flaws were not sufficient as to require the permit's revocation. Therefore, the Board **AFFIRMS** the Permit No. R14-0024.

FINDINGS OF FACT

1. Longview filed its application for a permit on August 15, 2002. On August 23, 2002, Longview had published in the Morgantown Dominion Post newspaper an advertisement stating that it had filed the application. The advertisement was placed in the "world" section of the paper.

2. The Appellee published an advertisement in the August 29, 2003, Dominion Post newspaper announcing the draft permit and a September 15, 2003, public meeting on the permit. The advertisement included a request for comments on the use of the AERMOD air quality model.

3. The meeting held on September 15, 2003, was well attended and forty-one people requested an opportunity to provide their oral comments on the permit to the Appellee.

4. The Appellee's limitation of three minutes per speaker was not inappropriate since the agency had to accommodate a large number of people who wanted to speak. Everyone had the opportunity to also file written comments in addition to the oral comments.

5. Some staff members of the Division of Air Quality who played key roles in the development of this permit attended the meeting and were present throughout the meeting. At least one staff member took notes of the comments.

6. The Appellee hired a court reporter to record and transcribe the September 15, 2003, public meeting. The court reporter attended the meeting but failed to provide the transcript. Months later, after the Appellee filed a lawsuit against her, the reporter provided to the Appellee a partial transcript and the tapes of the meeting.

7. The agency is not required to produce a transcript of the public meeting, however, the agency should have recognized that the public had an expectation that a transcript would be produced since the agency had hired a court reporter for the meeting. Although the agency was not to blame for the fact that a transcript was never produced, the agency should have made a disclosure of the problem with the transcripts earlier than it did. Importantly though, there is no evidence that the agency purposefully tried to conceal the problem with the transcript.

8. The tapes and the partial transcript were placed on file in the Morgantown public library and the agency's Fairmont office soon after the agency received them. These tapes and partial transcripts were on file and available to the public at this library and the Appellee's Fairmont office before the permit was finalized.

9. After the meeting on September 15, 2003, the agency made some changes to the draft permit. After these changes were made, the agency decided to hold a second comment period and to conduct a second public meeting on December 18, 2003. The Appellee published another notice in the Dominion Post.

10. On December 11, 2003, the Dominion Post published an article about the public meeting that was to be held regarding the daft permit. This article stated that a spokeswoman for the Appellee said that residents who had already commented on the issues did not have to repeat those comments.

11. A second article about the second public meeting was published on December 18, 2003, in the Morgantown Dominion Post. This article contained a statement that people who had already commented during the September public meeting did not need to repeat their comments because their comments were "already on record, and can be reviewed in the copy of the application available at the Morgantown Public Library."

12. On December 18, 2003, the oral comments were not on record nor were they available to the public or anyone on that date. The newspaper article was not correct in this assertion. The December 18, 2003, article did not identify any source for the contents of the assertions. A similar article published on December 11, 2003, stated that people who had already commented during the September

public meeting did not need to repeat their comments but did not contain any statement about the comments being on record and available to the public.

13. During the December public meeting, citizens began questioning the existence of the transcript from the September public meeting. Near the end of the December meeting, a staff member of the agency stated that the agency did not receive a copy of the transcript from the court reporter. Furthermore, the staff person announced that the agency doubted that it would ever receive a transcript.

14. Following the December public meeting, the Appellee extended the comment period on the permit by ten days. The Director sent a letter to everyone who signed their name and address to a sign-in sheet for speakers at the September meeting inviting the speakers to submit their comments in writing. The Appellant was one of many who submitted written comments in response to this letter.

15. The agency obtained the tapes of the meeting before it issued the final permit. The tapes were reviewed by the agency before the permit was finalized. There was no evidence that the agency did not in fact consider the comments made at the September public meeting.

16. Before the agency issued the permit it developed a written response to all the comments received. It did not address each comment individually, but instead grouped similar issues contained in those comments and responded in general to these issues. This document is evidence that the agency did in fact consider the public comments.

17. Class II modeling was discussed at the September meeting and the use of the AEROD model was mentioned in the notice of the September meeting.

18. One of the Intervenor-Appellants requested the agency to model the air quality for two selected sites. The agency did not provide a responsive model as requested by the commenter and it is not required to do so.

19. Permit No. R14-0024 was issued by the Appellee to Longview Power on March 2, 2004.

20. The permit, that is the basis of this appeal, allows Longview to construct a coal-fired electrical power generating facility near Maidsville, West Virginia.

21. The Appellant, Jarrett Jamison, filed an appeal of the permit on March 31, 2004.

. The Board granted the requests of Forks of Cheat Forest Property Owners Association and Fort Martin Community Association to intervene as party-Appellants, but restricted them to the issues raised in the original (Jamison) appeal.

23. Longview holds the permit which is the subject of the appeal and has the legal right to intervene in the appeal. The Board granted Longview's request to intervene in the appeal as a party Appellee.

24. The Board conducted an evidentiary hearing regarding the issues of the appeal on June 24, 2004, and July 18, 2004.

CONCLUSIONS OF LAW

1. This permit was developed in accordance with W.Va. Code Section -5-1 et seq. and W.Va. Legislative Rule 45 CSR 14.

2. The advertisement placed by Longview and published on August 23, 2002, was not required by 45 CSR 14 which governs this permit. The advertisement's placement in the "world" section did not violate any regulation.

3. The public notices of the September and December public meetings complied with the applicable regulations and they informed the public as to the subject of the meeting and the opportunity for comment.

4. The time allowance the Appellee provided each speaker at the September meeting was not unreasonable under the circumstances where forty-one people requested speaking time. The time allotted did not violate regulation 45 CSR 14-17.2 which requires that all interested parties have ample opportunity to present comments. In addition to oral comments, the public was also provided with the opportunity to submit written comments.

5. The Appellee is not required to produce a transcript of the oral comments received. The Director is required by 45 CSR 14-16.5 to make copies of all comments available for public inspection in the same locations where the Director made available preconstruction information relating to the proposed source or modification. The agency complied with this provision by placing the tapes and the partial transcript of the meeting in the library and the Fairmont office once it received these items.

6. The Appellee cannot be held responsible for every misstatement contained in newspaper articles. The agency is responsible for providing the media with appropriate information which the Board would interpret to include "accurate" information. The Appellee did not violate 45 CSR 14-17.3 which requires the Director to provide appropriate information to the media regarding public meetings.

7. The Appellee's extension of the comment period and the letter it sent to those who spoke at the September meeting adequately cured the problems regarding the transcript and the newspaper articles.

8. The Appellee is required to consider all of the comments received before it issues a final permit. However, the agency is not required to consider the initial public comments submitted regarding a draft permit prior to establishing a second public comment period and scheduling an additional public hearing on a permit redraft, provided that all comments are considered before it issues the final permit. The Appellee complied with the requirement to consider all of the comments before it issued the permit.

9. There is no requirement that the Appellee provide a separate response to each comment made on a permit.

10. The Appellee is not required to ensure that every citizen completely comprehends exactly how each term and condition of a permit are derived. As long as the agency makes the information available to the public, the agency has complied with its requirements.

11. The Appellee is not required to ensure that every possible subject about a permit is thoroughly discussed at every public meeting. The fact that Appellant did not think that enough discussion of the AERMOD model occurred at the September meeting did not invalidate that meeting.

12. Whether all modeling eventually performed for this permit was done prior to the September meeting is not relevant. Any defect in the completeness of matters in September was cured by the second notice and comment period and second meeting held in December.

13. The Appellee is not required to perform selected air quality modeling at each citizen's request. The agency's response to the request that it model the air quality for two selected sites was appropriate.

14. The Appellee has no obligation to respond to every request that it model air quality for a selected site.

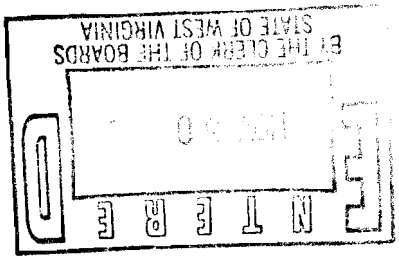
15. The permit process was not without problems but the problems were adequately resolved by the Appellee and none of the problems merited the revocation of the permit at issue in this appeal.

16. Based upon the evidence presented, there is no basis to revoke the permit.

The Board hereby **AFFIRMS** Permit No. R14-0024, issued to Longview Power Company, LLC, by the Appellee on March 2, 2003.

It is so ORDERED on this the 14th day of October 2004.

It is so ENTERED on this the 30th day of November 2004.



AIR QUALITY BOARD

R. Thomas Hansen, Ph.D., Chair

CERTIFICATE OF SERVICE

I, Melissa Carte, Clerk for the Air Quality Board, do hereby certify that I, on this 30th day of November, served the attached FINAL ORDER to all parties in Appeal No. 04-02-AQB as follows:

by Certified United States Mail, postage prepaid:

Jarrett Jamison, III
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Melissa Carte, Clerk

NOTICE OF RIGHT TO APPEAL FINAL ORDER

In accordance with § 22B-1-7(j) of the West Virginia Code, you are hereby notified of your right to judicial review of this FINAL ORDER in accordance with § 22B-1-9(a) and § 22B-3-3 of the West Virginia Code. If appropriate, an appeal of this final order may be made by filing a petition in the appropriate Circuit Court within thirty (30) days from your receipt of this final order in the manner provided by § 29A-5-4 of the West Virginia Code.