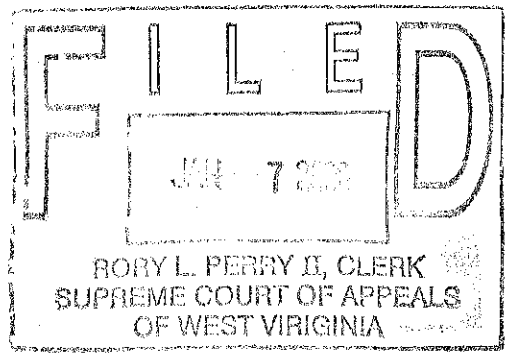
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33710

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797
Upper Guyandotte River Watershed
Subwatershed 2a

# AMICUS CURIAE BRIEF

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*Liaison Counsel for Defendants*

Dated: January 7, 2008

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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## I. INTRODUCTION

When the civil justice system finds something hard to swallow, it coughs it up. That's exactly what has happened here. The Honorable Judges John A. Hutchison and Arthur M. Recht have coughed up this litigation because it is not fit for consumption by our court system.[1] Judges Hutchison and Recht have chewed on the Flood Litigation for a long time, and each by different paths and for different reasons has reached the same conclusion: it is unpalatable. Your Amicus[2] asks that the respective appraisals of these

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[1] By Administrative Order entered on 16 May 2002, this Honorable Court granted the Plaintiffs' motion to refer all matters asserting claims related to 8 July 2001 flooding to the mass litigation panel and by Administrative Order entered on 13 June 2002, transferred the cases to the Circuit Court of Raleigh County. Thereafter, the Honorable Judges Gary Johnson ("Judge Johnson"), Arthur Recht ("Judge Recht"), and John Hutchison ("Judge Hutchison") (collectively "Panel Judges") were assigned to oversee what is commonly referred to as the West Virginia Flood Litigation.

[2] This Honorable Court granted these flood litigation Defendants leave to file an amicus curiae brief by Order entered 6 December 2007. Because of the continuing nature of the West Virginia Flood Litigation, the number of parties affected by the litigation, and the far reaching impact of this litigation on various industries and companies in West Virginia, it is important that these Defendants' views regarding issues beyond those raised by the Appellants on appeal herein be brought to the forefront for this Honorable Court's consideration, evaluation, and action.

two highly experienced, diligent Mass Litigation Panel Judges be affirmed by this Honorable Court; that the immense natural disaster of 8 July 2001 be recognized as just that; and that this litigation die the natural death that it so richly deserves.

The appeals[3] under consideration with respect to the decisions of Judges Hutchison[4] and Recht represent the second and third times that this Honorable Court has accepted the opportunity to consider what has come to be known pejoratively (in some circles) as the "West Virginia Flood Litigation." The first occurred at the most preliminary possible stage, and involved this Court answering certified questions from the three assigned Mass Litigation Panel Judges relating to which of the legal theories named by Plaintiffs in their Complaints might conceivably be available to them in this most unusual and unprecedented litigation. In those proceedings, this Court's attention was focused by the parties primarily upon the key issue of whether or not strict liability would apply, and secondarily upon the analytically similar question of whether Plaintiffs

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[3] Currently, three appeals are pending before this Honorable Court in relation to the Flood Litigation. Two appeals (Appeal Nos. 33710 and 33711) pertain to the Upper Guyandotte River Watershed Plaintiffs' appeal of Judge Hutchison's decision to enter judgment as a matter of law in favor of two defendants, appellees herein (Western Pocahontas LLP and Western Pocahontas Corporation (collectively "Western Pocahontas")) at the close of the Oceana/Mullens Phase I trial and to conditionally grant the appellees' motion for a new trial. The third appeal (Appeal No. 33664) pertains to the Coal River Watershed Plaintiffs' appeal of Judge Recht's decision to dismiss their claims for failing to state a claim upon which relief may be granted.

[4] Your Amicus respectfully point out the obvious: though two appeals are docketed from Judge Hutchison's decision, all Plaintiffs challenge the same proceeding: one trial, one body of evidence, presented to one jury, presided over by one judge, resulting in one verdict, and subsequently, one Order overturning that verdict. This Court will render one decision, and that decision will determine the fate of the Plaintiffs in the Oceana/Mullens Subwatershed and dramatically impact, if not eliminate, the claims of all the remaining 3,015 Flood Litigation Plaintiffs against these Defendants.

might pursue the theory of nuisance. This Court held that strict liability did not apply and, in doing so, recognized that "extractive activities such as coal mining and timbering are common activities in southern West Virginia" and that it was "unable to conclude that the great economic value of some of these extractive activities, such as coal mining, is outweighed by their dangerous attributes."[5] As to the nuisance theory, this Court held that it was "unable to conclude on the stipulated facts before us whether Plaintiffs have a cause of action for nuisance."[6]

In the ensuing two years of litigation, Plaintiffs dressed their strict liability claim up in the clothes of nuisance and continued to pursue it under that rubric. What became painfully clear — first to Judge Recht after holding Plaintiffs' pleading feet to the analytical fire, then to Judge Hutchison after his months of patient, painstaking, methodical, and "benefit of the doubt to the Plaintiffs" effort to bring the first proceeding to trial on schedule and provide a partial test of Plaintiffs' ability to meet their burden of proof — was that Plaintiffs had not pled and could not prove a claim.

When your Amicus last came before this Court in In re Flood, we felt in many ways like a voice crying in the wilderness. We faced an industry-wide attack against coal mining and timbering in West Virginia of a scope and thrust and nature unprecedented anywhere in the United States whereby thousands of Plaintiffs sought to impose liability

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[5] In re Flood, 216 W. Va. 534, 545, 607 S.E.2d 863, 874 (2004).

[6] Id., 216 W. Va. at 544, 607 S.E.2d at 872.

upon private parties for what was unquestionably a natural disaster of historic proportions. We tried to say "Stop!...Wait!...this is not an event for which man is responsible. This is not a matter for litigation. This is not something that may or should be addressed in the Courts." But the situation was too imperfectly understood, and the words that seemed so simply and accurately to describe the circumstances posed were lost in a wilderness of legal argument about the hypothetical application of traditional legal theories to them.

What Judges Hutchison and Recht gained in the two years that followed In re Flood, as is so carefully expressed in their respective decisions that this Court now reviews, was practical and legal perspective. Perspective informed by scores of motions, thousands of pages of briefs, hours and hours and hours of hearings, hundreds of pages of "disclosures" from Plaintiffs, and, with regard to Judge Hutchison, months of intense trial preparation and more than six weeks of trial.[7] Your Amicus respectfully submits this Brief in an effort to provide this Court with some of that perspective, much of which may

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[7] As Judge Hutchison acknowledged:

> In his own defense, this Judge would state that the issues in this case were technically complex. It was not until after this Judge, upon motion filed by the Defendants herein, 1) had heard all of the evidence, 2) had fully reviewed the testimony offered by Dr. Bell and Mr. Morgan, and 3) had reviewed the evidence offered by the various forestry experts and forest hydrologists offered by the Defendants, was able to wholly understand the scope and complexity of the multitude of issues dealing with forest hydrology and the limitations of the Plaintiffs' experts, both in limited knowledge of forest hydrology issues and in the unreliability of their testing. Thereafter, the Court came to fully understand how woefully inadequate, from a scientific standpoint, were the opinions of Dr. Bell and Mr. Morgan in this particular case.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 26-7).

not be readily visible through the curtain of "legal" argument that still surrounds us on these appeals.

## II. THE APPROACH

Although six major watersheds[8] in southern West Virginia are implicated in the Flood Litigation, the assigned Panel Judges determined first to address those three that presented the most significant number of Plaintiffs and Defendants; these are the Coal Watershed, Upper Guyandotte Watershed, and Tug Fork Watershed. As this Honorable Court can see from Figure 1 below, these three watersheds together cover all or part of ten counties in southern West Virginia and comprise a huge area of land --- 1,767,040 acres to be exact.[9] Judge Hutchison was assigned the responsibility for litigation in the geographic area of the Upper Guyandotte Watershed, Judge Recht the Coal, and Judge Johnson the Tug Fork.

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[8] The Mass Flood Litigation involves 6 different watersheds: 1) Coal River Watershed; 2) Tug Fork Watershed; 3) Upper Guyandotte Watershed; 4) Upper Kanawha Watershed; 5) Lower New Watershed; and 6) Upper (New) Watershed. Only the first three watersheds have been assigned to a specific Panel Judge to date.

[9] The geography involved alone gives this Court an idea of the scope and magnitude of the 8 July 2001 storms. This number represents the aggregate area listed in the WVDEP Watershed Atlas for all subwatersheds in the Upper Guyandotte, Coal and Tug Fork Watersheds.

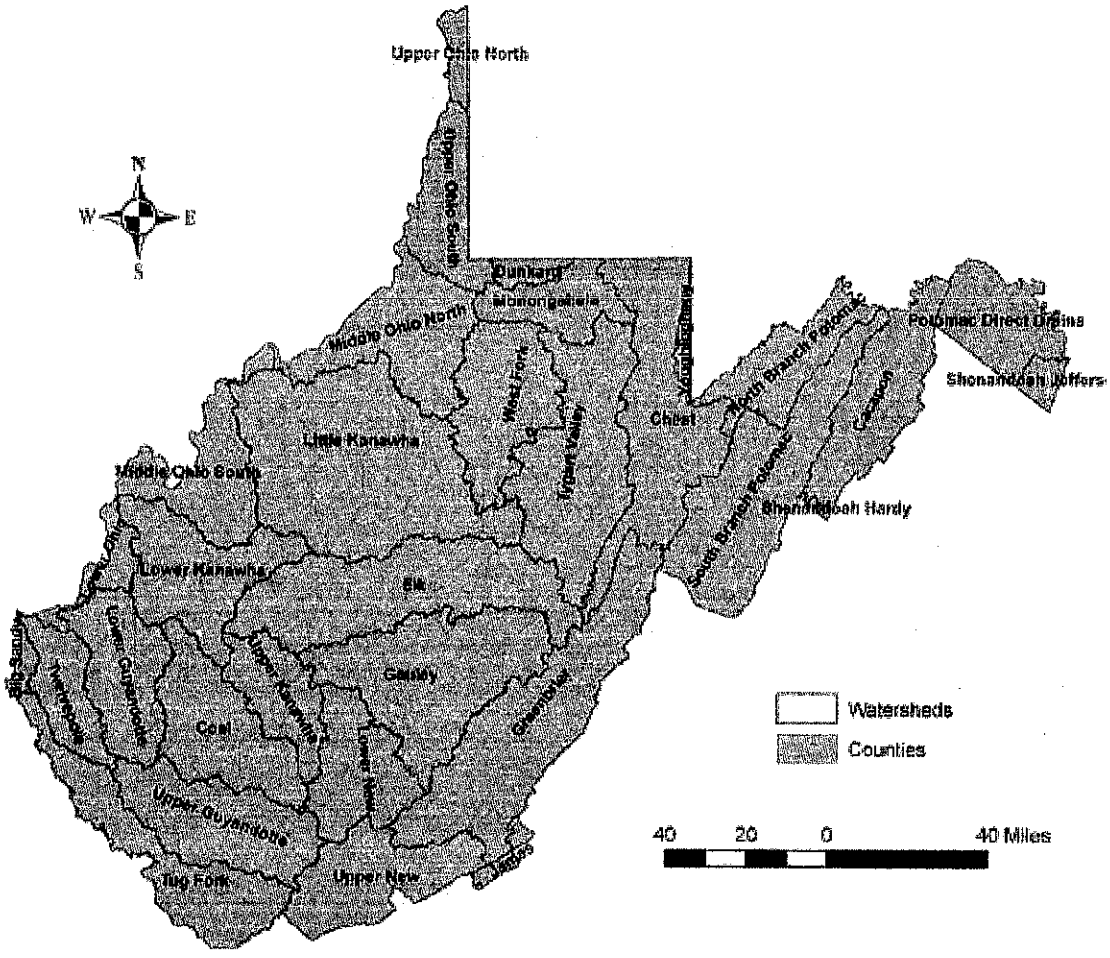


**Figure 1**

Faced with geographic[10] and procedural challenges of unprecedented scope, the Panel Judges determined to bifurcate the litigation and to try "liability" first without any Plaintiffs.[11] Judge Hutchison was designated to take the lead and move toward a trial

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[10] This litigation does not just encompass a large geographic area jurisdictionally; it involves that geography as a matter of fact.

[11] See 8 June 2005 Case Management Order at 1.

with respect to the Upper Guyandotte. Originally, three trials were set seriatim in March (Upper Guyandotte), June (Coal), and September (Tug) of 2006. It quickly became apparent to all, however, that only one proceeding could be actively pursued at a time, and the Coal and Tug proceedings were informally suspended while Judge Hutchison grappled with the Upper Guyandotte. Judge Hutchison was determined to meet his responsibility to press forward and have the first trial on schedule; this goal he doggedly and successfully pursued.

After careful consideration and with an understanding of the daunting complexity of the task assigned, Judge Hutchison adopted a trial plan that involved addressing first only the geographic areas encompassed by the Oceana and Mullens Subwatersheds of the Upper Guyandotte Watershed, and that would ask the jury to answer three factual questions.[12] Judge Hutchison did not contemplate that this Phase I trial would establish

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[12] On or about 26 January 2006, Judge Hutchison ruled that the following three questions must be answered affirmatively in favor of the Plaintiffs in Phase I in order for them to proceed further with their claims:

> (1) Whether, as to each Defendants' individual operation(s), the Defendants' use of its property materially increased the rate of surface water runoff that left that operation as a result of the storm events on or about July 8, 2001, compared to the rate of surface water runoff that would have left the operation but for the Defendants' use of that property;
>
> (2) Whether the water from the individual Defendants' operation(s) materially caused or contributed to the stream or streams into which they discharged to overflow their banks;
>
> (3) Regardless of the findings made in (1) and (2) above, was the use by the Defendants of the property in question unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of In re Flood Litigation, 216 W.Va. 534, 607 S.E. 2d 863 (2004).

(26 January 2006 Trial Plan for Subwatersheds 2A & 2E of the Upper Guyandotte Watershed at p. 3; see also, 15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 3). Judge Hutchison set the first Phase I trial on the three questions in the Mullens and Oceana Subwatersheds for 6 March 2006.

liability with respect to any Defendant; rather, he understood the three questions to represent the fundamental factual predicates that would have to be proven relative to a Defendant before any Plaintiff could move forward toward a final determination of liability, causation, issues of comparative contribution, counter and cross-claims, and damages in later trial proceedings either before Mass Litigation Panel Judges or originating circuit courts.

Thus, what Judge Hutchison embarked upon was a series of Phase I trials that would determine certain essential preliminary liability issues but not conclusively establish liability, to be followed by later trials involving remaining Defendants, if any, to address the other issues.[13] It is, of course, the result of this first Phase I trial that involved as actual parties no Plaintiffs and only some of the Defendants in the Flood Litigation, eventually resulting in the verdict against only two Defendants, that is presently before this Honorable Court for review.[14]

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[13] Judge Hutchison ruled that:

> those Defendants whose operations were determined by the jury to have materially increased the peak flow, materially caused the streams into which that flow discharged to overflow their banks, and finally, whose use of the property was deemed to be unreasonable, would remain as Defendants for Phase Two, which would determine legal liability based upon the conduct of the individual Defendant's operation and damages, if any.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 4.)

[14] Trial commenced in March 2006 against eleven Defendants; however, when the verdict was rendered on 2 May 2006, only Western Pocahontas remained. After painstaking consideration of the facts, evidence, and arguments before him, Judge Hutchison correctly entered judgment in favor of Western Pocahontas, and his well-reasoned ruling should be upheld by this Honorable Court. Accordingly, these Defendants hereby join, adopt, and incorporate herein by reference those arguments asserted by Western Pocahontas in support of affirming Judge Hutchison's decision.

## III. BACKGROUND

Your Amicus first invites this Honorable Court to learn some more detailed background about the most obvious fact in this litigation: It involves massive floods. Simple point? Not exactly.

### A. Terminology

By "floods" we mean situations where a creek or stream or river overflows its banks. Floods are one of the most common hazards in the United States (and the world, for that matter). (See National Weather Service website at http://www.weather.gov/floodsafety/floodsafe.shtml). There are "floods" that are associated with large geographic areas involving rivers and streams receiving larger quantities of water from their respective drainage areas than their normal channels can handle, causing them to overflow their banks. A subset is flash floods, a phrase generally used to refer to flooding that occurs in discrete smaller areas and generally within six hours of a rain event. Flash floods are well known in southern West Virginia, occurring in highly localized areas in connection with severe thunderstorm activity pretty much every summer. Floods and flash floods happen in all 50 states. (See http://www.weather.gov/floodsafety/floodsafe.shtml).

In its review of these appeals, this Honorable Court will undoubtedly read and hear references made to "recurrence interval" and/or "return period" to describe the magnitude of a rainfall event or flood in terms of the probability of that event or flood occurring in the particular location involved in any given year. You will see this

expressed, for example, as a "one-hundred year storm/flood." Stated in simplistic terms, if one refers to a "one-hundred year rainfall" or a "one-hundred year flood," this means that, in the particular location involved, there is a 1 percent chance in any given year that a rainfall event or flood of that magnitude will occur. Similarly, there is a 10 percent likelihood that a ten-year event will occur in any given year; a 50 percent likelihood that a two-year event will occur in any given year; a two-tenths of a percent likelihood that a five-hundred year event will occur in any given year; and so on. (See United States Geological Survey website at http://ga.water.usgs.gov/edu/100yearflood.html.)

Another concept that this Honorable Court should understand is "floodplain." A floodplain is the area that will be inundated by a flood of a specified magnitude. A one-hundred year floodplain is consequently the area that will be inundated by a one-hundred year flood for that location. (See Floodplain Management Association website at http://www.floodplain.org/overview_of_floods.htm.)

Generally and logically speaking, a stream's channel – defined by its "banks"—is formed by the more frequent rainfall events that flow through it. Accordingly, most stream banks are defined by, and can handle, events up to and including a two-year storm[15] (stated another way, a rainfall event of a magnitude greater than a two-year event will likely cause the receiving stream to overflow its banks). Thus, if a location receives more water than that which would be produced in a two-year storm event, it will probably overflow its banks.

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[15] The National Flood Frequency Program (USGS).

## B. Hydrology and Runoff

Hydrology is the science and study of the rainfall/runoff process, while hydraulics is the study of how water flows. (See American Meteorological Society Glossary of Meteorology Terms.) To say that these areas of science are extraordinarily complex is a grave understatement. Understanding in the most simplistic way how a watershed responds to rainfall events of varying magnitudes is a scientific puzzle of enormous complexity that has been empirically studied, analyzed, and reported upon for decades, yet still remains unsolved.[16] It is an aspect of nature that is utterly dependent upon the exact circumstances in the exact location involved at a particular time. The factors that affect the quantity of water that reaches the outlet point of a drainage area at a particular time are legion, and always different.

Let us focus for purposes of this discussion on the Upper Guyandotte Watershed, which comprises 599,600 acres of land,[17] all of which is "drained" by the Upper Guyandotte River. As this Court can see from the dendritic pattern of the streams shown on the map at Figure 2, by definition all of the water that runs off from rainfall anywhere within the Upper Guyandotte Watershed drains into the Upper Guyandotte River (shown on Figure 2 in green) and eventually exits the Upper Guyandotte Watershed at the westernmost point on the map, which is marked with an arrow on Figure 2.

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[16] See http://www.nrs.fs.fed.us/flooding

[17] This figure represents the aggregate area listed in the West Virginia Department of Environmental Protection Watershed Atlas of all subwatersheds in the Upper Guyandotte Watershed.

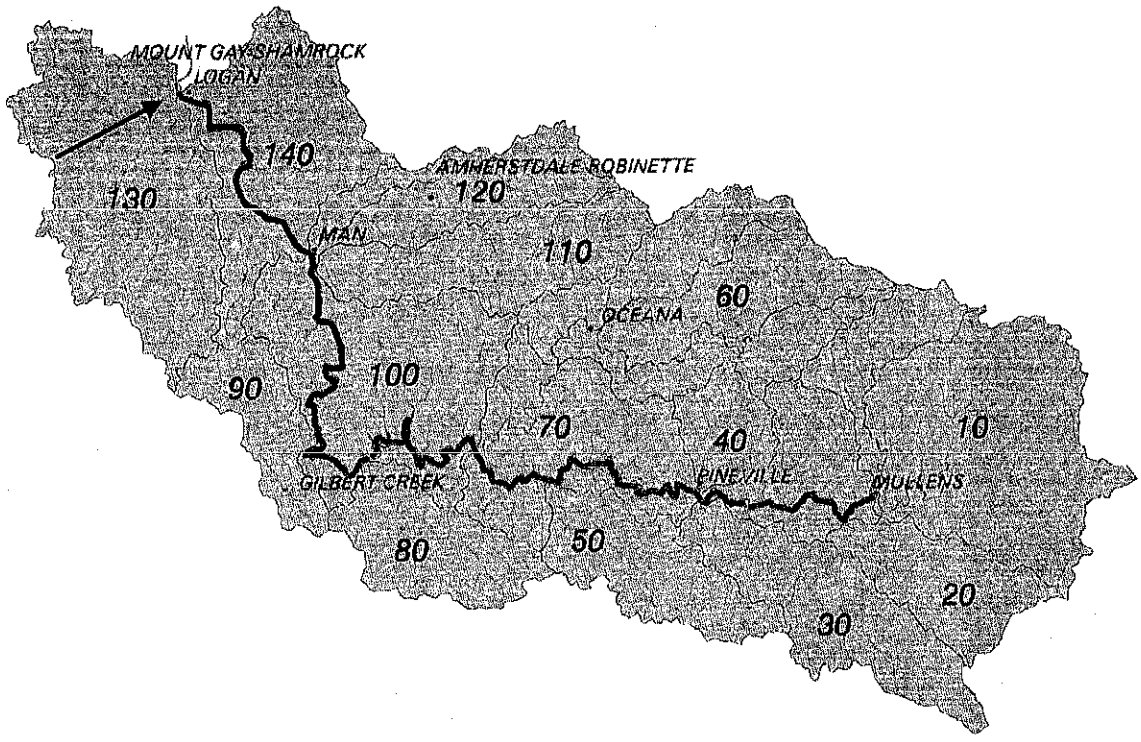
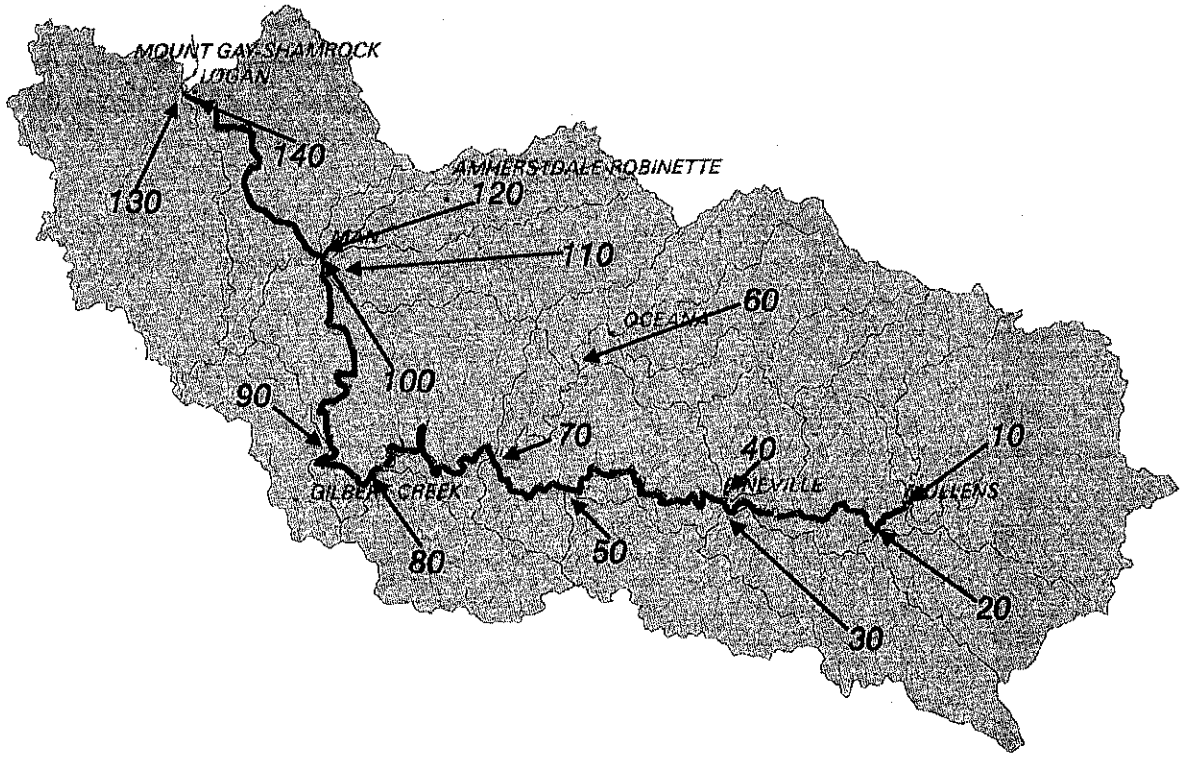



**Figure 2**

The Upper Guyandotte Watershed is in turn divided into 14 Subwatersheds. Each of these Subwatersheds likewise represents a discrete geographically defined "catchment" or "basin" and all of the water that runs off the land in each Subwatershed likewise flows to its one exit point and thence into the Upper Guyandotte River. All of these exit points are marked with arrows on Figure 3. From the standpoint of runoff, drainage, and potential flooding, each Subwatershed within the Upper Guyandotte Watershed is independent of every other; stated the other way, the amount of rainfall occurring in one Subwatershed will have no impact whatsoever upon whether there is

flooding within another Subwatershed.[18] The total drainage from each Subwatershed, however, will enter the receiving stream, in this example the Upper Guyandotte River, and will impact whether or not the river itself floods downstream from that Subwatershed exit point. Taken to its logical geographic conclusion, whether the Upper Guyandotte River floods or not at its outlet is dependent upon the cumulative impact of everything that happens everywhere in the entire Upper Guyandotte Watershed. The same statement applies to every other discrete point: whether that point floods or not is dependant upon the impact of everything that happens everywhere upstream from it.




[18] This analysis actually applies at all levels. Each creek, no matter how small, has its own drainage area independent of any other insofar as flooding within itself is concerned. Pick any place where a creek or stream or river joins another --- everything upstream of that point on that creek or stream or river, and nothing anywhere else, affects flooding within that drainage area.

**Figure 3**

Judge Hutchison determined to have the first Phase I trial with respect to the geographic area encompassed by two of the Subwatersheds of the Upper Guyandotte Watershed; Oceana and Mullens. These are outlined in blue on Figure 4 below. At the end of the trial, only Mullens remained.[19]

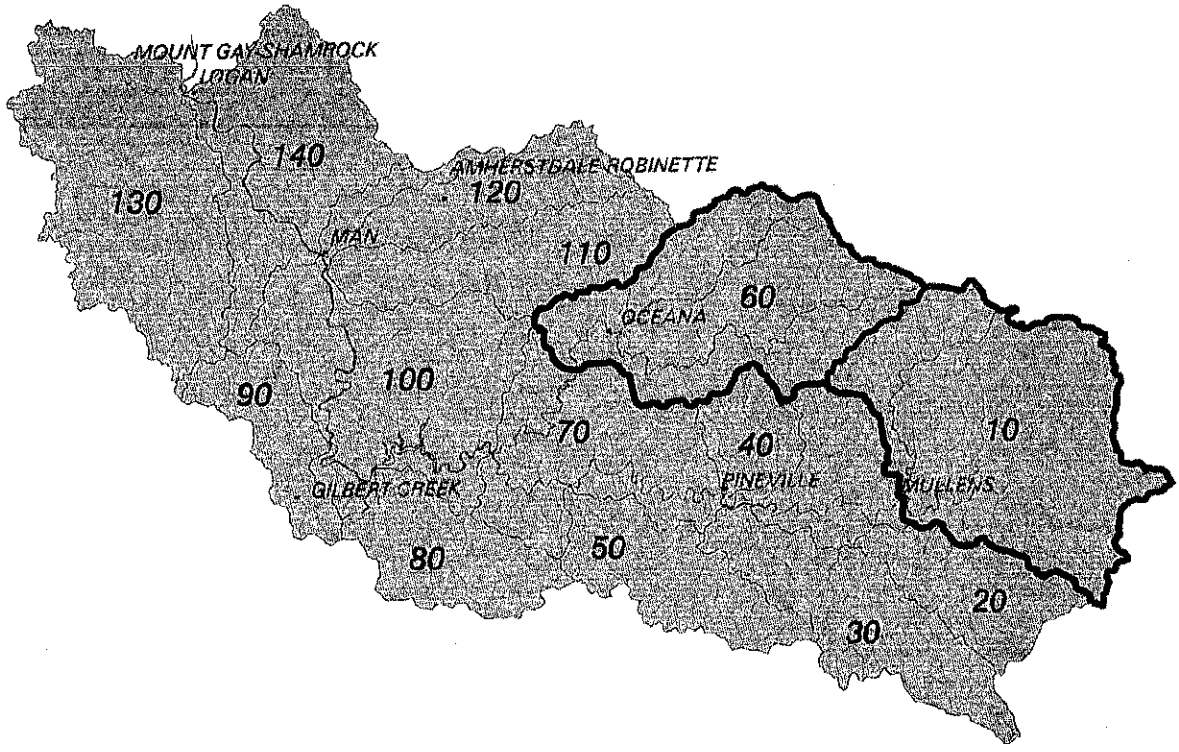



**Figure 4**

[19] All of the claims in the Oceana Subwatershed were resolved and dismissed during the course of the Phase I trial; hence, only the claims relating to the Mullens Subwatershed were submitted to the jury for determination. The Mullens Subwatershed was then "further defined and limited to the Slab Fork Sub-Subwatershed." (15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 6-7.)

As the Court can readily see, the town of Mullens, where we understand many of the Plaintiffs whose claims are directly before this Court in the Hutchison appeals had property, is located at the exit point of the Mullens Subwatershed. Accordingly, the amount of water draining through that point is determined by everything that happens with respect to rainfall and runoff in the entirety of the Mullens Subwatershed. The runoff from every residential piece of property, every farm, every town, every road, every shopping center, every surface mine, every pristine forest, in the Mullens Subwatershed has an impact upon the amount of water eventually reaching Mullens.

Just because there is considerable rain in the Mullens Subwatershed on a particular day does not, however, necessarily mean that Mullens will flood. Timing is also critical. Let us say, for example, that it rains a great deal between six and eight o'clock in the morning in the extreme northwest reaches of the Mullens Subwatershed and the runoff from that rain reaches Mullens at 3 o'clock p.m. Likewise, a great deal of rain falls in the extreme southeast reaches of the Mullens Subwatershed between 7 and 9 o'clock in the morning, but the runoff from that rainfall does not reach Mullens until 5 o'clock p.m. In each instance, the result might be flash flooding in the areas where the rain falls (because of a large amount of rain falling in a small area over a short period of time) but no flooding in Mullens because the runoff from each gets to Mullens at a different time. If, on the other hand, the runoff from the rainfall reaches the town of Mullens at the same

time, or extends over a more sustained period, their combination could produce flooding in Mullens. It depends on timing.[20]

Let us now look at the Mullens Subwatershed in even more detail. As the Court can see from Figure 5, the tentacles of the rivers, streams, and creeks reach from the mouth of the Subwatershed throughout its confines and represent the drainage pattern established by Mother Nature through the rainfall she has imposed upon the area down through the years.

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[20] Judge Hutchison acknowledged that:

> Mr. Morgan further opined that it would be impossible for him to tell when the water coming off of Western Pocahontas' land holdings in the Slab Fork Creek Subwatershed actually arrived in the town of Mullens and whether, upon its arrival, it had any material impact on the flooding that took place there.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 30.) (emphasis added).

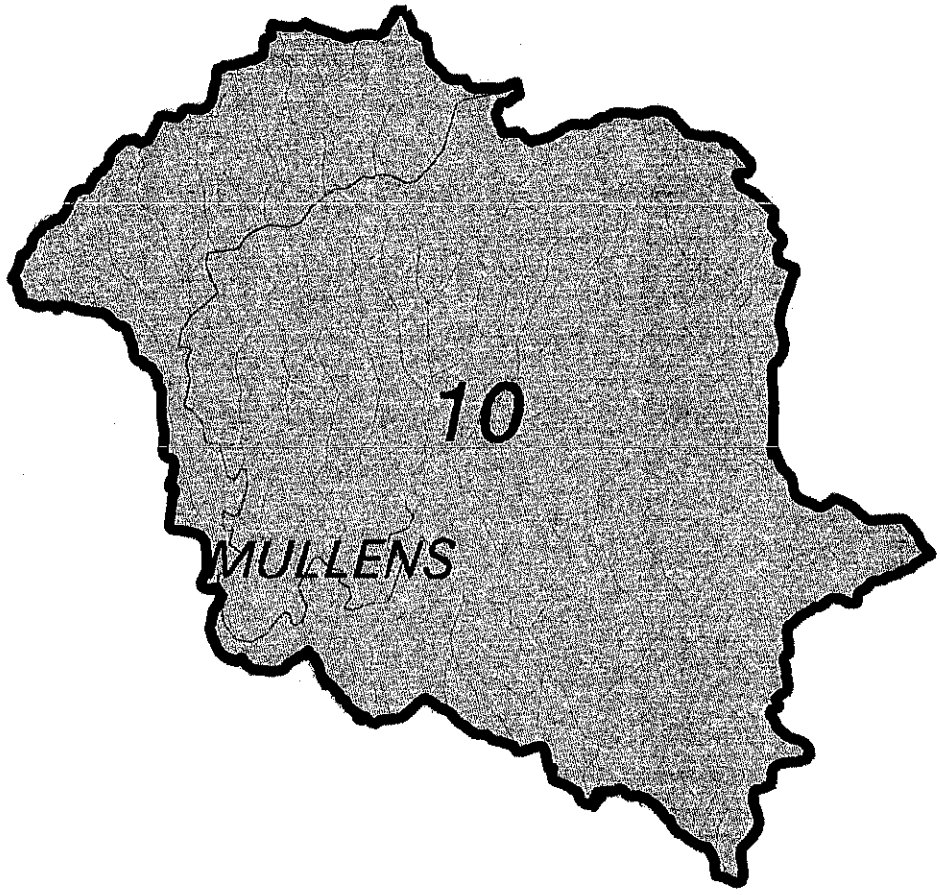


**Figure 5**

If this Court picks any location on any stream or tributary depicted, it can then visualize all of the area that is "upstream" of that particular location. As an example, see Figure 6. As has been described above, with respect to any particular location everything that happens everywhere upstream of that location impacts the amount of water that arrives there. Every house, every farm, every business, etc. If we move that location even less than a mile downstream the area which impacts the amount of water reaching the new location can be increased exponentially. See Figure 7.

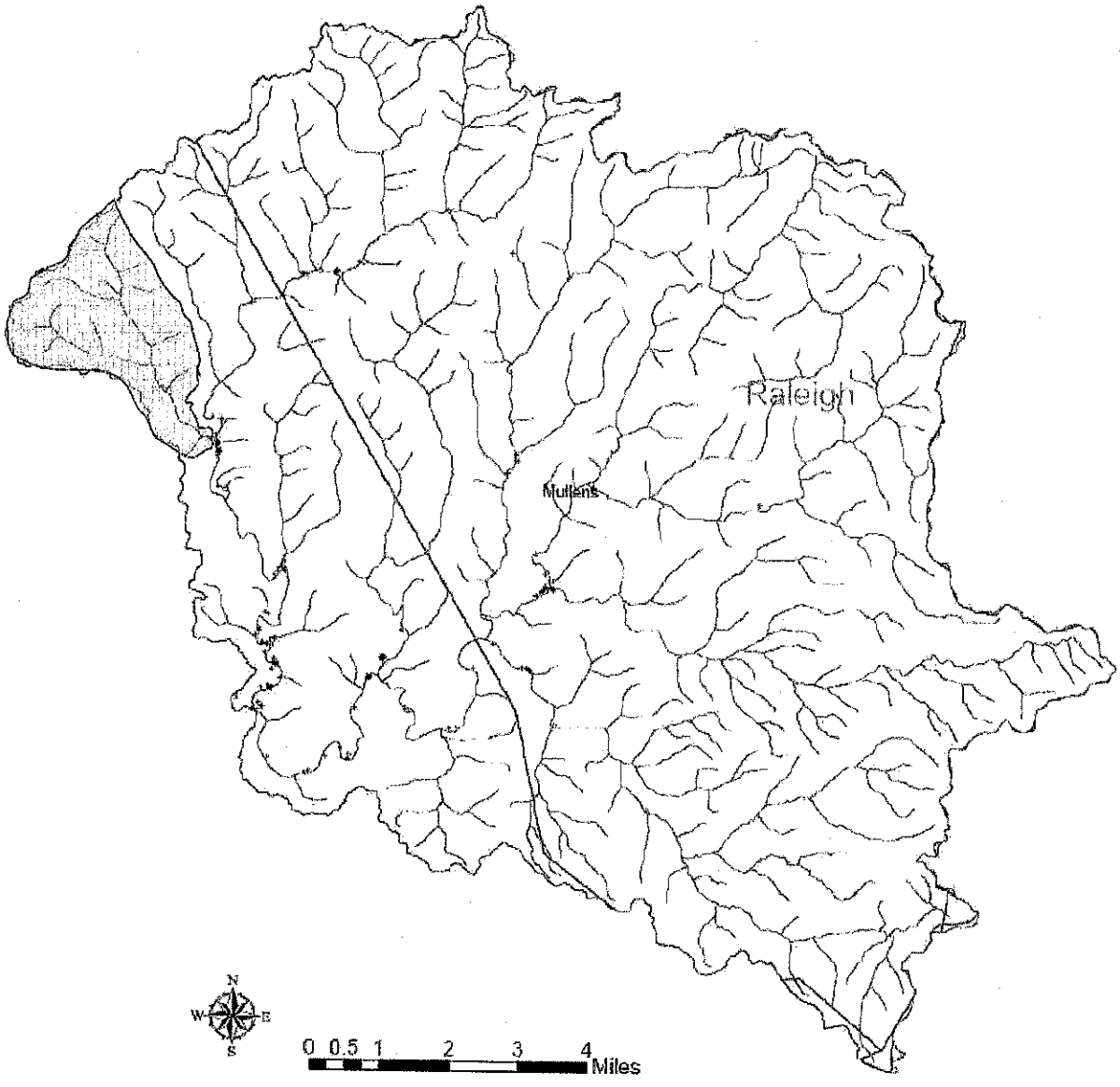


**Figure 6**

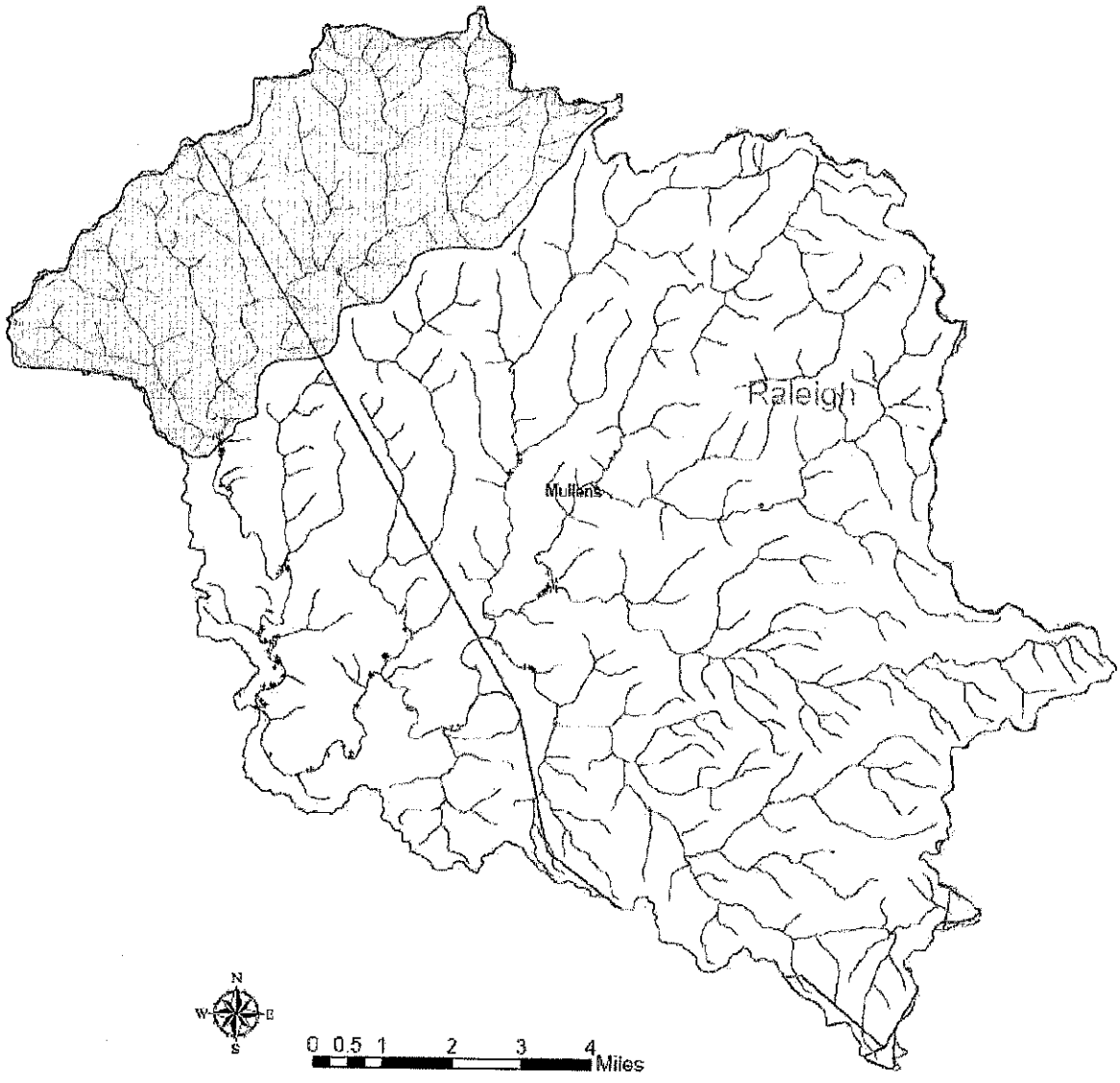


**Figure 7**

Similarly, however, the impact of runoff from a particular piece of property will diminish exponentially the farther downstream from that piece of property one goes. For example, if five thousand gallons of water run off from my residential property during 10 minutes of peak rainfall that it receives in a summer thunderstorm and drains into the small creek that runs by my property, it will have a certain impact upon the flow of that creek right there. If I move a mile downstream to a point that is carrying runoff

contributed to by 49 additional pieces of residential property located between my property that are all in a runoff situation similar to mine, then my contribution at that point is reduced to one-fiftieth. If I move five miles or 10 miles farther, or to the mouth of the Subwatershed, or to the mouth of the major watershed, my contribution becomes increasingly immeasurably infinitesimal. But of course, the runoff is not just from the 50 pieces of residential property in the example above--- it is from all the land drained. And not just the land downstream from me, but all land upstream of whoever it floods. If my property is itself downstream from 10,000 acres of other property above me in the drainage area, then my already infinitesimal contribution to locations downstream from me just got astronomically reduced again. Infinitesimal becomes unimaginable.[21]

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[21] Plaintiffs proffered testimony from two experts during the Phase I trial: 1) John Morgan ("Mr. Morgan") and 2) Dr. Bruce A. Bell ("Dr. Bell"). In granting Western Pocahontas' Motion for Judgment as a Matter of Law, Judge Hutchison premised his ruling largely upon the inadequacy of the Plaintiffs' expert testimony, finding, in part, that:

> Mr. Morgan testified that he ran a modeled program on SEDCAD that was not based on any particular area located in the Mullens Subwatershed or the Slab Fork Creek Watershed but was an analysis based upon a hypothetical area using certain assumptions selected by Mr. Morgan to be included in the model's computation. For example, Mr. Morgan assumed the humus depth, type of soil, existence of nonexistence of disturbed areas including log landings and roadways and other hypothetical criteria.
>
> The same models or the same type of computations were made by Dr. Bell as they relate to areas not in the Mullens Subwatershed, but nonetheless were performed to predict increases in surface flow based upon assumptions selected by Dr. Bell, and, in the case of both experts, as further limited by the parameters in the respective models.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 18.) (emphasis added).

Moreover, Judge Hutchison determined that "[i]t is undisputed that, with regard to the model programs used by Dr. Bell and Mr. Morgan, where one varies the base assumptions that are put into the model, there will automatically be a resulting change in perceived impacts." (Id. at 19. ) (emphasis added).

Viewed from the standpoint of Mother Nature, this whole system is flawless in its symmetry and beauty. The rain falls and, as Plaintiffs' counsel is wont to say, the water flows downhill. A gentle summer rain over a large area is welcome, normal — it perks everything up. A severe thunderstorm or series of thunderstorms in a small area sometimes causes problems like flash floods. A monumental storm of historic proportions over a widespread area, like that of 8 July 2001, is catastrophic. All these adjectives, however, reflect the perspective of men, not Mother Nature. From her perspective, everything is normal. And were man to exist and live and work outside the floodplain, the devastation and destruction that he suffers when Mother Nature visits flash floods or storms of monumental proportions would be minimal.

### C. Variables that Impact Discharge

Let us now focus on a discrete piece of property hypothetically located somewhere in the Mullens Subwatershed and outline some of the factors involved in considering runoff from that property due to a particular storm event that occurs on it.

The amount and rate and "peak flow" or "peak discharge" of water running off a piece of land depends on a huge number of variables, many of which in turn depend upon other variables, all resulting in an equation of enormous complexity. Assuming a fairly significant (by ordinary human standards) piece of land in the Mullens Subwatershed, say 500 acres (Mullens contains 83,840 acres), the following are some of the factors that will

impact the amount, rate, and peak flow or discharge of water running off that property due to a rainfall event:

The primary driving force, of course, is the rainfall as expressed in terms of depth, duration, and distribution. Depth and duration combine to give the intensity (an inch of rain over a 30 minute period is very intense, while an inch of rain in a week is not). Distribution, in turn, expresses how the intensity of rainfall changes over time. One inch in the first hour, a tenth of an inch in the second hour, a half inch in the third hour, etc. The intensity of rainfall in a storm or storm system varies enormously, and changes constantly.

The path that a particular storm takes across a piece of land is also important. From the standpoint of its drainage pattern, does the storm move from side to side, top to bottom, or bottom to top? Each will influence in a different way the overall burden placed upon the stream that receives the runoff from that property. If the storm moves from the headwaters downstream, for example, the overall amount of water heading for the exit point folds in on itself and is multiplied --- the runoff chases the storm. If the storm moves upstream, the opposite is true.

The area covered by the storm obviously is important. If only 200 of my 500 acres are rained on at high intensity, there will be one result; if 300 another; and if all 500, yet another.

The steepness of slopes (if any) and general topography of my land will be influential.

The aerial and surface cover of my land, the type of soil, the depth of soil, and the stratigraphy (meaning underlying rock structure and whether it is fractured and discontinuous, impervious, or whatever) are critical.

Of course, one must also consider whether or not the area involved had recently been rained on so that the soil was already saturated with moisture and could accept no more, whether previous storm systems had caused receiving waters already to be above their normal levels, the time of year (early in the "rainy" season, or late), and other aspects that might affect the particular result of runoff that occurs from a particular place on a particular day.

Pick any acre of land in any location in any storm and the factors noted above will be different as to each, as will the runoff results.[22]

This discussion illustrates the scientific difficulty and complexity in trying to determine why there is a certain amount of runoff from my 500 acres due to a particular

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[22] In reviewing the Plaintiffs' experts' testimony, Judge Hutchison noted that:

> ...both Mr. Morgan and Dr. Bell opined that it would be impossible for them to determine whether an increase in peak flow off of a particular geographical area would, in relation to the non-questioned landholdings, have caused the streams and rivers to materially overflow their banks. Mr. Morgan specifically opined that it would be impossible for him to state an opinion as to whether the increase in peak flow materially caused the streams and tributaries of Slab Fork Creek Subwatershed to overflow their banks, because there were too many unknown variable factors in making that determination.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 30.) (emphasis added).

storm. Multiply this level of complexity thousands of times, and one can appreciate how difficult this analysis is with respect to, for example, the town of Mullens (downstream from 83,840 acres). Add to this overall conundrum the fact that Mother Nature is in complete control of when, where, how much, from which direction, and how fast the rainfall comes. When her rainfall visits are ordinary and routine, the situation is normal and all is well. When her rainfall visits are extraordinary, unusual, widespread, and horrific, so will be the results. Man cannot change that fact, nor can litigation. No good can be accomplished by imposing a legal disaster upon a natural one. But that is what has so far been accomplished in the Flood Litigation, which this Honorable Court has the authority and now another opportunity to bring to an end.

## IV. ARGUMENT

**MAN'S ABILITY TO INFLUENCE THE RESULT OF MOTHER NATURE'S ACTIVITY IS MINISCULE TO NONEXISTENT ON THE 8 JULY 2001 END OF THE FLOOD SPECTRUM, AND FOR THAT REASON ANY EFFORT TO ASSESS LIABILITY TO MAN AT THAT END IS ENTIRELY MISPLACED.**

Your Amicus respectfully submits that the universe of "floods" exists on a spectrum. As it is with many aspects involving interaction between man and nature, at one end of that spectrum man has control; at the other end he doesn't. Examples of the end man can control are:

I own a piece of property upon which I impound water. My impoundment fails, and that water floods my neighbor.

I own property through which a stream flows. In order to protect myself and my property from flooding, I build flood walls along the stream on my property (thus raising

its banks) to deter it from overflowing and flooding me; by doing so, however, I increase the amount of water flowing to my neighbor's property, flooding it when it otherwise wouldn't.

I operate my motor vessel negligently, allowing it to become stuck upon a bridge abutment which results in blocking of the channel of the stream which causes flooding.

I own a small piece of property in southern West Virginia; it has been in my family for 50 years. In the past, if we had a five-year rainfall event (a 20% chance of one in any year) or less, my property did not flood. Five years ago, a surface mine was developed adjacent to and upstream of my property. Since then, I have water in my yard and in my basement every time it rains.

I own a piece of property near a municipality. Previously, it was dry and capable of being developed. Three years ago, a commercial entity built a retail outlet on the adjacent property. Since then, my property is wet and muddy thirty percent of the time, and has water standing on it several inches deep at least one month out of every year.

The Department of Highways builds a road along my property, including a drainage ditch. It allowed the ditch to be clogged near my home and a normal summer storm causes the ditch to back up and flood my house.

It is these situations existing at the end of the spectrum over which man clearly exerts control that have historically resulted in litigation and around which have grown the legal theories and principles which govern the apportionment of fault and liability to man for such events. Clearly, private land owners, commercial developers, government entities such as the Department of Highways, municipalities, farmers, and all other users

and developers of land can, should, and have been held responsible when it is proved that their actions on this end of the spectrum have caused damage to others.

At the other end of the spectrum are those events that are only infrequently visited upon us by Mother Nature that are of such scope and magnitude that they clearly overwhelm and supersede the impact of man's activities. Your Amicus respectfully submits that events that occur on that end of the spectrum are out of man's control, and cannot properly be dealt with in our civil justice system through utilization of the rules developed to adjudicate liability for events that occur on the opposite end of the spectrum, where man has control.

Already under a Federal disaster declaration,[23] West Virginia experienced on 8 July 2001 storms that were, by all accounts, of historic proportion. Huge portions of southern West Virginia sustained at least a one-hundred year storm event, much of it between a five-hundred and one-thousand year (or more) event.[24] The overall area implicated and/or affected by the 8 July 2001 storms covers several million acres and thousands of miles of creeks, streams, and rivers. Thousands of homes, businesses,

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[23] See FEMA website at http://www.fema.gov/news/newsrelease.fema?id=6544; http://www.fema.gov/news/newsrelease.fema?id=6463; http://www.fema.gov/news/eventcounties.fema?id=114; http://www.gismaps.fema.gov/2001graphics/dr1378/dr1378dec.jpg.)

[24] Judge Hutchison acknowledged that:

> [t]he storm event was significant by all accounts and by certain testimony, it was described as unprecedented, epic and perhaps diluvian. In interpreting the magnitude of the rainfall event, as this Court is required in a manner most favorable to the Plaintiffs, it is clear that the Slab Fork Creek Subwatershed received between two inches and five inches of rainfall in an eight-hour period.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 8).

bridges, roads, and other structures were damaged or destroyed, almost if not all of them, upon information and belief, located within the floodplain. It is on this end of the spectrum that belongs exclusively to Mother Nature, upon this backdrop, that Plaintiffs have chosen to sue. Their "theory," selectively applied to the coal and timber industries, is simple: If you own or lease or use land that is upstream from a Plaintiff whose property was flooded, and if changes that you made to your land increased the "peak flow" or "peak discharge" of water over what it would have been had the land remained pristine and undisturbed, you are liable. Your Amicus respectfully asks this Honorable Court to recognize one thing and hold it in its collective mind: If the Plaintiffs' "theory" is accepted, and assuming it could be factually proved, it means that every land user or owner can be "liable" to every other land owner or user for any flooding that occurs anywhere downstream. Every farm, every parking lot, every shopping center, every golf course, every residential development, every home, every business --- every "disturbed" piece of property. Is this to be the law in West Virginia? Can it possibly?

There is a wide, logical, analytical, scientific disconnect between the circumstances and situations posed by the rainfall and flooding of 8 July 2001, which was caused by rainfall on the far end of the spectrum of what one can receive from Mother Nature, and situations arising from rainfall on the other end, where Mother Nature's "routine" activities are involved. Accordingly, any effort to assess liability to man at that end of the flood spectrum is entirely misplaced. Trying to pound the square peg of sensible legal principles into that round factual hole causes them to shatter.

## V. CONCLUSION

Six and a half years have passed since major rain storms caused flooding that devastated southern West Virginia on 8 July 2001. The Flood Litigation filed in connection with that flooding has existed nearly as long. This Honorable Court entered its second administrative order with respect to this litigation on 16 May 2002.[25] In that Order, this Court adopted the findings of fact that had been recommended to it by Judge Johnson. It is noteworthy, and we submit dispositive, that the findings of fact adopted by this Honorable Court in that Order, most particularly Nos. 1 through 4, and very specifically No. 3, **represented then and still represent today the most reliable factual conclusions available relating to the 8 July 2001 floods.** Finding of Fact No. 3 is:

> The types of land uses in an area can affect the volume, rate and/or timing of runoff in a particular location during and/or after a period of rainfall as can a myriad of other factors. When the volume, rate and/or timing of runoff is affected, this can result in an **increase or decrease** in water level elevations in particular locations following any defined amount of rainfall.[26]

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[25] See Administrative Order, entered on 16 May 2002.

[26] Findings of Fact Nos. 1, 2 and 4:

1. The system of storms that passed over southern West Virginia during July 8, 2001 impacted, to different degrees, certain areas in Boone, Fayette, Kanawha, McDowell, Mercer, Raleigh, and Wyoming Counties along with other locations in West Virginia.

2. Rainfall during July 8, 2001 impacted, to different degrees, portions of the Coal River, Lower New River, Middle New River, Tug River, Upper Guyandotte River and Upper Kanawha Valley watersheds and the sub-watersheds within them.

4. The water levels at any given point in a watershed or sub-watershed depend, in addition to total rainfall over a defined period, upon a number of factors unique to that defined area, including, conditions in the watershed or sub-watershed upstream of the precise point of interest and can be affected in some instances by certain downstream conditions as

What Judge Hutchison so eloquently concluded after his first Phase I trial was that Plaintiffs were not able to carry their burden factually of proving that a particular Defendant's use of its land in a particular area did result in an "increase" in water level elevations in particular locations following the unprecedented rainfall event of 8 July 2001, and in fact their experts testified they could not do so. Simple as that. Years of litigating, millions of dollars in expenses, huge amounts of time expended by Judges and their staffs, and untold inconvenience to Defendant parties, have brought us full circle to a "fact" that was readily apparent from the beginning: Man's ever increasing use of the land may cause either an increase or a decrease in runoff from that land in a particular circumstance. Your Amicus respectfully submits that at Mother Nature's end of the spectrum it just doesn't matter. Absent this Court's approval of a general indictment of the extractive industries through the application of strict liability with respect to flooding, Plaintiffs are simply unable to prove as a factual matter with respect to any of the pieces of property that they have selectively pulled into this litigation (not to mention the other thousands of pieces waiting in the wings) that what might happen under some circumstances did happen on 8 July 2001.[27] End of story.

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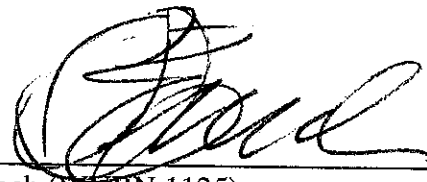
> well. An engineering analysis of water levels, including modeling, must be performed without regard for political boundaries such as county lines.

Id.

[27] In rendering his ruling, Judge Hutchison found that:

> ... it is not proper proof by circumstantial evidence to say that, because there was a potential increase in peak flow from a piece of real estate located several miles from the mouth of the Guyandotte River, that this



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> increase in peak flow caused or contributed to the flooding. We are left in the position where we are left with the logical fallacy of *Post Hoc ergo Propter Hoc*. The absence of any evidence regarding the downstream effect of increased peak flow left this jury with nothing more than speculation upon which to base a decision regarding its finding as to the second question.

(15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 30).

*Post Hoc ergo Propter Hoc* is "Latin for 'after this, therefore because of this'; a logical fallacy which assumes that if one event happens after another, then the first must be the cause of the second." (15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 30, n. 45).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33710

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797
Upper Guyandotte River Watershed
Subwatershed 2a

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 7th day of January 2008 true and correct copies of the Defendants' ***Amicus Curiae Brief*** were sent via first-class U.S. mail to:

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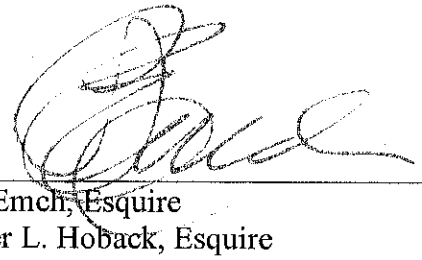

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