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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOOD LITIGATION

CIVIL ACTION NO: 02-C-797
Upper Guyandotte River Watershed
Subwatershed 2a

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION
FOR JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL**

STATEMENT OF THE CASE

The Motion now before the Court arises from a bifurcated trial involving the Upper Guyandotte River Watershed denoted for purposes of this flood litigation as Watershed #2 and further limited to Subwatershed 2a (hereinafter sometimes referred as Mullens) and Subwatershed 2e (hereinafter referred sometimes referred to as Oceana).

The trial of the bifurcated issues took place during March, April and May of the year 2006 and occurred in the Circuit Court of Raleigh County, West Virginia, John A. Hutchison, Judge presiding.

In preparation for the pending trial, this Court adopted on the 26th day of January 2006, a "Trial Plan for Subwatersheds 2a and 2e of the Upper Guyandotte Watershed." The Trial Plan was adopted over the strenuous objections of the Defendants then participating and over some objections filed by the Plaintiffs in this action.

For purposes of this Order, the Plaintiffs are identified in four groups: The Segal Group, The Calwell Group, The McGraw Group and The Humphrey Group. On the first day of jury selection, the Defendants numbered 28 and included the following:

MULLENS	OCEANA
Beaver Coal Company	A.Z. Litz, LLC
Bluefield Timber, LLC	Bluefield Timber, LLC
Eastern Associated Coal Corp.	Bob Crouch
Georgia Pacific Corp.	Eastern Associated Coal Corp.
McCreery Land Co.	Georgia Pacific Corp.
Norfolk Southern Corp.	Norfolk Southern Corp.
Norfolk Southern Railway Corp.	Norfolk Southern Railway Corp.
North American Timber Corp.	Pioneer Fuel Corp.
Piney Land Co.	Plum Creek Timber Lands
Pocahontas Land Corp.	Pocahontas Land Corp.
Western Pocahontas Corp.	North American Timber Corp.
Western Pocahontas Properties, LLP	Tioga Lumber Co
White Oak Land Co.	Wagner Forest Management, Ltd.
White Oak Lumber Co.	Western Pocahontas Corp.
Wyoming Pocahontas Land Co.	Western Pocahontas Properties, LLP
	White Oak Lumber Co.

During the course of the trial, based upon rulings made by this Court or based upon confidential settlements between the parties, the trial was concluded and sent to the jury regarding questions of conduct as it related to Western Pocahontas Properties LLP. and Western Pocahontas Corporation. For all intents and purposes, while the final two remaining defendants

were sued separately, the Corporations are related Corporations and for purposes of this order are treated as one Defendant hereinafter referred to simply as "Western Pocahontas".

In adopting the trial plan as previously cited, this Court, after consultation with all counsel for the Plaintiffs and all counsel for the Defendants, determined that the jury in the Phase One trial for the Mullens and Oceana Subwatersheds would be required to answer three questions:

- 1) Whether, as to each Defendant's individual operation or operations, the Defendant's use of its property materially increased the peak rate of surface water runoff leaving that operation as a result of the storm events on or about July the 8th, 2001, compared to the rate of peak surface water runoff that would have left the operation but for the Defendant's use of that property, and if so;
- 2) Whether the water from the individual Defendant's operation materially caused, or contributed to, the stream or streams in to which they discharged to overflow their banks and;
- 3) Regardless of the findings made in 1 and 2 above, whether the Defendant's use of the property in question was 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).

The Trial Plan further ordered 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 their 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.

At the conclusion of the evidence and upon instruction, the jury retired to consider its verdict with regard to the three questions placed to them as those three questions specifically related to Western Pocahontas.

On the 2nd day of May, 2006, the jury returned their verdict and found that Western Pocahontas had materially increased the peak flow from its operations, that the peak flow materially caused the streams into which the discharge ran to overflow their banks and ultimately that the use by the Defendants of their land holdings was unreasonable.

The jury verdict was recorded and it is from that trial and jury verdict that Western Pocahontas now seeks relief by way of Motion for a Judgment as a Matter of Law or for a New Trial.

Western Pocahontas cites in their Motion eleven (11) separate grounds for reversal of the jury's verdict and for entry of a Judgment as a Matter Of Law, or in the alternative, a new trial.

The issues are as follows:

- 1) The Trial Plan adopted by the Court was unconstitutional, especially as it relates to Rule 42(c) of the West Virginia Rules of Civil Procedure.
- 2) The inherently flawed and unconstitutional Trial Plan created an inherently flawed trial process.
- 3) The jury verdict as rendered is against the weight of the evidence produced at the trial.
- 4) Plaintiffs' counsel engaged in conduct and made statements throughout the trial that prejudiced the Defendants' right to a fair trial.

- 5) The Court erred in admitting Plaintiffs pictures of alleged flood damage without requiring proper foundation as to location, cause and relevance.
- 6) The Court erred by failing to admit photographs of flooding at Twin Falls State Park; the Park is in a separate Subwatershed but reasonably close to the Mullens Subwatershed.
- 7) The Court erred in allowing testimony regarding the conduct of dismissed Defendants to be considered by the jury and used to make a judgment regarding the conduct of Western Pocahontas.
- 8) The Court erred by allowing the conduct of White Oak Lumber and/or White Oak Timber to be considered as conduct attributable to Western Pocahontas when White Oak was dismissed prior to submission of the case to the jury.
- 9) The Court instructed the jury with a flawed jury charge.
- 10) The Court erred by using a flawed jury verdict form.
- 11) An individual juror should have been disqualified because of bias, which was not reasonably known to Western Pocahontas prior to the trial, during the trial or during jury deliberations.
- 12) Newly discovered evidence was not available at the time of the trial.

The Court, in preparing its ruling contained in this order, has reviewed the transcripts of the pertinent testimony and proceedings, the Motion and memorandum of Western Pocahontas, the memoranda in opposition filed by the various Plaintiffs and, finally, Western Pocahontas' reply to the Plaintiffs' joint response.

Western Pocahontas has filed a supplemental motion in this matter reciting newly found evidence which comes in the form of a scientific article, which was not published until after the

conclusion of the trial and which directly rebuts the scientific basis of Plaintiffs' experts and their use of certain water flow models in preparing their expert opinions. The Court, for purposes of this order, does not consider the supplemental motion at this time and defers ruling on Western Pocahontas' Supplemental Motion for Judgment as a Matter of Law or New Trial.

Prior to the conclusion of the taking of evidence in this case and through either Motions to Dismiss and confidential settlements, the sixteen (16) Defendants named in the Oceana Subwatershed were dismissed, either through legal rulings by this Court or global settlements entered into by the various Defendants with the Plaintiffs. It is important to note at this point that the Segal Plaintiffs only made claims against Western Pocahontas and only in the Mullens Subwatershed. The remaining Plaintiffs, identified as The Calwell Group, The Humphrey Group and The McGraw Group, who were identified as being in the Oceana Subwatershed, were all dismissed from further participation in this Flood Litigation, either by settlements or dismissal of all Defendants pertaining to them. All claims in the Oceana Subwatershed have been resolved and dismissed.

FINDINGS OF FACT

The purpose of this segment is to, as clearly as possible, outline the existing facts as proven by the evidence or taken in a light most favorable to the Plaintiffs and to outline, as clearly as possible, the legal claims that remained at the end of the evidence for submission to the jury. At the close of evidence, the only Subwatershed, which required resolution of issues by the jury, was the Mullens Subwatershed. The area in question is further defined and limited to the

Slab Fork Creek Sub-Subwatershed¹, which empties into the Guyandotte River, as said river passes through or near the town of Mullens, West Virginia.

At the beginning of these proceedings, great effort was expended in identifying the areas across the eight counties, affected by the rain event of July the 8th, 2001, and those efforts resulted in the identification of six (6) distinct watershed areas, which are labeled as:

- 1) Tug Fork River
- 2) Upper Guyandotte River
- 3) Upper (Middle) New River
- 4) Lower New River
- 5) Upper Kanawha River
- 6) Coal River

Each of these various distinct watersheds contains discrete and specifically identifiable Subwatersheds. The Upper Guyandotte River Watershed designated in all the records in this flood litigation as Watershed #2, contains fourteen (14) distinct and discretely identifiable Subwatersheds designated on the official maps adopted for this litigation as Watersheds 2a – 2m.

During the course of the Phase One Trial regarding the Mullens and Oceana Subwatersheds, the parties, by evidence and agreement, identified a number of sub-subwatersheds inside Subwatersheds 2a and 2e.

At the conclusion of the evidence and the presentation of the case to the jury for their consideration, the conduct of Western Pocahontas, as it occurred in the Slab Fork Creek Subwatershed, was the only conduct appropriately before the jury for their consideration, because the only Defendant remaining at the conclusion of trial was Western Pocahontas. The

¹ For purposes of this Order, clarity, and the manner in which the evidence was presented at trial, this Court will refer to the Slab Fork Creek Sub-Subwatershed, located within the Mullens Subwatershed, the boundaries of which were clearly identified in the evidence, as the Slab Fork Creek Subwatershed.

evidence showed that in the Slab Fork Creek Subwatershed there are approximately 22,650 acres. According to computations by Plaintiffs' expert, Mr. Morgan, approximately 10,000 acres of the Slab Fork Creek Subwatershed were subject to harvesting in the 10 years immediately preceding the flood event, and the Defendants used 90 percent of that acreage.

The essential claim against Western Pocahontas was that, in the ten years immediately preceding the July 8, 2001, storm event, Western Pocahontas had timbering operations on 40 percent of the acreage it controlled in Slab Fork Creek Subwatershed, and that the disturbance by Western Pocahontas of that 40 percent of acreage created conditions which materially increased the peak flow from that acreage, and that this peak flow materially increased the overflow of the receiving streams and, as a result, the use by Western Pocahontas of its property was unreasonable.

The evidence is quite clear that on July the 8th, 2001, a significant storm event occurred in the Mullens Watershed (and other areas of Southern West Virginia). The storm event was significant by all accounts and by certain testimony, it was described as unprecedented, epic and perhaps even 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.

The result of this significant rainfall was that the Mullens area and certain areas upstream of Mullens along Slab Fork Creek Subwatershed were flooded. There was significant physical damage to the property of the Plaintiffs, represented by The Segal Group, The Calwell Group, The McGraw Group and The Humphrey Group, which lived in the Mullens Watershed.

The *unrefuted* evidence presented by Western Pocahontas was that, while timbering operations occurred on approximately 40 percent of their holdings in the Slab Fork Creek Subwatershed,

over a ten year period, that those timbering operations resulted in the removal of only 20 percent of the trees growing on the areas timbered. The evidence further showed that while the specific acreage used for harvesting purposes varied slightly on a year-to-year basis, an average of 4 percent per year over a ten (10) year period is an accurate estimate of the annual acreage open for timbering in the Slab Fork Creek Subwatershed. In addition, based upon the evidence, an annual removal rate of 2 percent of the standing timber is likewise an accurate estimate. The testimony clearly showed that Western Pocahontas had a timber management plan which restricted timber removal by a process known as "diameter limit cut". The evidence was clear in this case that the timber management plan permitted the removal of trees sixteen (16) inches in diameter or larger for marketing purposes and also permitted the removal of "trash trees and/or damaged trees."

The undisputed evidence in the case is that, based upon the timber management plan in place on Western Pocahontas, the available board feet for harvesting was greater in 2001 than it was in 1991, despite the fact that Western Pocahontas removed, on average, 2 percent of the available timber on an annual basis for the preceding ten years.

The evidence is undisputed that on the date of his investigation, Plaintiffs' expert, John Morgan, based upon his review of aerial topographical maps and other information, opined that there were approximately 245 miles of skid trails, haul roads and other unimproved roads located on Western Pocahontas' property in the Slab Fork Creek Subwatershed. Based on Mr. Morgan's calculations, those 245 miles of roads equaled approximately 500 acres of total land used for roads, or approximately .5 percent of the land controlled by Western Pocahontas in the Slab Fork Creek Subwatershed.

During the timbering operations, the evidence showed that, with the exception of one or two specific instances noted in the records of Western Pocahontas regarding timber removal

operations, Western Pocahontas Land followed all Best Management Practices ("BMP's") and followed all industry standards with regard to diameter limit cutting and cutting in hilly terrain. The evidence is likewise undisputed that investigation of a representative number of harvesting sites on Western Pocahontas showed that all had been "closed out" as required by the BMP's adopted by the State of West Virginia and also by practices commonly found in the industry at large. The evidence shows that representatives of Western Pocahontas inspected harvest sites upon which contractors were operating and noted the compliance, or lack thereof, with the required standards included in the timbering contracts, which included BMP's. The testimony revealed that on two specific occasions a Western Pocahontas employee noted specific violations which were ordered altered and/or repaired. An investigation of all the records revealed no consistent pattern of violation of BMP's or accepted industry standards.

In a light most favorable to the Plaintiffs' case, the opinions of Mr. John Morgan were that:

- 1) The operations of Western Pocahontas on its real estate located in the Slab Fork Creek Subwatershed materially increased the peak flow during the storm event on July the 8th 2001;
- 2) This increase in peak flow materially contributed to the overflow of Slab Fork Creek and its sub-tributaries in a material way and;
- 3) The cumulative effect of timbering operations on 40 percent of the property owned and managed by Western Pocahontas in the Slab Fork Creek Subwatershed was unreasonable, caused the excessive peak flow and materially contributed to the overflow of Slab Fork Creek and its tributaries.

There was no direct testimony supplied by Mr. Morgan or by Dr. Bruce A. Bell, an engineering expert called by Plaintiffs, The Calwell Group, The McGraw Group and The Humphrey Group, that Western Pocahontas materially violated and BMP's or accepted industry standards.

The undisputed evidence produced by the defense, forestry experts and forest hydrologists was that, if a timbering operation follows BMP's and industry standards, and is "closed out" or reclaimed in conformity with these standards, then that particular timber operation will return to its pre-disturbance condition within four years.

CONCLUSIONS OF LAW **EXPERT OPINIONS**

The Defendants in this matter have vigorously, from the beginning of these proceedings, challenged the expert testimony proffered by the Plaintiffs' Groups in support of the Plaintiffs' position in this case that the disturbance of land by Western Pocahontas created conditions that materially increased the peak flow of water off the disturbed real estate. The Plaintiffs contend that, as a result of this increase, there was a material increase of flow into the streams serving Western Pocahontas' real estate causing those streams to overflow their banks. Finally, Plaintiffs' contend that the excessive timbering by Western Pocahontas was an unreasonable use of their real property.

The admission of expert evidence² is governed by Rule 103³, Rule 702⁴, Rule 104⁵, Rule 401⁶ and 403⁷ of the West Virginia Rules of Evidence. A review of these rules and the related

² Opinion evidence of competent experts may be properly called for when questions presented are of such nature that lay persons generally would not be as competent to pass judgment thereon. State v. McFarland, 175 W.Va. 205, 332 S.F.2d 217 (1985); State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); Norfolk & W. Ry. Co. v. Christian, 83 W.Va. 701, 99 S.E. 13 (1919).

RULE 103. RULINGS ON EVIDENCE

- (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
 - (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
 - (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
- (b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
- (c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. Where practicable, these matters should be determined upon a pretrial motion in limine.
- (d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

[Effective February 1, 1985.]

⁴ RULE 702: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

⁵ **RULE 104. PRELIMINARY QUESTIONS**

- (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
- (b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
- (c) Hearing of Jury. Hearings on the admissibility of confessions and evidence seized as a result of a search and seizure shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
- (d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
- (e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

⁶ RULE 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

⁷ RULE 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

case law indicates that a Court may admit expert testimony "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact an issue⁸."

Clearly this presupposes that the expert has knowledge, skill, experience, training and/or education which would permit him to have the above-referenced scientific, technical or other specialized knowledge⁹. From a very basic standpoint, it is clear that an expert will be permitted to testify, if his testimony is based upon sufficient facts or data and that the testimony is the product of reliable principles and methods and finally, that the expert has applied the principles and methods reliably to the facts of the particular case¹⁰.

In order to admit expert testimony, the Judge must establish, based upon the record before him¹¹:

- 1) The relevant issues to be proven;
- 2) Whether the technical issues are beyond the knowledge of the average juror;
- 3) Whether the expert's testimony will include:
 - a. Science,
 - b. Technology, or

⁸ See Rule 702.

⁹ Purpose of expert opinion testimony is to allow witnesses possessing requisite training, skill, or knowledge in particular area to enlighten fact finder. Rules of Evid., Rule 702. State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

¹⁰ In analyzing admissibility of expert testimony under applicable rule of evidence, trial court's initial inquiry must consider whether testimony is based on an assertion or inference derived from scientific methodology and whether it is relevant to a fact at issue, and further assessment should then be made of testimony's reliability by considering its underlying scientific methodology and reasoning and assessing factors including whether scientific theory and its conclusion can be and have been tested, whether theory has been subjected to peer review and publication, whether theory's actual or potential rate of error is known, and whether theory is generally accepted within scientific community. State ex rel. Weirton Medical Center v. Mazzone, 213 W.Va. 750, 584 S.E.2d 606 (2003).

¹¹ Under West Virginia law, qualification of a witness to testify as an expert lies within the sound discretion of the trial court. Bryant v. Sears, Roebuck & Co., 435 F.2d 953 (1970).

c. Other specialized knowledge:

- 4) And, finally, whether the expert's education, training, skill, experience and/or knowledge regarding the subject matter about which he will testify are sufficient.

Having reviewed all of these matters, this Judge must apply a two-prong test for admissibility¹². The first prong is "relevancy". Essentially, relevancy, in terms of scientific testimony, requires that the theories, studies or procedures fit the facts and issues before the Court. The second prong, "reliability", requires that the information is valid from a scientific standpoint. If the science is valid, i.e., the principals and methodology are valid, then the evidence is reliable. If the science is not valid, then the evidence is not reliable.

The United States Supreme Court, in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), announced a number of nonexclusive criteria to determine whether the proffered evidence is relevant and reliable. The West Virginia Supreme Court of Appeals, in Wilt v. Buraker, 191 W.Va. 39, 443 S.E.2d 196 (1993), adopted the Daubert standards. In Wilt, the West Virginia Supreme Court held that prior to admitting evidence under Rule 702 of the West Virginia Rules of Evidence, a trial judge must first determine that the testimony is "based upon an assertion or inference derived from scientific methodology"¹³. The West Virginia Court also

¹² When scientific evidence is proffered, circuit court in its gatekeeper role must engage in two-part analysis: 1) whether expert testimony reflects scientific knowledge, whether findings are derived by scientific method, and whether work product amounts to good science, and 2) whether scientific testimony is relevant to task at hand. Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

¹³ Id. at 46, S.E.2d at 203. Also see Watson v. Inco Alloys Intern., Inc., 209 W.Va. 234, 545 S.E.2d 294 (2001) (unless an engineer's opinion is derived from the methods and procedures of science, his testimony is generally considered technical in nature, and not scientific; therefore, a court considering the admissibility of such evidence should not apply the gatekeeper analysis set forth in Wilt and Gentry.)

found that the trial judge must consider the expert reliability¹⁴. If found, the Daubert analysis would be appropriate.

Essentially, the enumerated factors in Daubert (recognizing that they are nonexclusive) include as follows:

- 1) Testing:
 - a. "whether [the theory or technique] can be (and has been) tested¹⁵,"
 - b. Who has conducted tests on the issue at hand?
 - c. Was there independent testing?
 - d. How was it tested? (Meaning what methods were used, how was the data collected and was there a statistically significant sample collected.)
- 2) Error Rate:
 - a. Was there a statistically determined error rate¹⁶?
 - b. In addition to that, what would be the acceptable rate of error for the methodology performed?
- 3) Peer Review:
 - a. "whether the theory or technique has been subjected to peer review and publication¹⁷,"

¹⁴ "Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community". Id.

¹⁵ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993).

¹⁶ Id. at 594.

¹⁷ Id. at 593.

4) General Acceptance:

- a. In reviewing the tests, the methods, the data and the sample size, were the methods of testing and the methods used to perform the tests generally accepted¹⁸ within the scientific community regarding that type of expertise?

The United States Supreme Court, in Kumho Tire v. Carmichael, 526 U.S. 137 (1999), stated that all matters of expert testimony - scientific, technical or other specialized knowledge - are to be reviewed by the Court for their methodology in forming conclusions or opinions. Recognizing that the West Virginia Supreme Court of Appeals has not formally adopted the Kumho decision with regard to these matters, the West Virginia Supreme Court has nonetheless stated in State v. Lockhart¹⁹ that a "circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science²⁰." The Court went on to require that, "the Circuit Court must ensure that the scientific testimony is relevant to the task at hand²¹." In the Lockhart decision, the Court further noted that the question of admissibility of expert testimony under Daubert only arises, if it is first established that the testimony deals with scientific knowledge

¹⁸ Id. at 594.

¹⁹ First and universal requirement for admissibility of scientific evidence is that the evidence must be both reliable and relevant, and the reliability requirement is met only by a finding by the trial court that the scientific or technical theory, which is the basis for test, results is indeed scientific, technical, or specialized knowledge. State v. Lockhart, 208 W.Va. 622, 542 S.E.2d 443 (2000); Also see, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171(1995).

²⁰ "First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science." State v. Lockhart, 208 W.Va. 622, 624, 542 S.E.2d 443, 445 (2000).

²¹ Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand." Id.

and "scientific" implies a grounding in the methods and procedures of science, while "knowledge" connotes more than subjective belief or unsupported speculation²².

The experts proffered in this case by the Plaintiffs' groups include Dr. Bruce A. Bell and Mr. John Morgan, both of whom have engineering backgrounds²³. Dr. Bell testified that his work experience related to issues involving wastewater treatment, storm sewer design and storm water management systems, as well as other general duties connected with his undergraduate degree in Civil Engineering and his advanced degrees in Environmental Engineering²⁴.

John Martin has an undergraduate degree in engineering and has several years of experience, especially in mining engineering, and has dealt with, pursuant to his testimony, some issues related to water as they relate to mining operations²⁵.

Essentially, both experts in their testimony opined that, based upon their review of the facts and circumstances made available to them in this case, that the disturbance of the surface of the land by the Defendants significantly or materially increased the peak flow off of that real

²² Under Daubert standard for admissibility of scientific evidence, evidence must be both reliable and relevant; reliability requirement is met only by finding by trial court that scientific or technical theory which is basis for test results is indeed scientific, technical, or specialized knowledge, and relevancy requirement compels trial judge to determine that scientific evidence will assist trier of fact to understand evidence or to determine fact in issue. Craddock v. Watson, 197 W.Va. 62, 475 S.E.2d 62 (1996); State v. Beard, 194 W.Va. 740, 461 S.E.2d 486 (1995) opinion after remand 203 W.Va. 325, 507 S.E.2d 688.

²³ For purposes of determining whether a person is qualified to testify as an expert, neither a degree nor a title is essential, and a person with knowledge or skill borne of practical experience may qualify as an expert, although the circuit court may exclude testimony if the experience is too far removed from the subject of the proposed testimony. Tracy v. Cottrell ex rel. Cottrell, 206 W.Va. 363, 524 S.E.2d 879 (1999); Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

²⁴ An expert may state his conclusions drawn from findings which he is able to make within area of his special knowledge. Rhodes v. U.S., 282 F.2d 59 (1960), certiorari denied 364 U.S. 912.

²⁵ Although opinion of expert is admissible if given within field of his expertise, his opinion regarding matters outside his field of expertise and within knowledge of persons of common experience and observation is not admissible. State v. Noe, 160 W.Va. 10, 230 S.E.2d 826 (1976); Witness whose educational background was in civil engineering, with additional training in nuclear engineering, safety, radiological controls, and business management was not qualified to give opinion about health risks associated with exposure to medical waste. Medigen of Kentucky, Inc. v. Public Service Com'n of West Virginia, 787 F.Supp. 602 (1992).

estate during a rain event and because of that, caused the secondary streams to overflow their banks causing significant flooding.

In arriving at their expert opinions, both experts resorted to the use of certain waterflow models commonly used in engineering to predict peak surface flow, based upon a variety of factors selected by the engineers in running the model computation. The models used by the experts included the SEDCAD model, which was used by Mr. Morgan, the HEC-1 model, as well as, the TR55 model. The record should note that the SEDCAD model is a proprietary computer-based program, which is based on the HEC-1 modeling program.

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 Subwatershed but was an analysis based upon a hypothetical area using certain assumptions selected by Mr. Morgan to be included in the models' computation. For example, Mr. Morgan assumed the humus depth, type of soil, existence or 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.

During his cross-examination, Mr. Morgan clearly stated that, in preparing his models and publishing the data derived from those models, he was not trying to model actual runoff from the Mullens and/or Slab Fork Creek Subwatersheds; he was attempting to depict sensitivity of a watershed when changing various factors inside the model including humus depth, compaction and other variables, including curve numbers and, by changing these variables,

attempting to show a measured increase in predicted peak flow or a measured decrease in peak flow. It 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.

In performing their calculations, Dr. Bell and Mr. Morgan clearly indicated that their testing was done to provide information relative to Issue One, which would be an increase in peak flow, based upon a variety of disturbances found on a hypothetical piece of ground. Both experts, however, indicated that it would be nearly impossible to determine the impact of that increased runoff on the flooding, if any occurred, because of any number of uncontrolled factors. Therefore, neither of the experts opined regarding findings related to Issue Two, which required the jury to determine if a material increase in peak flow caused the receiving streams to materially overflow their banks. In fact, upon direct questioning, Mr. Morgan admitted that he could not ascertain from where the floodwater that arrived in the town of Mullens came, with respect to the Slab Fork Creek Subwatershed or other Subwatersheds inside the Mullens Subwatershed 2a, and how long it may have taken for the water to arrive in Mullens²⁶.

Thereafter, when queried regarding issues related to timbering operations' methods and steps used by timbering companies to abate any kind of risk of increase in peak flows off of timbered real estate, both Dr. Bell and Mr. Morgan relied upon the opinions of Dr. William Martin, a forest ecologist who had been named or identified as an expert witness by the Plaintiffs but who did not testify²⁷ and was later withdrawn²⁸.

²⁶ Admission, over objection of an opinion of a witness examined as an expert, upon a matter as to which he disclaims qualification to express an opinion, is erroneous. Fisher v. Flanagan Coal Co., 86 W.Va. 460, 103 S.E. 359 (1920).

²⁷ Expert testimony would not meet reliability standard and should be excluded where based on underlying studies that are not presented in evidence and whose methodology is not explained. Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), certiorari denied 511 U.S. 1129.

In ultimately reaching their expert conclusions, both Dr. Bell and Mr. Morgan opined that the disturbance by the Defendants materially increased the peak flow of water coming off the Defendant's property during the rain event of July 8, 2001. The ultimate basis for those opinions rests upon their computations and data derived from the use of the HEC-1, TR55 models and, in Mr. Morgan's case, the SEDCAD program, which as has been previously stated, is a proprietary program based upon the HEC-1 model. In addition to that, however, Dr. Bell and Mr. Morgan relied upon the conclusions of Dr. William Martin, who provided research and expert opinions to the Plaintiffs group based upon his review of the facts and circumstances available to him in the Mullens Subwatershed, but who did not testify regarding those findings and conclusions.

The Defendants in this matter have sought, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, a Judgment as a Matter Of Law in their favor, arguing that there was no legally sufficient evidentiary basis for a reasonable jury to find in favor of the Plaintiffs in this matter on any of the three issues tried²⁹.

With this outline in place, it is important, based upon the Defendants motions, to review and reanalyze the expert opinions provided by Dr. Bell and Mr. Morgan and to determine from a detailed analysis, whether the Defendants' Rule 50 Motion has merit.

It is quite clear, based upon the background of both Dr. Bell and Mr. Morgan, that in preparing for their expert testimony, each resorted to scientific analysis to determine or provide a basis for their opinions. Based upon a review of their education, training, skill and experience

²⁸ In determining whether expert is qualified to give opinion, generally, trial judge should determine whether expert's opinion has reliable foundation and whether expert's opinion is relevant to issue before court. City of Wheeling v. Public Service Com'n of W. Va., 199 W.Va. 252, 483 S.E.2d 835 (1997).

²⁹ The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings; thus, rulings on the admissibility of evidence are committed to the discretion of the trial court. State v. Johnson, 213 W.Va. 612, 584 S.E.2d 468 (2003).

backgrounds, it is clear that neither would possess any specialized knowledge with regard to timbering operations and the methodologies to use or not to be used during those operations. Both experts have relied on science and technology to serve as the basis for their opinions.

As required by a Daubert analysis, at the time the evidence is offered, it must be determined that the expert testimony proffered is based upon scientific evidence and the Judge must thereafter determine if the evidence is grounded in the methods and procedures of science³⁰. And before admitting scientific, technical or other specialized knowledge, the Court is required to ascertain whether the evidence or testimony of a theory or technique:

- 1) Can be tested or has been tested?
- 2) Was subjected to peer review in publication?
- 3) Has a known rate or potential rate of error?
- 4) Is the method generally accepted in the relevant scientific community?
- 5) Was completed and data collected for purposes of litigation?

The fifth test under Daubert was not adopted by the United States Supreme Court but was imposed by the U.S. Court of Appeals for the Ninth Circuit when the Supreme Court remanded the Daubert case. The Ninth Circuit imposed an additional requirement that, when evidence is created for litigation purposes, there must be an adequate explanation as to methodology³¹.

³⁰ When analyzing expert testimony, trial courts are to focus on the soundness of the principles and methodologies used, not the conclusions ultimately reached. State ex rel. Weirton Medical Center v. Mazzone, 213 W.Va. 750, 584 S.E.2d 606, (2003).

³¹ "One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir.1995) (holding that Plaintiffs' expert opinions were inadmissible because they must stand by the conclusions they originally proffered.)

Applying these standards to the reliance by Dr. Bell and Mr. Morgan upon the report prepared for this litigation by Dr. Martin, there was no evidence presented in this case that the reports, conclusions and data collected by Dr. Martin had ever been tested or were ever subjected to peer review. There was no information regarding a rate of error. There was no evidence that the opinions, methods and techniques used to derive the data and opinions of Dr. Martin were generally accepted in the relevant scientific community. Finally, it is clear that the testing and reports, prepared for purposes of this litigation by Dr. Martin, were not examined regarding the methodology utilized by Dr. Martin in arriving at his opinions. Thus, the Plaintiffs failed, either by and through Dr. Martin, or through the other expert witnesses, to prove the relevance and reliability of Dr. Martin's work³².

While it may be that experts such as Dr. Bell and Mr. Morgan may routinely rely upon reports of the nature provided by Dr. Martin, there was no indication or testimony by either of the testifying experts that they used the same intellectual rigor and standards of scientific or technical validity in reviewing Dr. Martin's report. There is no proof in the record that Dr. Martin's report was, from a scientific standpoint, relevant and reliable.

One must always remember that the scientific standard of validity is higher than any evidentiary standards used by the trier of fact in civil actions and experts do not, when they are called to testify, leave behind their obligation, required of scientific professionals, to subject the material upon which they are relying to close scrutiny from a scientific standpoint. Clearly, the inability of the Defendants in this case to cross-examine and test the methods used by Dr. Martin in his report placed them at a distinct disadvantage when these experts, who could not testify as to its scientific reliability, relied upon that same report. Therefore, this Court erred in permitting

³² Under rules of evidence, with regard to scientific tests that are not generally accepted, burden of proof that test is reliable is on proponent. State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989).

the experts, Dr. Bell and Mr. Morgan, to testify and use, as a basis for their opinions, a litigation report prepared by Dr. Martin³³.

More troubling to this Court, upon review of all the facts and circumstances in this case, is the use by both of these experts of modeling programs in developing data and support for their expert opinions³⁴. Without question, the HEC-1, TR55 and SEDCAD programs are generally accepted tools in the engineering industry to predict the behavior of water coming off of a particular piece of property, especially when the ground is altered or disturbed. The key is the predictive quality of these model programs and their ability to give to an engineer information for identifying future problems caused by water coming from a particular piece of property.

It is the opinion of this Court that from the beginning of these proceedings the experts proffered by the Plaintiffs provided the Court nothing more than subjective belief and unsupported speculation. The Court states this because it is clear that both experts for the Plaintiffs had an underlying belief that overuse of forested areas by Western Pocahontas resulted in significant flooding. The fallacy in their attempted proof is that they relied upon untested and unproved applications of otherwise recognized engineering tools, and the use of these tools was not supported scientifically with the Plaintiffs' experts' proposed application.

The Models, SEDCAD, HEC-1 and TR55, are recognized in the industry as being appropriate tools for the prediction of sheet water peak flows within the given parameters of the

³³ Where the court admitted and considered incompetent evidence and there was not enough competent evidence to support finding of judgment, admission of such incompetent evidence was reversible error. State ex rel. Pingley v. Coiner, 155 W.Va. 591, 186 S.E.2d 220 (1972); It is not error to exclude expert testimony presenting a possible, but highly improbable, theory, not based on any particular facts in support thereof. Wigal v. City of Parkersburg, 74 W.Va. 25, 81 S.E. 554 (1914); Where incompetent evidence has been allowed, in favor of the prevailing party, as to a material point not clearly established by competent evidence, it is ground for reversal. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., 58 W.Va. 62, 51 S.E. 129 (1905).

³⁴ When witness at trial has requisite skill and experience and demonstrates accuracy and reliability of models, photographs, and any other physical evidence utilized in particular case, trial court may admit opinion testimony of expert witness as valuable aid to jury in understanding evidence in the case. State v. Armstrong, 179 W.Va. 435, 369 S.E.2d 870 (1988).

testing model. However, there is no evidence that these predictive models can be adapted and used in a *forensic* application to determine if a historic use of a given piece of real estate has caused inappropriate increases in peak flow during storm events³⁵.

Full review of the models clearly indicates that the testing parameters, i.e. curve numbers, allowance for BMP's and other measures, severely limit application of the models to timbering operations in the State of West Virginia. Dr. Bell used the TR55 model, which from the outset, indicates that it is designed to test the sensitivity of land in small urban settings. The HEC-1 model, which was used by Dr. Bell and Mr. Morgan, only provided parameters which could best describe farmland and/or wood tracks surrounding arable lands which would be used for general agricultural uses.

In addition, the assumptions, to which Dr. Bell and Mr. Morgan testified and that were used in the model programs, used no data taken from the real estate in the Slab Fork Creek Subwatershed. There was no independent measuring of humus coverage or depth. There was no investigation with regard to the use of BMP's during the timbering process. Plainly put, the assumptions used in the hypotheticals, upon which Mr. Morgan and Dr. Bell based their opinions, do not fit the facts of this case³⁶.

A review of the Daubert case and its progeny clearly indicates that the use of assumptions, without connection to the facts in issue, is improper. The West Virginia cases clearly point to the position that where an expert offers opinions, those opinions must be based on facts in the record or facts personally known to the expert. If they are based on an assumption

³⁵ Evidence which is irrelevant and immaterial and has no probative value in determining any material issue is inadmissible and should be excluded. Smith v. Edward M. Rude Carrier Corp., 151 W.Va. 322, 151 S.E.2d 738 (1966); Ward v. Smith, 140 W.Va. 791, 86 S.E.2d 539 (1955).

³⁶ Immaterial and irrelevant evidence, which tends to raise immaterial issues or to becloud the real issue, should be rejected. Siever v. Coffman, 80 W.Va. 420, 92 S.E. 669 (1917).

without any connection to the facts or issues in the case, those facts do not fit and therefore must be excluded³⁷.

When applying the Daubert factors to the testimony in this case, The Court finds the following:

- 1) That the use of the models by Plaintiffs' experts as the basis for their opinions must be reliable. To that end, there was no testimony that the use of the HEC-1 and/or TR55 waterflow models a) had been previously tested, b) that tests using those models had been conducted in the past, and c) that the tests supplied, in a forensic sense, reliable data.
- 2) There is no known error rate with regard to the use of the particular models and, in fact, Dr. Bell, during cross-examination, indicated that calibration of the models from a scientific standpoint would be required to certify that the testing was scientifically reliable. Dr. Bell testified that he specifically a) did not attempt to calibrate his model and b) that without calibration there would be no way to determine what the error rate might be, given the use of the HEC-1 and TR55 models in this given application.
- 3) There is no indication in the literature presented at trial that any reviews of the testing or the engineering models had ever been completed.

³⁷ "According to Rule 402 of the West Virginia Rules of Evidence, in part, 'evidence which is not relevant is not admissible'. This is in line with this Court's holding in Syllabus Point 1 of Smith v. Edward M. Rude Carrier Corp., which states that 'evidence which is irrelevant or immaterial and has no probative value in determining any material issue is inadmissible and should be excluded.'" Graham v. Wallace, 214 W.Va. 178, 185, 588 S.E.2d 167, 174 (2003) (internal citation omitted). See also, Ward v. Smith, 140 W.Va. 791, 816, 86 S.E.2d 539, 552-53 (1955) ("Evidence which is irrelevant and immaterial to any issue in a case and which tends to confuse and mislead the jury is inadmissible and should be excluded.")

It should be noted, however, that the Governor of the State of West Virginia, after the flood event in question, commissioned a study group to determine if new laws, regulations or other oversight by the State of West Virginia was required to prevent in the future what had occurred on July 8, 2001. That group issued the FATT report, relying heavily on the use of the HEC-1 and TR55 models. However, the purpose for that study was not for litigation, and the parties recognized that the use of the engineering models for forensic purposes may not have been proper based upon the purpose of the engineering models. However, the FATT report indicated that the modeling gave the study group certain insight as to the operations of mineral and timber extraction in southern West Virginia.

The purpose of the FATT report, and its use in evidence in this case, likewise, was based upon untested, uncalibrated usages with no known error rate, no significant peer review and a clear admission by the review board that their methods and use of engineering models might not be generally accepted in the engineering community.

Clearly, in this case, there was no evidence upon which this Court can make a finding that these experts have "scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue." And it is impossible, upon review, for this Judge to find that "these witnesses qualified as experts by knowledge, skill, experience, training or education," in this case.³⁸

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 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

³⁸ See Rule 702, West Virginia Rules of Evidence.

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.

The Defendants preserved their objection to the testimony of Dr. Bell and Mr. Morgan at every stage and at every appropriate moment in these proceedings and further renewed their objection to the testimony of Dr. Bell and Mr. Morgan in their Post-Trial Motions. The Court, therefore, finds that it must **GRANT** the motion of the Defendants; it must **STRIKE** the testimony of Dr. Bell and Mr. Morgan from the record. The Court finds, as a matter of law, that, for the purposes of this case, Mr. John Morgan and Dr. Bruce Bell do not qualify under Rule 702 of the West Virginia Rules of Evidence as experts, because neither of these gentlemen, for the purposes offered, qualify as expert witnesses by knowledge, skill, experience, training or education in this case³⁹.

Under Rule 103, the Court finds that, in permitting Dr. Bell and Mr. John Morgan to testify, the Court committed error, and said error substantially affected the right of Western Pocahontas to defend its case⁴⁰. Based upon the Court's review, permitting these experts' testimony constituted plain error⁴¹.

³⁹ While the determination of whether a witness is qualified to state an opinion typically rests with the circuit court, an abuse of discretion warrants reversal. Jones v. Patterson Contracting, Inc., 206 W.Va. 399, 524 S.E.2d 915 (1999); Ultimate determination of expert's qualifications to state opinion is left to circuit court's discretion. Capper v. Gates, 193 W.Va. 9, 454 S.E.2d 54 (1994).

⁴⁰ If trial court abused its discretion in making evidentiary ruling, error is reversible where defendant was prejudiced. State v. Marple, 197 W.Va. 47, 475 S.E.2d 47 (1996).

⁴¹ To trigger application of the plain error doctrine, there must be: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Maples v. West Virginia Dept. of Commerce, Div. of Parks and Recreation, 197 W.Va. 318, 475 S.E.2d 410 (1996);

Under Rule 104, the Court finds that Dr. Bruce Bell and Mr. John Morgan were not qualified to be witnesses because, under Rule 401, the evidence proffered by Dr. Bell and Mr. Morgan was not relevant to the issues in controversy and was therefore not admissible⁴². It was not relevant because, as has been previously stated, that as expert witnesses, Dr. Bell and Mr. Morgan, seeking to offer opinions, did not qualify under Rule 702 nor the case law and their testimony, as a matter of law, was unreliable. Moreover, it is clear, based upon this Court's review, that the evidence proffered by Mr. Morgan and Dr. Bell was not relevant because it did not have any tendency to make the existence of any fact of consequences more probable or less probable. The opinions were unsupported, not based on reliable scientific method, and amounted to nothing more than subjective belief and unsupported speculation⁴³.

ISSUES TRIED

From the beginning of this case, the Defendants have sought to require the Plaintiffs to provide information and/or evidence to answer to basic questions.

- 1) Who is suing whom?
- 2) For what negligent or unlawful conduct?

In the case that ultimately was decided by the jury, the Plaintiffs answered those questions as follows:

- 1) The residents, named as Plaintiffs, that resided in the Mullens Subwatershed were suing Western Pocahontas;

State v. Marple, 197 W.Va. 47, 475 S.E.2d 47 (1996); Voelker v. Frederick Business Properties Co., 195 W.Va. 246, 465 S.E.2d 246 (1995).

⁴² Where improper evidence is admitted over the objection of a party, it will be cause for setting aside the verdict, unless it clearly appears that the objecting party was not prejudiced thereby. Alford v. Kanawha & W.V.R. Co., 84 W.Va. 570, 100 S.E. 402 (1919).

⁴³ Touchstone of whether witness may testify as expert is whether witness would be "helpful," but it is helpfulness to trier of fact, not to party's case, that counts. Hardin v. Ski Venture, Inc., 50 F.3d 1291 (1995).

- For conduct in the Slab Fork Creek Subwatershed of the Mullens Subwatershed;
- For disturbing the land; and
- For materially contributing to the floods that resulted from the rain event of July 8, 2001.

It is clear, based upon this Court's ruling regarding the Plaintiffs' expert witnesses, that no relevant testimony was provided by the Plaintiffs to show that Western Pocahontas' use of their real property was in any way a material contributing factor to the overflow of the streams and tributaries of the Upper Guyandotte River. However, if a reviewing tribunal were to determine that this Judge's granting of the Defendants' motion to strike Plaintiffs' experts was improper⁴⁴ and should thereafter reverse the decision of this Judge as to the propriety of admitting that expert testimony, the granting of Defendants' motion under Rule 50 of the West Virginia Rules of Civil Procedure would nonetheless still be proper.

The Plaintiffs had a burden of showing, by a preponderance of the evidence, that the Western Pocahontas' use of its property:

- 1) Materially increased the peak flow of surface water coming off of its property;
- 2) That the increase in peak flow materially caused the streams and tributaries of the Guyandotte River to overflow their banks; and
- 3) That the use by Western Pocahontas of the real property, notwithstanding affirmative answers to one or two, was unreasonable.

⁴⁴ Reviewing court is not permitted to grant new trials on basis of ethical considerations, but rather must ask whether trial court's rulings, decisions, and actions have erroneously and adversely affected substantial rights of parties; party is entitled to new trial only if there is reasonable probability that jury's verdict was affected or influenced by trial error. See W.Va. Code §§ 58-1-2, 58-1-3; W.Va. Rules of Evid. 103(a); W.Va. Rules of Civ. Proc. 61; Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).

Complete review of the Plaintiffs' case reveals that there is no evidence proffered by their expert witnesses with regard to Issue Two. In fact, 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. 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.

During the trial, there was no other evidence regarding the effect of any runoff from Western Pocahontas' land holdings and whether that runoff materially caused, or contributed to, any flooding that occurred on July 8, 2001. This Court recognizes that facts may be proven, if at all, by circumstantial evidence. However, 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 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*⁴⁵. The absence of any evidence regarding the downstream effect of increased peak flow left this jury with nothing other than speculation upon which to base a decision regarding its finding as to the second question.

⁴⁵ Latin for "after this, therefore because of this"; a logical fallacy which assumes or asserts that if one event happens after another, then the first must be the cause of the second.

If, however, that same reviewing tribunal decides that the jury was appropriately confronted with some evidence, which justified their decision, Western Pocahontas remains entitled to judgment as requested under Rule 50.

The third, and equally important, inquiry required of the jury in this trial was to determine, regardless of whether the use by the landowner materially increased the peak flow of water off of its property and, regardless of whether that increased peak flow materially contributed to the overflow of the receiving streams, whether the use by the landowner was reasonable.

In responding to the certified questions submitted to the Supreme Court of Appeals of West Virginia by the Mass Litigation Panel⁴⁶, the Supreme Court spent a significant amount of time discussing whether the Plaintiffs would have a cause of action under Morris Associates, Inc., et al. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989).⁴⁷

The Supreme Court in Morris recognized that the common law rule allowed each owner of a piece of real estate to deal with surface water as he saw fit. The Court further recognized that the State of West Virginia needed to adopt a more reasonable standard. The Supreme Court, therefore, adopted the "Rule of Reasonable Use", which states in part that

[g]enerally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact⁴⁸.

⁴⁶ In re Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004).

⁴⁷ In re Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004).

⁴⁸ Syl. Pt. 2, Morris Associates, Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770, (1989); also see In re: Flood Litigation, 216 W.Va. at 542, 607 S.E.2d at 871.

In developing the Rule of Reasonable Use in Morris, the Supreme Court was careful to define surface water as:

water of casual, vagrant character, oozing through the soil, or diffusing and squandering over or under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil: coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains or hills, and inundating the country; and the moisture of wet, spongy, springy, or boggy land⁴⁹.

Western Pocahontas would argue that the Morris' test of reasonable use does not apply to the case at bar because there was no development of Western Pocahontas' land in the sense of development for commercial purposes, golf courses, housing developments and the like. However, in Flood, the Supreme Court clearly rejected that argument and reformulated the panel's question⁵⁰. In doing so, the Supreme Court made abundantly clear that part of the reasonableness decision must include the foreseeability that harm will necessarily result from the use and, further, the jury should generally consider all relevant circumstances.⁵¹

There are many arguments to support the Defendants' position that the evidence does not support, as a matter of law, the jury's finding of unreasonable use. Chief among those arguments

⁴⁹ Morris Associates, Inc. v. Priddy, 181 W.Va. 588, 590, 383 S.F.2d 770, 772 (1989) (citing Syllabus Point 2, in part, of Neal v. Ohio River R.R. Co., 47 W.Va. 316, 34 S.E. 914 (1899)). Also see fn8, In re Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004).

⁵⁰ The Mass Litigation Panel submitted Question 1 to the Supreme Court as follows: "Whether the plaintiffs have a cognizable cause of action based on allegations of unreasonable use of land under the balancing test set forth in Morris Associates, Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989). Answer of the Flood Panel: Yes." The Supreme Court reformulated the question into "Whether adjacent and non-adjacent plaintiffs have a cognizable cause of action based on allegations of unreasonable use of land under the balancing test set forth in Morris Associates, Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989)" and affirmed the decision of the Panel to Question 1. In re Flood Litigation, 216 W.Va. 534, 541, 607 S.E.2d 863, 870 (2004).

⁵¹ "[T]he jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on part of landowner making alteration in the flow of surface waters, the purpose or motive with which the landowner acted, etc." In re Flood Litigation, 216 W.Va. 534, 542, 607 S.E.2d 863, 871 (2004).

is the failure of the Plaintiffs to provide reliable scientific evidence regarding the issues in the first two questions to be considered by the jury.

This Court, previously in this Order, ruled that the basis for the opinions of Plaintiffs' experts regarding the material increase in peak flow and any material increase in overflow of the receiving streams removes the question of reasonableness of use from the jury's consideration because the Plaintiffs have provided no required nexus of conduct proximately contributing to or causing any damage to adjoining or downstream property owners. In addition to removing reasonableness from the jury's consideration, there was absolutely no evidence presented that the proven conduct of Western Pocahontas placed them on notice that the use of their lands and operations could foreseeably cause damage to adjoining and/or downstream property owners.

It is important to note that neither Dr. Bell nor Mr. Morgan could or did testify that the hypothetical increases in peak flow in any way caused or contributed to the overflowing of the receiving streams in any material way.

The West Virginia Supreme Court of Appeals, in response to the 6th certified question⁵², confirmed its prior findings in Miller v. Warren, 182 W.Va. 563, 90 S.E.2d 207 (1990). The Court stated that

Failure to comply with a fire code or similar set of regulations constitutes prima fascia negligence, if an injury proximately arose from the non-compliance and the injury is of the sort the regulation was intended to prevent; on the other hand, compliance with the appropriate regulations is competent evidence of due care, but does not constitute due care per se or create a presumption of due care.

The Supreme Court went on to explain that, "[i]f the Defendants knew or should have known of some risk that would be prevented by reasonable measures not required by the regulation, they

⁵² "The sixth question is, 'In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with state law and with permits issued by appropriate state agencies, does this vitiate any cause of action for negligence, nuisance or unreasonableness?' Answer of Flood Panel: Yes." In re Flood Litigation, 216 W.Va. 534, 547, 607 S.E.2d 863, 876 (2004).

were negligent if they did not take such measures. It is settled law that a statute or a regulation merely sets a floor of due care."⁵³ The Supreme Court, in Flood, held that, in the case of extraction and removal of natural resources, a landowner may be held liable for negligence or unreasonable use if the injuries complained of were the sort of injuries that the regulations were intended to prevent⁵⁴. Finally, the Supreme Court stated that "compliance, however, does not give rise to a presumption that the landowner acted reasonably or without negligence or liability to others in his or her extraction and removal activities⁵⁵".

The Plaintiffs' contention is that the disturbance by the Defendants of 40 percent of its real estate in the Mullens Subwatershed and, specifically, 40 percent of the acreage in the Slab Fork Creek Subwatershed over a 10-year period was unreasonable because, in the opinion of Plaintiffs' experts, that disturbance materially increased the peak flow off the property and materially increased the overflow of the receiving streams. However, the clear evidence in this case is that despite the disturbance created by the Defendants on their real estate, any negative effect of that disturbance would be abated in a four-year period. This is because Western Pocahontas utilized Best Management Practices and adhered to industry standards. Thus, the evidence is equally clear that if Western Pocahontas appropriately conducted their timbering operations, the only operations which could reasonably be inferred to have potentially created conditions resulting in damage to the Plaintiffs, would be 16 percent of the timbered area, equaling approximately 1,440 acres in the Slab Fork Creek Subwatershed.

⁵³ In re Flood Litigation, 216 W.Va. 534, 548, 607 S.E.2d 863, 877 (2004) (finding that "[c]ircumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation.)

⁵⁴ Id.

⁵⁵ Id.

In their assumptions, the Plaintiffs' experts assumed that any disturbance created in the 10-year period prior to the July 8, 2001 flood remained unchanged until the flood event. These assumptions, based upon the testimony of Western Pocahontas' experts, were unwarranted, unreasonable and without factual basis. Using a figure, in a light most favor to the Plaintiffs, and assuming that, on average in the Slab Fork Creek Subwatershed, the Defendant disturbed 4 percent of the total watershed, approximately 906 acres per year, or 3,624 acres over a four-year period, were disturbed.

Plaintiffs produced no evidence that the Defendants failed to adhere to the best management practices, industry standards, and/or state regulation with regard to their operations in the Slab Fork Creek Subwatershed. The two instances brought to light by the Plaintiffs through the Defendants' witnesses were not material, did not result in citation, and the unrefuted evidence is that those two minor violations were immediately abated. The Plaintiff further did not present any evidence that there were reasonable alternatives to the methods used by the Defendants which would have reduced or negated any further potential harm.

This Court must conclude, based upon the available evidence in this case, that the lawful and regulated extraction of timber from lands in Slab Fork Creek Subwatershed by Western Pocahontas was not unreasonable.

In an action seeking to establish negligence, this Court believes that, a) when a defense is raised by the Defendants tending to show that its operations met regulatory standards, best management practices and industry standards, b) the Defendants operations involved only a small part of their actual holdings in the subwatershed, and c) the Defendants had developed, maintained and amended a forest management plan resulting in a net increase in the amount of available timber on the real estate owned by the Defendants over a 10-year period, it then

becomes incumbent upon the Plaintiffs to show what reasonable and additional protections or conduct, if any, would have provided an increased and material protection to adjoining landowners or downstream landowners in the event of a major rain event under these circumstances.

The unrefuted evidence in this case is clear that the State of West Virginia, through its Division of Forestry and cooperating research institutions, constantly strives to ensure that the extractive industry of timbering does not adversely affect the land upon which that timbering is accomplished, and further strives to ensure that timbering does not adversely affect streams and rivers in the State of West Virginia and adjoining landowners. Timber, as the evidence has shown, can be a renewable natural resource just as it can be a depletable natural resource. The unrefuted evidence in this case is clear that the management plans of Western Pocahontas were to ensure renewability of this valuable and vital natural resource.

Based upon all the evidence in the case, regardless of whether there is a subsequent finding that there was material increase in peak flow and material increase in the overflow of the streams, the use by Western Pocahontas of its land and resources in the Slab Fork Creek Subwatershed, as a matter of law, cannot be deemed unreasonable.

This finding is based solely upon the evidence that was presented in this case and, while there may be other evidence not before this Court that would tend to mitigate against this finding, this Court can, nonetheless, do nothing more than rule upon the admissible evidence before it. Based upon that admissible evidence, disturbance of 4 percent per annum over a 10-year period of the real estate in the Slab Fork Subwatershed, the removal of 2 percent of the trees on land in the Slab Fork Creek Subwatershed, and the consistent adherence to state regulation, best management practices and industry standards cannot support a finding of unreasonable use.

WHEREFORE, this Court having ruled that the Plaintiffs have failed to produce reliable evidence upon which a jury could make a determination with regard to Questions One and Two, and further having found that, as a matter of law, the operations complained of in the Slab Fork Creek Subwatershed do not constitute unreasonable use, therefore, pursuant to Rule 50 of the West Virginia Rules of Civil Procedures, this Court **GRANTS** the Motion of the Defendants, Western Pocahontas Properties, LLP and Western Pocahontas Corporation, for a Judgment as a Matter Of Law. The Court further **ORDERS** that the verdict of the jury previously entered in this case is set aside and judgment entered, as a matter of law, in favor of the Defendants, Western Pocahontas Properties, LLP and Western Pocahontas Corporation. This matter as to Subwatershed 2a (Mullens) is hereby **ORDERED STRICKEN** from these Flood proceedings. All Plaintiffs in Subwatershed 2a (Mullens) are hereby **DISMISSED** and their claims are **DISMISSED** as having been finally adjudicated, either by Order of this Court or by confidential settlement.

**CONDITIONAL GRANT OF MOTION OF THE DEFENDANT
FOR A NEW TRIAL**

Rule 50, specifically Rule 50(c), of the West Virginia Rules of Civil Procedure, requires that, if the Court grants a renewed Motion for Judgment as a Matter Of Law, that the Court shall also rule with regard to any Motion for a New Trial by determining whether that new trial should be granted if the Judgment as a Matter Of Law is thereafter vacated or reversed. Rule 59 of the West Virginia Rules of Civil Procedure guides the Court with regard to new trials and/or request for amendments of judgments and specifically states in subparagraph A that, “[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which

there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law;”⁵⁶

The standard required for awarding a new trial indicates that a “trial judge has the authority to weigh the evidence and consider the credibility of the witnesses, and if he finds that the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, he may set aside the verdict, even if supported by substantial evidence, and grant a new trial.⁵⁷ On the other hand, the Supreme Court has clearly stated that the judgment of a trial court in awarding a new trial should be reversed if it is clearly wrong.⁵⁸ Further, the Supreme Court has declared that, although the ruling of the trial court in granting or denying a motion for new trial is entitled to great respect and weight, the trial court’s ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.⁵⁹

Rule 59 requires that, in filing a Motion for a New Trial, the moving party set out with particularity the basis and/or claimed errors upon which that party relies in support of its motion. Western Pocahontas, in this Phase One trial, has set forth a significant number of allegations tending to support the motion for a new trial, which can be reasonably defined and categorized as follows:

- 1) The Court committed error in adopting and imposing upon these Defendants an unconstitutional and prejudicial trial plan (including subparts).

⁵⁶ West Virginia Rules of Civil Procedure, Rule 59

⁵⁷ See Whitt v. Sleeth, 198 W.Va. 398, 481 S.E. 2d 189 (1996).

⁵⁸ See Sargent v. Malcon, 150 W.Va. 393, 146 S.E. 2d 561 (1966).

⁵⁹ See Adams v. Consolidated Railway Corporation, 214 W.Va. 711, 591 S.E. 2d 269 (2003)

- 2) Because the Court adopted a trial plan that was inherently flawed, the trial was likewise inherently flawed and prejudicial to these Defendants (including subparts).
- 3) The jury's verdict is against the clear weight of the evidence, especially as to issues 2 and 3 as set forth in the trial plan (including subparts).
- 4) Plaintiffs' counsel engaged in conduct and made statements throughout the trial that severely prejudiced these Defendants (including subparts).
- 5) The Court erred by admitting photographs of alleged flood damage without a proper foundation to establish whether the source of the water and debris depicted therein originated from these Defendant's property.
- 6) The Court committed error in excluding the Twin Falls State Park exhibits proffered by the Defendants and in prohibiting these Defendants from calling Scott Durham to testify.
- 7) Western Pocahontas was prejudiced by the Court's determination that the Plaintiffs' could attack operations of Defendants that were voluntarily dismissed with prejudice.
- 8) The Court committed error by allowing the jury to consider the actions of White Oak Lumber Company in determining whether these Defendants reasonably used the property at issue (and subparts).
- 9) The charge given to the jury contained errors that materially prejudiced these Defendants.

- 10) The jury verdict form utilized by the Court unfairly prejudiced these Defendants, because it failed to follow the trial plan requirement that operations be assessed individually.
- 11) The Defendants are entitled to a new trial because Juror 20 should have been disqualified for reasons that were not discovered by these Defendants until after the verdict was rendered, despite the exercise of ordinary diligence.

This Court, for purposes of discussing the Motion for a New Trial, will limit the expanse of its inquiry to the following issues:

- A. Were Plaintiffs' experts appropriately qualified to testify under Rule 702 and Wilt v. Buraker ?
- B. Did the cumulative evidence introduced against those Defendants who were subsequently dismissed from the proceedings deny Western Pocahontas fair consideration of the issues related only to their operations?
- C. Did this Court refuse to admit relevant evidence?
- D. Was the jury tainted by improper reference to anecdotal evidence and further tainted by improper communication (non-verbal) by Plaintiffs' counsel?
- E. Was the Court's decision to admit the FATT report error?
- F. Was the Court's refusal to admit the evidence regarding Twin Falls State Park error?

PLAINTIFFS' EXPERT TESTIMONY

This Court adopts and reasserts, as fully and completely set forth in this section, its aforementioned ruling regarding the proffered Plaintiffs' experts, Dr. Bruce Bell and Mr. John Morgan. As heretofore stated, this Court believes 1) that there was not an appropriate analysis of

their testimony, as required by Wilt v. Buraker and other West Virginia cases regarding the admission of expert testimony, 2) that, in fact, those experts were not qualified by education, experience or specialized knowledge to render the opinions that they did render, 3) that the support for their opinions came from the untested and unreliable use of scientific models which, in fact, amounted to "junk science" and 4) said models placed before this jury unreliable evidence which required the jury to engage in speculation, especially with regard to Questions Two and Three.

CUMULATIVE EVIDENCE OF DISMISSED DEFENDANTS

This trial began with the naming of 31 Defendants, 15 in the Mullens Subwatershed and 16 in the Oceans Subwatershed. Nine of the Defendants in the Oceana Subwatershed were also named as Defendants in the Mullens Subwatershed. As the trial progressed, this jury heard evidence of the conduct of each of the Defendants in the Mullens Subwatershed. However, at different times throughout the trial, several Defendants in both Subwatersheds were dismissed by this Court, either upon Motion for Cause, or as a result of settlement by that Defendant with the Plaintiffs' groups who had sued them.

In addition to hearing evidence regarding the conduct of the various Defendants in the Mullens Subwatershed, the jury also heard evidence regarding the conduct of these various and other Defendants in the Oceana Subwatershed. The jury was only told at the appropriate times during the trial, that a Defendant had been dismissed and not why that Defendant had been dismissed. So when the jury was finally directed to deliberate upon its findings with regard to the three issues as determined by the trial plan, they were still carrying in their mental databases significant evidence regarding other Defendants and locations other than the Slab Fork Creek Subwatershed. Clearly, any evidence in the record relative to a Defendant that had been

dismissed, was irrelevant evidence as it related to the conduct of the remaining Defendants, Western Pocahontas Corporation and Western Pocahontas Properties, LLP. This Court, having reviewed the record, believes that the volume of what was once relevant and admissible evidence, subsequently rendered irrelevant by the dismissal of specific Defendants, created a situation where this jury was very likely overwhelmed by devastatingly, prejudicial evidence⁶⁰.

REFUSAL TO ADMIT RELEVANT EVIDENCE

Significant among the issues raised by the Defendants herein was the refusal of this Court to admit what they contend was relevant evidence, specifically, the evidence of flooding at Twin Falls State Park, located in a Subwatershed not part of these proceedings, but which abutted Subwatershed 2A (Mullens). The Defendants had proffered the evidence of significant flooding in Twin Falls State Park. Specifically, as related to the golf course, Western Pocahontas wanted to show evidence that tended to show that Subwatersheds which were not timbered experienced significant flooding events as a result of the July 8, 2001, storm. When weighed by itself, the refusal to admit this evidence was clearly within the discretion of the trial judge. This Court ruled, in excluding the proffered evidence, that the Twin Falls evidence did not relate to a site specific to the Mullens Subwatershed and was anecdotal in nature. The Court had previously ruled that anecdotal evidence was not appropriate during this Phase One trial stage. The Defendants countered in their brief, however, that this evidence, and specific other evidence related to the non-timbering in the Twin Falls Creek Subwatershed, was direct rebuttal evidence regarding testimony made by Mr. Morgan.

While its importance was not clear to this Court at the time the Motion to Exclude was made, the Court now finds that the evidence was relevant. The Court's exclusion of that

⁶⁰The general rule is that if disqualified evidence was so impressive that it probably remained in the jurors' minds and influenced their verdict, the verdict must be reversed, even where court instructed jury to disregard such evidence. Davidson v. Boles, 266 F.Supp. 645 (1967), certiorari denied 391 U.S. 970.

evidence alone is harmless, because the introduction of that simple piece of evidence would not, in the Court's opinion, have changed the outcome of the trial. However, when viewed in conjunction with the other errors, which this Court believes that it committed in the management of this trial, the cumulative effect of the failure to admit this evidence expands exponentially and becomes a significant denial of the Defendants' right to a fair trial.

TAINTED ANECDOTAL EVIDENCE

As discussed in the previous paragraph, despite the fact that the Court ruled that anecdotal testimony regarding the three issues before the jury would not be permitted, the jury was nonetheless confronted on a number of different occasions with anecdotal comments found in the FATT report and references to people having been killed by the flood. Despite the fact that this Court sustained the proper objections to those comments, the effect, when tied with the other prejudicial errors as set forth herein, denied Western Pocahontas a fair trial and encouraged the jury to resort to passion and sympathy in making their decisions.

ADMISSION OF THE FATT REPORT

This Court admitted the FATT report into evidence. The FATT report was a compilation of a study group appointed by then governor, Bob Wise, to study the rain event of July 8, 2001, and to make recommendations for any proposed law changes, regulatory changes or other things necessary to prevent, if possible, the kind of destruction that took place in southern West Virginia as a result of this rain event. As has been previously discussed, however, a majority of the FATT report was based upon research which used either the HEC-1, SECCAD or TR55 engineering models, and this Court has found as a matter of law that the use of those engineering models for forensic purposes was scientifically unreliable, and therefore finds the admission of

the FATT report and the conclusions of the report, especially as those reports dealt with specific areas not in the Mullen Subwatershed, was error.

THE VERDICT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE

As has been previously noted, a judge in making a determination to grant a new trial under Rule 50 or Rule 59 of the West Virginia Rules of Civil Procedure may find, if legally justified, that the verdict rendered by the jury is against the clear weight of the evidence. In making his determination, the judge may weigh the evidence himself, consider the credibility of the witnesses who testified, and find that the verdict is against the clear weight of the evidence or is based upon false evidence or will result in the miscarriage of justice. The judge may thereafter set aside the verdict, even if that verdict was supported by substantial evidence.

In this case, based upon this Court's ruling, with regard to the expert witnesses proffered by the Plaintiffs herein, and further based upon the weight of the evidence supplied by the Defendants herein, the Court **FINDS** that the Defendants' evidence in opposition to the Plaintiffs' position should have carried greater weight and should have created in the minds of fair and reasonable jurors a belief that the position proffered by the Defendants was in fact the better evidence presented in this case with regard to what happened on July the 8th, 2001. This Court has ruled that the testimony of Dr. Bruce Bell and Mr. John Morgan was not reliable and scientific. But in the event the appellate court disagrees with this Judge's conclusions, it is clear that the method and mode of presentation of the evidence by the Plaintiffs does not substantially support their obligation to prove by a preponderance of the evidence that the Defendants use of its property materially increased the peak flow of water from that property and that this material increase in peak flow materially caused the receiving streams to overflow their banks. Additionally, there is no relevant evidence that this Court can find that supports the conclusion

that the use by the Defendants of their real estate was unreasonable under the criteria as set forth in. In Re: Flood and also as instructed by this Court to the jury.

This Court in no way intends to impugn the integrity of the jurors who sat for nearly three months in this case, who nobly and diligently considered all the testimony and exhibits that were presented to them and, based upon the evidence they had, attempted to make a decision that was correct in their minds. The problem is that the jury was exposed to irrelevant, improper and salacious evidence, which they should not have heard, which this Court firmly believes affected their ability to make an informed decision. The Plaintiffs' entire case was designed to inflame this jury, and to imply that this jury's function during Phase One was less serious and less important than the roles of jurors in the phases to come.

In this Judge's mind, this jury was not adequately protected from what this Court has now found to be unreliable scientific evidence, inappropriate cumulative, objectionable evidence, improper anecdotal evidence, the admission of improper and unfounded documents, (specifically the FATT report) and the refusal to admit what, upon review, appears to have been relevant evidence in the form of the Twins Falls Creek Watershed evidence. This Court also believes that the net effect was that the jurors found it impossible to separate the wheat from the chaff and were required to improperly speculate as to their findings with regard to the three priority questions.

WHEREFORE, it is the judgment of the Court that, based upon the enumerated specific prejudicial errors, the cumulative effect of what would otherwise be harmless error, and the improper inferences by Plaintiffs' counsel with regard to the real role of this jury, that the Defendants herein are entitled to a new trial on all issues, should the appellate court reverse this Judge's decision with regard to its previously granted Motion for Judgment as a Matter of Law.

CONCLUSION

WHEREFORE, the Court **ADJUDGES, ORDERS** and **DECREES** as follows:

- 1) The Jury verdict entered on the 3rd day of May 2006, is hereby set aside and a Judgment as a Matter of Law is entered in favor of Western Pocahontas Corporation and Western Pocahontas Properties Limited Partnership.
- 2) The Motion of Western Pocahontas Corporation and Western Pocahontas Properties Limited Partnership for a new trial, pursuant to Rule 50(c) and Rule 59 of the West Virginia Rules of Civil Procedure is hereby **CONDITIONALLY GRANTED** and should the Motion for Judgment as a Matter of Law be reversed, this matter will proceed to a new trial on all issues.
- 3) The specific issues raised by the parties and not herein specifically addressed are denied as being without merit or mooted by this Court's rulings herein.
- 4) The exceptions and objections of the parties adversely affected by this ruling are hereby preserved for the record.
- 5) This **ORDER** is a **FINAL ORDER** as contemplated by Rule 72 of the West Virginia Rules of Civil Procedure.

The Clerk is **ORDERED** to prepare copies of this **ORDER** and to transmit one copy to Liaison Counsel for the Plaintiff Groups and one copy to the Liaison Counsel for the Defendant Groups.

All of the above which is hereby **ORDERED** this the 15th day of March 2007

ENTER:

The foregoing is a true copy of an order entered in this office on the 15th day of March, 2007

JANICE B. DAVIS, Circuit Clerk of Raleigh County, West Virginia

By: [Signature]
Deputy

[Signature]
John A. Hutchison, Judge