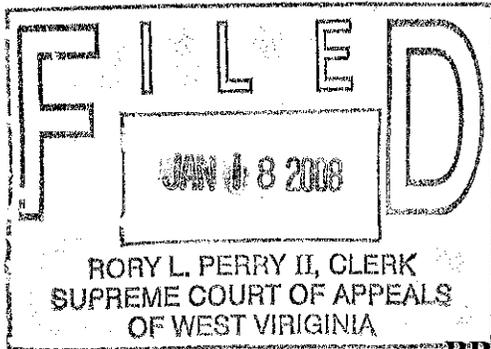


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CASE NO.: 33711

IN RE: FLOOD LITIGATION



Raleigh County  
Civil Action No. 02-C-797  
Honorable John A. Hutchison,  
Mass Litigation Panel  
(Upper Guyandotte River Watershed –  
Subwatershed 2a – Mullens)

**BRIEF OF APPELLEES**

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I.	Introduction .....	1
II.	The Standard for Granting Judgment as a Matter of Law and the Standard for Appellate Review of Judgments as a Matter of Law.....	6
III.	Argument.....	7
A.	The Calwell Group, McGraw Group, and Humphreys Group’s arguments as to Western Pocahontas’ Supplemental Motion and the 2006 McCutcheon Report are without merit, in that (1) the trial court never ruled on these issues, (2) Appellants waived the issues by failing to raise them at the trial court level, and (3) Appellants’ arguments are based on fundamental misconceptions as to Dr. McCutcheon’s deposition and Judge Hutchison’s ruling .....	7
1.	The 2006 McCutcheon Report was the most recent, and arguably the most significant, development in the long process of investigating the July 8, 2001 floods, initiated by Governor Wise in 2001; the 2006 McCutcheon Report, issued six months after the Phase I Trial concluded, was important, newly discovered evidence .....	8
2.	The Calwell Group, McGraw Group, and Humphreys Group did not file a response to the Supplemental Motion and, accordingly, have waived the right to raise a challenge thereto, for the first time, in this Court.....	11
3.	Contrary to the Calwell Group, McGraw Group, and Humphreys Group’s arguments, there was no inconsistency between the 2006 McCutcheon Report and Dr. McCutcheon’s earlier deposition.....	13
4.	Contrary to the Calwell Group, McGraw Group, and Humphreys Group’s assertion that Western Pocahontas created a “misimpression” by its “failure to disclose” the fact that Dr. McCutcheon was deposed in this case, Judge Hutchison was fully aware of the deposition, which was repeatedly disclosed in open court and in the trial court record.....	15
B.	Contrary to the argument of the Calwell Group, McGraw Group, and Humphreys Group, Judge Hutchison properly applied this Court’s holding in <u>In Re: Flood Litigation</u> to conclude that Appellants had the burden of proving unreasonableness and failed to discharge that burden.....	16

1.	Contrary to the Calwell Group, McGraw Group, and Humphreys Group's arguments, Issue Three was designed merely to "screen" out defendants which had acted reasonably, without creating liability as to any defendants under any theory of recovery.....	17
2.	Judge Hutchison's ruling did not confuse the rule of reasonable use and the theory of negligence .....	19
3.	Contrary to the Calwell Group, McGraw Group, and Humphreys Group's arguments, Judge Hutchison did not rule that compliance with regulations creates a presumption of reasonableness.....	21
IV.	Argument in support of the trial court's conditional grant of a new trial.....	24
V.	Argument in support of cross assignments of error as to additional grounds warranting the grant of a new trial.....	25
VI.	Conclusion.....	25

## Table of Authorities

<u>In Re: Flood Litigation</u> , 216 W.Va. 534, 607 S.E.2d 863 (2004) .....	2, 5, 17, 20, 21, 22, 24
<u>Robertson v. Opequon Motors, Inc.</u> , 205 W.Va. 560, 519 S.E.2d 843 (1999) .....	6
<u>Barefoot v. Sundale Nursing Home</u> , 193 W.Va. 475, 457 S.E.2d 152 (1995).....	6
<u>Neely v. Mangum</u> , 183 W.Va. 393, 396 S.E.2d 160 (1990).....	6
<u>Brannon v. Riffle</u> , 197 W.Va. 97, 475 S.E.2d 97 (1996) .....	6
<u>Johnson by Harper v. Hills Dep't Stores</u> , 200 W.Va. 196, 488 S.E.2d 471 (1997).....	6
<u>Brady v. Deals on Wheels, Inc.</u> , 208 W.Va. 636, 542 S.E.2d 457 (2000) .....	7
<u>Coleman v. Sopher</u> , 201 W. Va. 588, 499 S.E.2d 592 (1997) .....	12
<u>Maples v. West Virginia DOC, Div. of Parks &amp; Recreation</u> , 197 W. Va. 318, 475 S.E.2d 410 (1996) .....	12
<u>State v. Swims</u> , 212 W. Va. 263, 569 S.E.2d 784 (2002) .....	12
<u>State Rd. Comm'n v. Ferguson</u> , 148 W. Va. 742, 137 S.E.2d 206 (1964) .....	13
<u>Miller v. Warren</u> , 182 W.Va. 560, 390 S.E.2d 207 (1990) .....	21

## **BRIEF OF APPELLEES**

Western Pocahontas Properties Limited Partnership and Western Pocahontas Corporation (hereinafter collectively referred to as "Western Pocahontas," "Appellee," or "Defendant") pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure, hereby submit their brief in response to the brief filed by the Appellants represented by The Calwell Practice, PLLC, McGraw Law Offices, and James F. Humphreys and Associates (collectively referred to herein as the "Calwell Group, McGraw Group, and Humphreys Group").<sup>1</sup> Western Pocahontas respectfully requests that this Court affirm the trial court's March 15, 2007 Order granting judgment as a matter of law in favor of Western Pocahontas.

### **I. INTRODUCTION**

Torrential downpours on July 8, 2001 caused severe flooding throughout southern West Virginia. Subsequently, over fifty actions were filed by firms representing several thousand plaintiffs against companies in the extractive industries and the owners of the lands upon which extractive activities had occurred.<sup>2</sup> Those suits theorized that mining coal, cutting timber and drilling for gas "disturbs" the land, and

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<sup>1</sup> In addition to the brief filed by the Calwell Group, McGraw Group, and Humphreys Group, Plaintiffs represented by The Segal Law Firm previously filed their appellate brief arising from the same underlying action, Appeal Number 33710 (hereinafter referred to as the "Segal Appellants"). The Calwell Group, McGraw Group, Humphreys Group and Segal Appellants are collectively referred to herein as "Appellants."

<sup>2</sup> Illogically, none of the hundreds of landowners in the flooded areas whose lands have been used for non-extractive purposes were named as defendants, even though under the Appellants' "disturbance of land" theory, the landowners who have cleared their lands, built homes, farms, businesses, driveways, and otherwise improved/"disturbed" their property, and whose lands are closer to the rivers and streams at issue, in almost every case, would have been far more logical defendants than timber owners who have, by comparison, only minimally "disturbed" their lands, by selectively cutting only the largest trees -- on roughly twenty-five year intervals -- but otherwise have left in place the forest cover which has existed for thousands of years.

that such "disturbance" exacerbates flooding. These actions were referred by Chief Justice Robin Davis, by Order dated May 16, 2002, to the Flood Litigation Panel ("Panel") for determination. By Order entered August 1, 2003, the Panel certified nine questions to this Court. The certified questions, as reformulated by this Court, were answered in In Re: Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004).

Thereafter, the Panel determined that the most appropriate and expeditious manner in which to try the July 8, 2001 flood cases would be "through the conduct of trials for separate watersheds, with each such watershed trial to be conducted in phases, with one of the Panel Judges presiding at each of the trials of the claims in the different watersheds." (Trial Plan at p. 2).<sup>3</sup>

Judge John A. Hutchison, Chief Judge of the Tenth Judicial Circuit, was assigned the trial of the Upper Guyandotte Watershed. After conducting "numerous conferences with all parties" and hearing argument on "different approaches for the conduct of a trial for the Upper Guyandotte Watershed," Judge Hutchison determined that "the best way to move forward was to further subdivide the claims in the Upper Guyandotte Watershed by subwatersheds." (Trial Plan at p. 2).

Judge Hutchison determined that the first phase of the Upper Guyandotte trial would include both the Mullens and Oceana subwatersheds. Judge Hutchison further decided that the first phase of the Mullens/Oceana trial ("Phase I Trial") would "not determine issues of legal causation for any conduct of the defendants' operations for any damages allegedly suffered by any plaintiff involved in the Phase I Trial," and would "not determine the legal liability of any of the defendants, nor shall it determine the

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<sup>3</sup> The Trial Plan for Subwatersheds 2A & 2E of the Upper Guyandotte Watershed dated January 26, 2006 is referred to herein as the "Trial Plan."

damages, if any, of any of the plaintiffs." (Trial Plan at p. 3). Rather, Judge Hutchison limited the Phase I Trial to three preliminary issues:

- "A) ['Issue One'] whether, as to each defendant's individual operation(s), the defendants' use of its properties materially increased the rate of surface water runoff that left that operation as a result of a storm event on or about July 8, 2001, compared to the rate of surface water runoff that would have left that operation but for the defendant's use of that property; and if so,
- B) ['Issue Two'] whether the water from the individual defendants' operation(s) materially caused or contributed to the stream or streams into which they discharged overflowing their banks, and
- C) ['Issue Three'] regardless of the findings made in A and B above, was the use by the defendants of the property in question unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of *In Re: Flood Litigation*, 216 W.Va. 534, 607 S.E.2d 863 (2004)." (Trial Plan at p. 3).

Following several weeks of trial, a Raleigh County jury answered these three questions in the affirmative. Western Pocahontas, the sole remaining defendant at the time the jury returned its verdict, timely filed its post-trial motion for judgment as a matter of law under Rule 50 of the West Virginia Rules of Civil Procedure<sup>4</sup> on the ground that there was no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiffs on any of the three issues. Judge Hutchison agreed and entered judgment as a matter of law in favor of Western Pocahontas on March 15, 2007.<sup>5</sup> Judge Hutchison also conditionally granted Western Pocahontas' motion for a new trial.

Judge Hutchison's grant of judgment as a matter of law in favor of Western Pocahontas was based on at least three separate, independent, and alternative grounds:

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<sup>4</sup> In the alternative, Western Pocahontas moved for a new trial.

<sup>5</sup> The "Order Granting In Part And Denying In Part Defendant's Motion For Judgment As A Matter Of Law Or A New Trial" dated March 15, 2007 is referred to herein as the "March 15, 2007 Order."

(1) Appellants' experts, Dr. Bruce Bell and Mr. John Morgan, were not qualified to testify as experts in this case, and their testimony was unreliable and was properly stricken from the record. Accordingly, Judge Hutchison ruled that Appellants failed to discharge their burden of proof as to Issue One (whether the timbering operations on Western Pocahontas' properties materially increased the rate of surface water runoff leaving its properties). (March 15, 2007 Order at pp. 10-27);

(2) Even if Dr. Bell and Mr. Morgan had been qualified and their testimony had been reliable and relevant, no evidence was submitted regarding Issue Two (whether the timbering operations on Western Pocahontas' properties materially contributed to streams overflowing their banks., i.e., flooding). (March 15, 2007 Order at pp. 28-31); and

(3) Even if Dr. Bell and Mr. Morgan had been qualified and their testimony had been reliable and relevant, and even if a jury could properly infer proof of Issue Two solely from evidence regarding Issue One, Western Pocahontas would prevail on Issue Three (whether Western Pocahontas' use of its land was unreasonable) because the timber operations on Western Pocahontas' properties cannot be deemed unreasonable, as a matter of law. (March 15, 2007 Order at pp. 31-36).

On or about December 6, 2007, the Segal Appellants filed their appellate brief in Appeal Number 33710. On or about December 18, 2007, the Calwell Group, McGraw Group, and Humphreys Group filed their appellate brief in Appeal Number 33711. In their brief, the Calwell Group, McGraw Group, and Humphreys Group adopt the statement of facts, assignments of error, and arguments set forth by the Segal Appellants in their previously filed brief. Accordingly, Western Pocahontas incorporates

herein by reference in its entirety the Brief of Appellees filed on January 7, 2008 in response to the Segal Appellants' brief (Appeal Number 33710).<sup>6</sup>

In addition to their adoption of the Segal Appellants' brief, the Calwell Group, McGraw Group, and Humphreys Group assert two additional arguments:

(1) First, the Calwell Group, McGraw Group, and Humphreys Group speculate that a "misimpression may have been created" by Western Pocahontas' Supplemental Motion For Judgment As A Matter Of Law Or, In The Alternative, A New Trial (the "Supplemental Motion"), filed on November 15, 2007, which "may have played an important role in the trial court's reasoning";<sup>7</sup> and

(2) Second, the Calwell Group, McGraw Group, and Humphreys Group contend that Judge Hutchison's ruling regarding Issue Three (that Western Pocahontas' conduct cannot be deemed unreasonable as a matter of law) was erroneous and in violation of the mandates set forth by this Court in its answer to certified question six, as reformulated, in In Re: Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004).

As discussed below, neither of these arguments is meritorious.

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<sup>6</sup> A copy of Western Pocahontas' brief in Appeal Number 33710 has been served upon counsel for the Calwell Group, McGraw Group, and Humphreys Group.

<sup>7</sup> In the Supplemental Motion, Western Pocahontas moved the trial court, pursuant to Rule 60 of the West Virginia Rules of Civil Procedure, to grant a new trial on the basis of newly discovered evidence in the form of a scientific report, "Rainfall-Runoff Relationships for Selected Eastern U.S. Forested Mountain Watersheds: Testing of the Curve Number Method for Flood Analysis dated October 25, 2006" (the "2006 McCutcheon Report"). However, the 2006 McCutcheon Report played no role in Judge Hutchison's decision. He expressly stated in the March 15, 2007 Order that "[t]he 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." (March 15, 2007 Order at p. 6). Because the Calwell Group, McGraw Group and Humphreys Group have ignored the fact that there has been no adverse ruling regarding the Supplemental Motion from which they can appeal and, instead have appealed on the basis of their contention that the Supplemental Motion "may have" created a "misimpression," Western Pocahontas believes it appropriate to respond to the arguments made by the Calwell Group, McGraw Group and Humphreys Group, despite the fact that no final order has been entered and no ruling has been made regarding this issue.

## II. THE STANDARD FOR GRANTING JUDGMENT AS A MATTER OF LAW AND THE STANDARD FOR APPELLATE REVIEW OF JUDGMENTS AS A MATTER OF LAW.

Effective April 6, 1998, some of the terminology employed by Rule 50 of the West Virginia Rules of Civil Procedure was changed to mirror an earlier modification of Rule 50 of the Federal Rules. As a result, this Court, in Robertson v. Opequon Motors, Inc., 205 W.Va. 560, 563 n. 3, 519 S.E.2d 843, 846 n. 3 (1999) instructed that "litigants should employ the phrase 'judgment as a matter of law' in place of the phrases 'directed verdict' and 'judgment notwithstanding the verdict.'" Robertson, 519 S.E.2d at 846. More importantly, this Court noted that "the amendment did not ... affect either the standard by which a trial court reviews motions under the rule or the standard by which an appellate court reviews a trial court's ruling." Robertson, 519 S.E.2d at 846, quoting Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 482 n.7, 457 S.E.2d 152, 159 n.7 (1995).

The standard by which the trial court must review a motion for judgment as a matter of law under Rule 50 is, simply, whether the evidence, taken in the light most favorable to the plaintiff, creates an issue of fact. Importantly, the standard is not "whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict ...." Neely v. Mangum, 183 W.Va. 393, 395, 396 S.E.2d 160, 162 (1990). See also, Brannon v. Riffle, 197 W.Va. 97, 100, 475 S.E.2d 97, 100 (1996).

The appellate standard for reviewing a trial court's decision to enter judgment as a matter of law under Rule 50 is, in general, de novo. Johnson by Harper v. Hills Dep't Stores, 200 W.Va. 196, 199, 488 S.E.2d 471, 474 (1997); Brannon, 475 S.E.2d at 100. However, in this case, Judge Hutchison's decision to grant judgment as a matter of law

regarding Issue One was based largely on his decision that the Appellants' proffered experts, Dr. Bruce Bell and Mr. John Morgan, should have been excluded. Judge Hutchison's decision that these witnesses were not sufficiently qualified to testify as experts with respect to the effects of diameter limit timbering on surface water runoff was a decision within his discretion and must be reviewed under an abuse of discretion standard. Brady v. Deals on Wheels, Inc., 208 W.Va. 636, 642-43, 542 S.E.2d 457, 463-64 (2000) ("whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.... Determinations of whether a witness is sufficiently qualified to testify as an expert on a given subject and whether such expert testimony would be helpful to the trier of fact are committed to the sound discretion of the trial court. The trial court's ruling in this sphere should be upheld unless manifestly erroneous.").

Appellants bear the burden of showing that Judge Hutchison abused his discretion in determining that Dr. Bell and Mr. Morgan did not have scientific, technical or other specialized knowledge in a relevant field of expertise which would assist the trier of fact to understand the evidence or to determine a fact in issue.

### **III. ARGUMENT**

- A. The Calwell Group, McGraw Group, and Humphreys Group's arguments as to Western Pocahontas' Supplemental Motion and the 2006 McCutcheon Report are without merit, in that (1) the trial court never ruled on these issues, (2) Appellants waived the issues by failing to raise them at the trial court level, and (3) Appellants' arguments are based on fundamental misconceptions as to Dr. McCutcheon's deposition and Judge Hutchison's ruling.**

1. **The 2006 McCutcheon Report was the most recent, and arguably the most significant, development in the long process of investigating the July 8, 2001 floods, initiated by Governor Wise in 2001; the 2006 McCutcheon Report, issued six months after the Phase I Trial concluded, was important, newly discovered evidence.**

Before discussing the 2006 McCutcheon Report, some background is required.

On or about August 17, 2001, former Governor Bob Wise signed Executive Order No. 16-01, which created “a Flood Investigation Advisory Committee and a Flood Analysis Technical Team to focus specifically on the impacts of the mining and timbering industry on the July 8<sup>th</sup> flooding.”<sup>8</sup> (FATT Report at p. 1)<sup>9</sup>. In the watersheds that were investigated, the FATT Team, which was composed solely of DEP mining professionals- no timber experts at all- concluded that timbering increased runoff between zero and 5.9%. Importantly, at some points of measurement, timbering was found to have had **absolutely no effect** on peak runoff. The FATT Team did not study any of the watersheds at issue in the Phase I Trial, but as to the three watersheds they did study, they found significant differences.

In their study, the FATT Team used the National Resource Conservation Service (“NRCS”) curve number method to model increases, if any, in peak runoff caused by timbering and/or coal mining. The use of the NRSC curve number method of modeling the effects, if any, of timbering and/or coal mining on flooding took on added significance in the Phase I Trial, since both of the Appellants’ expert witnesses used

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<sup>8</sup> Importantly, the purpose of the FATT Report, to focus solely on potential mining and timbering impacts to the exclusion of all other possible contributing factors such as commercial development, residential development, highway projects, etc., reveals an inherent bias.

<sup>9</sup> The Flood Advisory Technical Taskforce (“FATT”) issued a report, which was admitted into evidence as Plaintiffs’ Exhibit 71. The FATT Report is discussed at length in Western Pocahontas’ Brief of Appellees in Appeal Number 33710.

variations of this method in opining that timbering had increased peak flow on July 8, 2001- but in percentages far in excess of the maximum percentage found by the FATT Team as to any watershed, i.e. 5.9%.

After the FATT Team issued its report, State Forester Randy Dye, Director of the West Virginia Division of Forestry, on June 14, 2002 contacted Dr. Steven C. McCutcheon, a nationally recognized hydrologist, to review the FATT Report. Dr. McCutcheon issued his first report on February 6, 2003 (the "2003 McCutcheon Report").<sup>10</sup> In the 2003 McCutcheon Report, it is noted that "For at least 135 years, foresters and hydrologists have investigated the effects of forests on runoff (Lull and Reinhart 1972, also see brief history by Wayne Swank in FATT 2002) but the Flood Advisory Technical Taskforce (2002) seems to have misinterpreted these findings." (2003 McCutcheon Report at p. 12). In regard to whether the curve number method utilized by the FATT Team can be properly applied to study effects of forestry practices, Dr. McCutcheon noted that "the curve number method has not been formally and scientifically adapted to forest hydrology and management and is known to be notoriously unreliable for some forests." (2003 McCutcheon Report at p. 3). However, Dr. McCutcheon ultimately concluded that "Additional investigation is necessary to determine if the curve number method is applicable for forested watersheds in West Virginia." (2003 McCutcheon Report at p. 2).

Counsel for Western Pocahontas contacted Dr. McCutcheon shortly before the Phase I Trial and requested to depose him. Because Dr. McCutcheon is an employee of an agency of the federal government, the United States Environmental Protection

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<sup>10</sup> The 2003 McCutcheon Report can be found on the West Virginia Division of Forestry's website at <http://www.wvforestry.com/McCutcheon.Report%20Final%20II.pdf>.

Agency ("EPA"), he requested from the EPA and was granted permission to submit to deposition. (Dr. McCutcheon Dep. Tr. of February 18, 2006 at p. 78). Dr. McCutcheon was deposed on February 18, 2006.

As noted above, in the 2003 McCutcheon Report, Dr. McCutcheon concluded that additional investigation would be necessary to make final conclusions regarding his review of the FATT Report and, in particular, the validity of the curve number method in evaluating forested watersheds. At his deposition, Dr. McCutcheon testified that he was nearing completion of his final report and expected it to be complete a few weeks after his deposition. (Dr. McCutcheon Dep. Tr. of February 18, 2006 at p. 148, 171, 173 and 215). However, in fact, it was almost an additional eight months before the report was completed.

On October 25, 2006, the report titled *Rainfall-Runoff Relationships for Selected Eastern U.S. Forested Mountain Watersheds: Testing of the Curve Number Method for Flood Analysis* (the "2006 McCutcheon Report") was issued. The 2006 McCutcheon Report concludes (1) that customary forestry practices do not cause flooding and (2) that the curve number method (the method used by the FATT Team, Dr. Bell, and Mr. Morgan) is not an appropriate method for analyzing the impacts of forestry practices on flooding.

On November 15, 2006, Western Pocahontas filed the Supplemental Motion for a new trial pursuant to Rule 60 of the West Virginia Rules of Civil Procedure based on the fact that the 2006 McCutcheon Report, which was not available at the time of the Phase I Trial or for many months thereafter, constitutes newly discovered evidence- evidence which, if available, would very probably have produced a different verdict. Nevertheless, Judge Hutchison chose not to rule on the Supplemental Motion and did not consider the

2006 McCutcheon Report. In the March 15, 2007 Order, Judge Hutchison stated that “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.” (March 15, 2007 Order at p. 6).

Despite Judge Hutchison’s express statement that the Supplemental Motion regarding the 2006 McCutcheon Report was not considered for purposes of the March 15, 2007 Order, the Calwell Group, McGraw Group, and Humphreys Group have speculated that Judge Hutchison’s ruling “may or may not have been influenced” by the Supplemental Motion and the 2006 McCutcheon Report. This unfounded speculation cannot properly form the basis for an appeal.

**2. The Calwell Group, McGraw Group, and Humphreys Group did not file a response to the Supplemental Motion and, accordingly, have waived the right to raise a challenge thereto, for the first time, in this Court.**

The Calwell Group, McGraw Group, and Humphreys Group state on page 1 of their appellate brief that they “seek to correct a misimpression that may have been created by Western Pocahontas’s Supplemental Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial...filed on November 15, 2006, concerning the significance of certain ‘newly discovered evidence’ [the 2006 McCutcheon Report] submitted as the basis for that Supplemental Motion.” If the Calwell Group, McGraw Group, and Humphreys Group believed that the Supplemental Motion created a “misimpression,” they should have sought to “correct” that misimpression by filing a response to the Supplemental Motion at the trial court level. Yet, in the four months that passed between the time that Western Pocahontas filed the Supplemental Motion on November 15, 2006 and the time that Judge Hutchison entered the post-trial order on

March 15, 2007, none of the Appellants filed a response to the Supplemental Motion or “sought to correct” any alleged “misimpressions.”

The law is well-settled that objections must be properly preserved by being raised at the trial court level. In Coleman v. Sopher, 201 W. Va. 588, 601, 499 S.E.2d 592, 605 (1997), this Court explained that:

“Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in State ex rel. Cooper v. Caperton, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996): **‘The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.’** (Citation omitted). When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. **The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court’s attention affords an opportunity to correct the problem before irreparable harm occurs.** There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.” (emphasis added).

The Calwell Group, McGraw Group, and Humphreys Group cannot be permitted to raise their arguments regarding the Supplemental Motion for the first time in this Court, having failed to make any response or objection regarding the Supplemental Motion at the trial court level. See also Maples v. West Virginia DOC, Div. of Parks & Recreation, 197 W. Va. 318, 323, 475 S.E.2d 410, 415 (1996) (“A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.”); State v. Swims, 212 W. Va. 263, 269, 569 S.E.2d 784, 790 (2002) (This Court held that a party could not challenge the adequacy

of a limiting instruction on appeal because the party failed to propose an alternative limiting instruction to the trial court judge); State Rd. Comm'n v. Ferguson, 148 W. Va. 742, 747, 137 S.E.2d 206, 209 (1964) (“Where objections are not shown to have been made in a trial court, and the matters concerned are not jurisdictional in character, such objections will not be considered on appeal.”).

**3. Contrary to the Calwell Group, McGraw Group, and Humphreys Group’s arguments, there was no inconsistency between the 2006 McCutcheon Report and Dr. McCutcheon’s earlier deposition.**

Even if the Supplemental Motion regarding the 2006 McCutcheon Report could properly be challenged for the first time on appeal, the arguments set forth by the Calwell Group, McGraw Group, and Humphreys Group are without merit. In response to Judge Hutchison’s conclusion that Dr. Bell and Mr. Morgan’s testimony must be excluded, in part, because of the unreliability and misapplication of the curve number method used in their models, the Calwell Group, McGraw Group, and Humphreys Group argue that “in the weeks leading up to trial, Dr. McCutcheon himself directly endorsed the curve number method.” (Brief of Appellants at p. 5). There was no such endorsement by Dr. McCutcheon. Although he did recognize that the use of the curve number method in urban hydrology is well established, he stated that this is not the case for forested watersheds:

“Q. All right. Well, I gather from your comment earlier to the effect that it’s possible the curve number system will work in the future but it’s going to have to be modified in order to be used in the future – is that what you said?”

A. I said both things without excluding one or the other. The curve number method will continue to be used as it is now in urban hydrology. I’m almost certain of that. It’s precise enough, especially when we use some design conservation techniques to make sure we don’t undersize pipes and things like that.

**But for these difficult hydrologic problems in forested watersheds, wildland settings and other settings that we don't deal with on a continuing basis, we are going to have to develop new techniques or find ways of using other techniques besides the curve number method to be able to relate rainfall and runoff.**

**We are – in some cases, we are well beyond original intentions of how this method should be used and we're well beyond the scientific basis of it and are going to have to develop an even better scientific basis for forested watersheds.**

(Dr. McCutcheon Dep. Tr. at pp. 175-176).

Not only did Dr. McCutcheon not “endorse” the curve number method for forested watersheds as used by Appellants’ experts in this case, he expressly testified that as of the time of his February 18, 2006, deposition, he and his team were “really struggling” with the issue of whether the curve number method was applicable at all in forested watersheds:

“Q. Okay. I appreciate that. I think we all do. Can you at least tell us whether you have drawn a conclusion with respect to the one basic point of whether the curve number method is applicable to forested watersheds in West Virginia?

A. West Virginia? That’s one of the points that we are really struggling with, is to be able to say how definitive we can extrapolate the results from Fernow, Coweeta and Hubbard Brook. We’re torn between our normal desire as scientists to speak very scientifically about how the curve number method was able to forecast the runoff volumes and some of the peak flows at Fernow or whether we can say that that kind of behavior – excuse me – that kind of forecasting ability exists or does not exist for any watershed forested, or any forested watershed in the Appalachian province here.

So, I wish today that I could be definitive about that, but I do have to go over the logic with my co-authors and make sure that we agree that there is a scientific basis for us being comprehensive in making such a statement.”

(Dr. McCutcheon Dep. Tr. at p.146-149). Thus, Dr. McCutcheon made it clear that he and the rest of the committee working on the 2006 McCutcheon Report had not completed the necessary research and had not made final conclusions regarding the applicability of the curve number method to forested watersheds. In fact, more than eight months passed from the time that Dr. McCutcheon was deposed on February 18, 2006 to the time he completed his report and submitted it to the West Virginia Division of Forestry on October 25, 2006, almost six months after the trial. Because Dr. McCutcheon's investigation, report, and conclusions were not completed prior to the Phase I Trial, Western Pocahontas could not have called Dr. McCutcheon as a witness at the Phase I Trial to testify as to conclusions that he had not yet formed.

While Dr. McCutcheon was not able to provide "definitive" testimony on February 18, 2006, in his report, finally completed on October 25, 2006, he concludes – for the first time – (1) that customary forestry practices do not cause flooding and (2) that the curve number method is not a scientifically accepted method for analyzing the impacts of forestry practices on flooding. These conclusions and the 2006 McCutcheon Report are newly discovered evidence which, had they been available to the jury, presumably would have produced a different verdict.

**4. Contrary to the Calwell Group, McGraw Group, and Humphreys Group's assertion that Western Pocahontas created a "misimpression" by its "failure to disclose" the fact that Dr. McCutcheon was deposed in this case, Judge Hutchison was fully aware of the deposition, which was repeatedly disclosed in open court and in the trial court record.**

The Calwell Group, McGraw Group, and Humphreys Group claim that Western Pocahontas "failed to disclose" that Dr. McCutcheon was deposed in this matter on February 18, 2006. This accusation is without merit. Western Pocahontas filed notices

and disclosed in open court that Dr. McCutcheon was deposed. The record in this matter contains three notices regarding Dr. McCutcheon's deposition, all filed by counsel for Western Pocahontas.<sup>11</sup> More importantly, at the March 7, 2006 hearing in this matter, Dr. McCutcheon's deposition was discussed at length. Counsel for the Calwell Group, McGraw Group, and Humphreys Group quoted directly from Dr. McCutcheon's deposition transcript and noted their continued objection to Dr. McCutcheon being permitted to testify as an expert witness at the Phase I Trial.<sup>12</sup> (March 7, 2006 Hearing Transcript at pp. 69-74). Accordingly, the Calwell Group, McGraw Group, and Humphreys Group's contention that Judge Hutchison was not made aware that Dr. McCutcheon was deposed is simply without merit.

**B. Contrary to the argument of the Calwell Group, McGraw Group, and Humphreys Group, Judge Hutchison properly applied this Court's holding in In Re: Flood Litigation to conclude that Appellants had the burden of proving unreasonableness and failed to discharge that burden.**

The second point raised by the Calwell Group, McGraw Group, and Humphreys Group relates to Issue Three. The Calwell Group, McGraw Group, and Humphreys Group assert that Judge Hutchison's ruling (that Western Pocahontas' conduct cannot be deemed unreasonable as a matter of law) is error. The Calwell Group, McGraw Group, and Humphreys Group's arguments reveal a fundamental misunderstanding as to what Issue Three was designed to accomplish and as to the applicable law.

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<sup>11</sup> The original Notice Of Video-Taped Deposition of Steven C. McCutcheon was filed on or about January 24, 2006. The first Amended Notice Of Video-Taped Deposition of Steven C. McCutcheon was filed on or about February 7, 2006. The Second Amended Notice Of Video-Taped Deposition of Steven C. McCutcheon was filed on or about February 10, 2006.

<sup>12</sup> Dr. McCutcheon was listed on Defendants' witness disclosures for the Phase I Trial in the hopes that his investigation and report for the West Virginia Division of Forestry would be completed prior to the conclusion of the Phase I Trial.

- 1. Contrary to the Calwell Group, McGraw Group, and Humphreys Group's arguments, Issue Three was designed merely to "screen" out defendants which had acted reasonably, without creating liability as to any defendants under any theory of recovery.**

In In Re: Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (W. Va. 2004), this Court held that Appellants have cognizable causes of action based on: (1) unreasonable use of land under the balancing test set forth in Morris v. Priddy, 181 W. Va. 588, 383 S.E.2d 770 (W. Va. 1989); (2) negligence; and (3) interference with riparian rights. This Court also answered that there were not enough facts on record to make a determination as to whether Appellants have a fourth cause of action based on private nuisance, and that the Panel and trial courts should make that determination as the evidence develops. In In Re: Flood Litigation, 216 W. Va. 534, 543, 607 S.E.2d 863, 872 (W. Va. 2004).

"Reasonableness," the subject of Issue Three, is a component of each of these four causes of action: (1) as to a Morris v. Priddy action, the question is "unreasonable use of land"; (2) as to negligence it's the familiar "reasonable person" inquiry; (3) in a riparian rights action, the issue is "unreasonable use of water"; and (4) in a nuisance action the focus is "unreasonable interference" with someone else's land.

In formulating the Trial Plan, Judge Hutchison explained that Issue Three did not relate solely or entirely to a Morris v. Priddy/rule of reasonable use theory, nor would a finding of unreasonableness be dispositive of the issue of liability under the rule of reasonable use or any other theory. As Judge Hutchison explained, reasonableness is a component of all four potential causes of action. Accordingly, if a defendant at the Phase I Trial was found to have acted "reasonably," it would be impossible for the Appellants to prevail against that defendant on any cause of action. Essentially, Issue Three was designed to be a preliminary issue common to all potential causes of action

that could serve to "screen" the number of defendants proceeding to a Phase II Trial-  
nothing more:

"MR. CALWELL: Well, I understand, but if that reasonable use is not going to be -- if we're not going to look at reasonable use in terms of negligence, as well, then we're only going to try half the conduct issue.

THE COURT: You and I disagree, Mr. Calwell. And we're not trying negligence in phase one. What would happen, as I perceive it, in phase two, is that the defendants who remain would not have the defense of reasonable use in their negligence, nuisance and other cases, they're not going to have that defense.

MR. CALWELL: But reasonableness -- reasonable use and a nuisance is not a defense to negligence. I mean, it's not -- they don't have -- they have nothing to do with each other. So, I mean, it's just like --

THE COURT: You and I have got -- we're not going to argue this all afternoon long. We're going to move on. (To Mr. Brock) Do you have something?

MR. BROCK: I just have a question. If the defendant prevails in phase one, that defendant is out?

THE COURT: My understanding is of the way this is going to go, if a jury finds that, despite the operations that were conducted on the premises, that those operations were not an unreasonable use of their premises, I think they're out. That is the position of the Panel."

(December 19, 2005 Hearing Transcript at pp. 65-66). Judge Hutchison summarized that, in the Phase I Trial "We're trying here to determine who are the defendants that are going to stay in this case." *Id.* at p. 65.

In addition to Judge Hutchison's explanation from the bench, the Trial Plan plainly states that: "It [the Phase I trial] ***shall not determine the legal liability of any of the defendants....***" (Trial Plan at p. 3, ¶ 4) (emphasis added). Thus, the Calwell Group, McGraw Group, and Humphreys Group are wrong to claim that the rule of reasonable use was a theory of liability that was put to the jury in the Phase I Trial. Issue Three did not relate to any particular cause of action, but rather addressed a

potentially dispositive issue common to all four potential theories of liability. Issue Three could not establish the liability of any defendant, but could only exonerate certain defendants from proceeding to Phase II.

Thus, the Calwell Group, McGraw Group, and Humphreys Group's wishful thinking in their footnote 3 to the effect that they "have already obtained a liability-creating verdict under the rule of reasonable use" is plainly wrong.

**2. Judge Hutchison's ruling did not confuse the rule of reasonable use and the theory of negligence.**

The Calwell Group, McGraw Group, and Humphreys Group argue in their brief, that in his March 15, 2007 Order, Judge Hutchison "confused the rule of reasonable use with the theory of negligence." The Calwell Group, McGraw Group, and Humphreys Group correctly note at some length, that the rule of reasonable use and the theory of negligence are "clearly two distinguishable theories," that "proof of all the elements of either of the two entitles the plaintiffs to recovery," and that "one is not necessarily dispositive of the other." All of this is true, and, contrary to the Calwell Group, McGraw Group, and Humphreys Group's argument, there is nothing in Judge Hutchison's ruling that suggests otherwise.

Nowhere in his 46-page order does Judge Hutchison ever suggest that the rule of reasonable use and the theory of negligence are anything other than separate theories of recovery. The confusion, if there is any, with respect to theories of recovery, is simply that the Calwell Group, McGraw Group, and Humphreys Group have apparently never understood that Issue Three did not address a single theory of recovery, as discussed above. Instead, Issue Three asked the jury to pass judgment on "reasonableness," a component of all four of the theories under which Appellants sought to recover.

In support of their “confusion” argument, the Calwell Group, McGraw Group, and Humphreys Group criticize Judge Hutchison’s use of the phrase “in an action seeking to establish negligence.”<sup>13</sup> Judge Hutchison’s use of this phrase is clearly derived from In Re: Flood Litigation, where this Court examined certified question 6, as reformulated, based on cases involving negligence, and extended the rationale of those negligence cases to apply to all of Appellants’ causes of action.

In In Re: Flood Litigation, this Court reformulated certified question 6 as follows:

“Is compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations competent evidence in ***any cause of action*** against the landowner ***for negligence or unreasonable use*** of the landowner’s land if the injury complained of was the sort the regulations were intended to prevent?” In Re: Flood Litigation, 607 S.E.2d at 877 (emphasis added).

This Court answered question 6, as reformulated, in the affirmative. “[W]e hold that compliance of a landowner in the extraction or removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence ***in any cause of action*** against the landowner ***for negligence or unreasonable use....***”

In Re: Flood Litigation, 607 S.E.2d at 877 (emphasis added). Therefore, despite the fact that Judge Hutchison only made explicit reference to “negligence,” this Court’s holding,

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<sup>13</sup> On pages 35 and 36 of the March 15, 2007 Order, Judge Hutchison ruled as follows:

“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.” (emphasis added).

as properly applied by Judge Hutchison, clearly relates to “any cause of action against the landowner for negligence or unreasonable use of the landowner’s land.” *Id.* (emphasis added).

**3. Contrary to the Calwell Group, McGraw Group, and Humphreys Group’s arguments, Judge Hutchison did not rule that compliance with regulations creates a presumption of reasonableness.**

The Calwell Group, McGraw Group, and Humphreys Group next assert that Judge Hutchison disregarded this Court’s ruling that compliance with the appropriate state and federal regulations “does not give rise to a presumption that the landowner acted reasonably or without liability to others in his or her extraction and removal activities.” However, it is Appellants, not Judge Hutchison, who have ignored the discussion of this Court regarding certified question 6 in In Re: Flood Litigation. This Court explained the rationale for and effect of its holding as follows:

“Our holding is based on the rationale that, if the defendants knew or should have known of some risk that would be prevented by reasonable measures not required by the regulation, they were negligent if they did not take such measures. It is settled law that a statute or regulation merely sets a floor of due care. Restatement (Second) of Torts, § 288C (1965); Prosser and Keaton on Torts, 233 (5th ed. 1984). Circumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation. *Id.*, 182 W.Va. at 562, 390 S.E.2d at 209. **We find that the above-stated rule and its underlying rationale are applicable in this case.**” In Re: Flood Litigation, 607 S.E.2d at 877 (emphasis added).

In Miller v. Warren, 182 W. Va. 560, 562, 390 S.E.2d 207, 209 (1990), which this Court relied on in In Re: Flood Litigation and extended to apply to “any cause of action against the landowner for negligence or unreasonable use,” this Court explained that “If the plaintiff is unable to show prima facie negligence by failure to comply with a statute, he

must prove negligence in some other particular.”<sup>14</sup> In this case, Appellants were unable to show prima facie “unreasonableness” because the evidence showed that Western Pocahontas required compliance with regulations and industry standards. Appellants were therefore required to prove unreasonableness “in some other particular.” They did not do so.

Based on In Re: Flood Litigation, because Appellants did not prove prima facie unreasonableness, they were required to show that (1) Western Pocahontas “knew or should have known of some risk,” (2) “that would be prevented by reasonable measures not required by the regulation.” Appellants presented no evidence that Western Pocahontas knew or should have known of a risk that the BMP-compliant operations on its property would materially increase flooding. Some of the operations under attack occurred seven and one-half years before the floods of July 8, 2001. Yet, there was no evidence of any complaints from any property owners regarding increased runoff from Western Pocahontas’ properties in that time. Likewise, there was no evidence of any complaints or violations from the Division of Forestry regarding any operations on Western Pocahontas’ properties in that time. For seven and one-half years, these operations apparently caused no problems at all—certainly none that Western Pocahontas was put on notice regarding.

In addition to the fact that there was no evidence that Western Pocahontas knew or should have known of any risk of increased water runoff or flooding from its BMP-compliant timber operations, there was no evidence that flooding could have been

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<sup>14</sup> Though this quote relates to a “negligence” action, in In Re: Flood Litigation, this Court applied the holding in Miller to “any cause of action against the landowner for negligence or unreasonable use of the landowner’s land.” In Re: Flood Litigation, 607 S.E.2d at 877.

prevented by any additional or different measures. Of course, it is clear that neither Dr. Bell nor Mr. Morgan could have opined as to any alternative measures for conducting a timbering operation, since neither of them is qualified to opine regarding how timber operations should be conducted. Accordingly, Judge Hutchison's ruling regarding Issue Three is consistent with the answer to certified question six in In Re: Flood Litigation.

After Western Pocahontas offered competent evidence to prove compliance with the appropriate regulations and standards, Appellants were required, under the holding of In Re: Flood Litigation, to prove what additional care should have been exercised. However, the Calwell Group, McGraw Group, and Humphreys Group argue that they have no such burden. Despite the Calwell Group, McGraw Group, and Humphreys Group's labored discussion of the definition of "presumption" and "special evidentiary burdens," Judge Hutchison merely followed the dictates of In Re: Flood Litigation which clearly states that if a failure to exercise due care or act reasonably cannot be established by violations of the applicable regulations and standards, then the plaintiff must show that the defendant knew or should have known of some risk that would be prevented by other reasonable measures.

Importantly, the Calwell Group, McGraw Group, and Humphreys Group do not dispute that Western Pocahontas proved that it required its contractors to comply with BMPs on all timber operations on its properties in the Mullens subwatershed. Yet, they claim that they should not have been required to prove that Western Pocahontas should have taken some additional precautions in addition to following BMPs. This is illogical. The Calwell Group, McGraw Group, and Humphreys Group did not answer, cannot answer, and now argue that they have no burden to answer the question of exactly what a "reasonable" landowner would have done to prevent increased runoff, if any.

This Court stated in In Re: Flood Litigation, “we are convinced that any increased risk of flooding which results from Defendant’s extractive activities can be greatly reduced by the exercise of due care.” In Re: Flood Litigation, 607 S.E.2d at 874. Western Pocahontas did exercise due care, as the evidence clearly showed at the Phase I Trial.<sup>15</sup> Appellants failed to prove what additional precautions, if any, should have been taken.

The reality is that the Calwell Group, McGraw Group, and Humphreys Group, like a broken record, are once again arguing for strict liability. They simply will not accept the fact that this Court imposed upon them the burden of proving wrongdoing on the part of Western Pocahontas- the burden of introducing evidence of some sort of unreasonable conduct. This was not a “special burden”; it was simply the ordinary, usual burden of every plaintiff in virtually every case of property damage or personal injury. Stripped of excess verbiage, Judge Hutchison’s ruling was simply that Appellants needed to introduce evidence of unreasonable conduct but failed to do that, thus necessitating judgment in favor of Western Pocahontas. This was clearly the correct ruling, one compelled by Appellants’ failure to sustain their burden of proof.

#### **IV. ARGUMENT IN SUPPORT OF THE TRIAL COURT’S CONDITIONAL GRANT OF A NEW TRIAL**

Because the rulings and order under consideration in this appeal are the same as those under consideration in the Segal Appellants’ case, Appeal Number 33710, Western Pocahontas incorporates by reference as if fully set forth herein the arguments and authorities in support of the trial court’s conditional grant of judgment contained in Western Pocahontas’ Brief of Appellees in Appeal Number 33710, at pages 77 through 104.

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<sup>15</sup> See Brief of Appellees in Appeal Number 33710 at pp. 64-77.

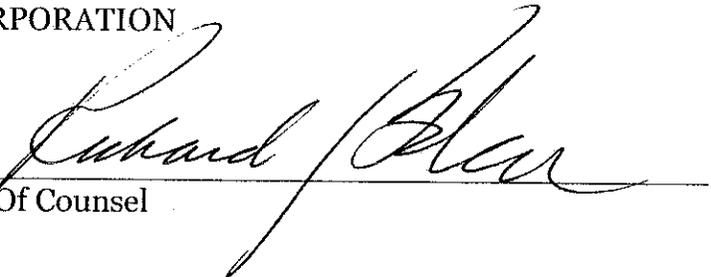
**V. ARGUMENT IN SUPPORT OF CROSS ASSIGNMENTS OF ERROR AS TO ADDITIONAL GROUNDS WARRANTING THE GRANT OF A NEW TRIAL**

In the Brief of Appellees in Appeal Number 33710, Western Pocahontas set forth in detail its cross assignments of error, all of which are equally applicable in this appeal. Western Pocahontas incorporates by reference as if fully set forth herein said cross assignments of error and the arguments and authorities in support thereof contained in the Brief of Appellees in Appeal Number 33710, at pages 104 through 169.

**VI. CONCLUSION**

For all of the foregoing reasons and the reasons set forth in Western Pocahontas' previously filed appellate brief in Appeal Number 33710, Western Pocahontas respectfully requests that this Court affirm the trial court's March 15, 2007 Order granting judgment as a matter of law in favor of Western Pocahontas. In the alternative, Western Pocahontas respectfully requests that this Court affirm Judge Hutchison's grant of a new trial on all issues for the reasons set forth in Judge Hutchison's order, or in the alternative, for the reasons outlined in Western Pocahontas' cross assignments of error in Appeal Number 33710, which are incorporated herein by reference.

WESTERN POCAHONTAS PROPERTIES LIMITED  
PARTNERSHIP and WESTERN POCAHONTAS  
CORPORATION

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CASE NO.: 33711

IN RE: FLOOD LITIGATION

Raleigh County  
Civil Action No. 02-C-797  
Honorable John A. Hutchison,  
Mass Litigation Panel  
(Upper Guyandotte River Watershed –  
Subwatershed 2a – Mullens)

**APPELLEES' MOTION TO ADOPT SUPPLEMENTAL APPENDIX**

Western Pocahontas Properties Limited Partnership and Western Pocahontas Corporation (hereinafter collectively referred to as "Western Pocahontas") moves the Court to permit Western Pocahontas to adopt the supplemental appendix filed by Western Pocahontas in Appeal Number 33710. As the Court is aware, the trial court order under consideration in Appeal Number 33710 is the same as that under consideration in the above-captioned matter, Appeal Number 33711. On January 7, 2008, Western Pocahontas filed its supplemental appendix of the following documents:

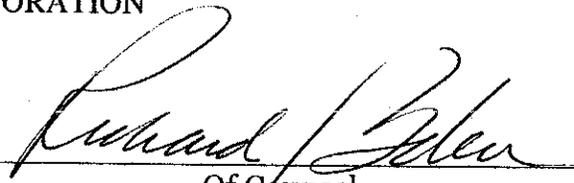
1. Supreme Court of Appeals of West Virginia's Administrative Order in re: "Motion to Refer Flood Damage Litigation to the Mass Litigation Panel," May 16, 2002.
2. Defendants' "Motion for Adoption of Upper Guyandotte Watershed Case Management Order No. 1," September 28, 2005.
3. "Order Amending Case Management Order June 8, 2005 With Respect to the Upper Guyandotte River Watershed Only," September 30, 2005.
4. "Order Regarding Various Matters Considered at the November 4, 2005 Hearing," December 19, 2005.
5. "Order Regarding The Various Matters Considered at the December 19, 2005 Hearing," January 11, 2006.
6. September 30, 2005 Hearing Transcript.
7. December 19, 2005 Hearing Transcript.
8. Transcript of Deposition of John S.L. Morgan, January 20, 2006.

9. "Trial Plan for Subwatersheds 2A & 2E of the Upper Guyandotte Watershed," January 26, 2006.
10. Transcript of Deposition of William Martin, January 27, 2006.
11. "The Jim C. Hamer Company's Motion to Preclude Evidence," February 27, 2006.
12. "Defendants' Renewed Motion for Judgment as a Matter of Law or a New Trial," "Defendants' Memorandum of Law in Support of Renewed Motion for Judgment as a Matter of Law or a New Trial," and accompanying exhibits, June 27, 2006.
13. "Notice of Filing Supplemental Exhibit to Defendants' Memorandum of Law in Support of Renewed Motion for Judgment as a Matter of Law or a New Trial," and accompanying exhibits, June 28, 2006.
14. Defendants' "Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw and Other Witnesses," "Defendants' Memorandum of Law in Support of Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw and Other Witnesses," and accompanying exhibits, July 31, 2006.
15. "Reply to Plaintiffs' Joint Response to Western Pocahontas Corporation and Western Pocahontas Properties Limited Partnership's Renewed Motion for Judgment as a Matter of Law of a New Trial," and accompanying exhibits, September 1, 2006.
16. "Reply to Plaintiffs' Memorandum in Opposition to Defendants', WPPLP and WPC, Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw and Other Witnesses," September 1, 2006.
17. "Supplemental Memorandum in Support of Defendants' Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw, and Other Witnesses," and accompanying exhibits, September 20, 2006.
18. McCutcheon, Steven C., et al, "Rainfall-Runoff Relationships for Selected U.S. Forested Mountain Watersheds: Testing of the Curve Number Method for Flood Analysis dated October 25, 2006."

WHEREFORE Western Pocahontas moves the Court to consider the supplemental appendix filed in Appeal Number 33710 as part of the record in Appeal Number 33711.

WESTERN POCAHONTAS PROPERTIES LIMITED  
PARTNERSHIP and WESTERN POCAHONTAS  
CORPORATION

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CASE NO.: 33711

IN RE: FLOOD LITIGATION

Raleigh County  
Civil Action No. 02-C-797  
Honorable John A. Hutchison,  
Mass Litigation Panel  
(Upper Guyandotte River Watershed –  
Subwatershed 2a – Mullens)

CERTIFICATE OF SERVICE

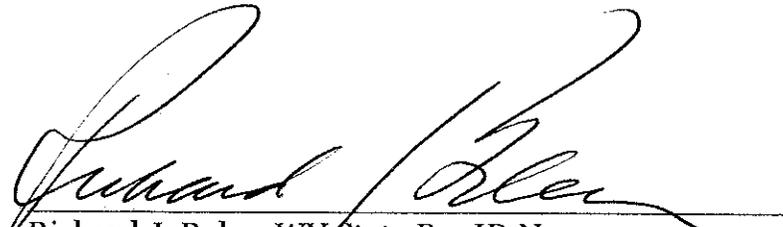
The undersigned hereby certifies that on the 18<sup>th</sup> day of January, 2008, true and correct copies of the “Brief of Appellees,” and “Appellees’ Motion to Adopt Supplemental Appendix,” were sent via United States Mail, postage prepaid to counsel of record as follows:

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