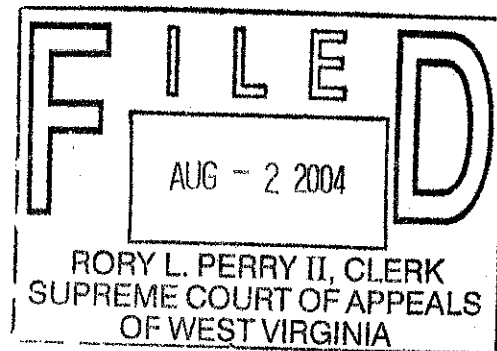


**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

**RE: In Re: Flood Litigation**

**Civil Action No. 02-C-797  
Supreme Court No. 031618**

**AMICUS CURIAE BRIEF OF THE SIERRA CLUB**



**Denise Hoffner-Brodsky, California Bar No. 208692  
Sierra Club  
1414 K Street, Suite 500  
Sacramento, CA 95814  
916-557-1100 x106 phone  
916-557-9669 facsimile  
denise.hoffner-brodsky@sierraclub.org**

## AMICUS CURIAE BRIEF OF THE SIERRA CLUB

### **I. Statement of Identity and Interest of *Amicus***

The Sierra Club is a nonprofit corporation with more than 740,000 members nationwide, more than 1800 of whom are West Virginia residents. The Sierra Club is dedicated to exploring, enjoying and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

Since 1992, the Sierra Club's Environmental Justice Campaign has worked in partnership with low-income communities and communities of color on local environmental, health and justice issues. The Sierra Club employs an Environmental Justice Resource Coordinator who works with West Virginia and Central Appalachian residents on coal mining impacts, including mountaintop removal mining and other local issues of concern. The Sierra Club is particularly interested in this case because of the past, present, and future harm to the West Virginia environment and its people that results from coal mining and logging in environmentally and culturally unique places.

### **II. Introduction**

This case is before the West Virginia Supreme Court because the Flood Litigation Panel, the presiding judicial body in this case, has certified nine questions to this Court for resolution.

Among the facts that the Flood Litigation Panel accepted as true are the following:

The land that was disturbed by the defendant corporations caused an increase in the peak flow of surface water onto the properties of plaintiffs, causing personal and property damage and wrongful death. Plaintiffs'

damages were more severe due to the disturbance of the land by several of the defendants.<sup>1</sup>

The issues currently before this Court are what causes of action lie and what theories of liability apply.

Several business organizations have filed *amicus* briefs on behalf of Defendants. They argue that if Defendants are ordered to compensate the flood victims, West Virginia's economy will suffer. The Sierra Club asserts that this position distorts the true economic picture associated with mountaintop removal coal mining. In particular, when the true costs are properly evaluated, it becomes clear that mountaintop removal mining places a very significant, ongoing economic burden on the state of West Virginia and its people. The Sierra Club respectfully wishes to focus the Court's attention on this aspect of the balance of harm associated with Defendants' activities. Regardless of what theory of liability the Court adopts in this case, the Court will likely engage in a balancing of harm test, and a comprehensive picture of the economic burden associated with Defendants' activities will be key.<sup>2</sup>

In considering the economic utility of mountaintop removal mining, the Court must take into account its enormous "externalized costs," which are the unavoidable costs of mountaintop removal mining that are borne by the local, state and federal government and local communities. A substantial body of scholarly literature recognizes the problem of externalized costs. Supreme Court Justice Stephen Breyer has explained externalized costs as "[t]he difference between true social costs and unregulated price." STEPHEN BREYER, REGULATION AND ITS REFORM

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<sup>1</sup> Flood Litigation Panel Certification (*Plaintiffs' Appendix and Designation of Record*, Ex. No. 10), page 4.

<sup>2</sup> Cf. The sixth factor in determining if an activity is "abnormally dangerous" is the "extent to which its value to the community is outweighed by its dangerous attributes." *Peneschi v. Nat'l Steel Corp.*, 170 W. Va. 511, 520, 295 S.E. 2d 1, 6 (1982) citing *Restatement (Second) of Torts*, § 519 (1976). See also *Restatement (First) of Torts* § 828 Utility of Conduct-Factors Involved (1939) ("In determining the utility of conduct which causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: (a) social value which the law attaches to the primary purpose of the conduct; (b) suitability of the conduct to the character of the locality [and] (c) impracticability of preventing or avoiding the invasion.").

23 (1982) cited by F. Paul Bland, *Problems of Price and Transportation: Two Proposals to Encourage Competition From Alternative Energy Sources*, 10 Harv. Envtl. L. Rev. 345 n.73 (1986). The problem of externalized costs is a familiar one in economics. Cf. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); and GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970). See also WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY*, 621-22 (3d ed. 1985) and WALTER NICHOLSON, *MICROECONOMIC THEORY* 695 (3d. ed. 1985).

Courts deciding tort cases have recognized the importance of externalized costs. For example, in evaluating whether an aluminum plant owner should pay punitive damages to an orchard owner who suffered damages caused by the plant's emissions, one court held that businesses must operate to provide "a net benefit, or at least not a net loss, to society." *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, 500 F.Supp. 984, 987 (D. Or. Mar. 28, 1980). The court recognized that factoring in externalized costs can tip the balance, exposing a seemingly profitable company as a net loss: "Because firms can sometimes impose a portion of their production costs upon others, the mere fact that a company continues to operate at a profit is not in itself conclusive evidence that it produces a net benefit to society." *Id.* at 989.

Mountaintop removal mining imposes a very significant portion of its production costs upon others. It costs the state of West Virginia millions of dollars a year to support a short-lived extractive industry that is destroying the backbone of West Virginia, her mountains. A 2002 report by two economists found the true cost of coal to be about \$150 per ton when social, human and environmental costs are considered. Todd L. Cherry, and Jason F. Shogren, *The Social Cost of Coal: A Tale of Market Failure and Market Solution*, Sept. 30, 2002. See also *The Appalachian Voice, The True Costs of Coal: New Study Adds Them Up*, June 1, 2002,

<http://www.ncpress.net/cgi-bin/advsearch.cgi?gffd=791> (as visited July 30, 2004). That is five times the \$30 per ton market cost. The difference is being absorbed by the economy of West Virginia.

The Sierra Club respectfully submits that the mining industry's plea for recognition of its social utility must be weighed against the extensive costs it imposes on West Virginia.<sup>3</sup>

### III. Argument

#### A. *Mountaintop Removal Mining Has Eliminated Jobs, and Generated Large Infrastructure and Health Costs*

Contrary to the picture painted by *amici* for the Defendants, mountaintop removal mining has taken jobs away from West Virginia. Each dragline does the work of 100 miners. According to one study, despite a 32 percent rise in coal production between 1987 and 1997, mining jobs *decreased* by 29 percent during that same period. Citizens Coal Council, <http://www.citizenscoalcouncil.org/facts/mtntop.htm> (as visited July 29, 2004) *citing* U.S. Bureau of Labor Statistics, <http://www.bls.gov/data/home.htm>. In 1979, coal accounted for 9.5 percent of jobs in West Virginia. Contrast that to 1998, when the coal industry accounted for only 3 percent of jobs in the state. *Id.* By comparison, the tourism industry, which is threatened by the decimation of the West Virginia landscape, contributed much more money to the state's economy during 1998. *Id.* While coal production in West Virginia in 2003 nearly surpassed its record, the number of coal miners employed reached its lowest level since the nineteenth century. West Virginia Office of Miners' Health Safety & Training, *2003 Coal Production by County*, <http://www.wvminesafety.org/cnty2003.htm> (as visited July 29, 2004) cited by Patrick

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<sup>3</sup> Although externalized costs are difficult to quantify, a decision not to consider them does quantify them; it sets their value at zero. F. Paul Bland, *Problems of Price and Transportation: Two Proposals to Encourage Competition From Alternative Energy Sources*, 10 Harv. Envtl. L. Rev. 345, 386 (1986). Ecological economists have been developing a variety of models to quantify the true and full costs of internal costs. *Cf.* TruCost, an environmental research organization dedicated to providing financial measures of environmental impacts. <http://www.trucost.com> (as visited July 29, 2004).

C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfield*, 34 *Envtl. L.* 21, 45 (Winter 2004).

The jobs that are created by mountaintop removal mining tend to be jobs requiring specialized skills, for which local residents have no formal training. Therefore, local economies benefit little. According to one study, the top fifteen coal-producing counties in the state are among the poorest in the country, even though they produce fifteen percent of our coal. Appalachian Voices, *Myths and Facts*, [http://www.appvoices.org/mtr/mtr\\_mythsfacts.asp](http://www.appvoices.org/mtr/mtr_mythsfacts.asp) (as visited July 29, 2004) (citing U.S. Census Bureau; West Virginia Office of Miners' Health Safety & Training). Coal-producing counties are experiencing school closings and high unemployment rates. See Appalachian Voices, *Economics of Mountaintop Removal*, [http://www.appvoices.org/mtr/mtr\\_economics.asp](http://www.appvoices.org/mtr/mtr_economics.asp) (graph) (as visited July 29, 2004). Moreover, the mountaintop removal mining industry acknowledges that it is extracting a finite resource and will be depleting the state's coal in a relatively short time frame. One industry study estimates that West Virginia's coal will last another 27 years if current levels of production are maintained. Dan Radmacher, *Coal Not Part of State Coalfields Future*, WEST VIRGINIA GAZETTE, May 21, 1999 (citing industry study by Hill and Associates).

Coal companies are fond of saying how cheap coal is. However, coal is far from cheap for the people of West Virginia who subsidize infrastructure required to support the coal industry. These costs are "externalized" costs, in that they do not affect the costs of coal or the profits of the coal industry. These externalized costs come in many forms. The West Virginia Division of Environmental Protection (WVDEP), through both the Division of Mining and Reclamation (DMR) and the Office of Explosives and Blasting (OEB), require an enormous

annual budget to oversee and police mountaintop removal mining. State of W. Va. 2005 Executive Budget, p. 248.

There is the devaluation of property damaged from blasting and heavy machinery traffic. The West Virginia Legislative Auditor recently published a Performance Review of the OEB and criticized its perennial backlog in addressing citizen complaints. “[U]nless the OEB devotes greater resources to resolving claims or changes the way that claims are currently resolved, claims will continue to be resolved untimely.” W. Va. Legislative Auditor, Performance Evaluation & Research Division, Preliminary Performance Review-Office of Explosives and Blasting, *Although the OEB Has Made Progress in Achieving Mandates, There is Still a Backlog of Claims to be Resolved*, Nov. 2003, p. 15. The report acknowledges that citizens with pending claims could be living in hazardous conditions from a blasting incident and that their property value could be adversely affected until that damage is repaired (assuming the damage is not irreversible). W. Va. Legislative Auditor, Performance Evaluation & Research Division, Preliminary Performance Review-Office of Explosives and Blasting, *The Office of Explosives and Blasting Is Not Meeting All Required Mandates*, Dec. 2002, pp. 15-16.

Coal truck traffic creates more than a nuisance in West Virginia. Reports indicate that speeding and overloaded coal trucks cause damage to residents’ vehicles, homes and health and are responsible for the deaths of innocent people every year. Brian Bowling, *Henshaw Residents Fighting Coal Trucks: Attorney General, Delegates Offer to Help with Effort*, CHARLESTON DAILY MAIL, Sept. 21, 2001 and Charles Owens, *Coal Truck Safety Weighs on Minds of Area Residents*, BLUEFIELD DAILY TELEGRAPH, Aug. 10, 2003. According to these reports, a host of problems are caused by the trucks. Many people believe that the coal companies intentionally overload the trucks. The coal dust creates a continuous haze and breathing problems. Currently,

coal truck loads do not have to be covered. Enforcement officers must actually see coal fall out of a truck in order to issue a citation for having an unsecure load. The Division of Highways' weight enforcement program had been concerned about these problems for years. *Id.*

There are also health-related impacts to both workers and community members in the form of workers compensation claims and hospitalization and other health care costs born by the government. During the late 1980s, the state Workers' Compensation Fund (WCF) decreased premiums for coal companies by 30 percent and provided them refunds, despite the WCF's dire need for funding. OTIS K. RICE and STEPHEN W. BROWN, WEST VIRGINIA: A HISTORY 288-289 (2d ed. 1993), cited by Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfield*, 34 *Envtl. L.* 21, 45 (Winter 2004); Paul J. Nyden, *The Making of a Deficit: Moore's Actions Put Fund on Brink of Insolvency*, SUNDAY GAZETTE-MAIL, Dec. 21, 1997, at 5a, available at 1997 WL 17424715. By the early 1990s, the WCF had a \$1.2 billion deficit as a result.

Industry *amici* boast about the amount of money the industry provides through the Coal Severance Tax Fund. What they fail to mention is that it required nearly seventy years to fight to enact the tax which was originally conceptualized by the governor of West Virginia in 1902.<sup>4</sup> Industry lobbyists routinely oppose any increases in the much needed Tax Fund. Not surprisingly, in opposing increases to the fund, an industry leader has asserted that it "would further depress the coal market."<sup>5</sup>

A 1990 study of the "super tax credit," a tax credit purportedly enacted to encourage economic development, found that it resulted in a windfall to coal companies that did not pay

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<sup>4</sup> Ohio Valley Environmental Coalition, *Coal, People, Politics and Money*, [http://www.ovec.org/old\\_site/mountains10.htm](http://www.ovec.org/old_site/mountains10.htm) (visited July 29, 2004).

<sup>5</sup> Coal Age (1996), *Industry Opposed West Virginia Severance Tax*, [http://www.findarticles.com/p/articles/mi\\_m0FTK/is\\_4\\_108/ai\\_100448982](http://www.findarticles.com/p/articles/mi_m0FTK/is_4_108/ai_100448982) (as visited July 29, 2004).

any business taxes on approximately 20 percent of the coal mined in West Virginia. This extreme result led to the passage of legislation preventing coal companies from using “super tax credits” to avoid severance tax payments. OTIS K. RICE and STEPHEN W. BROWN, WEST VIRGINIA: A HISTORY 289 (2d ed. 1993) cited by Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfield*, 34 *Envtl. L.* 21, 44 (Winter 2004).

***B. Mountaintop Removal Mining Has Wreaked Havoc on the Appalachian Environment and Culture***

In 2004, a Draft Programmatic Environmental Impact Statement on Mountaintop Removal/Valley Fill Activities in Appalachia was produced by the federal government, pursuant to a settlement in a 1998 lawsuit [hereinafter DEIS]. U.S. Environmental Protection Agency, *Draft Environmental Impact Statement*, <http://www.epa.gov/region3/mtntop/eis.htm> (as visited July 29, 2004). The DEIS documents the enormous environmental degradation caused by mountaintop removal mining. The document confirms the obvious: That mountaintop removal mining has drastically altered the Appalachian landscape.<sup>6</sup> The DEIS characterizes it this way: “The result is an area drastically different from its pre-mining condition.”<sup>7</sup> Staff from both the Environmental Protection Agency (EPA) and the Fish and Wildlife Service (FWS) agree that “it should be intuitively obvious that they’ll (sic) be a drastically different ecosystem from pre-mining forests for generations, if not thousands of years.”<sup>8</sup>

The DEIS asserts that approximately 1208 miles of streams have been affected to date. It then goes on to predict that if mining, permitting and mitigation trends stay the same, an

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<sup>6</sup> DEIS App. I, p.23.

<sup>7</sup> *Id.*

<sup>8</sup> Electronic mails from Cindy Tibbot, FWS, and William Hoffman, EPA, cited in *Comments of West Virginia Highlands Conservancy and Ohio Valley Environmental Coalition on the Draft Programmatic Environmental Impact Statement on Mountaintop Removal Mining/Valley Fill Activities in Appalachia*, [http://www.ohvec.org/issues/mountaintop\\_removal/articles/EIS\\_wvhc\\_ovec.pdf](http://www.ohvec.org/issues/mountaintop_removal/articles/EIS_wvhc_ovec.pdf), p. 47 (as visited July 29, 2004).

additional thousand miles of direct impacts could occur in the next ten years.<sup>9</sup> According to the DEIS, mountaintop removal mining and valley fills have already degraded one of the most unique and biologically diverse forests in the United States into grasslands. The document estimates that 1,408,372 acres of forest have been affected.”<sup>10</sup> William Maxey, former chief forester for West Virginia, resigned his post because the WVDEP would not require proper reforestation of mountaintop mines.<sup>11</sup> Further, the drastic changes in wildlife habitat caused by mining “could put a number of species in peril.”<sup>12</sup>

The industry’s destruction of the Appalachian landscape, sadly, also destroys local culture and local economies. Mountain people need their mountains. Appalachia is a diverse cultural landscape and its diversity will provide the key to its economic diversification. For example, Appalachia has a rich supply of ginseng, a very desirable plant with great commercial appeal. A 1996 study by Appalachia Science in the Public Interest observed that for wild and virtually wild ginseng, the Chinese market alone is 12 billion dollars annually. More than half of the U.S. annual export of wild ginseng comes from the coal-bearing plateaus. David Cole, *Ginseng in Appalachia*, ASPI Publications – Technical Papers, Mt. Vernon, KY (1996). By comparison, according to the West Virginia Mining and Reclamation Association in Charleston, the coal industry meets a direct annual payroll of around one billion dollars for the state of West Virginia.

In conclusion, the enormous economic, environmental and social costs of mountaintop removal mining must be weighed in any balance of harms associated with the floods of 2001.

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<sup>9</sup> DEIS App. I, pp. 66-67. *See also* DEIS App. I, p. v. These numbers are understatements because they do not include streams which are significantly “indirectly” impacted.

<sup>10</sup> DEIS IV, C-1.

<sup>11</sup> Maryanne Vollers, *Razing Appalachia*, <http://www.motherjones.com/news/feature/1999/07/mountaintop.html> (as visited July 29, 2004).

<sup>12</sup> DEIS App. I, p. v.

For people whose lives and communities have been decimated, the loss of that heritage is the single most important, uncounted cost of mountaintop removal. As Larry Gibson said of his home on Kayford Mountain, "You're not buying this land. If we sell, we sell our heritage. We have no past after that."<sup>13</sup>

Dated this 15<sup>th</sup> day of July, 2004.

Respectfully submitted,

Denise Hoffner-Brodsky /KH  
Denise Hoffner-Brodsky, California Bar No. 208692  
Sierra Club  
1414 K Street, Suite 500  
Sacramento, CA 95814  
916-557-1100 x106 phone  
916-557-9669 facsimile  
denise.hoffner-brodsky@sierraclub.org

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<sup>13</sup> Vollers, *Raising Appalachia*