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Industry whistleblower to testify in flood trial

Jurors to be absent during proceedings

By Audrey Stanton

Register-Herald reporter

The former head of the National Mine Health and Safety Academy in Beaver and nationally known industry whistleblower Jack Spadaro is expected to testify today at an evidentiary motions hearing within the 2001 flood mass litigation currently under way in Raleigh County Circuit Court.

Jurors won't be present today when Judge John Hutchison decides whether Spadaro — an upcoming expert witness for the plaintiffs — will be able to testify regarding evidence that defendant Pioneer Fuel had been issued multiple violation citations for illegally placing soil and rock onto steep sloped areas that resulted in off-site damage.

The case concerns the impact of land use on July 8, 2001, flooding in the Mullens and Oceana sub-watersheds of the Upper Guyandotte watershed.

Plaintiffs' attorneys representing hundreds of residents contend the landowners who allowed timbering and surface mining on their property near Mullens and Oceana were irresponsible neighbors who contributed to severe flood damage.

Defense attorneys representing six companies say they will prove such catastrophic rainfall as occurred that day would have overwhelmed the land regardless of its use.

Jurors must decide if the activities of coal and timber companies being sued materially increased the rate at which water flowed off their property, if that increase materially increased flooding of streams and if the landowners engaged in unreasonable conduct — which is why plaintiffs' attorneys are hopeful Hutchison will allow Spadaro to talk about citations issued to Pioneer's two surface mines.

In his report on permit information the former mine inspector reviewed within the Oceana sub-watershed, Spadaro wrote that Pioneer Fuel had been cited 27 times in the years preceding the 2001 flood for serious violations regarding placement of spoil onto downslope areas, valley fill instability and inadequate sediment control. He also reported the company had been cited for off-site damage to adjoining and downstream property owners and demonstrated a pattern of neglect that culminated in the flood.

But it's possible the citations may not be admitted into evidence.

Speaking to one specific violation regarding spoil inappropriately placed at the Simmons Fork Mine, Pioneer Fuel attorney Henry Jernigan said the violation itself was not evidence that such a condition existed.

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"Be that as it may, there is no indication as to where this violation occurred or that any of the spoil material that was placed on the downslope reached any of the tributaries at issue," Jernigan told the judge. " ... This violation does not establish anything with respect to the three issues that are before this court, and as such, it should be deemed irrelevant for purposes of these proceedings."

Jernigan also argued the reports show no indication that any drainage or debris got off-site on July 8, 2001, and he noted that one follow-up report indicated the mine was in full compliance on everything except downslope spoil.

And that's precisely the issue plaintiffs' attorney Randolph McGraw says Spadaro should be allowed to address.

"Spoil is excess waste, rocks and debris that helped to clog off the channels," McGraw said. "That spoil helped to block this water and then ultimately was washed downstream into the communities and into the yards of the people downstream."

He and attorney Alex McLaughlin argued the violations were legally relevant because they indicated a logical chain of proof. But Jernigan contends the evidence is inadmissible because it's not relevant — violations were corrected prior to July 8 — and because it could prejudice the jury.

Hutchison said if he does allow some or all of the violation citations to reach jurors, it will not be for the purpose of having the jury speculate that Pioneer had a plan or course of conduct that resulted in the filling up of the streams prior to July 8.

"I need to hear from Spadaro on all of this," Hutchison said.

Spadaro is known for a 2004 "60 Minutes" appearance on which he aired his grievances against Mine Safety and Health Administration management. Those grievances stemmed from the prior year when Spadaro was removed from his position after complaining about weak enforcement action in response to Massey Energy's huge October 2000 coal slurry spill in Martin County, Ky. The dam failure sent an estimated 300 million gallons of liquefied coal waste into tributaries in eastern Kentucky.

Pioneer Fuel is one of six defendants remaining in this portion of the lawsuit. Other remaining defendants as of Thursday afternoon were Western Pocahontas Corp., Western Pocahontas Properties Limited Partnership, Eastern Associated Coal, White Oak Land Co. and White Oak Lumber Co.

Pocahontas Land Corp. settled out of the case late Thursday, and it appeared Eastern Associated Coal may have been in negotiations with plaintiffs' attorneys for dismissal from the remaining sub-watershed in which it had not yet been dismissed.

Since the trial began last week and in the days just prior to its start, several companies have settled out or been dismissed from the proceedings. Among those are Bluefield Timber, Wagner Forest Management, Tioga Lumber Co., Pardee Resources Group, Georgia-Pacific Corp., North American Timber, Piney Land Co., McCreery Coal Land Co., A.Z. Litz, Bob Crouch, Wyoming-Pocahontas Land Co., Beaver Coal and Creekside Energy Development Co.

Jurors will return Monday morning.

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