



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

**IN RE: FLOOD LITIGATION**

**MC FLOOD 7/8/2001**

**THIS DOCUMENT APPLIES TO: MC 2a MULLENS MASTER CASE  
ORDER GOVERNING MEDIATION AND MEDIATION STATEMENTS**

Pursuant to Trial Court Rule 26.08(b), mediation of cases selected by the parties pursuant to the *Case Management and Scheduling Order Phase II Trial of Upper Guyandotte Watershed Subwatershed 2a* shall be conducted **on Monday, November 16, 2009, beginning at 10:00 a.m. and shall continue from day to day through Wednesday, November 18, 2009, in the Circuit Court of McDowell County, West Virginia, in the Courtroom of the Honorable Booker T. Stephens**, assigned by the Mass Litigation Panel as Lead Resolution Judge in the Flood Litigation. Judge Stephens will be assisted in these mediations by The Honorable Alan D. Moats and The Honorable James P. Mazzone, assigned by the Panel as Resolution Judges in the Flood Litigation.

Mediation of cases selected by the parties pursuant to the *Case Management and Scheduling Order Phase II Trial of Upper Guyandotte Watershed Subwatershed 2a* shall be conducted in accordance with the following schedule: Cases in which attorney Scott Segal represents plaintiffs shall be mediated on November 16, 2009; cases in which attorney Stuart Calwell and/or attorney Randolph McGraw represent plaintiffs shall be mediated on November 17, 2009; on November 18, 2009, attorneys Segal, Calwell and McGraw shall present any remaining cases to be mediated or issues that need to be addressed by the Resolution Judges.

Mediation shall be conducted in accordance with the following procedures:

### **REQUIRED PARTICIPANTS**

1. The following persons shall attend the entire mediation in person: (a) lead trial counsel for any party who is prosecuting a claim (i.e., the plaintiffs and any defendant who has made a counterclaim, crossclaim or third-party complaint); and (b) a representative of the insurance carrier for any insured party. Counsel and the representative of the insurance carrier for any insured party must be familiar with the cases to be mediated and must have full authority to act on behalf of the party/parties they represent, including the authority to negotiate a resolution of the case and to respond to developments during the mediation process. The individual party/parties may, but are not required to attend the mediation. Counsel shall provide the individual party/parties with written notice of the mediation advising them of their right to attend the mediation if they so desire.

### **CONTACT INFORMATION FOR REQUIRED PARTICIPANTS**

2. No later than **October 15, 2009**, counsel shall submit in writing, for each attorney who will be attending the mediation: (a) a direct dial telephone work number; (b) a cell phone or home telephone number; and (c) an electronic mail address where the attorney can be reached.

### **MEDIATION STATEMENTS**

3. No later than **October 15, 2009**, mediation statements containing all of the information required by ¶ 5 shall be delivered to the offices of Lead Resolution Judge Booker T. Stephens and Resolution Judges Alan D. Moats and James P. Mazzone either by hand delivery or by Federal Express, UPS or any other express mail service with tracking capability. **Mediation statements are confidential.** Mediation statements shall

state on their face “**CONFIDENTIAL MEDIATION STATEMENT**” and shall be placed in envelopes marked “**CONFIDENTIAL MEDIATION STATEMENT.**” Mediation statements **shall not** be filed with the Clerk’s office, **shall not** be exchanged among the parties or counsel (unless the parties or counsel so desire), **shall not** be provided to the Presiding Judges, and **shall not** become part of the record in this matter. **Mediation statements shall not be electronically filed and served since they are not part of the Court record.**

4. Mediation statements may be in memorandum or letter form. They must be double-spaced, in no less than 12-point font, and be no longer than **fifteen (15) pages**.

5. Mediation statements **must** contain each of the following headings and **must** contain a discussion of each of the topics described below:

a) **Parties**: identify the parties, describe their relationship, if any, to each other, and by whom each party is represented, including the identity of all individuals who will be participating on behalf of a party/parties during the mediation.

b) **Factual and Procedural History of the Case**: provide a brief summary of the factual and procedural history of the case, clearly indicating which material facts are not in dispute and which material facts remain in dispute.

c) **Summary of Applicable Law**: provide a brief summary of the law, including applicable statutes, cases and standards.

d) **Strengths and Weaknesses of the Case**: provide an **honest** discussion of the strengths **and** weaknesses of the party’s claims and/or defenses.

e) **Summary of Damages**: plaintiff’s counsel shall provide a brief summary of the plaintiff’s alleged damages, both liquidated and special.

f) **Settlement Efforts**: provide a brief description of prior settlement negotiations and discussions between the parties, including the most recent offers or demands exchanged by the parties and the party's assessment as to why settlement has not been reached.

g) **Settlement Proposal**: provide the party's proposed term(s) for a resolution. If the party has any suggestions as to how the Resolution Judges may be helpful in reaching a resolution, such suggestions should also be provided.

h) **Fees and Costs**: list separately (i) attorneys' fees and costs incurred to date; (ii) other fees and costs incurred to date; (iii) a good faith estimate of additional attorneys' fees and costs to be incurred if this matter is not settled; and (iv) a good faith estimate of additional other fees and costs to be incurred if this matter is not settled.

i) **Other Settlements**: plaintiff's counsel shall provide the gross settlement amount of any other settlements on behalf of a plaintiff whose case is being mediated.

In addition to the required topics described above, and provided that the mediation statement complies with the page limit stated above, counsel are encouraged to address any other matters they believe may be of assistance to the Resolution Judges.

#### **EXHIBITS TO MEDIATION STATEMENT**

6. Documents counsel believes are relevant to resolution of the case may be submitted as exhibits to the mediation statement. However, counsel are cautioned to limit exhibits to only those few documents counsel believe are crucial to resolution of the case.

**CONFIDENTIALITY**

7. The contents of the mediation statements and the mediation discussions, including any resolution or settlement shall remain confidential, shall not be used in the present litigation nor any other litigation (whether presently pending or filed in the future), and shall not be construed as nor constitute an admission. Breach of this provision shall subject the violator to sanctions.

8. If the parties reach a resolution of their dispute, the Resolution Judges will have a court reporter available to record the terms of any settlement reached by the parties.

**EX PARTE CONTACTS**

9. Before, during and after the scheduled mediation, the Resolution Judges may find it necessary and useful to communicate with one or more parties outside the presence of the other party or parties.

**OBLIGATION OF GOOD FAITH PARTICIPATION**

10. The required participants shall attend the entire mediation in person and shall be available and accessible throughout the mediation process. No party may be compelled by this Order, the Mass Litigation Panel, or The Resolution Judges to settle a case involuntarily or against the party's judgment. However, the Resolution Judges expect the parties' full and good faith cooperation with the mediation process, and expect the participants to be prepared to participate fully, openly and knowledgably in a mutual effort to examine and resolve issues. The Resolution Judges encourage all participants to keep an open mind in order to reassess their previous positions and to find creative means for resolving the dispute.

**AVOIDANCE OF SANCTIONS**

11. All counsel are reminded of their obligations to read and comply with this **Order**. To avoid the imposition of sanctions, counsel shall advise the Resolution Judges immediately of any problems regarding compliance with this Order.

ENTER: September 16, 2009

/s/ Booker T. Stephens  
Lead Resolution Judge, Flood Litigation