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McDowell County Circuit Clerk
Francine Spencer

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

DREMA DOTSON, a resident of West Virginia, individually and on behalf of others similarly situated,

DENVER ALLEN HUNT, a resident of West Virginia, individually and on behalf of others similarly situated,

CONNIE LESTER, a resident of West Virginia, individually and on behalf of others similarly situated,

WOODROW KIRK, a resident of West Virginia, individually and on behalf of others similarly situated,

JOHNNY LOCKHART, a resident of West Virginia, individually and on behalf of others similarly situated,

Plaintiffs,

v.

Civil Action No. 16-C-96-K

TWIN STAR MINING, INC., a West Virginia Corporation, and

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, a governmental entity,

Defendants.

ORDER DENYING WVDEP'S *MOTIONS FOR SUMMARY JUDGMENT* AND DENYING PLAINTIFFS' *MOTION FOR CLASS CERTIFICATION*

This matter has been pending before this Court since August 19, 2016 when the original Complaint was filed. Over the intervening years, the parties have conducted extensive discovery, the original Complaint has been amended twice and answered thrice. All parties have filed numerous motions. Ultimately, on May 9, 2019, this Court entered a Settlement Order following settlement hearings conducted by the Court on April 22, 23, and 24, 2019 settling all claims between Plaintiffs and Twin Star Mining, Inc.; leaving open Plaintiffs' Claims against the West

Virginia Department of Environmental Protection (WV DEP); and vacating Time-Frame Order deadlines with respect to DEP.

On October 16, 2019, the Court heard arguments on Defendant DEP's *Motions for Summary Judgment*, previously filed March 11, 2019, and Plaintiffs' *Motion for Class Certification*.

FINDINGS OF FACT

Taking the facts in the light most favorable to the nonmoving Plaintiffs as the Court must in considering DEP's *Motions for Summary Judgment*, the Court makes the following finding of facts:

1. On June 5, 2014, rains and surface water runoff from Twin Star Mining's surface mining operations known as Bull Creek Surface Mine Number 45 atop the Bull Creek and Trap Fork Watershed flooded residents along Upper Bull Creek (Mud Fork), the Right Fork of Bull Creek and Main Bull Creek, and Lower Bull Creek.
2. The 5 Plaintiffs are among approximately 151 residents that suffered damage from the floods.
3. Named Plaintiffs claim that Twin Star Mining negligently and improperly designed and then failed to properly maintain its water runoff system under the *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328; the *West Virginia Surface Mining Control and Reclamation Act ("WV SCMRA")*, W. Va. Code §§ 22-3-1 through 22-3-38; and violated its mining permits under W. Va. Code § 22-3-13(a) & (b); *see* W. Va. Code § 22-3-25(f).
4. Plaintiffs claim that DEP failed to enforce various portions of the *WV SCMRA*.

5. Plaintiffs claim they are at risk for future flooding and seek injunctive relief to cause DEP to enforce the *WV SCMRA* and mining permit requirements.
6. Plaintiffs seek injunctive relief from WV DEP.
7. Plaintiffs seek monetary damages from WV DEP up to the policy limits of WV DEP's insurance policy.
8. WV DEP does not claim sovereign immunity, has a policy of insurance, and asserts qualified immunity.

A. DEP's *Motions for Summary Judgment*

DEP's Arguments

DEP moves the Court to grant DEP summary judgment against all Plaintiffs because it has qualified immunity. Alternatively, DEP claims that it is entitled to summary judgment based on the "public duty doctrine". DEP argues that the "public duty doctrine" is a defense based on the fact that a public duty is a general duty to the public at large and not a specific duty to certain specific members of the public.

Plaintiffs' Arguments

Plaintiffs counter that DEP is not entitled to qualified immunity and Plaintiffs can overcome the "public duty" defense because Plaintiffs can establish a "special relationship" between DEP and themselves. Plaintiffs claim that they relied on DEP duty to properly enforce the *WV SCMRA*, relied on DEP's promises, and expected to be kept safe from harm by DEP. Plaintiffs claim that Twin Star Mining failed to limit storm water runoff to pre-mining levels, designed their storm water runoff engineering plans without proper runoff curve numbers, without sufficient storm water runoff controls, and without sufficient storm water detention capacity. Plaintiffs claim that DEP issued mining permits to Twin Star Mining that did not meet the *WV*

SCMRA requirements. Plaintiffs claim that Twin Star failed to conduct mining operations according to the *WV SCMRA* requirements and that DEP allowed this to happen.

Plaintiffs oppose DEP's *Motions for Summary Judgment* and Plaintiffs claim that material issues of fact exist concerning the design and implementation of Twin Star Mining's storm water runoff engineering plans, Twin Star Mining's compliance with the *WV SCMRA* requirements, and DEP's enforcement of the *WV SCMRA* and mining permit requirements. Plaintiffs claim they are at risk for future flooding and seek injunctive relief to cause DEP to enforce the *WV SCMRA* and mining permit requirements.

LAW

Summary Judgment

"A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment."[1] "Summary judgment is appropriate where the record, taken as a whole could not lead a rational trier of fact to find for the nonmoving party ..."[2] The Court grants summary judgment when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[3]

[1] Syl. pt. 6, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963).

[2] Syl. pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

[3] W. Va. R. Civ. P. 56.

Qualified Immunity

West Virginia's Constitution provides that the "courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."[4] However, West Virginia's Constitution also provides that the State of "West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia ..."[5] This is the doctrine of sovereign immunity.[6] "Under this theory, the "State" as contemplated by the constitution represents the ideal; it is the people united together for their common benefit."[7] "One may not sue the "State" as such, but "whatever wrong is attempted in its name is imputable to its government", which may no more wrong an individual with impunity than may any private person."[8] Thus, there is a "distinction between the State as an "ideal person, intangible, invisible, immutable," and the government of the State as an agent accountable for its wrongful acts."[9]

"W.Va. Code § 29–12–5 ... authorizes the Board of Insurance to procure liability insurance on behalf of the State, and ... further prohibits the insurer from whom a policy has been purchased from relying upon the constitutional immunity of the State against claims or suits.[10] In light of this statutory prohibition, we conclude that *a suit seeking recovery against the State's insurance carrier is outside the bounds of the constitutional bar to suit contained in* W. Va. Const. art. VI, § 35."[11] "Suits which seek no recovery from state funds, but rather allege that recovery is sought

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[4] W. Va. Const. art. III, § 17.

[5] W. Va. Const. art. VI, § 35.

[6] *See generally* Pittsburgh Elevator Co. v. W. Va. Bd. of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983).

[7] Pittsburgh Elevator Co., 172 W.Va. at 752, 310 S.E.2d at 684; *see* W. Va. Const. art. III, § 3.

[8] Id. (*quoting* Poindexter v. Greenhow, 114 U.S. 270, 290, 5 S. Ct. 903, 914, 29 L. Ed. 185 (1885)).

[9] Id.; *see generally* Coal & Coke Ry. Co. v. Conley, 67 W. Va. 129, 67 S.E. 613 (1910).

[10] Pittsburgh Elevator Co., 172 W.Va. at 756, 310 S.E.2d at 688 (*citing* W. Va. Code § 29-12-5).

[11] Id. (emphasis added).

under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State."[12]

"The state insurance policy exception to sovereign immunity, created by West Virginia Code § 29–12–5(a)(4) [2006] and recognized in Syllabus Point 2 of Pittsburgh Elevator Co. v. W.Va. Bd. of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983), applies only to immunity under the West Virginia Constitution and *does not extend to qualified immunity*. To waive the qualified immunity of a state agency or its official, the insurance policy must do so expressly, in accordance with Syllabus Point 5 of Parkulo v. W. Virginia Bd. of Prob. & Parole, 199 W. Va. 161, 483 S.E.2d 507 (1996)."[13] "Sovereign immunity is concerned with protecting the public fisc. Accordingly, "where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable [.]""[14]

"By contrast, the purpose of qualified immunity is to allow officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued. As we have said: "[t]he public interest [behind qualified immunity] is that the official conduct of the officer not be impaired by constant concern about personal liability." Parkulo v. W. Virginia Bd. of Prob. & Parole, 199 W. Va. 161, 177, 483 S.E.2d 507, 523 (1996). Indeed, "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " Harlow v. Fitzgerald, 457 U.S. 800, 813, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (*quoting* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)). The fact that the public fisc

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[12] Syl. pt. 2, Pittsburgh Elevator Co., 172 W.Va. 743, 310 S.E.2d 675 (1983).

[13] Syl. pt. 2, W. Va. Bd. of Educ. v. Marple, 236 W.Va. 654, 783 S.E.2d 75 (2015) (emphasis added).

[14] Marple, 236 W.Va. at 661, 783 S.E.2d at 82 (*quoting* Pittsburgh Elevator Co., 172 W.Va. at 756, 310 S.E.2d at 689.

is kept safe by a state insurance policy does not mean that a public officer is able to do his or her job unhampered by frivolous litigation."[15]

"To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of Parkulo v. W. Virginia Bd. of Prob. & Parole, 199 W. Va. 161, 483 S.E.2d 507 (1996)."[16]

"To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with State v. Chase Sec., Inc., 188 W. Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability."[17]

"In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the *West Virginia Governmental Tort Claims and Insurance Reform Act*, W.Va. Code § 29–

[15] Marple, 236 W.Va. at 661, 783 S.E.2d at 82.

[16] Syl. pt. 10, W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B., 234 W.Va. 492, 766 S.E.2d 751 (2014).

[17] Syl. pt. 11, A.B., 234 W.Va. 492, 766 S.E.2d 751.

12A–1, *et seq.*"[18] This qualified immunity bar is based on "acts or omissions in the exercise of a *legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy.*"[19] "Consequently, the analysis turns on whether the [Plaintiffs'] claims involve ... acts [involving] the State agency's exercise of discretionary, administrative policy-making."[20] The *State is not immune when it negligently performs ministerial duties* or *when "State actors violate clearly established rights while acting within the scope of their authority ...*"[21]

DEP's Enforcement Duties under *WV SCMRA*

"Under the *Surface Mining and Control Reclamation Act of 1977 (SMCRA),*[22] Congress established "minimum national standards" for regulating surface coal mining and reclamation, but allowed states to enact their own laws incorporating these standards, as well as any "more stringent," but not inconsistent, standards that they might choose.[23] Once a state has done so, and its program has been approved by the Secretary, the federal laws and regulations drop out and the state becomes the exclusive regulator of surface coal mining (and is known as a "primacy" state)."[24]

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[18] Syl. pt. 6, *in part*, Clark v. Dunn, 195 W. Va. 272, 465 S.E.2d 374 (1995) (emphasis added); *accord* Syl. pt. 1, *in part*, Hess v. W. Va. Div. of Corrections, 227 W.Va. 15, 705 S.E.2d 125 (2010); *but cf.* W. Va. Lottery v. A-1 Amusement, Inc., 240 W.Va. 89, 103, 807 S.E.2d 760, 774 (2017); *accord* W. Va. Reg'l Jail Corr. Facility Auth. v. A.B., 234 W. Va. 492, 502, 766 S.E.2d 751, 761 (2014).

[19] Parkulo v. W. Va. Bd. of Probation and Parole, 199 W.Va. 161, 176, 483 S.E.2d 507, 522 (1996) (*citing* Restatement (Second) of Torts § 895C (1979)) (emphasis added).

[20] Hess, 227 W.Va. at 20, 705 S.E.2d at 130; *see* Parkulo, 199 W.Va. 161, 483 S.E.2d 507.

[21] A. B., 234 W.Va. at 506, 766 S.E.2d at 765 (emphasis added).

[22] 30 U.S.C. §§ 1201 – 1328.

[23] Thomas C. Means and Sherrie A. Armstrong, Back in the Spotlight: The Surface Mining Control and Reclamation Act in 2013, 34 Energy & Min. L. Inst. 10, p. 395 (2013); 30 U.S.C. §§ 1202, 1253.

[24] Id.

Under the authority of *SMCRA*, the West Virginia Legislature enacted the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W. Va. Code §§ 22-3-1 through 22-3-38, to regulate surface mining in West Virginia. Both *SMCRA* and *WV SCMRA* provide for citizen suits by a person with interest to enforce these surface mining laws.[25] When the West Virginia's Legislature enacted *WV SCMRA*, the Legislature made several findings, including:

> "(a) (2) Further, the Legislature finds that *unregulated surface coal mining operations may result in disturbances of surface* and underground *areas* that burden and adversely affect commerce, public welfare and safety by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes; *by causing erosion and landslides*; *by contributing to floods*; by polluting the water and river and stream beds; by destroying fish, aquatic life and wildlife habitats; by impairing natural beauty; *by damaging the property of citizens*; *by creating hazards dangerous to life and property*; and by degrading the quality of life in local communities, all where proper mining and reclamation is not practiced.[26]

The West Virginia Legislature established purposes for *WV SCMRA*:

> "(b) Therefore, it is the purpose of this article to:
>
> (1) Expand the established and effective statewide program to protect the public and the environment from the adverse effects of surface-mining operations;
>
> (2) *Assure that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from the operations*;
>
> ...
>
> (6) *Assure that adequate procedures are provided for public participation* where appropriate under this article;
>
> (7) *Assure the exercise of the full reach of state common law, statutory and constitutional powers for the protection of the*

[25] 30 U.S.C. § 1270 and W. Va. Code § 22-3-25.

[26] W. Va. Code § 22-3-2, in part.

> *public interest* through effective control of surface-mining operations;"[27]

DEP's enforcement duties related to its issuance of mining permits mandates that DEP ensure:

> "A permit application must contain, *inter alia*, the name of the watershed and location of the surface stream into which drainage will be discharged; a determination of the probable hydrologic consequences of the mining and reclamation operations; a map or plan indicating the location of a water treatment facility or drainage system; and a chemical analysis of potentially acid-forming sections of the overburden."[28]
>
> "A permit application must also include a reclamation plan.[29] Each reclamation plan must demonstrate that reclamation required by *WV SCMRA* can be accomplished and must include, *inter alia*, "[t]he steps to be taken to comply with applicable air and water quality laws."[30] Furthermore, W. Va. Code R. 38-2-3.22(f) (1991)[31] states, in relevant part, that each permit application "shall contain a hydrologic reclamation plan" which, *inter alia*, meets "applicable Federal and State water quality laws and regulations [.]""[32]

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[27] W. Va. Code § 22-3-2, in part (emphasis added).

[28] State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Envtl. Prot., 191 W. Va. 719, 721, 447 S.E.2d 920, 922 (1994) (internal citations omitted); *see* W. Va. Code § 22-3-9(a)(10), (11), (13)(L) and (14)(D).

[29] Id.; *see* W. Va. Code § 22-3-9(a)(16); W. Va. Code § 22-3-10.

[30] Id.

[31] The text of W. Va. Code R. 38-2-3.22(f) (1991) states, in relevant part:

> Each permit application shall contain a *hydrologic reclamation plan. The plan shall be specific to the local hydrologic conditions.* It shall contain in the form of maps and descriptions the steps to be taken during mining and reclamation through bond release *to minimize disturbances to the hydrologic balance within the permit and adjacent areas;* to prevent material damage outside the permit area; *to meet applicable Federal and State water quality laws and regulations; and to protect the rights of present water users. The plan shall include the measures to be taken to:*
>
> 1. *Avoid acid or toxic drainage;*
>
> ....
>
> 3. *Provide water treatment facilities when needed* [.]

(emphasis added).

[32] State ex rel. W. Va. Highlands Conservancy, Inc., 191 W.Va. at 721-722, 447 S.E.2d at 922-923.

> "The DEP may not issue a mining and reclamation permit until the applicant files a performance bond covering "that area of land within the permit area upon which the [applicant] will initiate and conduct surface coal mining[33] and reclamation operations" and in an amount "sufficient to assure the completion of the reclamation plan if the work [is] to be performed by the [DEP] in the event of forfeiture [.]" 30 U.S.C. § 1259(a) (1988) (footnote added).[34] Under *WV SCMRA*, the DEP may issue site-specific performance bonds.[35] The amount of these bonds, which cannot exceed $5,000 per acre, must reflect the various factors which affect the cost of reclamation."[36]

Public Duty Doctrine

"The public duty doctrine, simply stated, is that a governmental entity is not liable because of its failure to enforce regulatory or penal statutes."[37] "The linchpin of the "public duty doctrine" is that some governmental acts create duties owed to the public as a whole and not to the particular private person or private citizen who may be harmed by such acts."[38]

> "Under the public duty doctrine, a government entity or officer cannot be held liable for breaching a general, nondiscretionary duty owed to the public as a whole. "Often referred to as the 'duty to all,

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[33] Under the *SMCRA*, surface coal mining and reclamation operations include surface disturbances as well as surface impacts incident to an underground coal mine. 30 U.S.C. § 1291(27) and (28) (1988) (30 U.S.C. § 1291 was amended in 1992; however, the amendments do not affect this discussion). Under the *WV SCMRA*, a "surface impact" from underground mining specifically includes "drainage and discharge therefrom." W.Va. Code § 22A-3-3(w)(1) [1991].

[34] 30 U.S.C. § 1259(a) (1988) provides, in relevant part:

> After a surface coal mining and reclamation permit application has been approved but before such a permit is issued, the applicant shall file with the regulatory authority ... a bond for performance payable, as appropriate, to the United States or to the State, and conditional upon faithful performance of all the requirements of this chapter and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit.... The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture and in no case shall the bond for the entire area under one permit be less than $10,000.

[35] State ex rel. W. Va. Highlands Conservancy, Inc., 191 W.Va. at 721-722, 447 S.E.2d at 922-923 (internal citations and footnote omitted); *see* W.Va. Code § 22-3-12.

[36] Id.

[37] Syl. pt. 1, Benson v. Kutsch, 181 W. Va. 1, 380 S.E.2d 36 (1989).

[38] Parkulo v. W. Va. Bd. of Prob. & Parole, 199 W. Va. 161, 172, 483 S.E.2d 507, 518 (1996).

> duty to no one' doctrine, the public duty doctrine provides that since government owes a duty to the public in general, it does not owe a duty to any individual citizen."[39] ... The public duty doctrine is restricted to "liability for nondiscretionary (or 'ministerial' or 'operational') functions [.]"[40]

"If a special relationship exists between a local governmental entity and an individual which gives rise to a duty to such individual, and the duty is breached causing injuries, then a suit may be maintained against such entity."[41] "The state may be liable where it has taken on a special duty to a specific person beyond that extended to the general public."[42] "In Randall, the Court restricted the public duty doctrine to "liability for nondiscretionary (or 'ministerial' or 'operational') functions"."[43] The Randall Court "defined a "discretionary" function as "the exercise of a legislative or judicial function or the exercise of an administrative function involving the determination of fundamental governmental policy" (*citing* Restatement (Second) of Torts § 895C (1979))."[44] In determining whether a "special relationship" or "special duty" exists, a plaintiff must prove four factors:

> (1) An assumption by the state governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

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[39] West Virginia State Police v. Hughes, 238 W.Va. 406, 412, 796 S.E.2d 193, 199 (2017) (*quoting* John Cameron McMillan, Jr., Government Liability and the Public Duty Doctrine, 32 Vill. L. Rev. 505, 509 (1987) (footnotes omitted)).

[40] Hughes, 238 W.Va. at 412, 796 S.E.2d at 199 (*quoting* Parkulo, 199 W.Va. 161, 174, 483 S.E.2d 507, 520 (*quoting* Randall v. Fairmont City Police Dep't, 186 W. Va. 336, 346, 412 S.E.2d 737, 747 (1991))).

[41] Syl. pt. 3, Benson, 181 W.Va. 1, 380 S.E.2d 36; *accord* Randall, 186 W.Va. at 347, 412 S.E.2d at 748.

[42] Hughes, 238 W.Va. at 412, 796 S.E.2d at 199 (*quoting* Barry A. Lindahl, 2 Modern Tort Law: Liability and Litigation § 16:20 (2d ed.)); *accord* Randall, 186 W.Va. 336, 412 S.E.2d 737.

[43] Parkulo, 199 W.Va. at 174, 483 S.E.2d at 520 (*citing* Randall, 186 W.Va. 336, 346, 412 S.E.2d 737, 747).

[44] Parkulo, 199 W.Va. at 174, 483 S.E.2d at 520 (*citing* Randall, 186 W.Va. at 346 n. 13, 412 S.E.2d at 747 n. 13).

(2) Knowledge on the part of the state governmental entity's agents that inaction could lead to harm;

(3) Some form of direct contact between the state governmental entity's agents and the injured party; and

(4) That party's justifiable reliance on the state governmental entity's affirmative undertaking."[45]

...

> [A] "government entity can interpose the public duty doctrine as a defense when it perceives a plaintiff is attempting to hold the entity liable for breach of a nondiscretionary duty owed to the general public.[46] When a duty owed to the general public is at issue, a plaintiff may then respond with proof that the government entity adopted a special duty toward that specific plaintiff.[47]

We "emphasize that the question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary governmental function is ordinarily a question of fact for the trier of the facts."[48]

DISCUSSION and ANALYSIS

Qualified Immunity

To determine whether WV DEP is protected by qualified immunity, the Court must first determine whether WV DEP's duty to enforce *WV SCMRA* is a nondiscretionary, ministerial duty

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[45] Hughes, 238 W.Va. at 412-413, 796 S.E.2d at 199-200 (*quoting* Syl. pt. 12, Parkulo, 199 W.Va. 161, 483 S.E.2d 507 (1996)); *see* Syl. pt. 2, Wolfe v. City of Wheeling, 182 W. Va. 253, 387 S.E.2d 307 (1989); *accord* Randall, 186 W.Va. at 347, 412 S.E.2d at 748; *accord* Syl. pt. 2, Bowden v. Monroe Cty. Comm'n, 239 W. Va. 214, 800 S.E.2d 252 (2017).

[46] Hughes, 238 W.Va. at 413, 796 S.E.2d at 200 (*quoting* W.Va. Dep't of Health & Human Res. v. Payne, 231 W.Va. 563, 571, 746 S.E.2d 554, 562 (2013) (We recognize that our prior case law analyzing and applying the qualified immunity doctrine and the public duty doctrine "has created a patchwork of holdings" in which there is an "absence of harmony.")).

[47] Hughes, 238 W.Va. at 413, 796 S.E.2d at 200.

[48] Wolfe, 182 W.Va. at 258, 387 S.E.2d at 312; *accord* Randall, 186 W.Va. at 347, 412 S.E.2d at 748.

or a discretionary duty. This question turns on whether WV DEP's duty involves legislative, judicial, or executive policy-making decisions. If WV DEP's duty to enforce *WV SCMRA* is a nondiscretionary, ministerial duty, then WV DEP is not entitled to qualified immunity. During oral argument on October 16, 2019, WV DEP argued that it has a nondiscretionary duty to enforce the Act, but a discretionary duty as to how it enforces the Act.[49] The facts are unclear as to whether WV DEP's duty to enforce *WV SCMRA* is discretionary or nondiscretionary.

If WV DEP's duty to enforce *WV SCMRA* is discretionary, then West Virginia's law on qualified immunity requires the Court to examine DEP's conduct and actions based "on the objective legal reasonableness of the action assessed, in light of the legal rules that were clearly established at the time it was taken."[50] In the Syllabus of Bennett, the West Virginia Supreme Court of Appeals stated, in part:

> "Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[51]
>
> "If, however, the law was clearly established, the immunity defense should fail unless "the ... [government official] pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard...."'"[52]

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[49] Hearing Tr. 8, Oct. 16, 2019.

[50] Hutchison v. City of Huntington, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996); *see* State v. Chase Sec., Inc., 188 W. Va. 356, 424 S.E.2d 591 (1992); Bennett v. Coffman, 178 W. Va. 500, 361 S.E.2d 465 (1987).

[51] Bennett, 178 W. Va. 500, 361 S.E.2d 465; *see generally* Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *accord* Goines v. James, 189 W. Va. 634, 637, 433 S.E.2d 572, 575 (1993).

[52] Goines, 189 W.Va. at 637-638, 433 S.E.2d at 575-576 *quoting* Harlow, 457 U.S. at 819, 102 S.Ct. at 2738.

If Plaintiffs can prove their case, then WV DEP's enforcement actions violated clearly established law and qualified immunity would not apply. However, Plaintiffs' proof is disputed by WV DEP and material issues of fact exist as to whether Plaintiffs can prove their case.

Public Duty Doctrine

WV DEP admits that it has a general duty to the public under WV SCMRA, but denies that it has any "special relationship" or "special duty" with Plaintiffs or others similarly situated. WV DEP argues that the evidentiary record shows that it had no direct contact with any of the Plaintiffs or made any specific promise to any of the Plaintiffs. WV DEP argues that it had no face-to-face meetings, telephone calls, or correspondence with any of the Plaintiffs before it issued the mining permits. The only communication WV DEP admits to with Plaintiffs is the publication by newspaper and other documents noticing public meetings and the issuance of the mining permits.

Plaintiffs admit that they had no direct, individual contact with WV DEP before it issued the mining permits. However, Plaintiffs claim that WV DEP's issuance of the mining permits created a "special relationship" or "special duty" between WV DEP and Plaintiffs as adjacent neighbors to Twin Star Mining's surface mining operations known as Bull Creek Surface Mine Number 45. Plaintiffs produced evidence that WV DEP knew or should have known that Twin Star Mining's operations were not *WV SCMRA*-compliant and created specific risks of flooding to these specific Plaintiffs and others similarly situated.

West Virginia's Legislature enacted *WV SCMRA* to ensure West Virginia's compliance with the Federal *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328. Section 1201, in part, contains the following Congressional Findings:

> "(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and

> forestry purposes, by causing erosion and landslides, *by contributing to floods*, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, *by creating hazards dangerous to life and property* by degrading the quality of life *in local communities*, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;
>
> (d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and *to protect the health and safety of the public.*"[53]

Section 1202, in part, establishes the following purposes:

> "(a) establish a nationwide program to *protect society and the environment* from the adverse effects of surface coal mining operations;
>
> (b) *assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations*;"[54]

"The first stated purpose of the *West Virginia Surface Coal Mining and Reclamation Act (WV SCMRA)* is "to protect the public and the environment from the adverse effects of surface-mining operations" [.]"[55] The second stated purpose is to assure "*that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from the operations.*"[56]

WV DEP has a clear, statutory, duty to ensure Twin Star Mining's compliance with the *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328; the *West Virginia*

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[53] 30 U.S.C. § 1201 (emphasis added).

[54] 30 U.S.C. § 1202 (emphasis added).

[55] Ooten v. Faerber, 181 W. Va. 592, 596–597, 383 S.E.2d 774, 778–779 (1989) (*quoting* W. Va. Code § 22A–3–2(b)(1) [1985]); *see also* Cogar v. Faerber, 179 W. Va. 600, 603, 371 S.E.2d 321, 324 (1988); W. Va. Code § 22-3-2, *in part*.

[56] W. Va. Code § 22-3-2, *in part* (emphasis added).

Surface Mining Control and Reclamation Act (WV SCMRA), W. Va. Code §§ 22-3-1 through 22-3-38. However, Plaintiffs must prove that WV DEP violated this duty.

The Court must determine whether Plaintiffs' can establish that WV DEP owed them any "special relationship" or "special duty". Applying Randall[57] and Wolfe,[58] material issues of fact exist whether (1) WV DEP assumed, through promises or actions, an affirmative duty to act on behalf of the party who was injured; (2) WV DEP had knowledge that inaction could lead to Plaintiffs' harm; (3) there existed some form of direct contact between WV DEP and Plaintiffs; and (4) that Plaintiffs justifiably relied on WV DEPs affirmative undertaking? Based on the law, the evidence, and argument of counsel, the Court finds that material issues of fact exist regarding any "special relationship" or "special duty" between Plaintiffs and WV DEP that preclude the grant of summary judgment based on public duty.

CONCLUSIONS OF LAW

1. Plaintiffs as downstream residents of Twin Star Mining's surface mining operations known as Bull Creek Surface Mine Number 45 have protected interests under the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W. Va. Code §§ 22-3-1 through 22-3-38.
2. Twin Star Mining negligently and improperly designed and then failed to properly maintain its water runoff system under the *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328; the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W. Va. Code §§ 22-3-1 through 22-3-38; and violated its mining permit under W. Va. Code § 22-3-13(a) & (b); *see* W. Va. Code § 22-3-25(f).

[57] Randall, 186 W.Va. at 347, 412 S.E.2d at 748.

[58] Wolfe, 182 W.Va. 253, 387 S.E.2d 307.

3. WV DEP is the responsible governmental body that has a duty to supervise Twin Star Mining's compliance with the *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328; the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W. Va. Code §§ 22-3-1 through 22-3-38.
4. WV DEP has a duty to enforce the clear law established by *WV SCMRA*.
5. WV DEP's alleged failure to properly supervise Twin Star Mining's permit and coal operations under *WV SCMRA* was at least one of the factors that led to flooding downstream resident Plaintiffs and others.
6. Material issues of fact exist regarding whether WV DEP's duty to enforce *WV SCMRA* were ministerial and nondiscretionary or discretionary.
7. Material issues of fact exist regarding whether WV DEP's acts, or failures to act, to enforce *WV SCMRA*, if discretionary, violated clearly established law.

RULING

Material issues of fact exist regarding WV DEP's acts related to WV DEP's duty to enforce *WV SCMRA*, and WV DEP's relationship with and type of duty owed Plaintiffs that preclude summary judgment; consequently, this Court **ORDERS DENIED** WV DEP's *Motions for Summary Judgment* based on qualified immunity and on the doctrine of public duty.

B. Plaintiffs' *Motion for Class Certification*

Plaintiffs' Arguments

Plaintiffs claim that they are entitled to class certification. Plaintiffs assert that they meet the requirements of W. Va. R. Civ. P. 23(a). Plaintiffs claim that they meet the numerosity requirement because the class represents "103 families and at least 165 adults" (later amended during oral argument to 151 possible class members). *Plaintiffs' Amended Motion for Class*

Certification, p. 4; Hearing Tr. 42, Oct. 16, 2019. Plaintiffs claim that they meet the commonality requirement because "the class members all suffered their injuries as a result of the June 5, 2014 flood within the Bull Creek Watershed." *Plaintiffs' Amended Motion for Class Certification*, p. 5. Plaintiffs claim they meet the typicality requirement because "the Putative Class Representatives, like other class members, reside and were present within the affected area on June 5, 2014, were subjected to the same floods, [and ... sustained] damages." *Plaintiffs' Amended Motion for Class Certification*, p. 5. Plaintiffs claim they meet the adequacy requirement because "there is no evidence of direct conflict with the class" and "Class Counsel has experience in federal class actions, mass tort actions[, ...] other complex litigation" and "are vigorously pursuing the claims in this case." *Plaintiffs' Amended Motion for Class Certification*, p. 6.

Plaintiffs assert that they meet the W. Va. R. Civ. P. 23(b)(1)(a) requirements because class certification "would promote efficiency for the court and the parties and fairness by reducing the risk of varied adjudications." *Plaintiffs' Amended Motion for Class Certification*, p. 7. Plaintiffs claim further that they meet the W. Va. R. Civ. P. 23(b)(2) requirements because they assert that WV DEP failed to enforce surface mining regulations designed to safeguard neighboring communities of which Plaintiffs are members, WV DEP contributed to the June 5, 2014 floodwaters that damaged Plaintiffs, and WV DEP refuses to address the risk of future flooding to Plaintiffs. Plaintiffs do not claim a class under W. Va. R. Civ. P. 23(b)(3).

DEP's Arguments

WV DEP opposes Plaintiffs' Amended Motion for Class Certification on two grounds: (1) WV DEP argues that this Court's jurisdiction is based on W. Va. Code § 22-3-25(a),[59] that this

[59] **(a)** Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action in the circuit court of the county to which the surface-mining operation is located on the person's own behalf to compel compliance with this article:

statute only allows for individual complaints, and this statute does not allow individual complaints; and alternatively (2) that for Plaintiffs to prevail over the "public duty doctrine" each individual Plaintiff would be required to prove that he or she had a "special relationship" with WV DEP.

LAW

Class Actions

Under *West Virginia Rule of Civil Procedure 23*, plaintiffs in a class action must prove that (1) the class is so numerous that joinder of all members is impracticable (the "**numerosity**" requirement), W. Va. R. Civ. P. 23(a)(1); (2) there is a common nucleus of operative facts or question of law (the "**commonality**" requirement), W. Va. R. Civ. P. 23(a)(2); (3) the claim or defense must arise from the same event or practice or course of conduct that gives rise to the claims of other class members (the "**typicality**" requirement), W. Va. R. Civ. P. 23(a)(3); and (4) the representative parties must fairly and adequately protect the interests of the class (the "**adequacy**" requirement), W. Va. R. Civ. P. 23(a)(4).[60]

In addition to meeting the four W. Va. R. Civ. P. 23(a) requirements, Plaintiffs must comply with W. Va. R. Civ. P. 23(b) requirements. W. Va. R. Civ. P. 23(b)[61]. These W. Va. R.

> **(1)** Against the state of West Virginia or any other governmental instrumentality or agency thereof, to the extent permitted by the West Virginia constitution and by law, which is alleged to be in violation of the provisions of this article or any rule, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, order or permit issued pursuant to this article; or
>
> **(2)** Against the director, division, surface mine board or appropriate division employees, to the extent permitted by the West Virginia constitution and by law, where there is alleged a failure of the above to perform any act or duty under this article which is not discretionary.

[60] *See* In re W. Va. Rezulin Litigation, 214 W.Va. 52, 585 S.E.2d 52; *accord* State ex rel. Municipal Water Works v. Swope, ___ W.Va. ___, 835 S.E.2d 122 (2019).

[61] W. Va. R. Civ. P. 23(b) states:

"(b) **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of

Civ. P. 23(b) requirements include (1) the risk of inconsistent verdicts among similarly situated plaintiffs or adjudication of parties' rights that are not involved in the litigation; (2) actions by defendant affecting entire class such that injunctive relief or declaratory judgment would apply to the class as a whole; or (3) "questions of law or fact common to the members of the class **predominate** over any questions affecting only individual members" and "a class action is **superior** to other available methods for the fair and efficient adjudication of the controversy." W. Va. R. Civ. P. 23(b) (emphasis added).

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relieve or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action."

See In re W. Va. Rezulin Litigation, 214 W.Va. 52, 585 S.E.2d 52.

Before granting or denying class certification, a trial court must conduct a *thorough analysis* of W. Va. R. Civ. P. 23 requirements.[62] "A circuit court must "conduct an intense factual investigation" before certifying a class action under Rule 23(a):

> "To determine whether class certification is appropriate, trial courts must conduct an intense factual investigation. A trial court must rigorously analyze [W. Va. R. Civ. P.] 23's prerequisites before certifying a class. This requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case. Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. When there are disputed facts relevant to [W. Va. R. Civ. P.] 23 requirements, overlap with the merits should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met his or her burden of establishing each of the [W. Va. R. Civ. P.] 23 class action requirements.
>
> ....
>
> An order that certifies a class action must define the class and class claims, issues, or defenses. Specifically, the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis. Clearly delineating the contours of the class along with the issues, claims, and defenses to be given class treatment serves several important purposes, such as providing the parties with clarity and assisting class members in understanding their rights and making informed opt-out decisions."[63]

When granting class certification, a trial court must set forth detailed and specific findings supporting the conclusion that the party seeking class certification met the requirements of W. Va. R. Civ. P. 23(a).[64] A defendant may challenge class certification by filing a Writ of Prohibition with the West Virginia Supreme Court of Appeals.[65]

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[62] Syl. pt. 8, State ex rel. Chemtall Inc. v. Madden, 216 W. Va. 443, 607 S.E.2d 772 (emphasis added); *accord* State ex rel. Municipal Water Works v. Swope, ___ W.Va. ___, 835 S.E.2d 122 (2019); State ex rel. W.Va. U. Hospitals, Inc. v. Gaujot, 242 W.Va. 54, 829 S.E.2d 54 (2019).

[63] State ex rel. Municipal Water Works v. Swope, ___ W.Va. ___, 835 S.E.2d 122, 131 (2019) (*quoting* Louis J. Palmer, Jr., and Robin Jean Davis, Litigation Handbook on West Virginia Rules of Civil Procedure, § 23, at 617-18 (5th ed. 2017).

[64] State of W. Virginia ex rel. Chemtall Inc. v. Madden, 216 W. Va. 443, 607 S.E.2d 772 (2004).

[65] *See* McFoy v. Amerigas, Inc., 170 W. Va. 526, 295 S.E.2d 16 (1982); Syl. Pt. 1, In re W. Va. Rezulin Litigation, 214 W.Va. 52, 585 S.E.2d 52 (2003); Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754, 763 (1997).

Before a plaintiff may take advantage of the class action device, it must prove that class members share "the same injury" and possess claims that present a "common question" that, if adjudicated on a class basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke."[66] In addition, the *plaintiff must satisfy the "far more demanding" requirement of proving that any common questions "predominate" over individual ones.*[67] These essential protections preserve the rights of both absent class members and defendants.[68]

Fed. R. Civ. P. 23's class action prerequisites are not designed only for the litigating convenience of court and counsel. Instead, Fed. R. Civ. P. 23's essential requirements protect the rights of both absent class members and defendants, ensuring that the procedures for aggregating claims and streamlining litigation are employed fairly and only in appropriate circumstances.[69] As the United States Supreme Court has noted, aggregation of individual claims for joint resolution endangers the right of absent class members to press their distinct interests and undermines the right of defendants "to present every available defense."[70] Class actions under Fed. R. Civ. P. 23 are therefore "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[71]

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[66] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011); *accord* State ex rel. W.Va. U. Hospitals, Inc. v. Gaujot, 242 W.Va. at 62, 829 S.E.2d at 62. *See generally* W. Va. R. Civ. P. 23(a)(2) and In re W. Va. Rezulin Litigation, 214 W.Va. 52, 67, 585 S.E.2d 52, 67 (2003).

[67] Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (emphasis added); Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

[68] *See generally* Ways v. Imation Enterprises Corp., 214 W. Va. 305, 589 S.E.2d 36 (2003) (commonality lacking in breach of contract suit where employees' claims were based on individual promises not common to all employees); Marcy Hogan Greer, A Practitioner's Guide to Class Actions, page 1190, American Bar Association (2010).

[69] *See* Unger v. Amedisys Inc., 401 F.3d 316, 320–21 (5th Cir. 2005) (there are "important due process concerns of both plaintiffs and defendants inherent in the certification decision").

[70] Philip Morris USA v. Williams, 549 U.S. 346, 353, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) (*quoting* Lindsey v. Normet, 405 U.S. 56, 66, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)).

[71] Califano v. Yamasaki, 442 U.S. 682, 700–01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979).

No aspect of Fed. R. Civ. P. 23 has tested the due process dimensions of class actions more than section 23(b)(3), the "most adventuresome" class certification provision.[72] The drafters of that provision "were aware that they were breaking new ground and that those effects might be substantial."[73] Fed. R. Civ. P. 23(b)(3) thus contains special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones.[74] The drafters added those essential protections to avoid having "their new experiment . . . open the floodgates to an unanticipated volume of litigation in class form."[75]

The ***predominance requirement*** works in tandem with Fed. R. Civ. P. 23's commonality requirement to ensure that, at a minimum, "proposed classes are sufficiently cohesive to warrant adjudication by representation."[76] That means that a "shared experience," without more, does not justify class certification.[77] Plaintiffs must "affirmatively demonstrate" their compliance with Fed. R. Civ. P. 23's requirements to be entitled to litigate their claims in a class action.[78] It is not enough merely to plead "a violation of the same provision of law" and label it a common question, for any "competently crafted class complaint literally raises common questions."[79] Instead, *class litigation must generate common answers to common questions and resolve the ultimate validity*

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[72] Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

[73] Stephen B. Burbank, The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View, 156 U. Pa. L. Rev. 1439, 1487 (2008).

[74] Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

[75] John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 401–02 (2000).

[76] Amchem Products, Inc., 521 U.S. at 623 (emphasis added).

[77] Amchem Products, Inc., 521 U.S. at 624.

[78] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

[79] Id. (internal quotation marks and citation omitted).

of individual claims "in one stroke."[80] Equally important, the *common questions must* ***predominate*** *over individual ones, which is a "demanding" requirement.*[81] Predominance "call[s] for caution when ... disparities among class members [are] great."[82] Dissimilarities within the proposed class may defeat class certification even when some degree of commonality exists.[83]

Alleging that class members "have all suffered a violation of the same provision of law" does not satisfy the commonality requirement.[84] Defining the common issues at that level of abstraction renders Fed. R. Civ. P. 23's protections meaningless, which is precisely why courts are supposed to dig deeper and consider both "the elements of the underlying cause of action" and the proof needed to establish each element.[85] That is also why the *rigorous analysis* required under Fed. R. Civ. P. 23 will often "entail some overlap with the merits of the plaintiff's underlying claim."[86] As the United States Supreme Court has explained, "[t]hat cannot be helped" because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[87]

Due process, Fed. R. Civ. P. 23, and United States Supreme Court precedents require that when a proposed class action could sacrifice "procedural fairness," the case must be litigated on

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[80] Id. (emphasis added); *accord* State ex rel. West Virginia University Hospitals, Inc. v. Gaujot, 242 W.Va. 54, 829 S.E.2d 54 (2019).

[81] Amchem Products, Inc., 521 U.S. at 624 (emphasis added).

[82] Id. at 623–25.

[83] *See* Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97 (2009).

[84] Wal-Mart Stores, Inc., 131 S. Ct. at 2551.

[85] *See* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011).

[86] Wal-Mart Stores, Inc., 131 S. Ct. at 2551; *accord* State ex rel. West Virginia University Hospitals, Inc., 242 W.Va. 54, 829 S.E.2d 54.

[87] Id. at 2551–52 (citation omitted).

an individual basis regardless of any efficiency considerations.[88] Class certification is appropriate only when class adjudication can be conducted both "fairly and efficiently."[89] Due process requires affording a defendant "an opportunity to present every available defense."[90]

In Amgen Inc., the Court approved certification of a class in the securities context that was "entirely cohesive" and would "prevail or fail in unison."[91] In Comcast Corp., the Court denied certification in the antitrust context because "[q]uestions of individual damage calculations" in that case "overwhelm[ed] questions common to the class."[92] Comcast emphasized that the safeguards provided by the predominance requirement obligate courts to take an especially "*close look at whether common questions* ***predominate*** *over individual ones.*"[93] And Comcast rejects the dissenting view that "economies of time and expense" override rigorous compliance with the predominance requirement.[94]

The United States Supreme Court has repeatedly explained that the right of plaintiffs to proceed as a class is "a procedural right only, ancillary to the litigation of substantive claims."[95] In other words, a "class action, no less than traditional joinder (of which it is a species), merely

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[88] Amchem Products, Inc., 521 U.S. at 615; *see also* Comcast Corp., 569 U.S. 27.

[89] Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 133 S. Ct. 1184, 1191, 185 L. Ed. 2d 308 (2013); *see also* In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("[e]fficiency is a vital goal in any legal system," but it must be rejected when it "suppresses information that is vital to accurate resolution").

[90] Philip Morris USA, 549 U.S. at 353.

[91] Amgen Inc., 133 S. Ct. at 1191.

[92] Comcast Corp., 569 U.S. 27.

[93] Comcast Corp., 133 S. Ct. at 1432 (emphasis added).

[94] Id. at 1437.

[95] Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980).

enables a . . . court to adjudicate claims of multiple parties at once, instead of in separate suits."[96] "[L]ike traditional joinder, [a class action] leaves the parties' legal rights and duties intact and the rules of decision unchanged."[97] Therefore, no less than in individualized, one-on-one adjudication, due process requires that every plaintiff in a class action prove each element of his claim and that the defendant receive a full and fair opportunity to mount a defense to each claim.[98]

The Wal-Mart Stores, Inc. Court reiterated the impropriety of curtailing a defendant's substantive rights in order to accommodate class action plaintiffs, instructing the lower federal courts not to certify a class if doing so would deprive a defendant of the right to litigate its defenses to each individual claim.[99] As the Court admonished, a putative class must not be certified unless the named plaintiffs prove that their claims depend on the resolution of common questions that are capable of generating common answers.[100] Following a similar pattern, the United States Supreme Court decided Comcast Corp. v. Behrend,[101] as a follow-up to Wal-Mart Stores, Inc.

"[T]he *Rules Enabling Act* forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" and therefore a defendant's right to litigate its defenses to individual plaintiffs' claims cannot be eliminated merely to facilitate class-wide adjudication.[102] The clear message of Wal-Mart Stores, Inc. is that courts cannot replace traditional methods of proof with shortcuts in order to make class certification more practicable, an application of the long recognized principle

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[96] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 1443, 176 L. Ed. 2d 311 (2010) (plurality opinion).

[97] Id.

[98] *See* Philip Morris USA Inc. v. Scott, 561 U.S. 1301, 131 S. Ct. 1, 3–4, 177 L. Ed. 2d 1040 (2010).

[99] *See* Wal-Mart Stores, Inc., 131 S. Ct. at 2561.

[100] Id. at 2551.

[101] Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

[102] Wal-Mart Stores, Inc., 131 S. Ct. at 2561 (*quoting* 28 U.S.C. § 2072(b)).

that "'[d]ue process requires that there be an opportunity to present every available defense.'"[103] To the contrary, the necessity of such shortcuts is an unmistakable sign that class certification is impermissible.[104]

The United States Supreme Court in Wal-Mart Stores, Inc. clarified that Fed. R. Civ. P. 23(a)(2)'s commonality requirement is not satisfied merely by raising superficial common questions, but instead requires plaintiffs to prove that their claims "depend upon a common contention" that "is capable of class-wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[105] "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation."[106]

DISCUSSION

The requirements for class certification under *West Virginia Rule of Civil Procedure 23*, are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.[107] In addition to meeting the four W. Va. R. Civ. P. 23(a) requirements, Plaintiffs must comply with W. Va. R. Civ. P. 23(b) requirements.[108]

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[103] Lindsey v. Normet, 405 U.S. 56, 66, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972) (*quoting* Am. Sur. Co. v. Baldwin, 287 U.S. 156, 168, 53 S. Ct. 98, 77 L. Ed. 231 (1932)).

[104] *See* Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 343 (4th Cir. 1998) ("That [a] shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court . . . .").

[105] Wal-Mart Stores, Inc., 131 S. Ct. at 2551; *accord* State ex rel. West Virginia University Hospitals, Inc., 242 W.Va. 54, 829 S.E.2d 54.

[106] Id. (*quoting* Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)).

[107] W. Va. R. Civ. P. 23(a); *see* In re W. Va. Rezulin Litigation, 214 W.Va. 52, 585 S.E.2d 52; *accord* State ex rel. Municipal Water Works v. Swope, ___ W.Va. ___, 835 S.E.2d 122 (2019).

[108] W. Va. R. Civ. P. 23(b); *see* In re W. Va. Rezulin Litigation, 214 W.Va. 52, 585 S.E.2d 52.

(1) Numerosity requires that "the class is so numerous that joinder of all members is impractical".[109] Numerosity is not simply met because the putative class numbers approximately 151 and courts often presume numerosity with 25-30 members.[110] On the contrary, a "thorough analysis" of all W. Va. R. Civ. P. 23 requirements is necessary.[111] During oral argument, this Court questioned both parties regarding the numerosity requirement.[112] Twin Star Mining, Inc., an original codefendant, settled with all 151 proposed class members. Although numerous, proposed class members have been identified. Each proposed class member will have separate evidence regarding damage and each may have different evidence regarding any "special duty" WV DEP owes them. All proposed class members have settled individually with Twin Star Mining, Inc. Some of these proposed class members will want to pursue further claims against WV DEP; others may not. Because West Virginia uses an "opt out"[113] rather than an "opt in" procedure for class actions, there is danger that some proposed class members may be included by default. Due process[114] concerns also give this Court pause about being able to provide each proposed class member and WV DEP an opportunity to plead their

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[109] W. Va. R. Civ. P. 23(a)(1).

[110] W. Va. R. Civ. P. 23(a)(1); Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, 523, 694 S.E.2d 815, 856 (2010) (*citing* Cleckley, Davis, & Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure § 23(a), at 536); see Syl. pt. 9, In re W. Va. Rezulin Litig., 214 W.Va. 52, 585 S.E.2d 52.

[111] State ex rel. Municipal Water Works, 835 S.E.2d 122; State ex rel. West Virginia University Hospitals, Inc. v. Gaujot, 242 W.Va. 54, 829 S.E.2d 54 (2019); *see* Wal-Mart Stores, Inc., 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374.

[112] Hearing Tr. 42-44, 47-48, Oct. 16, 2019.

[113] W. Va. R. Civ. P. 23(c)(2); *see, e.g.*, Board of Educ. of Monongalia County v. Starcher, 176 W.Va. 388, 343 S.E.2d 673 (1986); Allen v. Monsanto Co., 2013 WL 6153150 (unpublished opinion) (2013).

[114] W. Va. Const. art. III, § 10; *see* Philip Morris USA v. Williams, 549 U.S. 346, 353, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) (*quoting* Lindsey v. Normet, 405 U.S. 56, 66, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)); Unger v. Amedisys Inc., 401 F.3d 316, 320–21 (5th Cir. 2005) (there are "important due process concerns of both plaintiffs and defendants inherent in the certification decision")..

individualized cases in Court. Based on these concerns, the Court finds that including all of the 151 proposed class members that want to pursue this action against WV DEP is practical, preferred, and a better use of the Court's resources than to find numerosity and certify the class as a whole without individual inquiry into whether each potential class member opts in.

(2) Commonality requires that the party seeking class certification show that "there are questions of law or fact common to the class."[115] "Commonality requires that class members share a single common issue."[116]

> For purposes of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [2017], "a 'question' 'common to the class' must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims."[117]
>
> For commonality to exist under Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [2017], class members' "claims must depend upon a common contention[,]" and that contention "must be of such a nature that it is capable of class wide resolution[.]"[118] In other words, the issue of law (or fact) in question must be one whose "determination ... will resolve an issue that is central to the validity of each one of the claims in one stroke."[119]

The commonalities Plaintiffs share include living in and being flooded in the same areas, and claiming that WV DEP had a hand in their flooding. A number of issues exist that destroy their commonality: Plaintiffs live in separate watersheds subject to different mining

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[115] State ex rel. West Virginia University Hospitals, Inc., 242 W.Va. 54, 829 S.E.2d 54; In re W. Va. Rezulin Litig., 214 W.Va. at 67, 585 S.E.2d at 67; W. Va. R. Civ. P. 23(a)(2).

[116] Id.

[117] Syl. pt. 2, State ex rel. West Virginia University Hospitals, Inc., 242 W.Va. 54, 829 S.E.2d 54 (*quoting* Wal-Mart Stores, Inc., 564 U.S. at 369, 131 S. Ct. at 2562 (Ginsburg concurring in part and dissenting in part)) (emphasis added).

[118] Syl. pt. 3, State ex rel. West Virginia University Hospitals, Inc., 242 W.Va. 54, 829 S.E.2d 54 (*quoting* Wal-Mart Stores, Inc., 564 U.S. at 350, 131 S. Ct. at 2551).

[119] Id. (emphasis added).

permits, Plaintiffs have individually varying damages, and Plaintiffs have individually varying claims of promises by WV DEP and reliance by each Plaintiff. Because of the individual variances in evidence and prove required, including individualized defenses by WV DEP, Plaintiffs fail to meet the "commonality" requirement of W. Va. R. Civ. P. 23(a)(2).[120]

(3) Typicality "requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." A representative party's claim or defense "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.""[121] ""[M]ere anticipation that all class members will benefit from the suit ... is not enough. But interests sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief should satisfy W. Va. R. Civ. P. 23(a)(3)."[122] Based on the Court's findings on "numerosity" and "commonality", the Court does not address "typicality".

(4) Adequacy requires that the "that the "representative parties will fairly and adequately protect the interests of the class." "First, the adequacy of representation inquiry tests the qualifications of the counsel to represent the class. Second, it serves to uncover conflicts of interest between named parties and the class they seek to represent.""[123] Based on the

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[120] *See* State ex rel. West Virginia University Hospitals, Inc., 242 W.Va. 54, 829 S.E.2d 54; Wal-Mart Stores, Inc., 564 U.S. at 350, 131 S. Ct. at 2551; Ways v. Imation Enterprises Corp., 214 W. Va. 305, 589 S.E.2d 36 (2003) (commonality lacking in breach of contract suit where employees' claims were based on individual promises not common to all employees).

[121] In re W. Va. Rezulin Litig., 214 W.Va. at 68, 585 S.E.2d at 68 (*quoting* 1 Newberg on Class Actions, 4th Ed., § 3:13 at 328); W. Va. R. Civ. P. 23(a)(3).

[122] In re W. Va. Rezulin Litig., 214 W.Va. at 68, 585 S.E.2d at 68 (*quoting* Weiss v. York Hosp., 745 F.2d 786, 810 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985)).

[123] In re W. Va. Rezulin Litig., 214 W.Va. at 69, 585 S.E.2d at 69 (*quoting* In re Prudential Ins. Co. of America Sales Practices Litigation, 148 F.3d 283, 312 (3d Cir. 1998) (internal citations omitted)); *accord* Black v. Rhone–Poulenc, Inc., 173 F.R.D. 156, 162 (S.D. W.Va. 1996)); W. Va. R. Civ. P. 23(a)(4).

Court's findings on "numerosity" and "commonality", the Court does not address "adequacy".

Under Wal-Mart Stores, Inc. and State ex rel. West Virginia University Hospitals, Inc., Plaintiffs in this case failed to satisfy the "numerosity" and "commonality" requirements. Having reached a decision not to certify the class based on W. Va. R. Civ. P. 23(a) requirements, the Court does not address WV DEP's claim that a "citizen suit" under W. Va. Code § 22-3-25 cannot be brought as a class action.

CONCLUSIONS OF LAW

1. Plaintiffs fail to meet two legal prerequisites for class certification: numerosity and commonality.
2. Based on the analysis above, Plaintiffs are not entitled to class certification and may pursue this matter individually via consolidated actions.

RULING

The Court finds that Plaintiffs have specifically identified 151 potential claimants. Each of these potential claimants have potential damages that will vary from individual and would require individual damages hearings. WV DEP has potential individualized defenses against each potential claimant based on individual promises WV DEP may have made and individualized reliance by individual Plaintiffs. The Court FINDS and ORDERS that it is not impracticable to have each individual that wants to claim against WV DEP to file their own complaints, which the Court will join and consolidate with the complaints already filed. This process will ensure that individual claims and defenses may be heard in compliance with due process concerns. Consequently, this Court **FINDS** and **ORDERS** that Plaintiffs do not meet the W. Va. R. Civ. P. 23(a) requirements of "numerosity" and "commonality". The Court **ORDERS DENIED**

Plaintiffs' *Amended Motion for Class Certification.* The Court finds that this lawsuit has the effect of tolling the statute of limitations with respect to the claims made in the *Second Amended Complaint.* The Court notes Plaintiffs' objections and exceptions to this Ruling.

The Clerk is directed to forward a copy of this Order to plaintiffs, defendants, and all counsel of record.

ENTER: This 30th day of December, 2019.

/s/ Edward J. Kornish
Circuit Judge
Eighth Judicial Circuit