

COMMONWEALTH OF KENTUCKY
PERRY CIRCUIT COURT
CIVIL ACTION NO. 11-CI-_____

KENNETH NEACE, JR., STACEY NEACE,
NANCY BARNETT,
CODELL COMBS, SALLY COMBS,
EDGAR COMBS, SHARON COMBS,
SILAS FUGATE,
LAWRENCE GAYHART, OVILLA GAYHART,
GAIL HUNTER, WENDEL HUNTER,
CHESTER JONES,
FLORENCE JONES,
JOHN W. JONES,
WALLACE T. JONES,
SHANNON LONGSWORTH,
FRANCES MILLER, MARTIE MILLER,
VELMA MILLER,
WILLIE MILLER,
DWAYNE NEACE, CONNIE NEACE,
KENNETH NEACE, SR., LINDA NEACE,
WALLACE NOBLE,
WILLIAM TAULBEE, AND JANET TAULBEE

PLAINTIFFS

VS.

COMPLAINT

FRASURE CREEK MINING, LLC.
4978 Teays Valley Rd.
Scott Depot, West Virginia 25560

and

Unknown Agents of Defendant Frasure Creek Mining, LLC., who participated in the decision not to inspect or maintain properly the drainage control systems at mining site Frasure Creek #8

and

Unknown Defendants, who made modifications to the drainage control structure designated as "Dam #1" at mining site Frasure Creek #8 that were inconsistent with the approved drainage control plan

DEFENDANTS

SERVE: National Corporate Research, Ltd.
828 Lane Allan Road, Suite 219
Lexington, KY 40504

COMPLAINT

Plaintiffs, by their undersigned counsel and for their complaint, state as follows:

Nature of the Action

Residents of the Lost Creek watershed in Perry County, Kentucky, seek damages and injunctive relief for injuries they suffered due to landslides and flooding that occurred on June 20, 2011. Plaintiffs allege that the landslides and flooding they experienced on that date were direct consequences of Defendants' extra-hazardous activities in the watershed. Additionally and in the alternative, Plaintiffs allege that the landslides and flooding were the result of Defendants' mining operations that were negligent, reckless, or willfully non-compliant with Kentucky law and administrative regulations.

Parties

1. Defendant Frasure Creek Mining, LLC, ("Frasure Creek") is a foreign limited liability company with its principal office at 4978 Teays Valley Rd., Scott Depot, West Virginia 25560.

a. At times relevant to this action, Defendant conducted coal mining and related operations at a site Defendant designates as "Frasure Creek #8," located at or around 37°20'45"N 83°11'0"W and in the Lost Creek watershed of Perry County, Kentucky. Some of these operations were extra-hazardous under Kentucky law.

b. Frasure Creek's registered agent for service in Kentucky is National Corporate Research, Ltd., 828 Lane Allan Road, Suite 219, Lexington, Kentucky

40504, according to the records of the Kentucky Secretary of State at the time of this filing.

2. Unknown agents of Frasure Creek named as Defendants had decision-making and supervisory authority over operations at Frasure Creek #8 and are individually liable for the consequences of the improper exercise of that authority. Based on information and belief, Plaintiffs allege that Frasure Creek employed one or more Kentucky residents in this capacity.

3. Unknown Defendants made alterations to the drainage control structure designated as “Dam #1” that were not compliant with the drainage control plan submitted with Frasure Creek’s state mining permit application. Based on information and belief, Plaintiffs allege that one or more Kentucky residents were among these unknown Defendants, who worked as contractors for Frasure Creek.

4. All Plaintiffs are residents of Perry County, Kentucky.

a. Plaintiffs Kenneth Neace, Jr., and Stacey Neace, husband and wife, resided at 61 Thomasville Lane, Rowdy, Kentucky 41367, at all times relevant to their claims.

b. Plaintiff Nancy Barnett resided at 10914 Lost Creek Road, Dice, Kentucky 41736, at all times relevant to her claims.

c. Plaintiffs Codell and Sally Combs, husband and wife, resided at 8740 Lost Creek Road, Dice, Kentucky 41736, at all times relevant to their claims.

d. Plaintiffs Edgar and Sharon Combs, husband and wife, resided at 93 Thomasville Lane, Rowdy, Kentucky 41367, at all times relevant to their claims.

e. Plaintiffs Lawrence and Ovilla Gayhart, husband and wife, resided at 33 Mahogany Hill Drive, Hazard, Kentucky 41701, at all times relevant to their claims.

f. Plaintiff Silas Fugate resided at 73 Horseshoe Bend Lane, Dice, Kentucky 41736, at all times relevant to his claims.

g. Plaintiffs Lawrence and Ovilla Gayhart resided at 23 Mahogany Hill Drive, Hazard, Kentucky 41701, at all times relevant to their claims.

h. Plaintiffs Wendel and Gail Hunter, husband and wife, resided at 3775 Lost Creek Road, Hazard, Kentucky 41701, at all times relevant to their claims.

i. Plaintiff Chester Jones resided at 5316 Lost Creek Road, Hazard, Kentucky 41701, at all times relevant to his claims.

j. Plaintiff Florence Jones resided at 12 Perry Pines Run, Hazard, Kentucky 41701, at all times relevant to her claims.

k. Plaintiff John W. Jones resided at 3627 Lost Creek Road, Hazard, Kentucky 41701, at all times relevant to his claims.

l. Plaintiff Wallace T. Jones resided at 10 Perry Pines, Hazard, Kentucky 41774, at all times relevant to his claims.

m. Plaintiff Shannon Longworth resided at 29 Mahogany Hill Drive, Hazard, Kentucky 41701, at all times relevant to her claims.

n. Plaintiffs Martie and Frances Miller, husband and wife, resided at 9602 Lost Creek Road, Rowdy, Kentucky 41367, at all times relevant to their claims.

- o. Plaintiff Willie Miller resided at 1736 Willie Miller Drive, Box 125, Dice, Kentucky 41736, at all times relevant to his claims.
- p. Plaintiff Velma Miller resided at 10820 Lost Creek Road, Dice, Kentucky 41736, at all times relevant to her claims.
- q. Plaintiffs Dwayne and Connie Neace, husband and wife, resided at 126 Collins Spring Drive, Dice, Kentucky 41736, at all times relevant to their claims.
- r. Plaintiffs Kenneth Neace, Sr., and Linda Neace, husband and wife, resided and operated a business at 143 Thomasville Lane, Rowdy, Kentucky 41367, at all times relevant to their claims.
- s. Plaintiff Wallace Noble resided at 26 Perry Pines Run, Hazard, Kentucky 41701, at all times relevant to his claims.
- t. Plaintiffs William and Janet Taulbee, husband and wife, resided 4284 Sixteen Mile Creek Road, Dice, Kentucky 41736, at all times relevant to their claims.

Factual Allegations

5. In the period leading up to and including June 20, 2011, Defendants conducted mining and related operations at Frasure Creek #8 in the Lost Creek watershed under various permits issued by Kentucky's Energy and Environment Cabinet ("EEC"). These permits include, but are not limited to, numbers 897-0497, 897-0500, and 897-8048.

6. For each of the mining permits relevant to Frasure Creek #8, Ky. Rev. Stat. Ann. § 350.060(6)(I) required Defendant Frasure Creek to submit a drainage plan to the EEC specifying how Defendant would control surface drainage from the permitted area.

a. As a condition for Defendant Frasure Creek's operations at Frasure Creek #8, Frasure Creek was required to build sedimentation ponds, diversion ditches, or other surface drainage control structures in accordance with the applicable drainage plans.

b. As an ongoing condition for Defendants' operations at Frasure Creek #8, Frasure Creek and its Unknown Agents were required to monitor and maintain the drainage control structures in accordance with a state-approved drainage plan and regulatory standards established by the state of Kentucky.

7. On or around June 20, 2011, there were multiple catastrophic failures of the drainage control system associated with permit 897-0497.

a. As a consequence of the failures, the drainage control system could not function as designed, and inadequately-controlled drainage escaped Defendant Frasure Creek's permitted area. But for the failures, the area would have drained more slowly, the drainage would have passed through designated spillways, and the drainage would have carried less sediment.

b. At the time of the failures, the drainage control system held previously impounded water and sediment. A substantial portion of this water and sediment escaped Frasure Creek's permit area, creating a far greater flow rate than anticipated by the surface drainage plan.

c. State inspectors documented a breach in the outslope of the control structure Frasure Creek designates as Bench Pond "BB-2." The breach allowed water to escape through the outslope rather than through the designated spillway.

d. According to the corresponding Notice of Non-Compliance (NC# 63-1492), issued by the EEC on June 20, 2011, the breach in Bench Pond “BB-2” was caused by Defendants’ “failure to monitor and maintain sediment structures according to permit plans.”

e. Because the slope below the Bench Pond had not been designed to handle runoff from the mining site, the flow through the breach compromised the integrity of the slope. A resulting slide of surface material invaded the properties of Plaintiffs Lawrence and Ovilla Gayhart and of Plaintiff Shannon Longworth.

f. According to a second Notice of Non-Compliance (NC# 63-0488) issued the same day, Unknown Defendants made “third party alterations” to a structure Frasure Creek designates as “Dam 1.” Defendant Frasure Creek and its Agents failed to detect or remedy these alterations. The Notice further states that as a result of these alterations, the associated sediment pond was not functioning according to its design.

8. Failures in Defendants’ drainage control system added substantially to the flow of Lost Creek. In addition, the failures allowed large quantities of sediment and other materials to escape the mining area and flow into the Creek.

a. The fugitive materials interfered with the flow of the Creek and reduced its natural carrying capacity.

b. The combined effects of increased flow and reduced Creek capacity resulting from the control structure failure caused, in whole or in part, flooding along Lost Creek.

c. The resulting flood waters invaded the properties of all Plaintiffs.

9. During the twelve-month period up to and including June, 2011, inspectors from the EEC issued at least seven additional citations of Defendant Frasure Creek operations at mining site Frasure Creek #8:

a. For the above-mentioned permit number 897-0497, the EEC issued a Notice of Non-Compliance (NC# 63-0355) on July 29, 2010, for Defendants' failure to maintain its sediment control structures. The Notice states that the sediment levels in structures "BB-4" and "BB-5" exceeded the approved clean-out elevations. The EEC issued additional Notices on July 8, 2010 (NC# 63-0356) and August 6, 2010 (NC# 63-0470) for Defendants' operations under this permit.

b. For permit number 897-0500, the EEC issued a Notice of Non-Compliance (NC# 63-0487) on May 23, 2011, because Defendant Frasure Creek was operating in the Pigeon Roost drainage area without completing planning and permitting procedures established by the Kentucky Department of Environmental Protection, Division of Water.

c. For permit number 897-8048, the EEC issued drainage control system violations on November 19, 2010 (NC# 63-0476), March 21, 2011 (NC# 63-0485), and June 27, 2011 (NC# 63-0489). The November 19 violation cited Defendant Frasure Creek for failing to maintain an impoundment dam and for building a road that interfered with the drainage system. The other two violations cited Defendants for allowing "substandard water" to escape the mining area.

10. As the flood waters of June 20, 2011, receded and electric service was restored to the Thomasville Lane area, a short circuit ignited a fire that destroyed the home of Plaintiffs Stacey & Kenneth Neace, Jr.

Claims

11. Defendants' regulatory and statutory violations, some of which were documented in Notices of Non-Compliance NC#63-0866, NC# 63-1492, and NC# 63-0488, injured all Plaintiffs. Plaintiffs adopt the allegations contained in these Notices and incorporate them here by reference. Defendants' conduct as documented in these Notices violated EEC regulations established under the authority of Ky Rev. Stat. Ann. § 350.101 et seq. In addition to the causal role these violations played in the claims below, Plaintiffs assert that each of these violations gives rise to an independent cause of action under Ky. Rev. Stat. Ann. § 446.070.

12. On June 20, 2011, Defendants committed trespass to real property belonging to some among the Plaintiffs through the instrumentality of Defendants' inadequately controlled drainage.

a. Plaintiffs Stacey & Kenneth Neace, Jr., owned land and resided at 61 Thomasville Lane, Rowdy, Kentucky 41367. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

b. Plaintiff Nancy Barnett owned land and resided at 7183 Lost Creek Road, Dice, Kentucky 41736. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

c. Plaintiffs Codell & Sally Combs owned land and resided at 8740 Lost Creek Road, Dice, Kentucky 41736. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the property. The invasion damage Plaintiffs' land, home, and well.

d. Plaintiffs Sharon & Edgar Combs owned land and resided at 93 Thomasville Lane, Rowdy, Kentucky 41367. Defendant's inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

e. Plaintiff Silas Fugate owned land and resided at 73 Horseshoe Bend Lane, Dice, Kentucky 41727. Defendant's inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade land. The invasion damaged Plaintiff's land, home, and well.

f. Plaintiffs Ovilla & Lawrence Gayhart owned land and resided at 33 Mahogany Hill Drive, Hazard, Kentucky 41701. These Plaintiffs also owned adjoining land at 29 Mahogany Hill Drive. Defendants' inadequately controlled drainage caused, in whole or in part, surface material from an abutting property along with flood waters and sediment from the permit area to invade the land. The invasion damaged the land at both locations along with Plaintiffs' home and well.

g. Plaintiffs Wendel & Gail Hunter owned land and resided at 3775 Lost Creek Road, Hazard, Kentucky 41701. Defendants' inadequately controlled

drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

h. Plaintiff Chester Jones owned land and resided at 5316 Lost Creek Road, Hazard, Kentucky 41701. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

I. Plaintiff John W. Jones owned land and resided at 3627 Lost Creek Road, Hazard, Kentucky 41701. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

j. Plaintiff Florence Jones owned land and resided at 12 Perry Pines Run, Hazard, Kentucky 41701. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

k. Plaintiff Wallace T. Jones owned land and resided at 10 Perry Pines Run, Hazard, Kentucky 41701. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

l. Plaintiffs Martie & Frances Miller owned land and resided at 9602 Lost Creek Road, Rowdy, Kentucky 41367. Defendant's inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

m. Plaintiff Velma Miller owned land and resided at 10820 Lost Creek Road, Dice, Kentucky 41736. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

n. Plaintiffs Willie Miller owned land and resided at 9602 Lost Creek Road, Hazard, Kentucky 41701. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

o. Plaintiffs Dwayne & Connie Neace owned land and resided at 126 Collins Spring Drive, Dice, Kentucky 41736. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

p. Plaintiffs Linda & Kenneth Neace, Sr., owned land, resided, and carried on a business at 145 Thomasville Lane, Rowdy, Kentucky 41367. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land. The invasion damaged Plaintiffs' land, home, well, and business.

q. Plaintiff Wallace Noble owned land and resided at 26 Perry Pines Run, Hazard, Kentucky 41701. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land and damage the property.

r. Plaintiffs William and Janet Taulbee owned land and resided at 4284 Sixteen Mile Creek Road, Dice, Kentucky 41736. Defendants' inadequately controlled drainage caused, in whole or in part, flood waters and sediment to invade the land. The invasion damaged Plaintiffs' land, home, and well.

13. Defendants committed trespass to and/or conversion of various items of personal property belonging to each Plaintiff through the instrumentality of Defendants' inadequately controlled drainage. Plaintiffs give special notice of the following losses while asserting that this list is not exhaustive.

a. Plaintiffs Stacey & Kenneth Neace, Jr., resided at 61 Thomasville Lane, Rowdy, Kentucky 41367 in manufactured housing they owned. Defendants' inadequately controlled drainage caused, in whole or in part, the complete destruction of Plaintiffs' home and all its contents. The drainage also caused the destruction of, loss of, or damage to Plaintiffs' personal property located on the land outside the home.

b. Plaintiff Willie Miller resided at 1736 Willie Miller Road, Box 125, Dice, Kentucky 41736, in manufactured housing he owned. Defendants' inadequately controlled drainage caused, in whole or in part, the complete destruction of Plaintiff's home and all its contents. The drainage also caused the destruction of, loss of, or damage to Plaintiff's personal property located on the land outside the home.

c. Plaintiff Shannon Longworth resided at 29 Mahogany Hill Drive, Hazard, Kentucky 41701, in manufactured housing she owned. Defendants'

inadequately controlled drainage caused, in whole or in part, damage to Plaintiffs' home. The drainage also caused, in whole or in part, the destruction of, loss of, or damage to Plaintiffs' personal property at or around this location.

14. Defendants committed assault and/or battery against each Plaintiff through the instrumentality of Defendants' inadequately controlled drainage. Each Plaintiff experienced offensive contact with Defendants' drainage and/or a reasonable apprehension of imminent harmful or offensive contact. Plaintiffs Gail & Wendel Hunter and Plaintiff Shannon Longworth further experienced apprehension of imminent harmful contact with the fugitive landslide materials from Defendants' permitted area threatening their homes.

15. Defendants contaminated and interrupted the wells of some among the Plaintiffs through the instrumentality of Defendants' inadequately controlled drainage. Plaintiffs assert that these are injuries actionable under Ky. Rev. Stat. Ann. § 350.421(2).

a. Plaintiffs Linda & Kenneth Neace, Sr., owned a well on or near their property at 145 Thomasville Ln, Rowdy, Kentucky 41367, that supplied a portion of the water they used for their home and business. This well was inundated, causing an interruption and contamination of their water supply.

b. Plaintiffs Edgar & Sharon Combs own a well on or near their property at 93 Thomasville Ln, Rowdy, Kentucky 41367, that supplied the water they used for their home. This well was inundated, causing an interruption and contamination of their water supply.

c. Plaintiffs William & Janet Taulbee owned a well on or near their property at 4284 Sixteen Mile Creek Road, Dice, Kentucky 41736, that supplied

the water they used for their home. This well was inundated, rendering the well unusable and denying Plaintiffs of their water supply.

d. Plaintiff Silas Fugate owned a well on or near his property at 73 Horseshoe Bend Lane, Dice, Kentucky 41727, that supplied the water he used for his home. This well was inundated, rendering the well unusable and denying Plaintiff of his water supply.

e. Plaintiffs Lawrence & Ovilla Gayhart owned a well on or near their property at 23 Mahogany Hill Drive, Hazard, Kentucky 41701, that supplied water they used for their garden and home. This well was inundated, interrupting and contaminating the water supply.

f. Plaintiffs Codell & Sally Combs owned a well on or near their property at 8740 Lost Creek Road, Dice, Kentucky 41736, that supplied a portion of the water they used for their home. This well was inundated, causing an interruption and contamination of their water supply.

16. Defendants have substantially interfered with Plaintiffs' ability to use and enjoy their property, thus constituting a state law claim of nuisance.

17. Defendants acted in reckless and callous disregard of Plaintiffs' rights by their repeated and continuing violations of state regulations and accepted industry practices in their operations at Frasure Creek #8 or were grossly negligent in their conduct.

18. Defendant Frasure Creek has a long history of being a persistent violator of Kentucky environmental law and the conduct in this case is a continuation of this pattern of disregard for the rights of the citizens of this Commonwealth.

WHEREFORE, Plaintiffs pray the Court grant them relief as follows:

1. Judgment against each Defendant.
2. Compensation for damages referenced in this Complaint, including diminution of value to their lands, homes and businesses; destruction of, loss of, or damage to their homes and personal property; loss of contents; loss of earnings and other business-related damages; and all other reasonably foreseeable damages including the costs of alternative housing, cost of substitute transportation, and compensation for pain, suffering, and humiliation resulting from the massive interference with the Plaintiffs' quality of life.
3. Punitive damages.
4. Injunctive relief ordering such remediation as may be necessary to reduce the likelihood of future flooding in the Lost Creek watershed. The relief sought includes but is not limited to removal of the sediment and other obstructions to the natural flow of Lost Creek that were caused by Defendants' violations of state and industry standards. The relief sought also includes an independent evaluation of Defendants' drainage system for Frasure Creek #8, any required changes, and ongoing supervision of Frasure Creek's maintenance of the system.
5. Replacement of the water supply under Ky. Rev. Stat. Ann. § 350.421, and any attorney fees and expert witness expenses pursuant to Ky. Rev. Stat. Ann. § 350.020 (1)-(2).
6. Trial by jury.

7. Any and all other relief the Court deems appropriate.

Respectfully Submitted,

NED PILLERSDORF
PILLERSDORF, DEROSSETT & LANE
124 WEST COURT STREET
PRESTONSBURG, KENTUCKY 41653
Telephone: (606) 886-6090
Facsimile: (606) 886-6148