

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA**

ROANOKE DIVISION

WENDELL W. FLORA, MARY M.
FLORA, THE FRITH LIVING TRUST,
MICHAEL S. HURT, and
FRANCES K. HURT

Plaintiffs,

v.

CIVIL ACTION NO. 7:18CV240

MOUNTAIN VALLEY PIPELINE, LLC,

Defendant.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

1. This case arises from Mountain Valley Pipeline LLC's ("MVP") violation of Plaintiffs' property rights. MVP has violated and will continue to violate Plaintiffs' fundamental property right of exclusive possession by depositing soil, mud, and water on Plaintiffs' properties when it rains.

2. The right of exclusion from one's property is a foundational principle of Virginia property law. This is derived from the "general principle of law, [that] every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another." *Cooper v. Horn*, 448 S.E.2d 403, 406 (Va. 1994) (quoting *Tate v. Ogg*, 195 S.E. 496, 498 (Va. 1938)). Deposition of soil and mud onto Plaintiffs' property through inadequate or nonexistent erosion controls on Defendant's worksite constitutes an unlawful invasion of the exclusive and peaceful enjoyment of Plaintiffs' properties. Plaintiffs

are, therefore, entitled to injunctive relief to prevent future invasions of their properties as well as a cleanup of and damages for the harm already caused to their properties.

JURISDICTION AND VENUE

3. This case is brought pursuant to the common law of Virginia. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1332 (diversity).

4. Plaintiffs all reside in Franklin County, Virginia and are all citizens of the Commonwealth of Virginia. Defendant Mountain Valley Pipeline LLC is a Delaware Limited Liability Company with its principal place of business in Pittsburgh, Pennsylvania.

5. Venue is properly in this District and Division under 28 U.S.C. § 1391(b)(2) and Local Rules 2(a)(7) and 2(b) (W.D. Va.) because Plaintiffs in this action reside at and own the properties at issue in this case within the District and the Roanoke Division, and MVP's actions and inaction that caused the harm complained of occurred in this District and the Roanoke Division.

PLAINTIFFS

1. Plaintiffs Wendell and Mary Flora are residents of Franklin County, Virginia. Mr. Flora is a retired sheriff's deputy who now farms the property at issue in this case. Mr. Flora has owned the property for more than 50 years. Mr. Flora owns the farm jointly with his wife, Mary. The farm is located at 150 Floradale Farms Lane, Boones Mill, VA 24065.

2. Plaintiff The Frith Living Trust, is a trust created pursuant to the laws of Virginia and owns property in Franklin County, Virginia identified as Tax Map Parcel 0380001900. The property is in Boones Mill, Virginia and adjacent to Plaintiffs' Michael and Linda Hurt's property. Glenn C. Frith and Linda K. Frith are the sole trustees of the Frith Living Trust.

3. Michael S. Hurt and Frances K. Hurt own property and reside at 694 Wildwood Road, Boones Mill, Franklin County, Virginia.

DEFENDANT

4. Mountain Valley Pipeline LLC is a limited liability company incorporated in Delaware with its principal place of business in Pittsburgh, Pennsylvania. MVP is the company responsible for the construction of the Mountain Valley Pipeline and the party responsible for implementing erosion and sediment controls along the pipeline route.

FACTS

5. In constructing the Mountain Valley Pipeline, MVP has unlawfully caused large amounts of soil to be washed from its pipeline easement onto Plaintiffs' properties. Moreover, without proper erosion controls, MVP will cause soil and mud to continue to wash off its easement onto Plaintiffs' properties when it rains.

6. Defendant MVP is in the beginning phases of building a large natural gas pipeline from northern West Virginia to Pittsylvania County, Virginia known as the Mountain Valley Pipeline.

7. On property adjacent to Mr. Flora and owned by his brother, MVP holds an easement to construct a portion of the Mountain Valley Pipeline. Recently, MVP cleared a 125-foot right of way on Mr. Flora's brother's property of all vegetation in preparation for the construction of the pipeline, exposing a large amount of soil to erosion from rain. Mr. Flora's property is downhill from his brother's property and the construction corridor. Cahas Mountain Road separates the relevant part of Plaintiff's property from that of his brother and a portion of the MVP worksite.

8. MVP has cleared a large portion of its easement in addition to the portion cleared on Mr. Flora's brother's property. In the area near the Floras property portions of the Flora, Frith and Hurt properties have been cleared as well.

9. The construction right of way on all of the properties was left bare, with minimal erosion controls to prevent erosion in the event of a rain storm.

10. As a condition to constructing the pipeline, MVP secured a permit from the Virginia State Water Control Board pursuant to Section 401 of the Clean Water Act certifying that construction of the pipeline would comply with Virginia water quality standards and, relevant to this case, requiring that MVP use best management practices for erosion and sediment control during construction of the pipeline. These are codified at 9 Va. Admin Code § 840-40.

11. A steady rain began on May 15, 2018 and continued through May 19, dislodging large amounts of soil and mud from the denuded construction corridor created by MVP. The soil was deposited on the Flora property downhill from the cleared easement.

12. On May 18 Plaintiff Wendell Flora observed that large amounts of mud had flowed off the hillside worksite, across Cahas Mountain Road, depositing about eight inches of mud on the road, onto his hayfield, and finally into Little Creek, a stream that bisects the Flora hayfield. Mud also flowed off other areas of the cleared easement directly onto the Flora pasture and hayfield. This constitutes a trespass to the Floras' property rights in the hayfield, pasture, and Little Creek.

13. Plaintiff owns both banks of the stream and the stream bed.

14. On May 20, 2018, one day after the rain stopped, news outlets reported that up to eight inches of mud had slipped off the bare construction corridor and flowed onto Cahas

Mountain Road. Laurence Hammack, *Construction halted at Mountain Valley Pipeline worksite following severe erosion in Franklin County*, The Roanoke Times (May 20, 2018), http://www.roanoke.com/business/construction-halted-at-mountain-valley-pipeline-work-site-following-severe/article_2eeebd3a-5007-56b0-9469-3e381b09b668.html.

15. Prior to the rains on May 15 through 19, Plaintiff noticed that MVP had only established a few “silt socks” as the main erosion and sediment control mechanisms on the worksite above the Flora property. Mr. Flora also noticed a few cement barriers on the worksite, but during the rain event mud-laden rain water just flowed around the barriers.

16. Although prior to the rain event MVP and the Virginia Department of Environmental Quality (“DEQ”) claimed that erosion controls, including concrete barriers, were installed properly, those same controls completely disappeared during the rain, flooding the Flora property with mud. *Id.*

17. Moreover, DEQ and MVP publicly claimed that no mud had reached any stream, *id.*, but Mr. Flora’s eyewitness account, contemporaneous evidence collected by him, and internal DEQ emails discredit that statement. Furthermore, unpermitted discharges into a water of the United States are a violation of the Clean Water Act. *See* 33 U.S.C. § 1311.

18. Contrary to DEQ’s public statements defending MVP, an email from DEQ employee Elizabeth Abe to DEQ employee Matthew Grant on May 21 explained that she observed a stream adjacent to an MVP worksite so choked with mud that no water was flowing in the stream. Ex. A. She observed the stream while driving on Brick Church Road in Rocky Mount, Virginia. *Id.* Moreover, she did not see any sediment trapping measures installed at the worksite. *Id.*

19. Further, DEQ levied no fines or penalties against MVP. It issued no formal stop-work order. DEQ has not ordered MVP to use more stringent erosion or sediment control measures. In short, Plaintiffs cannot rely on DEQ to protect their property and environmental interests, particularly in light of DEQ's public denial of the fact that significant sediment was deposited in Virginia's waters as a result of MVP's actions.

20. Upon information and belief, the erosion and sediment controls that were used on the easement prior to the rains on May 15 through 19 were not in compliance with Virginia's best management practices as codified in 9 Va. Admin. Code § 840-40 nor were they in compliance with DEQ's erosion and sediment control handbook. Nonetheless, no matter what controls were extant at the worksite, they were inadequate to capture the soil washing from MVP's easement onto Mr. Flora's property and were unable to prevent MVP's trespass.

21. Other property owners adjacent to the MVP worksite were also inundated with mud and soil from the worksites on easements adjacent to the worksite near the Flora property.

22. The Hurt and Frith properties are adjacent, and they are just east of Mr. Flora's property, in the watershed of a separate small tributary. Mr. & Mrs. Hurt and the Frith trust each own property that is subject to the permanent pipeline right of way. Trees have been cleared and earth is exposed much as at Mr. Flora's property. Mr. & Mrs. Hurt and the Frith trust each own half of a private roadway, which the pipeline perpendicularly intersects. The private road runs roughly parallel to the small tributary, and there are hills rising on either side of the bottom area, which includes the private drive, the stream, and grazing land.

23. On Saturday May 26 and Sunday May 27, it rained in the Boones Mill area. The rain caused earth and mud to be washed off of at least two hillsides, one on the Frith property and one on the Hurt property. Mud was deposited to depths of 3-4 inches on the private drive to

the Frith residence. Muddy water could be seen passing underneath failing silt socks installed by MVP. Mud was deposited on the Frith and Hurt properties, where some of the mud remains. Some of the earth was washed into the stream.

24. As of May 28, 2018, MVP had not materially improved the erosion controls at any of the worksites and appears to have no plans to control erosion in future rain events.

25. As of Monday May 28, silt fences located near the Flora property and on the Frith property are riddled with holes and are collapsing. Silt socks are only staked to the ground, permitting flow under them, and in some cases have shifted their positions, allowing water and mud to flow onto Plaintiffs' property unimpeded. Those same silt socks have also collected some soil such that any amount of flow spills over them.

26. Water has also been allowed to pool behind the silt fence and silt socks on the construction site on the Frith property. The mud-filled water will flow onto the Frith property and deposit mud when it rains again.

27. MVP has constructed some sediment dykes but those dykes have not been compacted and are ineffective. The dykes are not seeded with grass mats and do not prevent erosion of the dykes or of the hillside they are meant to prevent from eroding. Silt socks placed in gaps between sections of silt fencing at the outlets of the dykes are not effectively secured, are undermined by erosion, and have failed in numerous areas. Overall, the sediment controls in place at the site now are insufficient and ineffective.

28. Another trespass, therefore, is imminent. It may happen as early as Wednesday May 30. Weather predictions indicate that another heavy multi-day rainfall is due to strike Plaintiffs' properties beginning on May 30. MVP's continued reliance on inadequate erosion

controls makes it extremely likely, if not a certainty, that large amounts of soil will again inundate Plaintiff's property.

29. Future rain events, that are nearly certain to occur this summer, will wash even more soil onto Plaintiff's property if MVP continues to rely on insufficient erosion controls.

30. In addition, even more extensive land disturbance associated with digging the trench in which to lay the pipeline will take place in the near future. Such disturbances will require the placement of large piles of loose soil on or near the construction corridor. The large-scale excavation that will be necessary to lay the pipeline will pose an even more severe threat of erosion and cause greater transport of mud onto adjacent fields and streams like Plaintiffs'.

31. MVP has shown a startling disregard of the effects of construction of the pipeline. On April 25, 2018, the West Virginia Department of Environmental Protection issued a notice of violation of erosion and sediment controls after finding sediment-filled water that had flowed beyond the boundaries of MVP's easement in Wetzel County, West Virginia. In March 2018 an environmental consulting firm employed by the United States Forest Service found that sediment and erosion controls on Mystery Ridge Road and Pocahontas Road were not functioning properly and sediment-laden water was running down the roads. Although the Forest Service brought this to the attention of MVP in March, the violations were not remedied by mid-April. The photos from the violation report demonstrate MVP's reliance of silt socks staked to the ground as the main sediment control measure.

32. Inspections of other worksites in the area of Plaintiff's property reveal that MVP has failed to even erect silt fencing along the perimeter of their worksites. The complete lack of erosion controls is corroborated by internal DEQ emails referencing a worksite in Rocky Mount, Virginia.

FIRST CAUSE OF ACTION
Trespass

33. The allegations of the preceding paragraphs are incorporated here by reference.

34. Plaintiffs own property adjacent to and within MVP easements which MVP has cleared of all vegetation exposing bare earth to erosion.

35. Between May 18 and 19, and May 26 and 27 mud, soil, and rainwater runoff flowed onto Plaintiffs' properties from cleared easements held by MVP.

36. The flow of mud, soil, and water from the MVP worksite was unauthorized.

37. The flow of mud, soil, and water from the MVP worksite was caused by MVP failure to properly control and contain the erosion of soil from its worksites.

38. The mud, soil, and water physically invaded Plaintiffs' properties as a result of MVP's actions. This constitutes a trespass. *See Krupiel v. Hicks*, 731 S.E.2d 921, 925 (Va. 2012) (quoting *Cooper v. Horn*, 448 S.E.2d 403, 406 (Va. 1994)).

SECOND CAUSE OF ACTION
Continuing Trespass

39. The allegations of the preceding paragraphs are incorporated here by reference.

40. MVP has failed to implement effective sediment controls. Without such controls MVP will continue to trespass on Plaintiffs' properties when it rains.

41. Without injunctive relief barring MVP from continuing to trespass on Plaintiffs' property, soil, mud, and water will continue to flow onto Plaintiff's property every time it rains. *See Boerner v. McCallister*, 89 S.E.2d 23, 25 (Va. 1955) ("As a general rule, where an injury committed by one against another is being constantly repeated, . . . the trespass will be prevented in equity by an injunction . . .").

THIRD CAUSE OF ACTION
Nuisance

42. The allegations of the preceding paragraphs are incorporated here by reference.

43. The facts above establish a nuisance because MVP's actions constitute an unreasonable interference with the use and enjoyment of Plaintiffs' properties.

REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court:

44. Grant an injunction barring MVP from continuing to trespass onto Plaintiff's property for as long as there is not sufficient ground cover to prevent mud, soil, and water from flowing onto Plaintiff's property when it rains.

45. Award damages and attorney's fees to Plaintiffs as the Court finds appropriate.

46. Trial by jury is hereby demanded for all Plaintiffs and all causes of action.

Respectfully submitted,

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