

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

NEIGHBORS FOR A SAFE DRAGON,)
and DANIEL AND RACHEL CROSS,)
Personally, and on behalf of SHANE,)
LOGAN AND MAKAYLA CROSS)
)
Plaintiffs,)
)
v.)
)
DRAGON PRODUCTS COMPANY, INC.,)
)
Defendant.)

Civil Action No. 05-_____

**COMPLAINT
[INJUNCTIVE RELIEF SOUGHT]**

Plaintiff Neighbors for a Safe Dragon (“Neighbors”), and Daniel and Rachel Cross, personally, and on behalf of their minor children, Shane, Logan and Makayla Cross (collectively, “the Cross Family”), complain against Defendant Dragon Products Company, Inc. (“Dragon”) as follows:

Nature of the Action

1. This is a citizen suit brought under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), to require Dragon to take all actions necessary to eliminate the imminent and substantial endangerment to health and the environment caused by Dragon’s past and present operation of its cement manufacturing facility in Thomaston, Maine. In addition to the RCRA claim brought by Neighbors, the Cross Family, individual members of Neighbors, have asserted claims against Dragon seeking redress for injuries that they have suffered as a result of Dragon’s operations:

- Dragon has a 15-acre, 845,000-ton cement kiln dust (“CKD”) pile on its property in Thomaston.
- Dragon has a 12-acre, 6,000-10,000-ton waste clinker pile on its property in Thomaston.
- Dragon has recently expanded its operations by 40%, including increased blasting in its adjacent quarry.
- Blasting from Dragon’s quarry has cracked foundations and windows in the home of the Cross Family.
- Corrosive dust from Dragon’s waste piles and other operations is blowing onto nearby homes and businesses, leaching into groundwater, and running off into surface water. Cars and other property are damaged by the corrosive dust; vegetation around the Dragon plant is dying; and Plaintiffs have suffered from a number of health problems that are, upon information and belief, attributable to Dragon’s dust.
- Many other Portland cement manufacturing facilities throughout the country are able to operate without causing the kind of imminent and substantial threat to health and the environment that is posed by the Dragon Facility. Dragon should also be able to operate its Facility without posing this kind of public threat.
- Federal and state regulators have failed to act to protect the health of the people and the environment near the Dragon facility.

2. Neighbors is a citizen group whose members living in, working in, or otherwise using the area around the Thomaston facility are harmed by Dragon’s failure to abate the endangerment related to its past and present operations. The Cross Family are

members of Neighbors. To redress this harm, Neighbors seeks injunctive relief, as provided by 42 U.S.C. § 6972, that will assure that the endangerment, as described more fully below, is eliminated. The Cross Family also seeks injunctive and other relief.

3. Dragon has contributed to and is contributing to the past and present handling and/or storage and/or treatment and/or transportation and/or disposal of solid and/or hazardous waste which presents an imminent and substantial endangerment to health and/or the environment within the meaning of section 7002(a) (1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), and is a “person” subject to the citizen suit provisions of RCRA, 42 U.S.C. § 6972, pursuant to 42 U.S.C. § 6903(15).

Jurisdiction and Venue

4. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. § 6972(a)(1)(B), 28 U.S.C. § 1331, 28 U.S.C. § 1367(a), and 28 U.S.C. § 2201.

5. On November 12, 2004, Neighbors gave notice of the endangerment as required by 42 U.S.C. § 6972(b)(2)(A), to the administrator of the United States Environmental Protection Agency (“USEPA”), the State of Maine Department of Environmental Protection (“Maine DEP” or “DEP”), and Dragon. A true copy of the notice is appended hereto as Exhibit A.

6. In accordance with 42 U.S.C. § 6972(b)(2)(A), more than ninety days have passed since notice was served on USEPA, Maine DEP and Dragon. USEPA has not taken any of the actions described in 42 U.S.C. § 6972(b)(2)(B)(i)-(v) of RCRA. Maine DEP has not taken any of the actions described in 42 U.S.C. § 6972(b)(2)(C)(i)-(iii) of RCRA.

7. Venue is proper in this District pursuant to 42 U.S.C. § 6972(a), because it is “the district in which . . . the alleged endangerment may occur.”

Parties

8. Neighbors is a Maine non-profit corporation. Neighbors’ purpose is to protect the community and the environment from the dangers posed by the past and current operation of Dragon’s Thomaston facility, particularly by seeking increased enforcement of federal and state environmental laws. Neighbors has 107 members who live, work, and recreate in and near Thomaston, Maine.

9. The Cross Family are individual members of Neighbors who live in Thomaston, Maine.

10. Dragon is a Delaware corporation which maintains offices in Portland, Maine.

11. Dragon has a number of facilities in the State of Maine, including a cement manufacturing facility and quarry in Thomaston, Maine.

12. The U.S. Attorney General, the USEPA, and the Maine DEP will be served with a copy of this Complaint as required by the citizen suit provisions of the Resource Conservation and Recovery Act, under which this suit is brought.

Facts

The Facility

13. Dragon’s facility in Thomaston includes a quarry, a cement manufacturing plant, a 12-acre, 6,000-10,000-ton waste clinker pile, and a 15-acre, 845,000-ton stockpile of cement kiln dust (“CKD”) located near Route 1 in Thomaston, Maine (“Facility”).

14. Dragon has been the owner and operator of the Facility since 1980. The Facility itself has been in operation for over 60 years.

15. Beginning in 1980, Dragon has operated the Facility in such a way as to cause large amounts of CKD and fugitive dust to be deposited onto the properties neighboring the facility, to cause large amounts of leachate from the CKD and clinker piles to percolate into the groundwater, and to cause CKD to run off into surface waters.

16. Dragon has recently expanded its operations at the Facility, hoping to increase cement production by up to 40% from prior levels, thereby increasing the volume of CKD produced and stored at the facility.

17. The raw materials for the cement are mined from Dragon's limestone quarry on the west side of Route 1 in Thomaston, and the limestone is then transported by tunnel under Route 1 to the plant. Dragon frequently uses explosive blasting as part of its quarrying operations.

18. The cement manufacturing process at the Facility has historically produced a number of byproducts, including waste clinker and CKD.

19. Between six and ten thousand tons of waste clinker and other material is currently stored in a 12-acre area on the east side of the Facility.

20. Although the plant originally discharged CKD directly into the atmosphere through its emissions stacks, since the early 1970s when a fabric filtration system was installed to capture CKD, approximately 845,000 tons of CKD covering approximately 15 acres have been accumulated and separately stored in an unlined and uncovered disposal area at the Facility.

Discharges and Emissions from the Facility

21. The CKD pile is not now, nor has it ever been, covered.
22. From at least the early 1970s to the present, CKD has been released from the Facility into the air through emissions of dust blowing off the uncovered pile.
23. From at least the early 1970s to the present, CKD has been released from the Facility into the environment, including surface waters, as precipitation falls onto the uncovered CKD pile, and is released through run-off.
24. The CKD pile is not now, nor has it ever been, lined.
25. From at least the early 1970s to the present, CKD has been released from the Facility into the water through water percolating through the CKD and into the ground.
26. Under Dragon's ownership, CKD has continued to be released into the environment and into (and onto) the local community from the stockpiles, soils and waters on the Facility.
27. In 1992, Dragon applied to the Maine Department of Environmental Protection for a special waste license to operate its CKD pile. DEP has not acted on the application for the past thirteen years. DEP has not acted on the application, at least in part, because Dragon does not meet licensing standards for the stockpile due to its releases of CKD into, and consequent contamination of, groundwater, as DEP itself has stated in in-house memoranda.
28. The waste clinker pile is not now, nor has it ever been, covered or lined. Upon information and belief, potentially hazardous materials have been improperly disposed of in the waste clinker pile, which disposal poses a risk of release of such

harmful materials into the environment, thereby jeopardizing the health of persons living, working or recreating in the vicinity of the Facility, including the members of Neighbors.

29. The USEPA has determined that emissions from Portland cement facilities are hazardous to human health and the environment, due to mercury, organic hazardous air pollutants, and hydrochloric acid, all of which are associated with significant health risks, including blood disorders, reproductive disorders, developmental disorders, and pulmonary edema.

Prior Regulatory History

30. Percolation of water through the CKD pile has caused severe groundwater contamination. Although the Maine DEP has not issued Dragon the solid waste permit for which it applied in 1992, DEP has allowed Dragon to continue operating the Facility, and DEP has been negotiating with Dragon over a “schedule of compliance” which is completely outside of the regulatory structure. DEP’s “schedule of compliance” approach has not adequately addressed or remedied the long-term effects of the persistent pollution from the Facility that are the target of this action.

31. In 1980, the United States Congress instructed the USEPA to study several special wastes, including CKD, to determine whether regulation under the hazardous waste provisions of RCRA was warranted. Specifically, USEPA was to determine whether CKD posed a risk to human health and the environment, and issue a regulatory determination addressing whether the waste should be regulated as a hazardous waste.

32. In February of 1995, the USEPA published its determinations regarding the regulation of CKD in the Federal Register, concluding that regulation of CKD as a hazardous waste was warranted.

33. The cement industry, including Dragon, lobbied heavily against such regulation, seeking to retain the exclusion of CKD from regulation as a hazardous waste under RCRA. The industry then became heavily involved in USEPA's development of a proposed federal rule addressing CKD, which was published in 1999, while arguing for state control over the regulation of CKD.

34. USEPA, after reviewing comments from the cement industry on its 1999 proposed rule, announced in July of 2002 that the agency would now rely on states to regulate the management of CKD, using standards similar to those set forth in the 1999 proposed rule.

35. The State of Maine is not regulating the management of CKD, and is condoning by inaction Dragon's unlicensed disposal and storage of CKD in a manner which poses significant hazards to human health and the environment.

The Hazards of Cement Kiln Dust

36. In 1993, the USEPA specifically found that CKD should be managed as a hazardous waste. USEPA left regulation of CKD management to the states. However, Maine DEP has not promulgated any regulations specific to the management of CKD.

37. CKD is known to be corrosive, capable of causing severe burns.

38. CKD is known to be toxic, harmful by inhalation.

39. Airborne CKD can cause immediate or delayed irritation or inflammation of the eye, and eye contact with large amounts of CKD or any amount of wet CKD can cause eye irritation, chemical burns and blindness.

40. CKD can cause dry skin, skin discomfort, skin irritation, severe burns and dermatitis. A skin exposure may be harmful, even where there is no pain or discomfort.

41. CKD can cause irritant dermatitis, due to the physical properties of the CKD, including alkalinity and abrasiveness. CKD can cause allergic contact dermatitis by sensitization to hexavalent chromium present in CKD. The dermatitis can range from a mild rash to skin ulcers. Allergic contact dermatitis can either be present immediately, or develop over time with repeated contact with CKD.

42. Breathing CKD can cause nose, throat or lung irritation.

43. CKD contains crystalline silica. Prolonged or repeated inhalation of respirable crystalline silica from CKD can cause silicosis, a seriously disabling and fatal lung disease. Silicosis also increases the risk of tuberculosis.

44. Although CKD is not listed as carcinogenic by the International Agency for Research on Cancer (“IARC”) or the National Toxicology Program (“NTP”), CKD contains crystalline silica and hexavalent chromium which are classified by IARC and NTP as known human carcinogens.

45. Exposure to respirable crystalline silica, with or without the subsequent development of silicosis, may be associated with the increased incidence of several autoimmune disorders, such as scleroderma, systemic lupus erythematosus, rheumatoid arthritis and diseases affecting the kidneys.

46. Exposure to wet CKD, or dry CKD on moist areas of the body, can cause serious, potentially irreversible damage to skin, eye, respiratory and digestive tracts due to chemical burns.

47. USEPA has determined that emissions from Portland cement facilities are hazardous to human health and the environment, including mercury, organic hazardous air pollutants, and hydrochloric acid, all of which are associated with significant health

risks, including blood disorders, reproductive disorders, developmental disorders, and pulmonary edema.

48. Upon information and belief, the raw materials and fuel used in the Dragon's cement kiln include fuels which contain heavy metals, which are a known hazard to human health and the environment.

49. Heavy metals do not metabolize in the kiln, so these metals can be present in CKD in more significant concentrations than they appeared in the fuel.

50. Heavy metals, like mercury and lead, cause serious health effects, including reduced growth and development, cancer, organ damage, nervous system damage, and in extreme cases, death.

51. Exposure to some metals, such as mercury and lead, may also cause development of autoimmune diseases, which can lead to joint diseases, such as rheumatoid arthritis, and diseases of the kidneys, circulatory system, and nervous system.

52. Metals are particularly toxic to the sensitive, rapidly developing systems of the fetus, infants and young children. Some metals, such as lead and mercury, easily cross the placenta and damage the fetal brain. Childhood exposure to some metals can result in learning difficulties, memory impairment, damage to the nervous system, and behavioral problems such as aggressiveness and hyperactivity. At higher doses, heavy metals can cause irreversible brain damage.

53. Particulate matter, in and of itself, is a significant threat to human health and the environment. Particulate matter is known to cause respiratory illnesses and complications, and can be abrasive to the skin, eyes, and other mucous membranes of the

human body. Particulate matter is also hazardous to plants and other organisms on which it is deposited, as evidenced by the damaged vegetation surrounding the Plant.

CKD in the Thomaston area

54. Members of Neighbors have suffered property damage, due to the dust from the Plant descending upon their homes, their cars, and infiltrating their belongings.

55. Members of Neighbors have suffered environmental damage, as the vegetated areas surrounding their places of residence, work and recreation are damaged by both the CKD from the air, and CKD and other leachate affecting the quality of the water the vegetation depends upon for its health.

56. Members of Neighbors have suffered personal injuries, including headaches, nausea, eye and skin irritation, respiratory illness and discomfort, which, upon information and belief, are attributable to Facility operations.

Harm to Members of Neighbors from Facility Releases.

57. Individual members of Neighbors live, work and/or recreate in the direct vicinity of the Facility. They use and enjoy the air, visibility and water in these areas.

58. The releases from the Facility, and Dragon's failure to eliminate the risk from contamination by CKD, presents an imminent and substantial endangerment to the health of these individuals and to the environment in which they have an interest, impairing these members' health safety and welfare. The releases pose a direct risk to the health of these members, through inhalation, ingestion, and exposure of body to the releases, and pose a risk to their interest in the environment through injury to the local ecosystem, including groundwater contamination and injury to vegetation and other organisms.

59. Without an order from this Court, the members of Neighbors will continue to suffer harm to their health, environmental, aesthetic, recreational and other interests from Dragon's failure to abate the hazards posed by the releases of CKD to the air and water.

60. Upon information and belief, many other Portland cement manufacturing facilities throughout the country are able to operate without causing the kind of imminent and substantial threat to health and the environment that is posed by the Dragon Facility. Dragon should also be able to operate its Facility without posing this kind of threat.

Harm to the Cross Family

61. The Cross Family has observed dust is coming from the Facility blowing from the dust "mountain" next to the plant onto their property. The dust is the color and odor of cement. After cleaning off a layer of dust, a new coating appears by the next day.

62. There is always a dust covering in the Cross Family home, including all the furniture, appliances, television, and embedded in computer, bedding, and curtains.

63. The Cross Family property has suffered a cracked foundation, uneven floors rusted front door, and continual abrasive dust covering on cars, which damages the finish.

64. There is often a bad smell in the air and at times it is hard for the Cross Family to breathe.

65. The Cross Family have experience a variety of serious health problems, including respiratory ailments and ADHD. These illnesses and conditions are, upon information and belief, attributable to Facility operations.

66. Dragon's deliberate conduct, as described in the paragraphs above, whether or not motivated by actual ill will toward the Cross Family, is so outrageous that malice toward the Cross Family is implied.

Count I – 42 U.S.C. § 6972(a)(1)(B) – RCRA - [Neighbors]

67. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 66.

68. Dragon is a person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment

69. The interests of the members of Neighbors are being harmed by the endangerment and by Dragon's failure to abate the endangerment, and will continue to be so harmed unless this Court grants the relief sought herein.

Count II – 28 U.S.C. § 2201 – Declaratory Judgment [Neighbors]

70. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 69.

71. Dragon's past and/or present handling, storage, treatment, transportation, and/or disposal of solid and/or hazardous waste with respect to discharges and emissions from the Facility presents an imminent and substantial endangerment to public health and to the environment under 42 U.S.C. § 6972(a)(1)(B).

72. Dragon disputes that its past and/or present operation of the Facility presents such a threat.

73. There is an actual controversy between Neighbors on the one hand, and Dragon, on the other, as to whether Dragon has triggered the threat standard articulated in 42 U.S.C. § 6972(a)(1)(B), and should therefore be restrained by this Court.

Count III – Preliminary and Permanent Injunction [Neighbors]

74. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 73.

75. The members of Neighbors will suffer irreparable injury if the injunctive relief that they seek is not granted.

76. Such injury to Neighbors would outweigh any harm to Dragon if this Court grants Neighbors' request for injunctive relief.

77. Neighbors can demonstrate a likelihood of success on the merits.

78. The public interest will not be adversely affected by granting an injunction.

Prayer for Relief [Neighbors]

WHEREFORE, Neighbors respectfully requests that the Court enter a judgment as to Counts I, II and III:

- Declaring that Dragon's past and/or present handling, storage, treatment, transportation, and/or disposal of solid and/or hazardous waste with respect to discharges and emissions from the Facility presents an imminent and substantial endangerment to public health and to the environment.
- Ordering Dragon to take all such actions as may be necessary to eliminate any such endangerment, including:

a. funding an independent, comprehensive, scientific study to determine the precise nature and extent of the endangerment, including a detailed examination of the migration and transport of CKD from the Facility to the local community;

b. funding an independent, comprehensive, scientific study, based on the results of the study described in paragraph (a) above, of appropriate, effective, environmentally-sound means to eliminate the endangerment;

c. developing and implementing an appropriate and effective remediation plan, based on the studies described in subparagraphs (a) and (b) above, such plan to include, but not be limited to, removal of the CKD pile within 2 years, modifying Facility operations to ensure no release of fugitive dust, and muffling sound from Dragon's quarry operation.

- Ordering Dragon to pay Neighbors' reasonable attorneys fees, expert witness fees and costs incurred in prosecuting this action; and
- Ordering such other relief as the Court may deem just and proper.

Count IV -Common-Law Trespass- [The Cross Family]

79. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 78 of this Complaint as if fully set forth herein.

80. Dragon has caused dust and vibrations from its Facility to invade the Cross Family's land at 21 Marsh Road in Thomaston on a continuing basis, knowing with a substantial certainty that its ongoing Plant operations will result in the invasion of dust and vibration.

81. The Cross Family have not authorized this continuing invasion.

82. This continuing invasion has caused mental suffering and emotional distress, has damaged the Cross Family's personalty and has diminished the market value of the Cross Family's realty.

83. This continuing invasion constitutes a new trespass on each and every new day that it takes place.

WHEREFORE, the Cross Family requests that this Court enter judgment in their favor, find Defendant Dragon Products Company, Inc. liable for all damages caused by and related to its trespass, along with punitive damages, and grant the Cross Family such other and further relief as the Court deems appropriate.

COUNT V -Statutory Trespass – 14 M.R.S.A. § 7551-B – [The Cross Family]

84. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 83 of this Complaint as if fully set forth herein.

85. Dragon has caused intentionally caused dust and vibrations from its Facility to invade Plaintiffs' land at 21 Marsh Road in Thomaston on a continuing basis, knowing with a substantial certainty that its ongoing Facility operations will result in the invasion of the dust and vibrations.

86. The dust and vibrations have damaged the buildings located on the land of the Cross Family and have diminished the market value of the Cross Family's realty.

87. This continuing invasion constitutes a new trespass on each and every new day that it takes place.

WHEREFORE, the Cross Family requests that this Court enter judgment in their favor, find Defendant Dragon Products Company, Inc. liable for all damages caused by and related to its trespass, along with punitive damages and the Cross Family's reasonable

attorney's fees and costs, and grant them such other and further relief as the Court deems appropriate.

COUNT VI –Nuisance – [The Cross Family]

88. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 87 of this Complaint as if fully set forth herein.

89. The continuing noise, vibration, dust and noxious odors generated by Dragon's operations at the Facility have substantially and unreasonably interfered with the Cross Family's use and enjoyment of their land and the market value of their property has been correspondingly substantially diminished.

90. The continuing noise, vibration, dust and noxious odors generated by Dragon's operations at the Facility constitute a nuisance.

WHEREFORE, the Cross Family requests that this Court enter judgment in their favor, find Defendant Dragon Products Company, Inc. liable for all damages caused by and related to the nuisance that it has created, along with punitive damages, and grant the Cross Family such other and further relief as the Court deems appropriate.

COUNT VII - Strict Liability – Restatement (Second) of Torts § 519(1) – [The Cross Family]

91. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 90 of this Complaint as if fully set forth herein.

92. Dragon's activities at the Plant are abnormally dangerous.

93. Dragon's activities have harmed the person, land and chattels of the Cross Family.

94. Dragon is strictly liable for the harm that it has caused.

WHEREFORE, the Cross Family requests that this Court enter judgment in their favor, find Defendant Dragon Products Company, Inc. strictly liable for all damages caused by and related to its activities, along with punitive damages, caused by the and grant the Cross Family such other and further relief as the Court deems appropriate.

COUNT VIII – Negligence – [The Cross Family]

95. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 94 of this Complaint as if fully set forth herein.

96. Dragon owes a duty to the Cross Family to take reasonable precautions to prevent migration of noise, vibrations, dust and noxious odors from the site of the Facility.

97. Dragon has breached its duty to the Cross Family.

98. Dragon's breach of duty is the proximate cause of harm to the Cross Family's person, land and chattels.

WHEREFORE, the Cross Family request that this Court enter judgment in their favor, find Defendant Dragon Products Company, Inc. liable for all damages caused by and related to its activities and grant the Cross Family such other and further relief as the Court deems appropriate.

COUNT IX – Injunction – [The Cross Family]

99. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 98 of this Complaint as if fully set forth herein.

100. The Cross Family will suffer irreparable injury if the Court does not enjoin Dragon's continuing trespass and nuisance.

101. The prospective irreparable injury to the Cross Family if Dragon's trespass and nuisance are permitted to continue outweigh any harm to Dragon that would result from granting injunctive relief.

102. The Cross Family can demonstrate success on the merits of their claims.

103. Enjoining Dragon's trespass and nuisance would be in the best interest of the public.

WHEREFORE, the Cross Family requests that this Court enjoin Defendant Dragon Products Company, Inc. from allowing further noise, vibrations, dust and noxious odors to migrate from the site of the Plant and grant the Cross Family such other and further relief as the Court deems appropriate.

Dated: this 25th day of March, 2005, at Portland, Maine.

/s/ David B. McConnell
Peggy L. McGehee
David B. McConnell
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