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**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

NATIVE VILLAGE OF POINT HOPE,)	
ALASKA COMMUNITY ACTION ON)	Case No.
TOXICS, and the NORTHERN ALASKA)	
ENVIRONMENTAL CENTER,)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
Plaintiffs,)	(Clean Water Act, 33 U.S.C. §1313; APA, 5
)	U.S.C. §§ 701-706)
v.)	
)	
U.S. ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Defendant.)	
)	
)	

Plaintiffs, the NATIVE VILLAGE OF POINT HOPE, ALASKA COMMUNITY ACTION ON TOXICS, and the NORTHERN ALASKA ENVIRONMENTAL CENTER (collectively “Point Hope”), by and through their undersigned counsel of record, file this Complaint for Declaratory and Injunctive Relief, and allege as follows:

NATURE OF ACTION

1. This action seeks declaratory and injunctive relief for violations of federal law by the U.S. Environmental Protection Agency (“EPA”) for approving a site-specific aquatic-life water quality criterion for total dissolved solids (“TDS”) of 1500 mg/L during the Arctic grayling spawning period, pursuant to 33 U.S.C. § 1313(c), 40 C.F.R. §§ 131.5, 131.11, 131.20,

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for the Main Stem of Red Dog Creek. This SSC allows for more than an eleven-fold increase above background levels in the TDS levels in Red Dog Creek.

2. The EPA violated its mandatory duties under the Clean Water Act (“CWA”), 33 U.S.C. § 1251, *et seq.*, and its implementing regulations by approving the site-specific criterion for the discharge of high levels of TDS without assuring that the criterion will protect designated uses of the water body – specifically, the growth and propagation of aquatic life – by failing to conduct an antidegradation analysis for the SSC, and by not ensuring that the SSC was based on sound science.

JURISDICTION AND VENUE

3. Jurisdiction over this action is conferred by 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). Point Hope has a right to judicial review pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

4. The violations of law alleged herein have occurred within the Western District of Washington. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and 5 U.S.C. § 703.

PARTIES AND STANDING

Plaintiffs

5. Plaintiff NATIVE VILLAGE OF POINT HOPE IRA COUNCIL (“Native Village of Point Hope”) is the governing body of the Native Village of Point Hope, a federally recognized Tribe established pursuant to the provisions of the Indian Reorganization Act of 1934, as amended in 1936. The Native Village of Point Hope is located on the coast of northwestern Alaska on the Chukchi Sea above the Arctic Circle. It is an Inupiat Eskimo community. The tribal members of the Native Village of Point Hope live a subsistence way of life and are highly dependent on the aquatic environment to provide food for subsistence and cultural purposes. Tribal members hunt marine mammals in the Chukchi Sea and fish for in Arctic rivers. They also pick berries and other plants, and hunt for terrestrial animals, especially

caribou. Their subsistence way of life requires them to travel considerable distances, and their subsistence use area encompasses a large area of Northwest Alaska and the Chukchi Sea.

6. Plaintiff ALASKA COMMUNITY ACTION ON TOXICS (“ACAT”) is a nonprofit corporation located in Anchorage, Alaska. ACAT’s mission is “to assure justice by advocating for environmental and community health. We believe that everyone has the right to clean air, clean water, and toxic-free food.” ACAT works statewide to limit the discharge of chemicals into water bodies by industries and through government action. ACAT has tracked and actively participated for many years in decision making processes relating to the allowance of increased pollution in Red Dog Creek, including reviewing permits and submitting comments.

7. Plaintiff NORTHERN ALASKA ENVIRONMENTAL CENTER (“NAEC”) is a nonprofit corporation located in Fairbanks, Alaska. NAEC has over 1,500 contributing members, with over 650 located throughout Alaska. NAEC’s mission is to “promote[] conservation of the environment and sustainable resource stewardship in Interior and Arctic Alaska through education and advocacy.” NAEC operates five major programs, one of which is the Clean Water and Mining Program. The Clean Water and Mining Program “seeks to protect clean air, clean water, and wilderness through robust state and federal permitting processes for northern mines.” NAEC participates in agency decision making processes relating to issues on water quality and mining, including the challenged action, and provides its members and the public with information about the impacts of mining on Alaska’s land and water resources to enable members also to participate in agency decision making processes.

8. Plaintiff organizations and their members reside near, use, and enjoy the waters, adjacent habitat, and dependent aquatic life affected by the EPA’s approval of the less stringent TDS SSC challenged in this action. The Plaintiff organizations’ and their members’ interests in, and uses of, Red Dog Creek and its tributaries and watershed, are directly and irreparably injured by the degradation of the water quality authorized by the EPA’s decision.

9. Plaintiff organizations and their members have an interest in enforcing the mandates and procedures of the CWA, 33 U.S.C. §§ 1251 *et seq.* This includes, but is not limited to, the right to ensure water quality protection through the procedures of the CWA, the right to have federal environmental decision making carried out in accordance with applicable water quality laws and regulations, and the right to educate themselves and the public about environmental concerns and policy issues affecting the waters and wildlife in Red Dog Creek.

10. The EPA's approval of the SSC has caused Plaintiffs ongoing and threatened injury to concrete, particularized interests and the relief requested of this Court would redress that injury. Further, this controversy is ripe for adjudication and Plaintiffs' injuries fall within the zones of interest protected by the CWA and the APA.

Defendant

11. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is an agency of the federal government that has the duty to review and approve revisions to water quality standards adopted by the State of Alaska, ensuring that any revisions comply with the CWA and the agency's implementing regulations and guidance.

FEDERAL STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act

12. In 1972, Congress passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress established several goals, including: (a) eliminating the discharge of pollutants into navigable waters by 1985; (b) attaining water quality that provides for the protection and propagation of fish, shellfish, and wildlife, and provides for the recreation in and on water by July 1, 1983; and (c) prohibiting the discharge of toxics pollutants in toxic amounts. *Id.*

13. To attain these goals, the CWA requires the development of water quality standards, which can be adopted by the states or by the EPA if a state fails to develop water quality standards. 33 U.S.C. § 1313(b).

14. Water quality standards consist of three parts: (1) water quality criteria (which can be either numeric or narrative); (2) designated uses; and (3) an antidegradation policy and implementation procedures. 33 U.S.C. § 1313(c)(2).

15. The CWA's implementing regulations allow for the creation of site-specific criteria ("SSC") "to reflect site-specific conditions." The adoption of SSC allows for a variance from the generally applicable water quality criteria for a specific water body or reach of a water body. 40 C.F.R. § 131.11(b)(1)(ii).

16. States can revise water quality standards—including water quality criteria and SSC—but "only if such revision is subject to and consistent with the antidegradation policy." 33 U.S.C. § 1313(d)(4)(B). Making this consistency determination requires the agency to conduct an analysis of the proposed revision.

17. The EPA must approve all water quality standards adopted by states, 33 U.S.C. § 1313(b), including all SSC. 40 C.F.R. § 131.20(c).

18. The Alaska Department of Environmental Conservation ("DEC") has developed water quality standards that are applicable in Alaska, establishing water quality criteria and designating uses for water bodies. 18 AAC 70.020.

19. Alaska also developed an antidegradation policy. This policy established three tiers of waters in Alaska based on the water quality of the water body. 18 AAC 70.015. "Tier 1" waters are those with degraded water quality; the water quality must be maintained to protect existing and designated uses. 18 AAC 70.015(a)(1). "Tier 2" waters are those that exceed water quality standards necessary for the growth and propagation of fish; degradation of tier 2 waters is allowed only after the DEC determines that the degradation is "necessary to accommodate important economic or social development in the area in which the waters are located," considers

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less degrading alternatives, ensures that the best available pollution control measures are used to limit degradation, and guarantees that if water quality is lowered, existing uses are protected. 18 AAC 70.015(a)(2). “Tier 3” waters are those with exceptional water quality that are deemed an “outstanding national resource”; the water quality in those water bodies must be maintained and degradation is generally prohibited. 18 AAC 70.015(a)(3).

20. Similar to the EPA’s regulations, Alaska also allows for the development of SSC. 18 AAC 70.235.

21. Once Alaska approves a SSC, it must submit the SSC to the EPA for review and approval. 33 U.S.C. § 1313(c)(2); 40 C.F.R. §§ 131.5, 131.20.

22. When reviewing a SSC adopted by Alaska, the EPA must ensure that the SSC protects the designated uses of the water body, that the SSC is based on “scientifically sound rationale,” and that Alaska followed its legal procedures for approving a water quality standard. 40 C.F.R. §§ 131.5(a), 131.6, 131.11(a)(1).

23. While there is a public review and comment process at the state level, AS 44.62.190, AS 44.62.200, AS 44.62.210, the EPA’s review and approval of a SSC does not involve any public process. 40 C.F.R. § 131.20(c).

24. The CWA also prohibits discharges of pollutants from point sources to waters of the United States without a permit. 33 U.S.C. §§ 1311(a), 1342(a). Discharge permits issued under section 402 of the CWA, 33 U.S.C. § 1342, include individual effluent limitations for pollutants that must be met by the discharging facility.

25. Once a facility obtains a discharge permit, the CWA prohibits the permitting agency to allow “backsliding” in that discharge permit. This means that “a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title [the antidegradation policy].” Thus, to allow for a less-stringent effluent

limit in a permit, the permitting authority must conduct an antidegradation analysis to ensure that

the less-stringent effluent limit will not degrade water quality, except in accordance with the antidegradation policy. *See* 40 C.F.R. § 131.12.

Administrative Procedure Act

26. The APA, 5 U.S.C. §§ 701-06, provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

27. The EPA is a federal agency subject to the APA.

28. The APA provides that a court shall set aside agency “findings, conclusions, and actions” that are “arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or are “without observance or procedure required by law.” 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

The Red Dog Creek Stream System and Important Aquatic and Marine Species

29. The Red Dog Creek is located in Northwest Alaska in the Delong Mountains of the Western Brooks Range. The Red Dog Creek historically had three branches: the North Fork of Red Dog Creek, the Middle Fork of Red Dog Creek, and the South Fork of Red Dog Creek. Historically, the South Fork flowed into the Middle Fork, which flowed into the North Fork, creating the Main Stem of Red Dog Creek. Red Dog Creek then flows into Ikalukrok Creek, which in turn flows into the Wulik River, and ultimately empties into the Chukchi Sea.

30. The designated uses of the Main Stem of Red Dog Creek under Alaska’s water quality standards are: industrial water supply, contact recreation (wading only), secondary recreation, and the “growth and propagation of fish, shellfish, other aquatic life, and wildlife.” 18 AAC 70.020; 18 AAC 70.230(e)(18).

31. Many fish species are present in Red Dog Creek and the Wulik River watershed. Arctic grayling, Dolly Varden, and Slimy sculpin spawn, rear and out-migrate in both the North Fork and the Main Stem of Red Dog Creek. These same species rear in Ikalukrok Creek

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upstream of the confluence with Red Dog Creek, as well as between where Red Dog Creek and Dudd Creek (a small creek that flows into Ikalukrok Creek downstream of Red Dog Creek) flow into Ikalukrok Creek, where the fish rear and out-migrate. In Ikalukrok Creek downstream of where Dudd Creek flows into it, Sockeye salmon, Dolly Varden, Chum salmon, and Chinook salmon spawn. Dolly Varden, Chum salmon, Chinook salmon and Arctic grayling also rear in Ikalukrok Creek downstream of the confluence with Dudd Creek.

32. Under Alaska's antidegradation policy, the Main Stem of Red Dog Creek is a "tier 2" water because it exceeds water quality standards "necessary to support propagation of fish." 18 AAC 70.015(a)(2).

33. Residents in the villages of Kivalina, Noatok and Kotzebue catch fish that spawn and rear in these creeks and rivers for subsistence use. In 2007, according to a 2008 Alaska Department of Fish and Game report, residents of Kivalina consumed 184 pounds of fish per person, including Dolly Varden and salmon species.

34. In addition to providing habitat for fish species, the Wulik River is the source of drinking water for the village of Kivalina.

35. Various species of marine mammals, including the beluga whale, the bowhead whale and bearded seals migrate along the coast where the Wulik River empties into the Chukchi Sea. These marine mammals are harvested by the villages of Kivalina and Point Hope for subsistence use.

The Red Dog Mine's Discharges into Red Dog Creek

36. In 1989, Teck Alaska, Incorporated (formerly Teck Cominco) ("Teck") began constructing the Red Dog Mine near the confluence of the three forks of Red Dog Creek, including a large earthen-dam across the South Fork of Red Dog Creek as part of the mine's tailings disposal facility. This dam created a large tailings pond behind it, in what was formerly the South Fork of Red Dog Creek; that fork is no longer free-flowing. Teck continues to raise

and enlarge the earth-dam and tailings pond to accommodate additional tailings. The dam will remain in use in perpetuity.

37. As part of the construction and continued operation of the Red Dog Mine, the company built a water treatment system to treat wastewater collected in the tailings pond. Water in the tailings pond comes from slurry tails deposited in the pond from the refining process as well as water that comes into contact with the ore body and waste rock piles and collected rainfall and inflow from snow melt. The company also disposes of the sludge from its wastewater treatment operations in the tailings pond.

38. During the waste water treatment process, water is pumped from the tailings pond to wastewater treatment plants, where the company adds significant amounts of lime to the wastewater stream to reduce the pH of the water and precipitate concentrated metals out of solution. The addition of lime results in high levels of TDS in the wastewater stream.

39. TDS is a measure of the combined content of all organic and inorganic substances contained in a liquid in molecular, ionized, or micro-granular form. Generally, TDS is inclusive of the solids small enough to be filtered through a two micrometer sieve.

40. The treated wastewater is discharged via a pipe at a location named "Outfall 001" into the Middle Fork of Red Dog Creek. Teck must obtain and comply with a permit for its discharge at Outfall 001 under the CWA. 33 U.S.C. §§ 1311, 1342.

41. Teck's discharge permit contains a TDS monthly average effluent limit of 170 mg/L and daily maximum level of 198 mg/L, which is based on the statewide water quality criteria for TDS that is: one third above background concentrations. Teck has had considerable problems meeting this effluent limitation.

The EPA's Approval of the TDS SSC

42. In January 2001, Teck applied for a SSC from the DEC for TDS in the Main Stem of Red Dog Creek of 500 mg/L when Arctic grayling are spawning and a SSC for TDS in the Main Stem of Red Dog Creek of 1,500 mg/L when Arctic grayling are not spawning.

43. The DEC approved both SSC and submitted them to the EPA for the federal agency's review and approval in June 2003.

44. In February 2003, Michael S. Stekoll, William W. Smoker, Ivan A. Wang, and Barbi J. Failor published the report: *Salmon as a Bioassay Model of Effects of Total Dissolved Solids*. The report indicated that TDS similar in composition and concentration to the Red Dog Mine effluent could negatively impact salmonid egg fertilization. The study focused on coho salmon, but also tested king and pink salmon. The report concluded that there was considerable variation between species, and thus, the results could not be applied to other species.

45. In April 2003, Michael S. Stekoll, William W. Smoker, Ivan A. Wang, and Willard E. Hayes II released another report: *Final Report on the Effects of Total Dissolved Solids on Fertilization Rates of Salmonids in the Red Dog Mine Area*. This study looked at the impacts to Arctic grayling, Dolly Varden and chum salmon egg fertilization at varying concentrations of TDS under three experiment set-ups: (a) exposure at fertilization and during incubation; (b) exposure at fertilization but not during incubation; and (c) no exposure at fertilization but exposure during incubation. The incubation phase of this study was of short duration — one week for Arctic grayling and eighteen hours for Dolly Varden and chum salmon. The results of these tests showed only a 37% fertilization success rate for Arctic grayling eggs that were fertilized and incubated in water with a TDS concentration of 500 mg/L. Stekoll *et al.* concluded that Arctic grayling have not “adapted to being fertilized in levels of TDS higher than the background levels.” The study stressed that only impacts to fertilization were tested and that the results could not be extrapolated to other development stages or to determine the impacts from chronic exposure.

46. The EPA approved the 1,500 mg/L SSC for when Arctic grayling are not spawning, but because of the results showing impacts to fish species from TDS at variable rates in the first Stekoll report, the EPA did not act on the 500 mg/L TDS SSC for when Arctic grayling are spawning. Instead, the EPA required Teck to conduct additional studies of the impact of TDS on Arctic grayling and Dolly Varden. *See* 33 U.S.C. § 1318(a).

47. The additional study was conducted by Kevin Brix and Martin Grosell and funded by Teck. The study focused only on the acute impacts to egg fertilization; it did not study the chronic impacts to Arctic grayling and Dolly Varden egg fertilization or hatch from prolonged exposure to waters at varied TDS concentrations.

48. Further, only eight of eleven tests conducted for Arctic grayling resulted in usable data. The lowest observable effects concentrations from these eight individual tests show impacts to Arctic grayling fertilization at concentrations of 921 mg/L, 1,381 mg/L, 503 mg/L, and 254 mg/L, with four tests showing impacts at concentrations of 2,782 mg/L. The tests also showed that at concentrations of 921 mg/L, 1,381 mg/L, 748 mg/L and 202 mg/L, and again with four tests showing 2,782 mg/L, fertilization of 20% of the eggs was unsuccessful (“EC20”). The geometric mean of the EC20 results was a concentration of 1,357 mg/L.

49. Following the completion of the Brix and Grosell study and report, Teck applied for a new SSC of 1,500 mg/L for the period when Arctic grayling are spawning. The DEC issued a public notice regarding the proposed SSC on September 29, 2005, and accepted public comments.

50. On November 2, 2005, the NAEC, in a joint-comment letter with the Center for Science in Public Participation, submitted comments on the proposed SSC to the DEC. The NAEC stated that the proposed SSC would not protect existing and designated uses of Red Dog Creek and Ikalukrok Creek, as many fish species spawn, rear and migrate in those water bodies. The comments also raised concerns with the study conducted by Brix and Grosell, including

concerns about the testing methods and the lack of testing for chronic effects from long-term TDS exposure at the fertilization, hatch and growth stages.

51. Additional comments submitted also raised concerns about the lack of testing for chronic impacts from continuing or prolonged exposure to water with a high concentration of TDS and the ability of the SSC to protect a designated use of the water body: growth and propagation of fish. The commenters also stated that the results of the Brix and Grosell study do not support the 1,500 mg/L proposed SSC because the geometric mean of the test results was only 1,357 mg/L.

52. Additional comments questioning the Brix and Grosell study and raising concerns about all stages of fish development from TDS exposure, as well as impacts to children and adults from consuming water with high TDS concentrations, were submitted by James Booth, Water Resource Technician for the Native Village of Kivalina, Millie Hawley, Environmental Coordinator for the Native Village of Kivalina, and Colleen Swan, Tribal Administrator for the Native Village of Kivalina.

53. The DEC approved the TDS SSC of 1,500 mg/L for when Arctic Grayling are spawning on January 26, 2006, and submitted it to the EPA for the federal agency's approval.

54. The EPA approved the TDS SSC of 1,500 mg/L for when Arctic Grayling are spawning on April 21, 2006, stating that "the TDS SSC will protect designated uses." The EPA relied on a "weight of the evidence approach" to justify its determination that the results of the study supported a 1,500 mg/L criteria for Red Dog Creek despite the fact that test results indicated impacts to Arctic grayling fertilization at concentrations below 1,500 mg/L, with one test indicating impacts at concentrations as low as 202 mg/L.

55. As a result of the EPA's approval, the TDS criteria for Red Dog Creek is 1,500 mg/L year-round, more than eleven times above the background TDS level in Red Dog Creek.

56. Based on the TDS criteria for Red Dog Creek, Teck's most recent discharge permit contained an effluent limit for TDS of 1,500 mg/L. This permit limit was challenged and subsequently revoked by the EPA.

CLAIMS FOR RELIEF

Count I

Failure to Ensure that the TDS SSC of 1,500 mg/L Protects Designated Uses of Red Dog Creek, as Required by CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A)

57. The Native Village of Point Hope repeats the allegations in paragraphs 1-56 as if set forth in full.

58. Water quality criteria must protect designated uses. 40 C.F.R. § 131.11(a)(1).

59. The Main Stem of Red Dog Creek has the designated use of the "growth and propagation of fish, shellfish, other aquatic life, and wildlife." 18 AAC 70.230(e)(18).

60. When the EPA approves a SSC, the EPA must determine that "the state has adopted criteria that protect the designated water uses." 40 C.F.R. § 131.5(a)(2). Thus, if a SSC will not protect a designated use, the EPA cannot approve it.

61. The Brix and Grosell study relied on by the EPA to approve the TDS SSC of 1,500 mg/L only looked at the acute impacts on fertilization of Arctic grayling and Dolly Varden eggs from short-term exposures of the eggs to waters with varying concentrations of TDS.

62. However, the February 3, 2003 Stekoll report indicated that coho salmon suffer from chronic impacts, including increased pre- and post-hatch mortality, when eggs were fertilized and hatched in waters with high TDS concentrations.

63. Given the limited focus of the Brix and Grosell study, the EPA did not have any evidence before it when it approved the TDS SSC regarding chronic impacts to Arctic grayling and Dolly Varden that are continuously exposed when eggs are fertilized and hatched in water with high concentrations of TDS.

64. Because of the lack of evidence regarding chronic impacts to Arctic grayling and Dolly Varden fertilization and hatch from continuous exposure to water with elevated TDS

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concentrations, the EPA failed to ensure that the SSC protects a designated use of the growth and propagation of fish in the Main Stem of Red Dog Creek.

65. Further, the Brix and Grosell study concluded that the mean TDS concentration affecting egg fertilization was 1,357 mg/L, with half of the results affecting fertilization at well below 1,500 mg/L and one test indicating impacts at concentrations as low as 202 mg/L.

66. The EPA violated section 303 of the CWA and its implementing regulations by approving the SSC because EPA could not ensure that the SSC protects the growth and propagation of fish in the Main Stem of Red Dog Creek. Therefore, the EPA's approval of the TDS SSC is arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, and otherwise not in accordance with law.

Count II

Failure to Ensure that Approval of the TDS SSC of 1,500 mg/L Was Based on Sound Scientific Rationale, as Required by the CWA's Implementing Regulations, 40 C.F.R. § 131.11(a)(1).

67. The Native Village of Point Hope repeats the allegations in paragraphs 1-66 as if set forth in full.

68. Under the CWA, water quality criteria, including SSC, must be based on "sound scientific rationale." 40 C.F.R. § 131.11(a)(1).

69. When approving a SSC adopted by a state, the EPA reviews the methodologies relied upon for the development of the SSC. 40 C.F.R. § 131.20(c).

70. The State of Alaska relied on the Brix and Grosell study when it adopted the TDS site-specific criterion for spawning and submitted this study to the EPA for its review during the approval process for the proposed criterion.

71. The results of the Brix and Grosell study indicate that a concentration of 1,357 mg/L may be protective of Arctic grayling fertilization, based on the geometric mean of the EC20 individual test results. Half of the test results demonstrated effects on fertilization at well below 1,500 mg/L and one test indicating impacts at concentrations as low as 202 mg/L.

72. Despite the fact that the results from the Brix and Grosell study indicated that a limit of 1,357 mg/L or lower might be protective of fertilization, the EPA approved the proposed 1,500 mg/L criterion.

73. The EPA based its approval on a “risk assessment approach, specifically a weight of the evidence approach,” determining that most of the test results supported a 1,500 mg/L limit.

74. However, the EPA never conducted an actual risk assessment prior to approve a criterion above what the scientific studies indicated may be protective.

75. Additionally, no studies were conducted to determine whether the proposed site-specific criterion was protective of all stages of Arctic grayling and Dolly Varden development or if there were chronic impacts from TDS exposure at the spawning and hatch stages.

76. The EPA’s approval was based on incomplete scientific information, and the scientific information available to the EPA did not support the 1,500 mg/L criterion. Further, while claiming justification of the criterion under a risk assessment approach, the EPA did not actually conduct a risk assessment.

77. The EPA did not ensure that the criterion was based on “sound scientific rationale.” The EPA’s approval of the TDS criterion during spawning, therefore, violates the CWA and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, and otherwise not in accordance with law.

Count III

Failure to Conduct or Require an Antidegradation Analysis Prior to Approving the TDS SSC, as Required by CWA 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B)

78. The Native Village of Point Hope repeats the allegations in paragraphs 1-77 as if set forth in full.

79. Under the CWA, any revision to a water quality standard “is subject to” and must be “consistent with the antidegradation policy.” 33 U.S.C. § 1313(d)(4)(B).

80. A SSC is a revision to a water quality standard, as it involves revising the applicable water quality criteria for a specific water body or a reach of a water body.

81. Adoption of a SSC “is subject to” and must be “consistent with the antidegradation policy.” 33 U.S.C. § 1313(d)(4)(B).

82. The DEC did not conduct an antidegradation analysis prior to adopting the SSC.

83. The EPA did not require the DEC to conduct an antidegradation analysis prior to the federal agency’s approval of the SSC and the EPA did not conduct its own antidegradation analysis prior to approving the SSC.

84. The EPA’s approval of the TDS SSC thus violates the CWA and its implementing regulations and is, therefore, arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, and otherwise not in accordance with law.

Count IV

Failure to Conduct or Require an Antidegradation Analysis Prior to Approving the TDS SSC, Which Allowed for a Weaker Effluent Limit in Teck’s Permit, in Violation of the CWA’s Prohibition on “Backsliding,” CWS § 402(o)(1), 33 U.S.C. § 1342(o)(1)

85. The Native Village of Point Hope repeats the allegations in paragraphs 1-84 as if set forth in full.

86. The CWA contains an anti-backsliding provision, which prevents a permit applicant from obtaining a renewed, reissued, or modified permit that contains less stringent effluent limitations than the effluent limitations in a previous permit, unless the less stringent effluent limitation complies with the antidegradation policy, among other limited exceptions. 33 U.S.C. § 1342(o)(1), 40 C.F.R. § 122.44(l).

87. The effluent limits in discharge permits issued pursuant to CWA § 402, 33 U.S.C. § 1342, must meet water quality standards, including the water quality criteria applicable to the water body.

88. Teck’s discharge permit currently contains a TDS monthly average effluent limit of 170 mg/L and daily maximum limit of 198 mg/L, which is based on the statewide water quality criteria for TDS allowing limits one third above background concentrations.

89. The TDS SSC increases the water quality criteria applicable to the Main Stem of Red Dog Creek from approximately 135 mg/L to 1,500 mg/L.

90. The increased TDS criteria will allow a less stringent effluent limit to be approved for Teck's discharge permit for the Red Dog Mine.

91. The allowance of a less stringent effluent limitation in a permit must comply with the antidegradation policy, 33 U.S.C. § 1342(o)(1), 40 C.F.R. § 122.44(l). No antidegradation analysis was conducted prior to the approval of the TDS SSC, however, and the TDS SSC would likely justify less stringent TDS effluent limits without an antidegradation analysis.

92. The EPA's approval of the TDS SSC thus violates the CWA and its implementing regulations and is therefore arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, and otherwise not in accordance with law.

PRAYER FOR RELIEF

Wherefore, Native Village of Point Hope respectfully requests that the Court grant the following relief:

1. Enter a declaratory judgment stating that EPA's April 21, 2006, approval of the TDS SSC of 1,500 mg/L for the Main Stem of Red Dog Creek was unlawful, in violation of the CWA, and the implementing regulations of that law;

2. Issue an immediate and permanent injunction prohibiting the EPA from applying the SSC in any decision making process regarding discharges into the Main Stem of Red Dog Creek and requiring EPA to use the previous state-wide TDS water quality criteria in any permitting decision concerning the Main Stem of Red Dog Creek;

3. Issue an injunction requiring the EPA to inform the DEC of the invalidation of the TDS SSC and informing the DEC of the need to revoke the TDS SSC from state water quality standards;

4. Award Native Village of Point Hope all costs and expenses of this action, including all reasonable attorneys fees and costs; and
5. Award such additional relief as the Court deems proper.

Respectfully submitted, this 19th day of April, 2011,

s/Richard A. Smith

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