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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA CENTER FOR THE )  
ENVIRONMENT, ALASKA )  
COMMUNITY ACTION ON TOXICS, )  
COOK INLETKEEPER, NORTHERN )  
ALASKA ENVIRONMENTAL CENTER, )  
NUNAMTA AULUKESTAI, NATIVE )  
VILLAGE OF POINT HOPE, NATIVE )  
VILLAGE OF PORT GRAHAM, AND )  
SOUTHEAST ALASKA )  
CONSERVATION COUNCIL, )

Plaintiffs, )

vs. )

STATE OF ALASKA, DEPARTMENT )  
OF ENVIRONMENTAL )  
CONSERVATION, )

Defendant. )

Case No.: 3AN-11-

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs allege as follows:

INTRODUCTION

1. This action is brought under Alaska's declaratory judgment statute, Alaska Statute ("AS") 22.10.020.

COMPLAINT

2. Plaintiffs seek a declaratory judgment that the Alaska Department of Environmental Conservation (“DEC”) violated AS 44.03.880(a) when it failed to follow the procedures set out in the Alaska Administrative Procedure Act (“APA”), AS 44.62.180–AS 44.62.290, for adopting a regulation when it issued Interim Antidegradation Implementation Methods (“Interim Methods”), and thus, the Interim Methods are an illegal regulation.

3. Based on this declaratory judgment, this action seeks appropriate orders and equitable relief prohibiting DEC from relying on the Interim Methods to issue or certify permits or conduct analysis in accordance with the federal Clean Water Act, 33 U.S.C. § 1342, concerning whether a permitting action in Alaska will degrade water quality

#### JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction under AS 44.62.300.

5. Venue is proper in this court under Civil Rule 3 and AS 44.62.300.

#### PLAINTIFFS

6. Plaintiff Alaska Center for the Environment (“ACE”) is a nonprofit organization organized pursuant to, and in good standing under, the laws of the State of Alaska. ACE currently has over 6,000 dues-paying members around the State of Alaska. Its mission statement provides that ACE’s purpose is to “To enhance Alaskans’ quality of life by protecting wild places, fostering sustainable communities, and promoting recreational opportunities.” ACE works through grassroots activism and education to protect Alaska’s natural environment, including clean water. ACE’s business address is 807 G Street, Suite 100, Anchorage, Alaska 99501.

7. Plaintiff Alaska Community Action on Toxics (“ACAT”) is a nonprofit organization organized pursuant to, and in good standing under, the laws of the State of Alaska. ACAT’s mission statement provides that its purpose 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 the government. ACAT’s business address is 505 West Northern Lights Boulevard, Suite 205, Anchorage, Alaska 99503.

8. Plaintiff Cook Inletkeeper (“CIK”) is an Alaska nonprofit organization with offices in Homer, Alaska and Anchorage, Alaska; it is headquartered in Homer. CIK is a nonprofit organization organized pursuant to, and in good standing under, the laws of the State of Alaska. CIK’s mission is to “protect Alaska’s Cook Inlet watershed and the life it sustains.” CIK represents over 400 members, the vast majority of whom reside in Alaska. CIK works to protect clean water through policy work and by building community support. CIK’s headquarters’ business address is P.O. Box 3269, Homer, Alaska 99603.

9. Plaintiff Northern Alaska Environmental Center (“NAEC”) is a nonprofit organization organized pursuant to, and in good standing under, the laws of the State of Alaska. NAEC has over 1,500 contributing members, with 673 located in Alaska. NAEC’s mission statement provides that it “promotes conservation of the environment and sustainable resource stewardship in Interior and Arctic Alaska through education and advocacy.” NAEC operates five major programs, including 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, and monitors schemes to mine northern coal deposits, especially plans for transportation infrastructure that would have major cumulative effects especially in the Western Arctic.” NAEC’s business address is 830 College Road, Fairbanks, Alaska 99701.

10. Plaintiff Nunamta Aulukestai (“Nunamta”), which means “Caretakers of Our Land” in Yup’ik, is a non-profit corporation comprised of nine Native Village Corporations, including Ekwook, Koliganek, New Stuyahok, Clarks Point, Aleknagik, Togiak, Manakotak, Dillingham, and Levelock. The organization was formed with the goal of diversifying the economy in the Bristol Bay region while sustaining the resources

and cultural heritage, and the organization works to conserve the water resources in the Bristol Bay watershed. Nunamta's members include subsistence users, commercial fishermen, landowners, sportfishing guides, tourism promoters, and citizen-taxpayers. Nunamta's business address is P.O. Box 735, Dillingham, AK 99576.

11. Plaintiff Native Village of Point Hope IRA Council ("Point Hope") is a tribal entity recognized by the United States. Point Hope is located in northwestern Alaska, above the Arctic Circle and is an Inupiat Eskimo community. The people of Point Hope practice a subsistence way of life and are highly dependent on the marine environment to provide food for subsistence and cultural purposes. Point Hope's business address is P.O. Box 109, Point Hope, AK 99766.

12. Plaintiff Native Village of Port Graham ("Port Graham") is a tribal entity recognized by the United States. Port Graham is located on the southern end of the Kenai Peninsula and is an Alutiiq community. The people of Port Graham refer to themselves as *Sugpiaq*, which means "real people". The people of Port Graham participate in subsistence activities, including fishing, and rely on clean fresh and marine waters to provide and support subsistence resources. Port Graham's business address is P.O. Box 5510, Port Graham, Alaska 99603.

13. Plaintiff Southeast Alaska Conservation Council ("SEACC") is a nonprofit organization organized pursuant to, and in good standing under, the laws of the State of Alaska, with headquarters in Juneau and another office in Klawock, Alaska. SEACC's mission "is to safeguard the integrity of Southeast Alaska's unsurpassed natural environment, while supporting the sustainable use of our region's natural resources. SEACC is dedicated to protecting the integrity of Southeast Alaska's unsurpassed natural environment while encouraging the balanced, sustainable use of our region's resources." SEACC works to protect the natural environment across all of southeast Alaska, including clean water, and encourages human use and enjoyment of the region's remarkable resources in ways that are consistent with retaining them substantially

unimpaired. SEACC's main business address is 419 Sixth Street, Suite 200, Juneau, Alaska 99801.

14. Plaintiff groups all have an interest in the protection and promotion of clean water resources in Alaska and bring this action on behalf of themselves and their members or affiliated groups.

15. Plaintiffs and their members or affiliated groups commonly participate in decision making processes regarding the use and protection of Alaska's water resources to protect the organizations' and members' interests and plan to continue to do so.

16. Many members of the Plaintiff groups use and enjoy public waters throughout the state for purposes such as fishing, rafting, camping, photography, canoeing, kayaking, hiking, hunting, subsistence, wildlife viewing, solitude, and aesthetic enjoyment. Members of the Plaintiff groups are also citizen-taxpayers.

17. Plaintiff groups and their members were unable to participate in the development and finalization of the Interim Methods because they were illegally promulgated as "guidance," and thus, Plaintiffs' interests were injured by DEC's illegal issuance of the Interim Methods.

18. This case is one of public significance because it challenges DEC's issuance of the Interim Methods as "guidance," without following the procedures required by the APA and allowing for public participation in the development and finalization of the Interim Methods.

19. Plaintiffs are appropriate parties to bring this lawsuit because they actively participate in rulemakings and permitting decisions regarding the use and degradation of waters in Alaska. Plaintiffs are represented by counsel, and are capable of competently advocating their positions.

#### DEFENDANT

20. Defendant State of Alaska is a sovereign state of the United States of America.

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#### COMPLAINT

21. The DEC is a department of Alaska state government created by AS 44.17.005(14). Under AS 46.03.080, DEC's director of the division of water has the exclusive authority to develop water quality standards, which include antidegradation implementation methods.

### LEGAL BACKGROUND

#### The Federal Water Pollution Control Act (a.k.a. The Clean Water Act) and Antidegradation

22. The United States Congress passed the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), in 1972. *See* 33 U.S.C. §§ 1251, *et seq.* The overarching objective of the CWA "is 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: (1) eliminating the discharge of pollutants into navigable waters by 1985; (2) attaining water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water by July 1, 1983; and (3) prohibiting the discharge of toxic pollutants in toxic amounts. *Id.*

23. In pursuit of achieving these goals, the CWA requires the creation of water quality standards ("WQS"), which states promulgate and the U.S. Environmental Protection Agency ("EPA") must approve. 33 U.S.C. § 1313(a) & (b).

24. There are three components to WQS: (1) water quality criteria, (2) designated uses, and (3) antidegradation. 40 C.F.R. §§ 131.6, 131.10–131.12.

25. Antidegradation is not defined in statute or regulation, but is a process to be followed when evaluating activities that have the potential to degrade water quality.

26. There are two parts to antidegradation: (1) the antidegradation policy and (2) implementation procedures or methods. 40 C.F.R. § 131.12.

27. Federal regulations require that states promulgate an antidegradation policy that is no less stringent than the federal antidegradation policy in every water quality standards package submitted to the EPA for review. *See* 40 C.F.R. § 131.6(d).

28. Under Alaska's antidegradation policy, waters are divided into three "tiers" based on the water quality: (1) in waters classified as "tier 1 waters", existing uses must be protected ; (2) "tier 2 waters" are those that exceed water quality standards and degradation is only permitted when "necessary to accommodate important economic and social development in the area where the water is located"; and (3) "tier 3 waters" are those that have been designated as an "outstanding national resource" whose water quality cannot be degraded. 18 AAC 70.015.

29. Despite Alaska's development and EPA's approval of an antidegradation policy in 1997, Alaska does not have legally adopted final implementation procedures to implement its antidegradation policy. *See* 18 AAC 70.015.

#### Alaska's Rulemaking Process and the Definition of "Regulation"

30. Pursuant to AS 46.03.880, the DEC must comply with the APA when it issues regulations.

31. Under AS 44.62.640(a)(3), "regulation" is defined as:

[E]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; ... "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.

32. The process set out by the APA for adopting regulations includes public notice, AS 44.62.190 & AS 44.62.200, and allows for public participation, AS 44.62.210, among other requirements, AS 44.62.180–AS 44.62.290.

### FACTUAL BACKGROUND

33. On July 14, 2010, the DEC issued the Interim Methods to serve “as interim guidance to be used while the Division [of Water] works with other agencies, permittees and the public to develop more detailed procedures.” State of Alaska, Department of Environmental Conservation, Interim Antidegradation Implementation Methods at 1 (July 14, 2010), *available at* [http://www.dec.state.ak.us/water/wqsar/Antidegradation/docs/P&P-Interim\\_Antidegradation\\_Implementenation\\_Methods.pdf](http://www.dec.state.ak.us/water/wqsar/Antidegradation/docs/P&P-Interim_Antidegradation_Implementenation_Methods.pdf).

34. The Interim Methods state that the determination regarding what tier a waterbody falls into under the antidegradation policy is to be determined with a parameter-by-parameter approach.

35. The Interim Methods do not set forth an independent process for designating a water body as an “outstanding national resource” or “tier 3 water.”

36. The Interim Methods sets out the process for DEC to follow to allow degradation of “tier 2 waters.”

37. The DEC did not follow the procedures set out in the APA for adopting a regulation when it issued the Interim Methods. *See* AS 44.62.180–AS 44.62.290.

38. The DEC relied on the Interim Methods to issue various permits and certifications under Section 401 of the CWA, 33 U.S.C. § 1341, for various industrial dischargers around the state, including, but not limited to, the Pogo Mine on the Goodpastor River and the Healy Coal Plant #1 on the Nenana River, as well as the Medium-Size Suction Dredge General Permit.

### COUNT 1

Violation of AS 44.62.180–AS 44.62.290 and AS 46.03.880(a)



### *Statutory Rulemaking Requirements*

39. Plaintiffs repeat and incorporate by reference the allegations and statements made in paragraphs 1-38.

40. Pursuant to AS 46.03.880(a), the DEC must follow the procedures set forth in the APA when it issues regulations.

41. The Interim Methods are a “regulation” as that term is defined by the APA. *See* AS 44.62.640(a)(3).

42. The DEC did not follow the rulemaking procedures of the APA, which include public notice and the opportunity for public comment, AS 44.62.190; AS 44.62.200; AS 44.62.210, when it issued the Interim Methods.

43. Because the DEC did not follow the rulemaking requirements of AS 44.62 when it issued the Interim Methods, the DEC violated AS 46.03.880(a), and the Interim Methods are an illegal regulation that cannot be relied upon by the DEC in its CWA permitting decisions.

### PRAYER FOR RELIEF

Therefore, the Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that DEC issued the Interim Methods without following the rulemaking procedures set forth in the APA, in violation of AS 46.03.880(a), and therefore the Interim Methods are an illegal regulation;

2. Enter a judgment prohibiting DEC from using the Interim Methods when issuing any future permits or certifications;


3. Enter a judgment requiring DEC to follow EPA antidegradation guidance until such time as Alaska’s antidegradation implementation methods are legally adopted as regulations;

4. Declare that the Plaintiffs are prevailing parties in this action and award them their costs, including their full and reasonable attorneys’ fees, pursuant to Alaska Rules of Civil Procedure 54(d), 79 and 82; and

5. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 26<sup>th</sup> day of April, 2011.

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