

Brian Litmans (AK Bar No. 0111068)  
Suzanne Bostrom (AK Bar No. 1011068)  
Trustees for Alaska  
1026 W. Fourth Avenue, Suite 201  
Anchorage, AK 99501  
Phone: (907) 276-4244  
Fax: (907) 276-7110  
Email: blitmans@trustees.org  
sbostrom@trustees.org

Attorneys for Plaintiffs

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

JONAH NUKAPIGAK, SAM  
KUNAKNANA, EDWARD  
NUKAPIGAK, CLARENCE  
AHNUPKANA, ROBERT  
NUKAPIGAK, MARTHA ITTA,  
and JOHN NICHOLLS,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF  
ENGINEERS, THOMAS P. BOSTICK,  
Commander and Chief of Engineers, U.S.  
Army Corps of Engineers, and  
CHRISTOPHER D. LESTOCHI, Colonel,  
District Commander, U.S. Army Corps of  
Engineers, Alaska District,

Defendants,

Case No. \_\_\_\_\_

COMPLAINT FOR INJUNCTIVE AND  
DECLARATORY RELIEF  
(Clean Water Act: 33 U.S.C. Section  
1344; National Environmental Policy Act,  
42 U.S.C. Section 4332; Administrative  
Procedure Act: 5 U.S.C. Section 706)

Plaintiffs Jonah Nukapigak, Sam Kunaknana, Edward Nukapigak, Clarence Ahnupkana, Robert Nukapigak, Martha Itta, and John Nicholls (collectively “Plaintiffs”), by and through their undersigned counsel of record, file this Complaint for Injunctive and Declaratory Relief, and hereby allege:

## **I. NATURE OF THE CASE**

1. This action seeks declaratory and injunctive relief for violations of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1387, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-70h, and their implementing regulations, by the U.S. Army Corps of Engineers (“Corps”) for issuing a CWA section 404 permit (“the Permit”), under 33 U.S.C. § 1344, for the CD-5 Project. Plaintiffs challenge the Corps’ December 19, 2011 decision to issue the Permit to ConocoPhillips Alaska, Inc. (“CPAI”) to discharge fill material into 58.5 acres of wetlands and other waters of the United States to construct the CD-5 satellite drilling pad and a six-mile-long access road with a bridge crossing the Nigliq Channel of the Colville River. *See* Department of the Army, Record of Decision & Permit Evaluation, Application No. POA-2005-1576 (Dec. 19, 2011) (hereinafter “2011 ROD”).

2. Plaintiffs ask the Court to: (1) declare that the Corps’ issuance of the Permit was arbitrary and capricious under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, and in violation of the CWA and NEPA; (2) vacate the Permit; (3) enjoin the Corps from authorizing any further discharge of fill material in connection with this Permit until it complies with the CWA and NEPA; and (4) award to the Plaintiffs their costs and expenses, including reasonable attorneys’ fees.

## **II. JURISDICTION AND VENUE**

3. Jurisdiction over this action is conferred by 28 U.S.C. §§ 1331 (federal question), 1361 (action to compel mandatory duty), 2201 (declaratory relief), and 2202 (injunctive relief). Plaintiffs have a right to judicial review pursuant to the APA, 5 U.S.C. §§ 701-706.

4. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to these claims occurred in the Corps’ Alaska District Office and because the CD-5 project is located in Alaska.

### III. PARTIES AND STANDING

#### Plaintiffs

5. Plaintiff JONAH NUKAPIGAK is a resident of Nuiqsut. Mr. Nukapigak was born in 1961 in Barrow and has resided in Nuiqsut since it was resettled in 1973. About ninety percent of Mr. Nukapigak's diet comes from subsistence hunting and fishing. Mr. Nukapigak learned to fish and hunt from his parents, grandparents, aunts, uncles, and other community members. He intends to continue to support his subsistence way of life and culture through hunting and fishing, and he teaches the young children in the community to hunt and fish. Mr. Nukapigak fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, and burbot. He fishes in the Nigliq Channel, Ublutuoch River, Fish Creek, Colville River, and Itkillik River. Mr. Nukapigak fishes for whitefish and grayling in Fish Creek during the summer and fall and in the Ublutuoch River during the fall and winter. He has a set net site on the Nigliq Channel and fishes for whitefish at his fish camp on the Nigliq Channel throughout the year. Mr. Nukapigak has been a whaling captain since 1985, and he uses the Nigliq Channel for transportation to other subsistence resources and to access the Beaufort Sea for whaling and hunting. Mr. Nukapigak hunts caribou for himself and for the elders and other members of his community in the summer, fall, and winter. He has hunted for caribou in the vicinity of the Alpine facilities for thirty-six years. He has hunted in the area of the CD-5 well pad and in the area of the proposed bridge on the Nigliq Channel. Mr. Nukapigak also hunts for birds in the vicinity of the existing Alpine facilities, in the area of the CD-5 well pad, and in the area of the proposed bridge.

6. Plaintiff SAM KUNAKNANA is a resident of Nuiqsut. Mr. Kunaknana was born in 1967 and has resided in Nuiqsut since he was thirteen years old. Approximately eighty percent of his diet comes from subsistence hunting and fishing. He learned to hunt and fish from his grandmother and intends to continue fishing and hunting to support his way of life. He fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, and burbot, and hunts

for caribou, bearded seal, and ringed seal. He fishes in the Nigliq Channel, Ublutuoch River, Fish Creek, Tin Creek, and Colville River. He fishes with nets and rods in the Nigliq Channel during the summer, fall, and winter. During the summer, fall, and winter, he fishes in Fish Creek for grayling and broad whitefish. Mr. Kunaknana also hunts for caribou in the summer, fall, and winter. He shares his caribou with the elders and other members of the community. He has hunted for caribou in the vicinity of the CD-5 well pad and the proposed bridge. He has hunted in the vicinity of the existing Alpine facilities since 1985, but has had difficulty finding caribou in that area since the development of the facilities. He hunts for birds in the spring, summer, and fall and has hunted for birds in the vicinity of the CD-5 well pad and in the area of the proposed bridge on the Nigliq Channel. He also gathers eggs in the spring in the vicinity of the Nigliq Channel.

7. Plaintiff EDWARD NUKAPIGAK is a resident of Nuiqsut. Mr. Nukapigak was born in Barrow in 1954 and has resided in Nuiqsut since it was resettled in 1973. Mr. Nukapigak's entire diet comes from subsistence hunting and fishing. He learned to hunt and fish from his father, mother, and relatives. He intends to continue to hunt and fish to support his subsistence way of life and culture, and teaches the young children in the community to hunt and fish like his elders did for him. He fishes in the Nigliq Channel, Ublutoch River, Fish Creek, Tin Creek, and Judy Creek. He fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, burbot, and salmon. He fishes on the Nigliq Channel in the summer, fall, and winter, and also has a set net site on the Nigliq Channel. He fishes in Fish Creek during the summer, fall, and winter for grayling and broad whitefish. He also fishes for grayling in the Ublutuoch River in the fall. He has a fish camp on the Ikillik River that he visits in the spring, summer, and fall. He also uses the Nigliq Channel to access other rivers and resources and to access the Beaufort Sea for whaling and hunting. Mr. Nukapigak has been a whaling captain since 1976. Mr. Nukapigak hunts for caribou throughout the year for himself and for everyone in the village. He has hunted for caribou in the area of the proposed CD-5 drilling pad and on both sides of the Nigliq Channel, including in the area of the proposed bridge. Mr. Nukapigak

hunts for birds in the spring, summer, and fall. He has hunted for birds in the vicinity of the existing Alpine facilities since 1973 and has hunted in the vicinity of the CD-5 pad and in the area of the proposed Nigliq Channel bridge.

8. Plaintiff CLARENCE AHNUPKANA is a resident of Nuiqsut. Mr. Ahnupkana was born in Barrow in 1961 and has resided in Nuiqsut since it was resettled in 1973. About ninety-five percent of Mr. Ahnupkana's diet comes from subsistence. He learned to fish and hunt from his father and mother, and plans to continue to fish and hunt to support his culture and subsistence way of life. Mr. Ahnupkana fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, and burbot in areas including the Nigliq Channel, Ublutuoch River, Fish Creek, and Tin Creek. Mr. Ahnupkana fishes in the Nigliq Channel in the summer, fall, and winter, and has a set net site on the Nigliq Channel. He also uses the Nigliq Channel to access other rivers and subsistence resources, and to access the Beaufort Sea for whaling and hunting. Mr. Ahnupkana hunts for caribou throughout the year and has hunted in the vicinity of the CD-5 well pad, in the area of the proposed Nigliq Channel bridge, and in the area surrounding the existing Alpine facilities. When he hunts for caribou, he does so on behalf of everyone in the village, including the elders. Mr. Ahnupkana also hunts for birds in the spring for himself and for other individuals in the Nuiqsut. He has hunted for birds east and west of the Nigliq Channel and in the area of the proposed bridge, as well as in the vicinity of the existing Alpine facilities.

9. Plaintiff ROBERT NUKAPIGAK is a resident of Nuiqsut. Mr. Nukapigak was born in 1953 and has resided in Nuiqsut since it was resettled in 1973. Mr. Nukapigak's entire diet comes from subsistence hunting and fishing. He learned to hunt and fish from his grandparents, aunts, uncles, and community members, and intends to continue fishing and hunting to support his subsistence way of life and culture. He fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, and burbot in the Nigliq Channel, Ublutuoch River, Fish Creek, Tin Creek, and Colville River. Mr. Nukapigak has a set net site on the Nigliq Channel. He fishes for grayling and whitefish in Fish Creek and for grayling in the Ublutuoch River. Mr. Nukapigak has hunted for caribou and birds in the vicinity of the existing Alpine

facilities since 1973. He has hunted in the vicinity of the CD-5 well pad and in the area of the proposed bridge. When he hunts for caribou and birds, he hunts for everyone in Nuiqsut, including the elders. Mr. Nukapigak also gathers eggs in June.

10. Plaintiff MARTHA ITTA is a resident of Nuiqsut. Ms. Itta was born in 1977 and has lived in Nuiqsut her entire life. Approximately 80% of her diet comes from fish and wildlife caught through subsistence hunting and fishing. Ms. Itta learned to fish from her grandparents, aunts, uncles, and great aunts and uncles. She plans to continue fishing and hunting, and intends to teach the young children in the community to hunt and fish. Ms. Itta fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, and burbot in the Nigliq Channel and Fish Creek. She fishes with nets on the Nigliq Channel during the summer and winter, and also uses the Nigliq Channel to access other rivers and subsistence resources. She fishes in the Ublutuoch River for whitefish in the spring, summer, and fall. Ms. Itta hunts for caribou for herself and for members of the community in the summer, fall, and winter. She has hunted for caribou to the east and west of the Nigliq Channel, including in the area of the proposed bridge, and has hunted in the vicinity of the CD-5 well pad. She has hunted for caribou in the vicinity of the existing Alpine facilities for thirty years. She hunts for birds in the spring and summer, and has hunted for birds in the vicinity of the proposed bridge and CD-5 pad.

11. Plaintiff JOHN NICHOLLS is a resident of Nuiqsut. Mr. Nicholls was born in 1977 and has resided in Nuiqsut since 1996. Mr. Nicholls' diet depends exclusively on fish and wildlife caught through subsistence hunting and fishing. He learned to hunt and fish from his elders and community members and intends to continue hunting and fishing to support his way of life. He fishes for Arctic cisco, least cisco, Bering cisco, Arctic char, whitefish, grayling, and burbot. He fishes in the Nigliq Channel and Fish Creek. Mr. Nicholls fishes with nets and rods on the Nigliq Channel in the spring, summer, and fall. He uses the Nigliq Channel to access other rivers and subsistence resources and to access the Beaufort Sea for whaling and hunting. He also fishes in Fish Creek in the spring, summer, and fall. Mr. Nicholls hunts for caribou in the spring, summer, and fall, and has hunted for caribou in the vicinity of the CD-5 well pad, to the

east and west of the Nigliq Channel, and in the vicinity of the existing Alpine facilities. Mr. Nicholls hunts for birds in the spring and summer. He has hunted for birds in the vicinity of the CD-5 well pad and in the area of the proposed bridge on the Nigliq Channel. When he hunts for caribou and birds, he hunts for everyone in the village, including the elders.

12. Plaintiffs sue on behalf of themselves. Plaintiffs have suffered, and will suffer, injuries to their aesthetic, recreational, subsistence, cultural, environmental and/or economic interests by Defendants' authorization of the filling of wetlands and other waters of the United States associated with the construction of the CD-5 drilling pad, bridges, and access road. The development of the CD-5 drilling pad, access road, and bridges will permanently bury 58.5 acres of high-functioning wetlands and streams, will present a serious risk for catastrophic oil spills in the Colville River Delta, and will adversely impact the wildlife that rely on the Arctic Coastal Plain and Colville River Delta. Plaintiffs live in Nuiqsut, and hunt and fish for subsistence resources near the proposed access road and bridge for the CD-5 pad. They regularly visit the area that will be impacted by the CD-5 project for subsistence purposes and intend to continue their subsistence activities in the future, although they are less likely to continue fishing and hunting in the area of the proposed access road if it interferes with their ability to successfully hunt and fish. Plaintiffs have difficulty hunting on the east side of the Nigliq Channel because of the existing Alpine Satellite facilities and anticipate that further development in the Delta will negatively impact their ability to hunt. Plaintiffs' subsistence use of these areas, including their reliance upon wildlife such as caribou, waterfowl, and fish as a main source of food, will be adversely affected by the filling of wetlands and construction of the drilling pad, access road and bridges to CD-5 that is authorized by the Permit.

13. In addition, Plaintiffs have procedural rights under the CWA and NEPA to comment on the Corps' environmental review process so that the Corps properly assesses the environmental impacts of the project. Plaintiffs rely on and use the environmental documents produced by the Corps to better understand contemplated changes to the environment that surrounds them, and in order to better participate in public review-and-comment proceedings.

Plaintiffs suffer procedural harms from the Corps' failure to comply with the CWA and NEPA.

#### Defendants

14. Defendant U.S. ARMY CORPS OF ENGINEERS is the federal agency charged with administering permits under section 404 of the CWA for the discharge of dredged or fill material into waters of the United States. 33 U.S.C. § 1344(a), (d); 33 C.F.R. § 323.6(a). The Corps is headquartered in Washington, D.C., and has a District Office in Alaska, where a significant portion of the actions and omissions alleged in this Complaint occurred.

15. Defendant LIEUTENANT GENERAL THOMAS P. BOSTICK is the Chief of Engineers and Commander of the U.S. Army Corps of Engineers. He is charged with the supervision and management of all Corps decisions and actions, including the issuance of Corps permits under section 404 of the CWA.

16. Defendant COLONEL CHRISTOPHER D. LESTOCHI is the District Engineer for the Alaska District office of the U.S. Army Corps of Engineers headquartered in Anchorage, Alaska. The Alaska District office is responsible for issuing permits for discharges of dredged and fill material into waters of the United States in Alaska under section 404 of the CWA.

#### **IV. STATUTORY AND REGULATORY BACKGROUND**

##### The Clean Water Act

17. Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish this goal, the CWA prohibits the discharge of any pollutant into navigable waters unless authorized by a permit. *See id.* §§ 1311, 1344. “Pollutants” include dredged spoil, rock, and sand, among other materials. *Id.* § 1362(6).

18. The CWA authorizes the Secretary of the Army to issue section 404 permits, under certain circumstances, “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” *Id.* § 1344(a). The Secretary of the Army acts through the Chief of Engineers of the Corps. *Id.* § 1344(d); 33 C.F.R. § 323.6(a).



19. Section 404(a) of the CWA provides that individual permits can only be issued “after notice and opportunity for public hearings.” 33 U.S.C. § 1344(a). “The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest.” 33 C.F.R. § 325.3(a). The Corps’ regulations for processing individual section 404 permits require that its public notice of permit applications “include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” *Id.*

20. The Corps, in administering section 404 of the CWA, conducts a public interest review “based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” *Id.* § 320.4(a)(1). In its own guidelines, the Corps has determined that “[m]ost wetlands constitute a productive and valuable resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.” *Id.* § 320.4(b)(1). Wetlands that provide habitat, store storm and flood waters, purify waters, and maintain natural drainage characteristics are considered to perform functions important to the public interest. *Id.* § 320.4(b)(2).

21. The U.S. Environmental Protection Agency (“EPA”), in conjunction with the Corps, has developed guidelines — known as the “404(b)(1) Guidelines” (and referred to herein as “the Guidelines”) — for discharging fill material under section 404 of the CWA. 40 C.F.R. § 230.2(a). The 404(b)(1) Guidelines are codified at 40 C.F.R. pt. 230.

22. Under those guidelines, EPA identifies wetlands as “special aquatic sites” that “are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.” 40 C.F.R. § 230.3(q-1); *see id.* § 230.41.

23. Under the Corps’ regulations, a section 404 permit “will be denied if the discharge that would be authorized by such permit would not comply with” the Guidelines. 33 C.F.R. § 320.4(a)(1).

24. Under the Guidelines, the Corps must adopt practicable alternatives that avoid environmental impacts of the discharge. *Id.* § 230.10(a). The Corps must also take “appropriate and practicable steps” to “minimize potential adverse impacts of the discharge on the aquatic ecosystem.” *Id.* § 230.10(d). This process identifies and mandates the selection of the Least Environmentally Damaging Practicable Alternative (“LEDPA”).

25. The Corps defines a practicable alternative as an alternative that “is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.10(a)(2). Where the project “does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not ‘water dependent’), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.” *Id.* § 230.10(a)(3). Moreover, “all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” *Id.*

26. The Corps is prohibited from issuing a permit if “[t]here is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences.” *Id.* § 230.12(a)(3)(i).

27. An applicant seeking authorization to discharge fill material to a wetland in connection with a non-water-dependent activity must clearly demonstrate, and the Corps must independently verify, that there is no practicable alternative to the discharge or that any practicable alternative would have greater environmental impacts. *See id.* § 230.10(a)(3).

28. Practicable alternatives include, but are not limited to, “[a]ctivities which do not involve a discharge of dredged or fill material into the waters of the United States” and “[d]ischarges of dredged or fill material at other locations in waters of the United States.” *Id.* § 230.10(a)(1)(i)-(ii). An alternative to discharging to a wetland “is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics

in light of overall project purposes.” *Id.* § 230.10(a)(2).

### The National Environmental Policy Act

29. NEPA requires federal agencies to prepare a detailed environmental impact statement (“EIS”) for every major federal action that will have a significant impact on the quality of the human environment. *See* 42 U.S.C. § 4332(C). Such a statement shall “provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

30. The issuance of a CWA section 404 permit is a major federal action subject to NEPA.

31. To implement the requirements of NEPA, regulations applicable to all federal agencies have been promulgated by the Council on Environmental Quality (“CEQ”). *Id.* §§ 1500-1508. In addition, the Corps has promulgated regulations and adopted procedures for complying with NEPA in the processing of section 404 permits to supplement the CEQ’s NEPA regulations. 33 C.F.R. pt. 325, app. B.

32. The EIS requirement serves two functions. First, it ensures that an agency takes a hard look at a proposed project’s environmental effects before making a decision. Second, the EIS ensures that relevant information about a proposed project is made available to members of the public so that they may play a role in both the decision-making process and the implementation of the decision.

33. An agency preparing an EIS must specify the underlying “purpose and need” for the proposed action. 40 C.F.R. § 1502.13. The agency must then “[r]igorously explore and objectively evaluate all reasonable alternatives” that would satisfy the stated purpose and need. *Id.* § 1502.14.

34. The Corps must analyze the direct, indirect, and cumulative impacts of the proposed alternatives and evaluate their significance. *Id.* § 1502.16; 33 C.F.R. § 230.10(b); 33 C.F.R. pt. 325, app. B, § 7(b)(3). A project’s “cumulative impact” is “the impact on the

environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. Cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

35. When an applicant conducts environmental analyses for a project, the Corps must independently verify the accuracy of those analyses.

36. The NEPA regulations of CEQ and the Corps require public participation in the preparation of EISs or environmental assessment (“EA”), including the opportunity to review and comment upon draft EISs. *See, e.g., id.* §§ 1500.1(b) (explaining that “public scrutiny [is] essential” to the implementation of NEPA), 1500.2(d) (indicating the agency must “[e]ncourage and facilitate public involvement”), 1503.1 (requiring public comments), 1506.6 (stating the agency must “[m]ake diligent efforts to involve the public” in preparing environmental documents, give “public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected,” and “[s]olicit appropriate information from the public”); 33 C.F.R. § 230.11. NEPA requires that an agency give environmental information to the public and then provide an opportunity for informed comments to the agency. 40 C.F.R. §§ 1501.4, 1506.6. This process of disclosing information to the public must occur before the agency has reached its final decision on whether to go forward with the project. *Id.* § 1500.1(b).

37. NEPA requires federal agencies to “insure the . . . scientific integrity[] of the discussions and analyses” in an EIS and “make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.” *Id.* § 1502.24.

38. To satisfy its NEPA obligations, the Corps may adopt an EIS prepared by another federal agency. *Id.* § 1506.3; 33 C.F.R. § 230.21. The Corps may adopt another agency’s EIS without recirculating the statement for public comment only if it performs an “independent review of the statement” and “concludes that its comments and suggestions have been satisfied.”

40 C.F.R. § 1506.3(c).

39. A supplemental EIS must be prepared when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* § 1502.9(c)(1).

#### The Administrative Procedure Act

40. The APA 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.

41. The Corps is a federal agency subject to the APA.

42. The APA provides that a court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” 5 U.S.C. § 706(2), or agency action that is undertaken “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D).

### **V. FACTS**

#### The Colville River Delta and the Village of Nuiqsut’s Subsistence Way of Life

43. The Colville River is a large river and the Colville River Delta (“the Delta”) is the most complex delta in northern Alaska, draining approximately 29% of the North Slope. *See* Letter from Steven Lewis, Field Supervisor, U.S. Fish & Wildlife Serv., to Colonel Timothy J. Gallagher, District Engineer, U.S. Army Corps of Eng’rs 1 (Nov. 23, 2005) (hereinafter “Nov. 2005 FWS Letter”).

44. The Colville River is characterized by diverse geomorphic and biological processes, which have created a unique mosaic of wetlands, deep channels, and tapped lakes. *Id.* at 1-2. Many of these habitats are found nowhere else on the North Slope. *Id.* at 2.

45. Spring on the Delta is brief and is marked by the breakup of ice on the river and

widespread flooding. Each spring, breakup creates water sheet flow across the entire Delta, functioning to recharge area lakes and wetland. At the peak discharge of a 50-year flood, the majority of the Delta is under water.

46. Fish Creek, Judy Creek, Ublutuoch River, Kalikpik River, and Tingmeachsiovik River are all west of the Colville River Delta and within the planning area for CD-5. *See* Bureau of Land Mgmt., U.S. Dep't of the Interior, Alpine Satellite Development Plan Final Environmental Impact Statement 56 tbl.2.3.11-2, 215 (2004) (hereinafter "FEIS"). This region and the nearby coastal zone contain a variety of habitats that support approximately 30 fish species. *Id.* at 215. The complex mosaic of river and stream channels and coastal lakes forms a highly dynamic system of interconnected habitats. *Id.* These habitats are used by fish for overwintering, feeding, rearing, spawning, and as migration corridors. *Id.* All of the rivers, streams, creeks, and non-tundra lakes in the region, including the Delta, constitute important fish habitat. *Id.* at 216. Whitefishes, ciscoes, salmon, Dolly Varden, Arctic grayling, burbot, lake trout, Alaska blackfish, and ninespine stickleback are sensitive to project activities such as water withdrawal. *Id.*

47. Twenty fish species are found in the Delta, including important subsistence resources such as Arctic cisco, several species of whitefish, Dolly Varden, and Arctic grayling. Nov. 2005 FWS Letter at 2. As many as 11 species use Fish and Judy Creeks, and 8 species use the Ublutuoch River. *Id.* These waterbodies provide important habitat for Arctic grayling, all the whitefishes except round whitefish, ciscoes, and burbot — all important subsistence species. *Id.*

48. The deep channels and lakes of the Delta provide approximately 70% of the overwintering fish habitat on the North Slope. *Id.*; Letter from Deborah Rocque, Supervisor,

Fairbanks Field Office, U.S. Fish & Wildlife Serv., to Colonel Reinhard W. Koenig, Alaska District Engineer, U.S. Army Corps of Eng'rs 1 (July 10, 2009) (hereinafter "July 2009 FWS Letter"). Overwintering habitat is considered critical to the survival of fish populations on Arctic Coastal Plain. 2005 FWS Letter at 2; FEIS at 217. The Nigliq Channel may be one of the primary overwintering sites for Arctic cisco. FEIS at 216. The Delta is the only system west of the Mackenzie River in Canada that can support substantial overwintering populations of sub-adult and adult Arctic cisco. *Id.* at 220.

49. The Delta also provides important nesting habitats for a variety of waterbirds, including tundra swans, the largest known North Slope colony of nesting brant, greater white-fronted geese, spectacled eiders (listed as threatened under the Endangered Species Act), and one of only two known concentrations of yellow billed loons in Alaska (identified as a species that warrants listing but is precluded due to the U.S. Fish and Wildlife Service's ("FWS") limited resources to list the species). Nov. 2005 FWS Letter at 2. The salt marshes and coastal tide flats of the outer Delta are the most extensive found along the coast of the Alaskan Beaufort Sea and provide important staging habitat for up to 300,000 shorebirds on any given day between July 25 and September 5. *Id.* The Delta also supports large numbers of staging swans and geese prior to fall migration. *Id.*

50. The area to the west of the Colville River, where the CD-5 road and pad would be constructed, is characterized by moist tussock tundra, aquatic sedge with deep polygons, non-patterned wet meadow, and young basin wetland complex. *Id.* This area supports a variety of nesting and brood-rearing waterbirds, including greater white-fronted geese, brant, Canada geese, northern pintails, and long-tailed ducks. *Id.* This area, as well as the Delta, is also within the range of the threatened spectacled eider and Steller's eider (listed as threatened under the

Endangered Species Act). *Id.*

51. The area to the west of the Colville River (where CD-5 is to be located) is at the edge of the herd ranges for the Teshekpuk (“TCH”) and Central Arctic caribou (“CACH”) herds. FEIS at 260. These caribou use the coastal area for insect relief. *Id.* at 261. The TCH use the area where CD-5 is to be located and the Delta during summer months for foraging and insect relief (late-June through August). *Id.* at 261, 263-64. The Delta is used most heavily by caribou during July when mosquitoes and oestrid flies are active. *Id.* at 265. The TCH has been observed as far east as Fish Creek, in the area where CD-5 is to be located, in the fall. *Id.* at 261, 265. During the winter, 10 to 100% of the TCH use the CD-5 area as their winter range. *Id.* at 261. TCH calving occurs in the vicinity of the CD-5 location. *Id.* at 264. The CACH can also be found in the Delta and west of the Colville River, where CD-5 is to be located, during the summer. *Id.* at 262-63. A large group of the CACH moved west, across the Colville River and into the vicinity of Fish and Judy Creeks (near the location of CD-5), in 2001. *Id.* at 265. The CACH’s usual crossing of the Nigliq Channel westward is between CD-2 and CD-4. *Id.* Several hundred caribou from the CACH overwinter on the coastal plain. *Id.* at 262-63.

52. Subsistence hunters from Nuiqsut harvest caribou year-round depending on availability, although most are harvested from mid-summer to early-winter (specifically from July to October). *Id.* at 266. The entire Alpine Satellites Development Plan area west of the Nigliq Channel falls within defined subsistence land use for caribou harvest. *Id.* Nuiqsut subsistence hunters gain access to areas that provide a substantial proportion of their annual harvest via the Nigliq Channel, the Delta, and Fish Creek. *Id.*

53. Residents of Nuiqsut subsistence fish in the Delta year-round. *Id.* at 232. The summer fishing season generally begins in July and extends until early September, when freeze-



up ends the open-water fishing. *Id.* Summer fishing is concentrated in the Nigliq Channel, the main stem of the Colville River Delta upstream of Nuiqsut, and in Fish Creek. *Id.* The summer subsistence fishery targets broad whitefish, but may also include fishing for Dolly Varden, humpback whitefish, and pink and chum salmon. *Id.* The fall under-ice subsistence fishery, which is the major fishery of the year, begins in late September to early October and typically lasts through late November. *Id.* The fall fishery is concentrated in the upper Nigliq Channel near Nuiqsut, the lower Nigliq Channel near Woods Camp, and the Nigliq Delta. *Id.* Artic cisco is the principal subsistence target, along with least cisco, broad whitefish, and humpback whitefish. Bering cisco, Arctic grayling, rainbow smelt, round whitefish, Dolly Varden, burbot, Arctic flounder, and fourhorn sculpin are also harvested. *Id.*

54. Due to its importance for subsistence use and its unique aquatic habitat, the EPA determined that the Delta is an aquatic resource of national importance (“ARNI”). *See* Letter from Marcia Combes, Director, Alaska Operations Office, Region 10, U.S. Evtl. Prot. Agency, to Colonel Kevin Wilson, Alaska District Engineer, U.S. Army Corps of Eng’rs (June 9, 2009) (hereinafter “June 9, 2009 EPA Letter”); *see also* 2011 ROD at 2-3. EPA made this ARNI opinion pursuant to the August 11, 1992 Memorandum of Agreement between the EPA and the Corps regarding section 404(q) of the CWA. *Id.* at 40.

55. FWS also determined that the Delta is an ARNI because of the diversity and abundance of fish and wildlife, and their habitats. 2011 ROD at 3; July 2009 FWS Letter at 1. According to FWS, the CRD is “the most hydrologically active and resource-rich river delta on the North Slope.” *Id.* at 2. FWS explained that the Delta is the largest and most productive delta in northern Alaska “due to its unique assemblage of wetland habitats, deep channels, and tapped lakes.” *Id.* at 1.

## The Alpine EIS NEPA Process and Development of CD-1 through CD-4

56. The initial Alpine Development occurred in February 1998, when the Corps issued ARCO Alaska a section 404 permit authorizing fill for construction of the Colville Delta (“CD”) production processing facility pad (CD-1) and satellite drill pad (CD-2). 2011 ROD at 1.

57. The Alpine Development incorporated state of the art engineering designs, including a minimal footprint and a Horizontal Directional Drilled (“HDD”) pipeline crossing beneath the East Channel of the Colville River for the transport of processed product from the production facility to the Kuparuk oil field.

58. The 1998 permit included Special Condition 10, which required that future development in the Delta follow a roadless design unless an environmentally preferable alternative is available or roadless development is infeasible.

59. In 2004, the Bureau of Land Management (“BLM”) prepared an EIS for the Alpine Satellite Development Plan (“2004 Alpine EIS”), in response to an application from CPAI for rights-of-way and permits to drill for oil and gas within and outside the National Petroleum Reserve–Alaska (“NPR”).<sup>1</sup> The 2004 Alpine EIS reviewed development of five drill pads — CD-3 through CD-7. Two of these pads are located in the Delta and the other three are located in the NPR.<sup>2</sup>

60. BLM was the lead agency and the Corps served as a cooperating agency (along with the Coast Guard and EPA) in the development of the 2004 Alpine EIS.

61. The final EIS was issued in September 2004 and the Record of Decision (“2004 Alpine ROD”) was issued in November 2004.

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<sup>1</sup> The 2004 Alpine EIS tiers off of the 1998 Northeast National Planning Reserve-Alaska Integrated Area Plan and EIS.

<sup>2</sup> CD-3 (Fiord or CD-North) is on State of Alaska land. CD-4 (Nanuq or CD-South) is on Kuukpik Corporation land. CD-5 (Alpine West) is on Kuukpik Corporation land within the NPR. CD-6 (Lookout) and CD-7 (Spark) are on BLM land within the NPR.

62. The preferred alternative (Alternative F) included the construction of a gravel road to connect CD-4 through CD-7 to the CD-2 site located on the east side of the Nigliq Channel. The road system would include a bridge, approximately 1,650 feet long, over the Nigliq Channel. An above ground pipeline would transport three-phase fluids to the processing facility at Alpine Central Processing Facility (“APF-1”) located at CD-1.

63. In December 2004, the Corps issued a section 404 permit for the construction of CD-3 and CD-4, an access road to CD-4, and an airstrip at CD-3. CD-3 and CD-4 came on line in 2006.

64. CD-3 is located east of the Nigliq Channel, between the West Ulamnigiq and East Ulamnigiq channels in the Delta, and 3 miles north of the main Alpine facility (CD-1). CD-3 is operated as a roadless drill site with winter only operations; drill rigs and other heavy equipment are brought to and from CD-3 via an ice road from CD-1. A winter development drilling program for CD-3 was proposed by the applicant to avoid impacts to wildlife and subsistence activities during summer months.

65. CD-4 is four miles south of the main Alpine facility, located less than 0.5 miles east of the Nigliq Channel, and is connected by a gravel road to CD-2 and CD-1.

#### The Corps’ CWA Section 404 Permitting Decision for CD-5

66. CD-5 is approximately 8.5 miles northwest of Nuiqsut and lies within the NPRA.

67. In September 2005, CPAI submitted an application for a section 404 permit for construction of the CD-5 pad and road access to the pad. 2011 ROD at 2.

68. On November 23, 2005, EPA sent a letter to the Corps responding to CPAI’s proposal. Letter from Marcia Combes, Director, Alaska Operations Office, Region 10, U.S. Envntl. Prot. Agency, to Colonel Timothy J. Gallagher, Alaska District Engineer, U.S. Army

Corps of Eng'rs (Nov. 23, 2005). According to EPA, CPAI did not demonstrate that the proposed project was the LEDPA and did not provide sufficient information to support a determination that the roadless design was infeasible or that CPAI's proposed road was environmentally preferable. *Id.* at 1-2. EPA further explained that the project changed significantly since the publication of the 2004 Alpine EIS and suggested that the Corps conduct a supplemental comprehensive alternatives analysis. *Id.* at 2. EPA notified the Corps that the proposed project might result in substantial and unacceptable impacts to aquatic resources of national importance and recommended that the Corps deny the 404 permit request because the proposal did not qualify as the LEDPA. *Id.* at 3.

69. FWS sent a letter to the Corps on November 23, 2005, analyzing CPAI's proposal. Nov. 2005 FWS Letter at 1. FWS believed that CPAI's proposal would cause significant indirect and cumulative impacts to fish and wildlife resources in the Delta. *Id.* at 3. FWS recommended that CD-5 be developed without a road connection and noted that a roadless design would be feasible and less damaging to the environment than CPAI's proposal. *Id.* at 3.

70. In February 2008, CPAI requested that the Corps suspend the permit application due to outstanding issues in obtaining local authorization and in meeting the Corps' information requests. 2011 ROD at 2. In May 2008, the application file was closed. *Id.*

71. In May 2009, CPAI submitted a new application to the Corps for a section 404 permit for construction of the CD-5 drill pad and access road to the pad. *Id.* The application included changes in the location of the drill pad, the road alignment, and the bridge crossing over the Nigliq Channel. *Id.* The pipeline would be suspended on the bridge and would run from CD-5 to CD-1 above ground and generally parallel to the road. Department of the Army, Record of Decision & Permit Evaluation, Application No. POA-2005-1576, at 4, 6 (Feb. 5, 2010)

(hereinafter “2010 ROD”).

72. The bridge crossing over the Nigliq Channel was moved approximately three miles south (upstream) from the bridge location proposed in the 2005 permit application, just north of the CD-4 pad location. 2011 ROD at 2.

73. On June 9, 2009, EPA submitted comments to the Corps on the new CPAI proposal. June 9, 2009 EPA Letter at 2. EPA expressed concern over the permit, noting that CPAI had increased the adverse impacts to waters of the U.S. compared to its 2005 application. *Id.* at 2. EPA stated that CPAI failed to demonstrate how the proposed road and bridge project was the LEDPA. *Id.*

74. EPA determined that the proposed project might result in substantial and unacceptable impacts to the Delta, which EPA determined to be an ARNI. *Id.* at 1. EPA found that the direct, indirect, and cumulative impacts from the discharge of fill material may cause or contribute to the significant degradation of waters of the U.S., which support fish overwintering, feeding, and spawning areas; migratory bird nesting and feeding habitat; and wildlife and protected and endangered species habitat — all of which contribute to supporting human health and welfare for residents of Nuiqsut. *Id.* at 3. EPA expressed particular concern over adverse impacts to regional surface hydrology within the Nigliq Channel and the Delta, caused by the bridge and road, especially during flood events. *Id.* The adverse effects of hydrological changes could result in scouring, erosion, and downstream sedimentation, causing the degradation and loss of aquatic habitats and also adversely affecting access to critical subsistence resources for the people of Nuiqsut. *Id.* Further, EPA expressed concern over the risk of a catastrophic spill, which was increased by the proposal to suspend a pipeline above the Nigliq Channel. *Id.*

75. Because of EPA’s strong opposition to the use of a road and bridge in the Delta

for the CD-5 project, as well as EPA's belief in the availability of roadless alternatives, EPA recommended that the Corps deny the permit. *See id.* at 1, 4.

76. In a July 10, 2009 letter, FWS recommended that the Corps deny the permit application. July 2009 FWS Letter at 3. FWS explained that the conversion of the Alpine complex into an operations and logistics center, made possible by the road and bridge over the Nigliq Channel, would lead to greater industrial activity on the Delta. *Id.* at 2. Such an expansion would create the need for more facilities and fill, which would result in the further loss of habitat in the Delta, create a greater risk of an oil spill as a result of the suspended pipeline on the proposed Nigliq Channel bridge, increase the disturbances to wildlife on the Delta, and increase impacts to subsistence resources and users. *Id.*

77. FWS notified the Corps that the proposed project might result in substantial and unacceptable impacts to the Delta, which FWS considered to be an ARNI. *Id.* FWS explained that an alternative that avoids the creation of additional infrastructure in the Delta would be the LEDPA for the development of oil reserves at CD-5. *Id.*

78. FWS included an alternatives analysis with the July 10, 2009 letter. *Id.* att. 1. Based on the analysis, FWS concluded that an alternative utilizing an HDD pipeline and no road to connect the main Alpine facility (CD-1) and CD-5 would conserve high-value wetland habitat and would "eliminate redundant road infrastructure and greatly reduce construction and activity-related impacts" on the Delta. *Id.* att. 1, at 1-2, 7.

79. In February 2010, the Corps denied the permit application, finding that the proposed project was not the LEDPA. *See* 2010 ROD at 2-3, 59. Based on the Corps' analysis of the alternatives, the Corps concluded that there were reasonable and practicable alternatives that would accomplish the purposes of the proposed action and would be less environmentally

damaging than the alternatives proposed by CPAI. *Id.* at 59.

80. The Corps identified two practicable alternatives that would not include a road in the Delta and would utilize HDD to place the pipeline under the Nigliq Channel. *Id.* at 11. Instead of having a bridge and a suspended pipeline across the Nigliq Channel, CPAI could place a pipeline under the channel by drilling down and then west; the pipeline would emerge on the other side of the Nigliq Channel and head to the CD-5 site with no corresponding road. With these roadless alternatives, CPAI would access the CD-5 pad from an airstrip at the CD-5 pad or with a road from Nuiqsut. *Id.* at 11-13, 39.

81. The Corps recognized “that impacts within the [Delta] floodplain may have a greater effect on the surrounding environment than impacts outside the [Delta] due to the unique aquatic resources, its value as habitat, and its connectivity to other waters of the United States.” *Id.* at 3. When denying CPAI’s proposal, the Corps explained that an “overriding national issue is further impacts to aquatic resources within the [Delta]” and that, because of the ecological importance of the Delta and the availability of alternatives with far fewer impacts to the Delta, “denial of the permit is in the national interest.” *Id.* at 66.

82. The 2010 ROD noted that CPAI’s preferred alternative would include approximately 2.5 miles of road and three bridge crossings in the Delta. *Id.* at 27. With the HDD pipeline, the Corps estimated that there would only be a gravel valve pad at the Nigliq Channel for the HDD drill site. *Id.* at 11, 31. The Corps explained that, because there would not be any roads, bridges, or bridge abutments within the Delta, the HDD proposal would have less of an impact than the road and bridges proposed by CPAI. *Id.* at 32.

83. The Corps concluded that it is likely that the presence of 2.5 miles of road and three bridges within the Delta, perpendicular to the natural flow path, would impact water levels,

overland sheet flow, and circulation and fluctuation patterns within the Delta. *Id.* at 31.

84. In finding that HDD was a less environmentally damaging practicable alternative, the Corps identified a major concern about risks to the aquatic environment from a catastrophic spill from the suspended pipeline over the river. *Id.* at 40. Although the probability of a large spill from a suspended pipeline would be small, “its occurrence during the summer, during the height of wildlife and fish usage, could have devastating effects.” *Id.* According to the Corps, a large spill at any of the three proposed bridges, particularly at the Nigliq Channel Bridge where flow would be present, could be difficult to contain and could have devastating effects on the aquatic resources in the downstream area of the Delta. *Id.* The Corps noted that the HDD line under the Nigliq Channel would eliminate the possibility of a large spill caused by ice jamming or a vehicle collision with the pipeline. *Id.* at 41. However, because the HDD portion of the pipeline would not be visible, the Corps acknowledged the possibility that small leaks could go undetected with the HDD alternative. *Id.*

85. On April 2, 2010, CPAI appealed the permit denial on several grounds.

86. On December 2, 2010, the Pacific Ocean Division Commander remanded the permit decision to the Corps for reconsideration. *See* Administrative Appeal Decision, File POA-2005-1576 (Dec. 2, 2010) (hereinafter “Appeal Decision”). The Corps Reviewing Officer found that, although none of those grounds supported a finding that the permit denial was arbitrary or capricious, some of those grounds required further clarification or explanation from the District Engineer. *Id.* The Reviewing Officer therefore remanded the decision to the District Engineer for further explanation and clarification of his reasoning on seven points. *Id.*

87. On October 19, 2011, CPAI submitted a permit package with minor design changes and a mitigation proposal based on coordination with the Corps, EPA, and FWS. The



revised permit package was for a bridge and suspended pipeline across the Nigliq Channel, as originally proposed, with a change in the bridge crossing location and changes to the road specifications.

88. In December 2011, after receiving additional information from CPAI and various state and federal agencies, the Corps issued a new decision, reversing itself and finding that the bridge with a suspended pipeline was the LEDPA, and granted the permit. *See* 2011 ROD.

89. In the 2011 ROD, the Corps explained that a bridge and suspended pipeline proposal was the LEDPA because this alternative would allow for greater leak detection and that the pipeline would be serviceable in the event of an oil spill. *Id.* at 33. The Corps rejected the previous LEDPA determination on the grounds that a buried pipeline with three-phase liquid pipeline, which suffers from a higher degree of corrosivity, would not be available for visual leak detection and could therefore cause greater impacts. *Id.* at 26.

90. Based on information provided by CPAI during the remand period, the Corps changed its position that the risk of a catastrophic spill is a greater concern than an undetected leak. *Id.* at 42. The Corps concluded that the CPAI proposal will result in less potential for a spill than the HDD proposal but did not compare the scope or magnitude of spills associated with rupture of a pipeline above the Nigliq Channel. *Id.*

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM**

Failure to Provide Reasoned Analysis for Least Environmentally Damaging Practicable Alternative Determination Pursuant to CWA Section 404 and the Section 404(b)(1) Guidelines  
**(Violation of CWA § 404, 33 U.S.C. § 1344)**

91. Plaintiffs repeat and incorporate by reference the allegations contained in the foregoing paragraphs 1-90, *supra*.

92. The Corps may not issue a section 404 permit “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so

long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. § 230.10(a). The Corps defines a practicable alternative as an alternative that “is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.10(a)(2). Where the project is not “water dependent,” “practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.” *Id.* § 230.10(a)(3). Moreover, “all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” *Id.*

93. When an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy,” an agency is required to provide a reasoned explanation for the decision to “disregard[] facts and circumstances that underlay or were engendered by the prior policy.” *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Although an agency is entitled to change its course when its view of what is in the public’s interest changes, the “agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-88 (9th Cir. 2006) (quoting *Greater Boston Television Corp. v. Fed. Commc’ns Comm’n*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

94. The CD-5 project is not water dependent.

95. The Corps initially determined in the 2010 ROD that the HDD alternative was the least environmentally damaging practicable alternative. The Corps later reversed its decision in the 2011 ROD and found that CPAI’s preferred road and bridge alternative was the LEDPA.

96. The Corps failed to discuss why facts and policies that were relevant to the 2010 decision, such as the risk of a catastrophic spill from the suspended pipeline, no longer support the finding that the HDD alternative is the LEDPA.

97. The Corps violated section 404 of the Clean Water Act and its implementing regulations, including the 404(b)(1) Guidelines, by failing to provide a reasoned explanation for the decision to disregard the facts and circumstances underlying the Corps' prior determination in the 2010 ROD. The Corps' approval of the section 404 permit is therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

98. These violations of the CWA by the Corps threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

### **SECOND CLAIM**

#### **Failure to Comply With NEPA by Relying on an Inadequate EIS and by Failing to Consider Direct, Indirect, and Cumulative Impacts (Violation of NEPA § 102, 42 U.S.C. § 4332)**

99. Plaintiffs repeat and incorporate by reference the allegations contained in the foregoing paragraphs 1-98, *supra*.

100. To comply with NEPA, an EIS must "provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

101. NEPA regulations provide that environmental information must be made available to the public before decisions are made and that agencies must involve the public, to the extent practicable, in preparing their environmental analyses. *Id.* §§ 1500.1(b), 1501.4(b).

102. The Corps did not prepare its own NEPA analysis for its section 404 permit decision for CD-5.

103. The Corps, in adopting the BLM's 2004 Alpine EIS, failed to take the requisite "hard look" at the impacts of the CD-5 project, particularly direct, indirect, and cumulative impacts associated with development of the CD-5 satellite.

104. The Corps' reliance on and adoption of BLM's 2004 Alpine EIS, pursuant to 40 C.F.R. § 1506.3 and 33 C.F.R. § 230.21, was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

105. To the extent that the Corps relied on materials not included in the 2004 Alpine EIS to evaluate the direct, indirect, and cumulative impacts of the CD-5 project, those materials were not subject to public review and comment as part of the NEPA process. Any such reliance thus violates the public participation requirement of NEPA and its implementing regulations.

106. These violations of NEPA by the Corps threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

### **THIRD CLAIM**

#### **Failure to Prepare Supplemental NEPA Analysis (Violation of NEPA § 102, 42 U.S.C. § 4332)**

107. Plaintiffs repeat and incorporate by reference the allegations contained in the foregoing paragraphs 1-106, *supra*.

108. Under NEPA, an agency must prepare a supplement to a final environmental impact statement if “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).

109. Since the Final EIS was released for the Alpine Satellite Development Plan in 2004, the proposed project has changed and new significant information has come to light that bears on the associated impacts of the project.

110. The Corps has failed to provide any supplemental NEPA analysis that addresses changes in the proposed project or relevant new information, including new information

regarding climate change, changes in industry practice, changes in federal land management within the NPRA, expanded oil and gas leasing activity offshore and resulting necessary onshore infrastructure, as well as new information regarding wildlife.

111. Failure to supplement the 2004 EIS with additional NEPA analysis violates NEPA.

112. This violation of NEPA threatens Plaintiffs with irreparable injury for which they have no adequate remedy at law.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that the Court grant the following relief:

1. Declare that the Corps' decision is arbitrary, capricious, and an abuse of discretion under the APA, and that issuance of the Permit for CD-5 violates the CWA and NEPA;
2. Declare that the Corps' adoption of the EIS is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law under the APA;
3. Declare the Corps is in violation of 42 U.S.C. § 4332 and its implementing regulations by not supplementing the 2004 Alpine EIS despite the fact that significant new information exists concerning the impact of the ongoing action on the environment;
4. Vacate the section 404 permit for CD-5 and issue an immediate and permanent injunction prohibiting any further construction activities resulting in the discharge of any dredged or fill material into any wetlands or waters of the United States associated with the development of CD-5 until a valid permit is issued;
5. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees and costs; and
6. Grant Plaintiffs such other relief as the Court deems appropriate.

Respectfully submitted, this 27th day of February, 2012.

s/ Brian Litmans  
Brian Litmans (AK Bar No. 0111068)  
Suzanne Bostrom (AK Bar No. 1011068)  
Trustees for Alaska  
1026 W. Fourth Avenue, Suite 201  
Anchorage, AK 99501  
Phone: (907) 276-4244  
Fax: (907) 276-7110  
Email: blitmans@trustees.org  
sbostrom@trustees.org

Attorneys for Plaintiffs