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

ALASKA COMMUNITY ACTION ON	)	
TOXICS and ALASKA CHAPTER OF THE	)	Case No.
SIERRA CLUB,	)	
	)	<b>COMPLAINT FOR DECLARATORY</b>
Plaintiffs,	)	<b>AND INJUNCTIVE RELIEF</b>
	)	(Clean Water Act: 33 U.S.C. Sections 1311,
v.	)	1342, 1365)
	)	
AURORA ENERGY SERVICES, LLC and	)	
ALASKA RAILROAD CORPORATION,	)	
	)	
Defendants	)	
	)	
	)	

Plaintiffs ALASKA COMMUNITY ACTION ON TOXICS and the ALASKA  
 CHAPTER OF THE SIERRA CLUB (collectively "Alaska groups"), by and through their

undersigned counsel of record, file this Complaint for Declaratory and Injunctive Relief, and hereby allege:

## I. NATURE OF THE CASE

1. This is a citizen enforcement action brought by the Alaska groups on behalf of themselves, their members and the general public against Defendants Aurora Energy Services, LLC (“AES”) and Alaska Railroad Corp. (“ARRC”) for illegal discharges of coal and coal debris to Resurrection Bay in violation of the Clean Water Act (“CWA”), 33 U.S.C. § 1251, *et seq.* The Alaska groups seek declaratory and injunctive relief, civil penalties and litigation expenses under the citizen suit provision of the CWA, 33 U.S.C. § 1365. AES operates the Seward Coal Loading Facility (“SCLF”) and ARRC owns the SCLF. As owner and operator of the SCLF, AES and ARRC discharge coal to Resurrection Bay from the SCLF without a National Pollutant Discharge Elimination System (“NPDES”) permit in violation of the CWA.

## II. JURISDICTION AND VENUE

2. This is a civil suit brought under the citizen suit provisions of the Clean Water Act against ARRC and AES for ongoing violations of CWA §§ 301 and 402. This Court has subject matter jurisdiction over the parties and subject matter of this action pursuant to § 505(a)(1)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A), and 28 U.S.C. § 1331 (an action for declaratory and injunctive relief arising under the Constitution and laws of the United States).

3. On October 28, 2009, the Alaska groups gave written notice of AES’ and ARRC’s violations of the CWA and of the Alaska groups’ intent to file suit with regard to those violations to ARRC, AES, AES’s registered agent, the Administrator of the U.S. Environmental Protection Agency (“EPA”), the Regional Administrator of Region 10 of EPA, and the Commissioner of the Alaska Department of Environmental Conservation (“DEC”) pursuant to 33 U.S.C. § 1365(b). A true and correct copy of the notice letter is attached as Exhibit A. The allegations in Exhibit A are incorporated herein by reference.

4. More than sixty days have passed since notice was served on AES, ARRC and the state and federal agencies. The Alaska groups are informed and believe, and thereon allege, that neither the DEC nor the EPA has commenced, nor is diligently prosecuting, a civil or criminal action under the CWA against AES or ARRC. In addition, this action is not barred by any prior administrative penalty under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

5. Venue is proper in the District of Alaska under § 505(c) of the CWA, 33 U.S.C. § 1365(c), because AES, ARRC and their facilities (the sources of the pollution) are located within the District of Alaska in Seward, Alaska.

6. In addition, venue is proper in the District of Alaska under 28 U.S.C. § 1391 because AES and ARRC reside within the District of Alaska.

### III. PARTIES AND STANDING

7. Plaintiff Alaska Community Action on Toxics is an Alaska nonprofit corporation in good standing with the State of Alaska. It is a statewide, environmental health and justice organization founded in 1997 in response to requests from individuals, tribes, and other communities seeking technical assistance because of concerns related to toxic contaminants. The organization works collaboratively with communities to facilitate environmental justice by holding corporations, the military, and governments accountable for their environmental practices. It also help communities put in place effective strategies to limit their exposure to toxic substances and to protect and restore the ecosystems that sustain them and their way of life. Alaska Community Action on Toxic's mission is to assure justice by advocating for environmental and community health because everyone has the right to clean air, clean water, and toxic-free food. Alaska Community Action on Toxics has approximately 2,600 members, some of whom who live, work, and recreate in and around Resurrection Bay and otherwise use and enjoy the Bay.

8. Plaintiff Alaska Chapter of the Sierra Club is a division of the Sierra Club, a national nonprofit organization of approximately 1.3 million members and supporters dedicated

to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass a variety of environmental issues in Alaska and beyond, including an interest in protecting Alaskan communities and the environment from coal dust and other toxic pollutants. The Alaska Chapter of the Sierra Club has approximately 1,500 members. The Alaska Chapter of the Sierra Club has members who live, work, and recreate in and around Resurrection Bay.

9. The Defendants' unlawful actions adversely affect the Alaska groups' organizational interests and their members' use and enjoyment of Resurrection Bay and the lands around the Bay.

10. The Alaska groups', and both groups' members, have health, economic, recreational, scientific, environmental, aesthetic, educational, conservation, commercial and/or other interests in Resurrection Bay and the waters that flow into Resurrection Bay. These interests have been, are being, and continue to be adversely affected by Defendants' violations of the CWA. Defendants' discharge of toxics and pollutants into the natural environment used and enjoyed by the Alaska groups' members and the public directly and indirectly harms the interests of the Alaska groups' members and the public. Defendants' failure to comply with the procedural and substantive requirements of the CWA, and the resulting unlawful, unpermitted discharges of coal into Resurrection Bay and wetlands surrounding the SCLF impacts each of these uses. Thus, the interests of the Alaska groups' members have been, are being, and will continue to be adversely affected by Defendants' failure to comply with the CWA. These injuries are actual, concrete injuries suffered by the Alaska groups and their members, are fairly traceable to Defendants' violations and would be redressed by the relief sought herein. The Alaska groups have no other adequate remedy at law.

11. Defendant Aurora Energy Services, LLC is an Alaska limited liability corporation, the operator of the SCLF and is an affiliate of Usibelli Coal Mine, Inc., an Alaska corporation.

12. Defendant Alaska Railroad Corporation is a corporation that was established by Alaska Statute 42.40 after the railroad was purchased by the State from the federal government in January 1985. The ARRC is a public corporation and an instrumentality of the State within the Department of Commerce and Economic Development, but by statute it has a legal existence independent of, and separate from, the State. The ARRC also has title to substantial land holdings, and is the current owner of the SCLF lands. The ARRC acquired the SCLF in 2003 from Hyundai Merchant Marine and the Alaska Industrial Development and Export Authority. Seward Terminals, Inc., a subsidiary of Hyundai Merchant Marine, operated the SCLF through a lease and operating agreement with ARRC through the end of 2006. On January 1, 2007, facility management and control reverted to ARRC. The ARRC currently has an interim agreement with AES to operate and maintain the facility.

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

13. The Clean Water Act was intended “to restore and maintain the chemical, physical and biological integrity of the nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, § 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits any discharge of pollutants into waters of the United States, unless such discharge is in compliance with specified provisions of the CWA. In particular, § 301(a) prohibits all discharges of pollutants, including wastewater, storm water, and waste, not authorized by, or in violation of, the terms of an NPDES permit issued under § 402 of the CWA, 33 U.S.C. § 1342.

14. The “discharge of a pollutant” means, among other things, the addition of a pollutant to “waters of the United States” from any “point source,” as well as the addition of any pollutant to the waters of the “contiguous zone” or the ocean from a point source other than a vessel or floating craft. 40 C.F.R. § 122.2.

15. The term “pollutant” is defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2.

16. The CWA defines “navigable waters” as the “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The EPA has further defined “waters of the United States” to include “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide,” as well as “all interstate waters” and “all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, ‘wetlands,’ sloughs” and all tributaries and impoundments of waters of the United States, etc. 40 C.F.R. § 122.2.

17. The term “point source” means any “discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C § 1362(14); *see* 40 C.F.R. § 122.2.

18. Section 301 of the CWA, 33 U.S.C. § 1311, requires compliance with all terms and conditions included in a permit issued pursuant to the CWA § 402, 33 U.S.C. § 1342.

19. On October 31, 2008, the EPA delegated authority over the issuance of individual and general NPDES permits to the State of Alaska.

20. Although the SCLF operates under the NPDES Storm Water Multi-Sector General Permit for Industrial Activities (“MSGP”) that was issued by the EPA and became effective on September 29, 2008, the MSGP only covers storm water discharges under section 402(p) of the CWA, 33 U.S.C. § 1342(p). There currently is no NPDES permit for point source discharges of pollutants from the SCLF.

21. Sections 505(a)(1) and 505(f) of the CWA provide for citizen enforcement actions against any “person,” including individuals, corporations, or partnerships, to prosecute the unpermitted discharges of pollution under §§ 301 and 402 of the CWA. 33 U.S.C. §§ 1365(a)(1) and (f); 1362(5).

## V. FACTS

22. Resurrection Bay is located along the eastern shore of the Kenai Peninsula in Alaska. The Bay empties out into the Gulf of Alaska. Glaciers that flow from the Harding and Sargent Icefields extend down to treeline or tideline along the Bay. The Bay, surrounded by many unnamed peaks, is habitat for a variety of sea mammals, pelagic birds, and fish.

23. Seward, one of Alaska’s oldest and most scenic Alaskan communities with an approximate population of 3,000 people, is situated at the head of Resurrection Bay.

24. Seward is the seventh most lucrative fisheries port in the United States. In 2004, 49.7 million dollars worth of fish and shellfish passed through Seward, according to the National Marine Fisheries Service.

25. Beyond fisheries, tourism is a major industry in Seward. Seward is host to hundreds of thousands of visitors drawn by the Bay’s natural beauty, wildlife and wildness. Tourist and recreational opportunities include sport fishing for salmon and halibut, glacier and wildlife day cruises, sea-kayaking, sailing, hiking, mountain biking, and a Fourth of July Celebration where the town swells from approximately 3,000 residents to about 40,000 people. Seward is also the gateway to Kenai Fjords National Park

26. Seward is also the southern terminus of the Alaska Railroad.

27. The SCLF is located on land owned by the ARRC at ARRC Milepost 2.0, on the northwest shore of Resurrection Bay in Seward, Alaska.

28. The ARRC transports coal, via railcar, from the Usibelli Coal Mine near Healy, Alaska, to the SCLF. Coal is stored at the SCLF until it is loaded onto vessels for shipment to out-of-state markets. A conveyor system is used to transfer the coal from stockpiles to vessels

(also referred to as bulk carriers). The SCLF consists of the following major components: (1) the railcar dumper facility, with a pit and unloaders to discharge coal from hopper cars; (2) two conveying systems (one of which moves coal from the railcar dumper to the stockpile while a second is used to move coal from the stockpile to the dock for loading onto vessels); (3) a stacker-reclaimer (which distributes coal from the conveyor to the stockpile and, in turn, reclaims coal from the stockpile for ship loading); (4) two coal stockpiles; (5) the stationary ship loader (which includes a conveyor system for discharging coal into the holds of ocean-going bulk carriers); and (6) office/control and shop buildings.

29. When ARRC trains arrive at the SCLF, the coal is offloaded and stored in two, approximately 1,000-foot-long stockpiles with a height that can exceed 40 feet. The conveyor system then delivers loads of coal as large as 400,000 tons from the stockpiles to large transport vessels for out-of-state markets.

30. The SCLF is the only facility used to load coal from the Usibelli Coal Mine onto ships for transport to out-of-state markets. In 2009, the Usibelli Coal Mine estimated that approximately 817,000 metric tons were exported to Asia and Chile. Usibelli Coal Mine estimates that it will export 1,000,000 metric tons of coal in 2010.

31. It takes approximately four days to fully load a vessel with coal for export. In 2009 there were approximately 12 vessels that transported coal from Seward to out-of-state markets. Vessels typically carry approximately 60,000-90,000 metric tons of coal.

32. While the conveyor system between the coal stockpiles and the dock includes a cover over the top and sides of the conveyor to protect the coal and conveyor system from wind and rain, there are various openings in the covering.

33. The conveyor system includes no containment or catchment system beneath the conveyor belt.



34. While the conveyor is intended to be self-cleaning with brushes located at the end of the conveyor belt, these brushes fail to remove all coal debris from the belt after coal is transferred to the transport vessel.

35. When the conveyor system delivers coal from the stockpiles to a transport vessel, coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water falls from the conveyor system into Resurrection Bay.

36. In addition, when the prevailing wind is from the north and is of sufficient speed, wind transports coal dust from the stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and the conveyor systems into Resurrection Bay.

37. As snow accumulates at the SCLF, it becomes contaminated with coal, coal dust and/or coal slurry. The ARRC and the AES plow the coal-contaminated snow from the SCLF directly into Resurrection Bay or to nearby wetlands and ponds. When coal-contaminated snow is plowed to Resurrection Bay or nearby wetlands or ponds, and the snow melts, coal is discharged directly into Resurrection Bay, nearby wetlands and/or ponds.

38. In 2007, the DEC issued a Notice of Violation (“NOV”) to the ARRC for its failure to take reasonable precautions to prevent fugitive coal dust from leaving the SCLF. The DEC received 25 complaints and 75 pictures over a period of fourteen days from February 24, 2007, through April 3, 2007, documenting fugitive dust emissions. An inspection team from the DEC also confirmed that many boats in the Seward small boat harbor were coated with coal dust. The heaviest deposition of coal was noted on boats on the outer side of the docks, which were closest to the SCLF and directly downwind of the stacker-reclaimer and the stockpiles.

39. In September 2007, the DEC found that the ARRC’s proposed control measures were insufficient.

40. In March 2008, the DEC again issued an NOV for failing to control fugitive coal dust emissions. The DEC received public complaints of fugitive coal dust emissions on February 8, 2008, along with documentation of coal dust beyond the boundaries of the SCLF.

41. Uncontrolled fugitive coal dust emanating from the SCLF has been deposited in Resurrection Bay, and in and/or on: residential homes and properties; commercial businesses and properties; motor vehicles; city streets, sidewalks and parkland; boats in storage and in the small boar harbor; the AVTEC campus; and other areas.

42. The SCLF property consists of Parcel 1-A, located south of Port Avenue, and Parcels 2 and 3, located north of Port Avenue.

43. The SCLF operates under the NPDES Storm Water MSGP that was issued by the EPA and became effective on September 29, 2008. The MSGP only covers storm water discharges under § 402(p) of the CWA, 33 U.S.C. § 1342(p). As required by the MSGP, the SCLF operates under a Storm Water Pollution Prevention Plan, which was prepared in May 2009.

44. Dust control sprinklers are used at the SCLF to control dust on the coal stockpiles.

45. The sprinklers have been difficult to operate in cold temperatures.

46. The coal stock piles are not covered or otherwise protected from the wind or weather.

47. Defendants do not possess an NPDES permit for the discharge of coal into Resurrection Bay from any of the activities at the SCLF.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM**

#### **Discharge of Pollutants without a Permit (Violation of 33 U.S.C. §§ 1311(a) and 1342(a))**

48. The Alaska groups re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

49. Coal, coal dust, coal slurry, coal-contaminated snow, and coal-contaminated water are “pollutants” as that term is defined in the CWA § 502, 33 U.S.C. § 1362.

50. Resurrection Bay is a “navigable water” as that term is defined in the CWA Section 502, 33 U.S.C. § 1362.

51. The SCLF conveyor systems are “point sources” as that term is defined in CWA § 502, 33 U.S.C. § 1362 because they convey coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water to Resurrection Bay, a water of the U.S.

52. Defendants’ transfer and loading of coal onto vessels via the conveyor systems results in the discharge of coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water from a point source into navigable waters.

53. Defendants’ discharge of pollutants from a point source to navigable waters without a permit is prohibited under the CWA § 301, 33 U.S.C. § 1311(a).

54. Under CWA § 402, Defendants are required to obtain a permit from the DEC before discharging any pollutants from a point source into navigable waters. 33 U.S.C. § 1342.

55. These specific violations occur every day that Defendants do not have an NPDES permit for the discharges. There have been at least 1,826 such violations since October 28, 2004, and these violations are ongoing.

56. These violations will continue to occur each day until a permit is obtained for these discharges.

57. By failing to obtain the necessary permit under § 402 before it commenced the discharges of coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water from the SCLF conveyor systems into Resurrection Bay, Defendants violated and continue to violate §§ 301 and 402 of the CWA. 33 U.S.C. §§ 1311, 1342.

## **SECOND CLAIM**

### **Discharge of Pollutants without a Permit (Violation of 33 U.S.C. §§ 1311(a) and 1342(a))**

58. The Alaska groups re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

59. Coal, coal dust, coal slurry, coal-contaminated snow, and coal-contaminated water are “pollutants” as that term is defined in the CWA § 502, 33 U.S.C. § 1362.

60. Resurrection Bay is a “navigable water” as that term is defined in the CWA § 502, 33 U.S.C. § 1362.

61. When the prevailing wind is from the north and is of sufficient speed, wind transports coal dust from the stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and the conveyor systems into Resurrection Bay.

62. The SCLF stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and the conveyor systems are “point sources” as that term is defined in CWA Section 502, 33 U.S.C. § 1362 because they convey coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water to Resurrection Bay.

63. These conveyances via wind are unpermitted discharges of pollutants into waters of the U.S. in violation of the CWA, and a violation occurs each day that Defendants do not have an NPDES permit for the discharges.

64. These specific violations occur every day that Defendants do not have an NPDES permit for the discharges. There have been at least 1,826 such violations since October 28, 2004, and these violations are ongoing.

65. These violations will continue to occur each day until a permit is obtained for these discharges.

66. By failing to obtain the necessary permit under § 402 before it commenced the discharges of coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water from the stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and the conveyor systems into Resurrection Bay, the ARRC and the AES violated and continue to violate §§ 301 and 402 of the CWA. 33 U.S.C. §§ 1311, 1342.

### **THIRD CLAIM**

#### **Discharge of Pollutants without a Permit (Violation of 33 U.S.C. §§ 1311(a) and 1342(a))**

67. The Alaska groups re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

68. Coal, coal dust, coal slurry, coal-contaminated snow, coal-contaminated water are “pollutants” as that term is defined in the CWA § 502, 33 U.S.C. § 1362.

69. Wetlands and ponds within and adjacent to the SCLF and Resurrection Bay are “navigable waters” as that term is defined in the CWA § 502, 33 U.S.C. § 1362.

70. When snow accumulates at the SCLF, coal and coal dust contaminates the snow. When the Defendants plow the coal-contaminated snow directly into Resurrection Bay or adjacent wetlands or ponds, the snow melts and coal is deposited directly into Resurrection Bay, adjacent wetlands and/or ponds.

71. The SCLF snow plows are “point sources” as that term is defined in the CWA § 502, 33 U.S.C. § 1362 because they convey coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water to Resurrection Bay or adjacent wetlands or ponds.

72. In the winter, AES routinely plows snow directly off the loading dock into Resurrection Bay. This snow is contaminated with coal dust.

73. These conveyances of coal-contaminated snow to wetlands, ponds and/or Resurrection Bay are unpermitted discharges of pollutants into waters of the U.S. in violation of the CWA, and a violation occurs each day that the ARRC and the AES do not have an NPDES permit for the discharges.

74. These specific violations occur every day that the ARRC and the AES do not have a NPDES permit for the discharges. There have been at least 1,826 such violations since October 28, 2004, and these violations are ongoing and will continue to occur each day until a permit is obtained for these discharges.

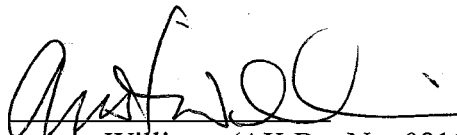
75. By failing to obtain the necessary permit under the CWA § 402 before it commenced the discharges of coal-contaminated snow into wetlands, ponds and/or Resurrection Bay, the ARRC and the AES violated and continue to violate §§ 301 and 402 of the CWA. 33 U.S.C. §§ 1311, 1342.

## PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request that this Court grant the following relief:

1. A declaration that the Defendants have violated and are in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), every day since October 28, 2004, for unpermitted discharges of pollutants from the SCLF into waters of the United States.
2. A temporary and permanent injunction prohibiting the Defendants from discharging pollutants from the SCLF to waters of the United States without an NPDES permit.
3. A temporary and permanent injunction ordering the Defendants to restore the receiving waters damaged by its illegal discharges of pollutants from its facility.
4. An order requiring Defendants to pay civil penalties, including \$32,500 per day per violation for violations occurring between October 28, 2004, and January 12, 2009, and \$37,500 per day per violation for violations occurring on and after January 13, 2009, pursuant to §§ 309(d) and 505(a) of the CWA, 33 U.S.C. §§ 1319(d) and 1365(a), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4.
5. Retain jurisdiction over this matter until such time as the Defendants have come into compliance with the prohibitions, terms, and conditions of the CWA and its permits.
6. Award the Alaska groups' costs (including reasonable attorney, expert witness and consultant fees) as authorized by the CWA, 33 U.S.C. § 1365(d).
7. Such other and further relief as this Court deems just and proper.

Respectfully submitted, this 28th day of December, 2009.



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