

TRUSTEES FOR ALASKA

A Nonprofit Public Interest Law Firm Providing Counsel to Protect and Sustain Alaska's Environment

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October 28, 2009

Via CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Paul Farnsworth
Seward Facilities Program Manager
913 Port Avenue
Seward, AK 99664

Robert Brown
Aurora Energy Services, LLC
903 Port Avenue
Seward, AK 99664

Re: Notice of Violations and Intent to File Suit under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.

Dear Messrs. Farnsworth and Brown:

On behalf of Alaska Center for the Environment (ACE), Alaska Community Action on Toxics (ACAT), and the Alaska Chapter of the Sierra Club (hereinafter collectively referred to as ACE), Trustees for Alaska provides you with Notice of Violations and Intent to File Suit under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.*, also known as the Clean Water Act (CWA). This notice is provided pursuant to Section 505(b) of the CWA, 33 U.S.C. § 1365(b), which requires that 60 days prior to the initiation of a civil action under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), a citizen must give notice of intent to sue and a description of the alleged violations. This notice is provided to the Alaska Railroad Corp. (ARR) and Aurora Energy Services, LLC (AES), an affiliate of the Usibelli Coal Mine, as owner and operator, respectively, of the Seward Coal Loading Facility (SCLF), located at ARR Milepost 2.0 on the northwest shore of Resurrection Bay in Seward, Alaska.¹

Based on information available to ACE, it is clear that ARR and AES are not complying with Sections 301(a) and 402(a) of the CWA, 33 U.S.C. §§ 1311(a), 1342(a), which prohibits the unpermitted discharge of pollutants from the SCLF and its infrastructure into Resurrection Bay,

¹ ARR acquired the SCLF in 2003 from Hyundai Merchant Marine (HMM) and the Alaska Industrial Development and Export Authority. Seward Terminals, Inc., a subsidiary of HMM, remained the operator through a lease and operating agreement with ARR through the end of 2006. On January 1, 2007, facility management and control reverted to ARR. ARR has an interim agreement with AES, a subsidiary of Usibelli Coal Mine, to operate and maintain the facility. See "Seward Coal Loading Facility" available at <http://www.akrr.com/pdf/2009%20Seward%20Coal%20Loading%20Facility.pdf> (last visited Oct. 20, 2009).

which is a water of the United States. Additionally, based on information available to ACE, it is clear that ARR and AES are not complying with their storm water permit.

I. BACKGROUND

The SCLF is located on ARR land at ARR Milepost 2.0 on the northwest shore of Resurrection Bay in Seward, Alaska. The ARR transports coal via railcar from the Usibelli Coal Mine near Healy, Alaska to the SCLF. The SCLF consists of the following major components: (1) the railcar dumper facility; (2) conveying systems (which move coal from the railcar dumper to the stockpile and 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) the coal stockpiles; and (5) the stationary ship loader (which includes a conveyor system for discharging coal into the holds of oceangoing bulk carriers). See "Seward Coal Loading Facility" available at <http://www.akrr.com/pdf/2009%20Seward%20Coal%20Loading%20Facility.pdf> (last visited Oct. 20, 2009). When the trains arrive at the SCLF, the coal is offloaded and stored in two, approximately 1000-foot-long stockpiles. The conveyor system then delivers loads of coal as large as 400,000 tons from the stockpiles to large transport vessels for export to markets in Asia or South America. See <http://www.alaskarails.org/industries/UCM2/ops.html> (last visited Sept. 30, 2009). The Usibelli Coal Mine currently produces approximately 1.5 million tons of coal per year, with the capacity to double production through minimal capital expenditure. See http://www.usibelli.com/Coal_data.asp (last visited Sept. 30, 2009). The SCLF is the sole facility used to load coal from the Usibelli Coal Mine onto ships for transport to out-of-state markets. Transport vessels are expected to arrive every two weeks through the end of 2009 and at currently unknown dates in 2010 and beyond. It takes approximately four days to load a vessel with coal.



Figure 1: The two coal stockpiles (left portion of this photo) and conveyor system extending into Resurrection Bay (right portion of this photo).

While the conveyor system between the coal stockpiles and the dock includes a cover over the top and sides to protect the coal and conveyor system from rain and wind, there are several openings in the covering and no containment system beneath the conveyor belt. Additionally, 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.



Figure 2: Conveyor system extending over Resurrection Bay.



Figure 3: Conveyor system and transport vessel in Resurrection Bay.

The ARR owns the SCLF, but has an interim agreement with AES to maintain and operate the SCLF until negotiations for a long-term contract can be agreed upon. Although the SCLF operates under the National Pollutant Discharge Elimination System (NPDES) Storm

Water Multi-Sector General Permit for Industrial Activities (MSGP) that was issued by the U.S. Environmental Protection Agency (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.

For several years, ACE has documented four major problems with the SCLF. First, when the conveyor system delivers coal to the vessels, coal falls from the conveyor system directly into Resurrection Bay along the length of the conveyor system to the loading facility as well as from the belt after it loops back underneath itself. *See* Exhibits 1-23 (providing evidence of coal that has fallen from the conveyor belt into either the intertidal zone or directly into Resurrection Bay). Second, wind blows coal dust from the stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and the conveyor systems into Resurrection Bay. *See* Exhibits 24-37 (providing evidence of coal dust accumulation in Resurrection Bay originating from the SCLF). Third, AES plows snow that is contaminated with coal dust directly into Resurrection Bay. *See* Exhibit 35 (providing an example of coal laden snow deposits that are eventually plowed directly into the Bay or are left to melt over wetlands²). Fourth, storm water is being discharged into Resurrection Bay in a manner inconsistent with what is authorized by the MSGP and without complying with “best management practices” detailed in the Storm Water Pollution Prevention Plan (SWPPP).

II. VIOLATIONS OF THE CLEAN WATER ACT

Information currently available to ACE demonstrates that ARR and AES have violated and continue to violate Sections 301(a) and 402(a) of the CWA, 33 U.S.C. §§ 1311(a), 1342(a), which prohibit the unpermitted discharge of pollutants from the SCLF into Resurrection Bay. ACE hereby places ARR and AES on notice that after the expiration of 60 days from the date of this Notice of Violations and Intent to File Suit, we intend to file suit in Federal Court against ARR and AES for violations of the CWA.

Section 301(a) of the CWA provides that “the discharge of any pollutant . . . shall be unlawful” unless authorized by the CWA. 33 U.S.C. § 1311(a). Section 402 of the CWA provides that, notwithstanding Section 301, a facility may discharge pollutants pursuant to a permit issued under the NPDES. 33 U.S.C. § 1342(a). A facility that discharges pollutants without an NPDES permit is in violation of the CWA, specifically Sections 301 and 402, 33 U.S.C. §§ 1311, 1342.

ARR and AES have violated and continue to violate the CWA by allowing three forms of unpermitted direct discharges. These direct discharges then contribute to an additional violation of the MSGP and the SWPPP. Additionally, ARR and AES are violating the SWPPP by allowing storm water associated with industrial activity to discharge directly into Resurrection Bay from the facility parking lot and coal stockpile areas. Each violation is addressed in turn.

² Based on information available to ACE, ARR/AES deposits snow just north of the stockpiles, on the east side of roundhouse pond.

First, when the conveyor system delivers coal from the stockpiles to a transport vessel, coal falls from the conveyor system into Resurrection Bay. *See* Exhibits 1-23. Based on information currently available to ACE, these are unpermitted discharges of a pollutant into waters of the U.S. in violation of the CWA. These specific violations occur every day that ARR and AES do not have an NPDES permit³ for the discharges. There have been at least 1,826 such violations since October 28, 2004⁴, and these violations are ongoing. Specifically, discharges have occurred but are not limited to the following dates when coal has been loaded onto docked vessels or coal has fallen from the conveyor infrastructure into Resurrection Bay: October 18-23, 2009, October 9-12, 2009, August 8, 2009, and April 1-2, 2007. These violations will continue to occur each day until a permit is obtained for these discharges.

Second, wind blows coal dust from the stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and the conveyor systems into Resurrection Bay. *See* Exhibits 23-37. According to a July 9, 2007, report conducted by AMEC, Inc. for the Alaska Railroad Corp.,

[t]he coal dumping, material handling and ship loading operations generate coal dust emissions. When the prevailing wind is from the north, the fine coal dust particles migrate south and deposit on cars, homes, boats, etc. in the nearby harbor area.

See Ventilation Evaluation and Recommendations – Alaska Railroad Seward Coal Loading Facility, AMEC, Inc. July 9, 2007, at p.3 (hereinafter “AMEC Report”). When the wind speed is sufficiently strong, it transports coal from the SCLF into Resurrection Bay. Specifically, discharges due to wind occurred on the following dates: January 18, 2005, February 8, 2007, March 6, 2007, March 20, 2007, April 2, 2007, the last week of January 2009, and Oct. 20, 2009.⁵ *See* Exhibits 23-37.⁶ 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 a

³ Although the MSGP contemplates storm water discharges from the conveyor into Resurrection Bay, there is no permit for direct discharges of pollutants. This letter provides notice and intent to sue over those direct discharges of pollutants.

⁴ October 28, 2004, is the date referred to for calculating violations because Section 2462 of Title 28 of the United States Code provides for a 5-year statute of limitations “for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.” 28 U.S.C. § 2462.

⁵ The AMEC report also notes that “[t]he dust problem is worse during a two month period usually from the start of February through March. During this time period the coal transported from the mine is frozen and the air temperature is below freezing. The combination of the frozen coal, which is dustier, and the freezing temperatures in Seward, when the water sprays can no longer be used, exacerbates the dust control problem.” AMEC Report at p.2. The report also notes that the railcar dumping facility has been identified as a source of dust emissions and that this operation currently has no method for controlling dust emissions. *Id.*

⁶ When wind is generated from the north (towards Resurrection Bay) at speeds of 11mph or greater, studies indicate that wind is capable of transporting coal dust from the stockpiles to Resurrection Bay. Discharges occur whenever the wind is strong enough to transport coal from the stockpiles to Resurrection Bay. Wind speeds often exceed 11 mph and are in the direction of Resurrection Bay. While coal may be transported at wind speeds below 11 mph and unlawfully discharged into Resurrection Bay, it is evident from meteorological data that Seward experiences many high wind days with wind direction aligned with Resurrection Bay, making it possible for coal transport from the SCLF to Resurrection Bay.

permit is not obtained for these discharges. There have been at least 1,826 violations since October 28, 2004, and violations are ongoing.

Third, as snow accumulates at the SCLF, AES plows the snow directly into Resurrection Bay or over wetlands (where the snow eventually melts and deposits coal directly into wetlands). This snow is contaminated with coal dust. *See* Exhibit 38. As the snow melts, coal is directly deposited into wetlands and ponds. This too is an unpermitted discharge of pollutants into waters of the U.S. in violation of the CWA, and a violation occurs each day that a permit is not obtained for these discharges. This is also an unpermitted discharge of storm water into waters of the U.S. in violation of the CWA, and a violation occurs each day that a permit is not obtained for these discharges.

Furthermore, due to these unpermitted discharges, the ARR and AES are violating the MSGP and their SWPPP because ARR and AES have not eliminated all unpermitted non-storm water discharges from the SCLF. Section 2.1.2.10 of the MSGP requires that ARR and AES “must eliminate non-storm water discharges not authorized by an NPDES permit.” Section 3.1 of the MSGP requires that “an unauthorized . . . discharge (e.g., spill, leak or discharge of non-storm water not authorized by this or another permit)” be “eliminated” and “not repeated in the future.” In addition, Sections 3.4, 5.1.2 and 5.1.3.4 of the MSGP require that non-storm water discharges must be reported, identified, and that the elimination of unauthorized discharges must be documented. Section 2.3 of the SWPPP purports to identify all the non-storm water discharges that are allowed at the SCLF, but fails to mention any non-storm water discharges from coal falling from the conveyor, wind-borne discharges from the SCLF, or discharges of coal-contaminated snow into Resurrection Bay. Based on information currently available to ACE, because of the above unpermitted non-storm water discharges of coal into Resurrection Bay, ARR and AES are in violation of the MSGP and the CWA.

Additionally, ARR and AES are in violation of the SWPPP by allowing storm water associated with industrial activity to discharge directly into Resurrection Bay from the facility parking lot and coal stockpile areas. This storm water, instead of draining pursuant to Drainage Area A and G in the SWPPP into municipal storm water drains, is routinely flowing directly into the Bay. *See* SWPPP at p. 6. These violations are ongoing.

The ARR and AES are in violation of the CWA, and specifically are in violation of Sections 301 and 402(a) of the CWA, 33 U.S.C. §§ 1311, 1342(a). These violations are continuous and ongoing. The ARR and AES will continue to be in violation of the CWA every day that they do not obtain an NPDES permit for the discharges or are in violation of the MSGP and/or SWPPP.

In addition to the violations set forth above, this Notice covers all violations of the CWA by ARR and AES evidenced by information that becomes available to ACE after the date of this Notice of Violations and Intent to File Suit.

III. PENALTIES FOR VIOLATIONS

Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19, each of the violations of the CWA

described above subjects the violator to a penalty of up to \$37,500 per day per violation for violations occurring after January 12, 2009, and \$32,500 per day per violation for violations occurring between October 28, 2004, and January 12, 2009. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. In addition to civil penalties, ACE will seek injunctive relief preventing further violations of the CWA pursuant to Sections 505(a) & (d), 33 U.S.C. § 1365(a) & (d), and such other relief as is permitted by law. Lastly, Section 505(d) of the CWA, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and attorneys' and expert witness fees.

IV. PERSON(S) RESPONSIBLE FOR THE VIOLATIONS

Based on information available to ACE, ARR and AES are responsible for the violations of the CWA at the SCLF in Seward, Alaska.

V. LOCATION OF THE VIOLATIONS

The SCLF at ARR Milepost 2.0 on the northwest shore of Resurrection Bay in Seward, Alaska.

VI. IDENTITIES OF NOTICING PARTIES

The Alaska Center for the Environment is an Alaska nonprofit corporation whose mission is to enhance Alaskans' quality of life by protecting wild places, fostering sustainable communities, and promoting recreational opportunities.

The Alaska Community Action on Toxics is an Alaska nonprofit corporation dedicated to the protection of human health and the environment from toxic contamination.

The Sierra Club is 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 names, addresses and telephone numbers of the noticing parties are as follows:

Alaska Center for the Environment	807 G Street, Suite 100 Anchorage, AK 99501 (907) 274-3621
Alaska Community Action on Toxics	505 W. Northern Lights, Ste. 205 Anchorage, AK 99503 (907) 222-7714

Alaska Chapter of the Sierra Club

333 W. 4th Ave, Suite 307
Anchorage, AK 99501
(907) 276-4048

VII. LEGAL COUNSEL FOR NOTICING PARTIES

ACE has retained legal counsel to represent them in this matter. All communications regarding this Notice should be addressed to:

Brian Litmans
Staff Attorney
Trustees for Alaska
1026 W. 4th Ave., Suite 201
Anchorage, AK 99501

VIII. CONCLUSION

ACE believes that this Notice of Violations and Intent to File Suit sufficiently states grounds for filing a lawsuit. We intend, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), against ARR and AES for the described CWA violations at the SCLF.

During the 60-day notice period, we are willing to discuss effective remedies for the violations noted in this letter, and settlement terms. However, please note that we do not intend to delay the filing of a complaint in Federal Court if violations are ongoing and discussions are continuing when that period ends.

Sincerely,



Brian Litmans

cc:

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