

II. JURISDICTION AND VENUE

2. This is a civil suit brought under the citizen suit provisions of the Clean Water Act. This Court has subject matter jurisdiction over the parties and subject matter of this action pursuant to Section 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 April 18, 2006, Plaintiffs gave written notice of the City's violations of the CWA and of Plaintiffs' intent to file suit with regard to those violations to the Mayor and City Manager of the City of Seward, 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.

4. More than 60 days have passed since notice was served on the City and the state and federal agencies. Plaintiffs are informed and believe, and thereon allege, that the EPA has not commenced, nor is it diligently prosecuting, a civil or criminal action under the CWA against the City. 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 Section 505(c) of the CWA, 33 U.S.C. § 1365(c), because the City and its 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 the City resides within the District of Alaska.

III. PLAINTIFFS

7. Resurrection Bay Conservation Alliance is an Alaska nonprofit corporation in good standing with the State of Alaska, whose mission is to enjoy and advocate for healthy oceans, land, and air on behalf of its members. RBCA has members who live, work, and recreate in and around Resurrection Bay. RBCA implements its mission by attending local government

meetings to monitor threats to healthy oceans, land, and air, and participating in political and administrative processes to assure protection of oceans, land, and air.

8. Alaska Community Action on Toxics is an Alaska nonprofit corporation in good standing with the State of Alaska, and is dedicated to the protection of human health and the environment from toxic contamination. ACAT has members who live, work, and recreate in and around Resurrection Bay.

9. The City's unlawful actions adversely affect RBCA's and ACAT's organizational interests and their members' use and enjoyment of Spring Creek, Fourth of July Creek, and Resurrection Bay and the lands around those waterbodies.

10. The interests of RBCA, ACAT, and their members have been, are being, and continue to be adversely affected by these violations of the CWA. The City's discharge of toxics and pollutants into the natural environment used and enjoyed by these members and the public, directly and detrimentally affects the health, economic, recreational, scientific, aesthetic, educational, conservation, and commercial interests of these members and the public. The City's failure to comply with the procedural and substantive requirements of the CWA, and the resulting discharges of contaminated storm water and other pollutants into surrounding waterbodies and wetlands impacts each of these uses. Thus, the interests of RBCA's and ACAT's members have been, are being, and will continue to be adversely affected by the City's failure to comply with the CWA. These injuries are actual, concrete injuries suffered by RBCA, ACAT, and their members and would be redressed by the relief sought herein. RBCA and ACAT have no other adequate remedy at law.

IV. DEFENDANT

11. The City of Seward is a political subdivision of the State of Alaska.

V. STATUTORY BACKGROUND

12. 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, Section 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, Section 301(a) prohibits all discharges of pollutants, including wastewater, storm water, and waste, not authorized by, or in violation of, the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

13. 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.

14. “Waters of the United States” are defined as all interstate waters as well as all intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, tributaries and impoundments of waters of the United States, etc. 40 C.F.R. § 122.2.

15. 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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. 33 U.S.C § 1362(7); 40 C.F.R. § 122.2.

16. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), establishes a framework for regulating municipal and industrial storm water discharges under the NPDES permitting program. Federal implementing regulations require that storm water associated with industrial activity, which is discharged either directly or indirectly to waters of the United States, be regulated through an NPDES permit. 40 C.F.R § 122.26.

17. In Alaska, responsibility for issuance of individual and general NPDES permits has not been delegated to the State, but remains with EPA, Region 10.

18. In 2000, EPA reissued the NPDES Storm Water Multi-Sector General Permit for Industrial Activities (“MSGP”), which requires facilities to implement Best Available Technology Economically Achievable (“BAT”), Best Conventional Pollutant Control Technology (“BCT”), and Best Management Practices (“BMPs”) to reduce and eliminate industrial storm water pollution. In addition, the MSGP requires existing facilities subject to its

terms to (1) file a Notice of Intent (“NOI”) to be covered by the MSGP (MSGP §§ 1.2 and 1.3); (2) develop and implement an adequate Storm Water Pollution Prevention Plan (“SWPPP”) (MSGP §§ 4, 6.Q.4, 6.R.4); and (3) develop and implement a monitoring, reporting and sampling program for storm water discharges (MSGP §§ 5.1, 6.Q.5, 6.R.4.5).

19. The MSGP is a general NPDES permit that authorizes various industrial sectors (organized by Standard Industrial Classification (“SIC”) codes) to discharge stormwater once a discharger submits an NOI to be covered by the permit. Sector Q covers water transportation facilities in SIC Code major groups 44 that have vehicle/vessel maintenance shops and/or equipment cleaning operations, including facilities engaged in foreign or domestic transport of freight or passengers in deep sea or inland waters, marine cargo handling operations, ferry operations, towing and tugboat services, and marinas. Sector R covers SIC codes 3731 and 3732, which are ship and boat building or repairing yards.

20. 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 Sections 301 and 402 of the CWA and to prosecute violations of NPDES storm water permit requirements. 33 U.S.C. §§ 1365(a)(1) and (f); 1362(5).

VI. STATEMENT OF FACTS

21. The City of Seward owns and operates the Seward Small Boat Harbor on the northwest shore of Resurrection Bay.

22. The Seward Small Boat Harbor falls into Sector Q of the MSGP.

23. The City of Seward also owns and operates the Seward Marine Industrial Center (“SMIC”) on the northeast shore of Resurrection Bay at Mile 7 Nash Road. Part of the SMIC site is an upland ship and boat repair area where private boat owners are permitted to repair their vessels. On the west side, that site is adjacent to a ditch that flows northward to Spring Creek, which flows into Resurrection Bay. The east side of that site is also adjacent to an upland area next to Fourth of July Creek, which flows into Resurrection Bay.

24. The SMIC ship and boat repair yard falls into Sector R of the MSGP.

25. Even though the MSGP has been in effect in some form since the 1990s and the City operates industrial sites that are covered by the permit, the City has never submitted an NOI to be covered by the MSGP.

26. The City has also never submitted an application to EPA to be covered by an individual NPDES permit for its discharges from the Seward Small Boat Harbor or the boat repair yard at the SMIC.

27. Resurrection Bay, Spring Creek, and Fourth of July Creek are waters of the United States, as defined by the CWA.

28. The public uses Spring Creek and Fourth of July Creek for fishing and recreation activities. Resurrection Bay is also used for recreation and navigation. Seward is a port where cruise ships anchor, and the Seward Small Boat Harbor is used by charter boat and tour boat operators for fishing and wildlife viewing in the Bay and Kenai Fjords National Park. The public also walks along the shoreline of Resurrection Bay, and uses the Bay for kayaking, boating, and watching wildlife, including many bird and marine mammal species.

29. During every rain event, storm water containing metals, including tributyltin and cupric oxide; oil and grease; and other pollutants harmful to fish, plants, birds, and human health are discharged without a permit from the City's facilities directly and indirectly to waters of the United States in violation of the CWA.

FIRST CLAIM
Discharge of Pollutants without a Permit
(Violation of 33 U.S.C. Sections 1311(a) and 1342(a))

30. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

31. The Seward Small Boat Harbor is an industrial site for purposes of Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1324(p)(2)(B).

32. The City discharges pollutants from the Seward Small Boat Harbor into Resurrection Bay.

33. Resurrection Bay is a water of the United States.

34. The City does not possess an NPDES permit for these discharges of pollutants.

35. The City has been in violation of the CWA for these unpermitted discharges every day since April 18, 2001, to the present, or on 1,983 occasions. Every day from April 18, 2001, until the City obtains an NPDES permit and complies with the CWA constitutes a separate and distinct violation of CWA Sections 301(a) and 402(a), 33 U.S.C. §§ 1311(a) and 1342(a).

36. The City's violations of the CWA NPDES permit requirements are ongoing. In light of the history of violations and the nature of the violations, the City will violate these requirements in the future unless and until the City is enjoined from doing so by the Court.

37. By committing the acts alleged above, the City is subject to an assessment of civil penalties pursuant to Sections 309(d) and 505(a) of the CWA, 33 U.S.C. §§ 1319(d) and 1365(a). In addition, the award of litigation costs and attorneys' fees are sought pursuant to Section 505(d) of the CWA, 33 U.S.C. § 1365(d).

38. Plaintiffs seek injunctive relief pursuant to Section 505(a) of the CWA, 33 U.S.C. § 1365(a). Continuing commission of the acts alleged above will irreparably harm Plaintiffs and the citizens of Alaska, for which harm there is no plain, speedy or adequate remedy at law.

SECOND CLAIM

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

39. Plaintiffs reallege, as if set forth fully herein, each and every allegation contained in the preceding paragraphs.

40. The boat and ship repair yard at the SMIC is an industrial site for purposes of Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1324(p)(2)(B).

41. The City discharges pollutants from the boat and ship repair yard at the SMIC into a ditch on the west side of the property that flows northward to Spring Creek, which flows into Resurrection Bay.

42. Spring Creek and Resurrection Bay are waters of the United States.

43. The City also discharges pollutants from the boat and ship repair yard at the SMIC to an upland area on the east side of the site that is adjacent to Fourth of July Creek, which flows into Resurrection Bay.

44. Fourth of July Creek and Resurrection Bay are waters of the United States.

45. The City does not possess an NPDES permit for these discharges of pollutants.

46. The City has been in violation of the CWA for these unpermitted discharges every day since April 18, 2001, to the present, or on 1,983 occasions. Every day from April 18, 2001, until the City obtains an NPDES permit and complies with the CWA constitutes a separate and distinct violation of CWA Sections 301(a) and 402(a), 33 U.S.C. §§ 1311(a) and 1342(a).

47. The City's violations of the CWA NPDES permit requirements are ongoing. In light of the history of violations and the nature of the violations, the City will violate these requirements in the future unless and until the City is enjoined from doing so by the Court.

48. By committing the acts alleged above, the City is subject to an assessment of civil penalties pursuant to Sections 309(d) and 505(a) of the CWA, 33 U.S.C. §§ 1319(d) and 1365(a). In addition, the award of litigation costs and attorneys' fees are sought pursuant to Section 505(d) of the CWA, 33 U.S.C. § 1365(d).

49. Plaintiffs seek injunctive relief pursuant to Section 505(a) of the CWA, 33 U.S.C. § 1365(a). Continuing commission of the acts alleged above will irreparably harm Plaintiffs and the citizens of Alaska, for which harm there is no plain, speedy or adequate remedy at law.

PRAYER FOR RELIEF

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

1. A declaration that the City has violated and is in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), every day since April 18, 2001 for unpermitted discharges of pollutants from the Seward Small Boat Harbor.

2. A declaration that the City has violated and is in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), every day since April 18, 2001 for unpermitted discharges of pollutants from the boat and ship repair yard at the SMIC.

3. A temporary and permanent injunction prohibiting the City from discharging pollutants from its facilities to waters of the United States without an NPDES permit.

4. A temporary and permanent injunction ordering the City to restore the receiving waters damaged by its illegal discharges of pollutants from its facility.

5. An order requiring the City to pay civil penalties, including \$27,500 per day per violation for violations occurring between April 18, 2001, and March 14, 2004, and \$32,500 per day per violation for violations occurring March 15, 2004, and later, pursuant to Sections 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. Part 19 (1997).

6. Retain jurisdiction over this matter until such time as the City has come into compliance with the prohibitions, terms, and conditions of the CWA and its permits.

7. Award Plaintiffs' costs (including reasonable attorneys', expert witness and consultant fees) as authorized by the CWA, 33 U.S.C. § 1365(d).

8. Such other and further relief as this Court deems just and proper.

Dated: September 22, 2006

Respectfully submitted,

TRUSTEES FOR ALASKA



Attorneys for Plaintiffs
RESURRECTION BAY CONSERVATION
ALLIANCE and ALASKA COMMUNITY
ACTION ON TOXICS

Exhibit A