

VIRGINIA:

**RECEIVED**

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

JUL 9 2008

STeadFAST INSURANCE COMPANY )  
1400 American Lane )  
Schaumburg, IL 60196, )

Plaintiff, )

v. )

THE AES CORPORATION )  
4300 Wilson Boulevard )  
Arlington, VA 22203 )

Serve: )  
CORPORATION SERVICE COMPANY )  
11 S 12th St. )  
Richmond, VA 23218 )  
Registered Agent )

Defendant. )

PAUL FERGUSON, CLERK  
Arlington County Circuit Court  
by Deputy Clerk

CASE NO. 2008 -

858

**COMPLAINT FOR DECLARATORY RELIEF**

COMES NOW the Plaintiff, Steadfast Insurance Company ("Steadfast"), through counsel, and as and for Plaintiff's Complaint for Declaratory Relief against Defendant, The AES Corporation ("AES"), hereby states as follows:

**Nature of the Action**

1. Steadfast is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Schaumburg, Illinois.
2. AES is a corporation organized under the laws of the State of Delaware, with its principal place of business located in Arlington, Virginia.
3. Pursuant to the Virginia Declaratory Judgment Act (VA. CODE ANN. § 8.01-184, *et seq.*), Steadfast seeks an adjudication of its rights and obligations under a series of commercial

general liability insurance policies issued by Steadfast to AES. The policies in issue are identified more fully herein and are attached as Exhibits “A-E” hereto (hereinafter “the Policies”).

4. This insurance coverage dispute arises out of allegations asserted against AES and a number of other defendants involved in the energy industry in an underlying lawsuit captioned *Native Village of Kivalina v. ExxonMobil Corp., et al.*, CV 08-1138 SBA (N.D. Cal.) (hereinafter “*Kivalina* Lawsuit”), filed in the United States District Court for the Northern District of California, in which the plaintiffs seek to recover damages caused by the environmental phenomenon commonly referred to as “global warming.” A true and correct copy of the *Kivalina* Lawsuit Complaint (hereinafter “*Kivalina* Complaint”) is annexed hereto as Exhibit “F.”

5. For the reasons set forth below, Steadfast seeks a declaration that it is not obligated to provide either defense or indemnity coverage to AES under the Policies for the claims asserted against AES in the *Kivalina* Lawsuit.

#### **The Underlying *Kivalina* Lawsuit**

6. The plaintiffs in the *Kivalina* Lawsuit, the Native Village of Kivalina and the City of Kivalina (collectively the “*Kivalina* Plaintiffs”), are governing bodies of an Inupiat village located on the Northwest coast of Alaska, approximately seventy miles north of the Arctic Circle. *Kivalina* Complaint at ¶¶ 1 and 12-15.

7. The *Kivalina* Plaintiffs contend that global warming is destroying the land upon which Kivalina is located because of massive erosion caused by the reduction and melting of Arctic sea ice that formerly acted as a protective barrier to coastal winter storms, storm waves and surges. *Kivalina* Complaint at ¶¶ 4 and 16.<sup>1</sup>

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<sup>1</sup> According to the *Kivalina* Plaintiffs, due to rising temperatures caused by global warming, Arctic sea ice adjacent to Kivalina forms later in the year, attaches to the coast later, breaks up earlier and is less extensive and thinner than usual, leaving Kivalina’s coast more vulnerable to waves, storm surges and erosion. *Kivalina* Complaint at ¶¶ 16, 185 and 187.

8. In support of their claims, the *Kivalina* Plaintiffs rely upon conclusions reached by the United States Government Accountability Office in a December 2003 report (hereinafter the “GAO Report”) and by the United States Army Corps of Engineers in an April 2006 report (hereinafter the “Army Corps of Engineers Report”), including the conclusion that global warming has resulted in a significant erosion to the Kivalina coast over a period of many years. *Kivalina* Complaint at ¶¶ 185 and 187. Pertinent portions of those reports are annexed hereto as Exhibits “G” and “H.”

9. The *Kivalina* Plaintiffs allege that greenhouse gases, such as carbon dioxide, trap atmospheric heat, and, therefore, cause global warming, which in turn has been destroying the village of Kivalina, necessitating the urgent abandonment and relocation of the village at an estimated cost of between \$95 million and \$400 million. *Kivalina* Complaint at ¶¶ 1, 4, 13, 17, 250 and 264.

10. The *Kivalina* Plaintiffs allege that AES and the other defendants named in the underlying *Kivalina* Complaint collectively contributed to global warming by emitting large quantities of greenhouse gases, such as carbon dioxide, into Earth’s atmosphere, and that AES and the other defendants are responsible for a substantial portion of the greenhouse gases that have caused global warming, and, therefore, caused “special injuries” as alleged by the *Kivalina* Plaintiffs. *Kivalina* Complaint at ¶¶ 2, 3, 251, 260 and 266.

11. The *Kivalina* Plaintiffs allege that AES is a holding company that maintains large ownership interests in domestic electric utility subsidiaries and fossil fuel-fired electric generating facilities located in nine states and Puerto Rico, and “manages, directs, conducts and/or controls operations relating to emissions of carbon dioxide from fossil fuel-fired electric generating facilities owned and/or operated by AES’s subsidiaries.” *Kivalina* Complaint at ¶¶ 57 and 59.

12. According to the *Kivalina* Plaintiffs, AES, through its subsidiaries, is responsible for a substantial amount of past and present carbon dioxide emissions placed into Earth’s atmosphere. *Kivalina* Complaint at ¶ 61. Specifically, the *Kivalina* Plaintiffs allege that AES

emits millions of tons of carbon dioxide each year into the atmosphere from the combustion of fossil fuels and has “been doing so for many years.” *Kivalina* Complaint at ¶¶ 60, 61, 170 and 253.

13. The *Kivalina* Plaintiffs further allege that AES has long known about its emissions of carbon dioxide, as evidenced by AES’s 2002 Annual Report, which states that as “one of the largest emitters of CO<sub>2</sub> in the world, AES must continue to strive to economically stabilize greenhouse gas concentrations.” *Kivalina* Complaint at ¶ 60.

14. The *Kivalina* Complaint asserts causes of action against AES for public nuisance under federal common law, for private and public nuisance under state law, and based upon the alleged concert of action undertaken with the other *Kivalina* defendants, and seeks monetary damages against AES based on its past and ongoing contributions to global warming. *Kivalina* Complaint at ¶¶ 6, 249-261, 262-267 and 228-282.

#### **Underlying Allegations Regarding the Science of Global Warming**

15. The *Kivalina* Complaint alleges that carbon dioxide is a greenhouse gas that, when existing in Earth’s atmosphere, traps heat, raising the temperature of the Earth’s atmosphere. *Kivalina* Complaint at ¶¶ 123-124.

16. The *Kivalina* Complaint alleges that combustion of fossil fuels adds carbon dioxide to Earth’s atmosphere and that carbon dioxide levels in Earth’s atmosphere have consistently increased for the past 200 years, and that the current level of carbon dioxide in the atmosphere is higher than at any time in the last 650,000 years. *Kivalina* Complaint at ¶ 125 and 126.

17. The *Kivalina* Plaintiffs allege that “[t]he science of global warming is not new” and “there has been for many years an overwhelming scientific consensus that human activity that releases greenhouse gases is causing a change in Earth’s climate.” *Kivalina* Complaint at ¶¶ 132, 134, and 135-161

18. The *Kivalina* Plaintiffs further allege that “[t]here is also clear scientific consensus that global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion....” *Kivalina* Complaint at ¶ 133.

19. The *Kivalina* Plaintiffs further allege that scientific organizations specifically recognized as long ago as 1990 that a rise in global warming mean temperatures caused by the emission of carbon dioxide from the combustion of fossil fuels would melt polar ice caps and raise sea levels. *Kivalina* Complaint at ¶ 153.

### **Jurisdiction and Venue**

20. This is an action for declaratory relief pursuant to VA. CODE ANN. §8.01-184, regarding an insurance coverage dispute with an amount in controversy in excess of \$15,000.

21. An actual case and controversy of a justiciable nature, involving an antagonistic assertion and a denial of right, exists between Steadfast and AES, involving the rights and liabilities of the parties under an insurance contract.

22. This controversy may be resolved by a judgment in this action without the necessity of other suits.

23. Venue is proper in this Court, pursuant to VA. CODE ANN. §8.01-185 and VA. CODE ANN. §8.01-262, because AES maintains its headquarters, and thus regularly conducts substantial business activity, in Arlington County, Virginia.

### **The Insurance Policies at Issue**

24. Steadfast issued to AES a policy of liability insurance, policy number BOG 9376234-00, having a policy period effective from September 5, 2003 to September 5, 2004 (the “2003-2004 policy”).

25. The 2003-2004 policy was renewed, for four additional annual terms. True and correct copies of the Policies are annexed hereto as Exhibits “A-E” respectively.

26. Each of the Policies afforded AES a \$1,000,000 per occurrence limit.

27. Each of the Policies contained an “Insuring Agreement,” which states, in pertinent part, as follows:

**SECTION I – COVERAGES**

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies....

28. Each of the Policies sets forth conditions that must exist for the policies to apply. Among these conditions is the requirement that:

- b. This insurance applies to “bodily injury” and “property damage” only if:
  - (1) The “bodily injury” or “property damage” is caused by an **occurrence** that takes place in the “coverage territory”; and ....

(Emphasis added).

29. Each of the Policies contains the following definition of the term “occurrence:”

- 13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful condition.

30. Each of the Policies also contains the following terms and conditions that limit Steadfast’s defense obligation to AES:

We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

31. Each of the Policies contains a “loss in progress” exclusion which states as follows:

**EXCLUSION – KNOWN LOSS AND LOSS IN PROGRESS**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE  
READ IT CAREFULLY.**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE**  
(occurrence)

This insurance does not apply to:

- (1) any injury or damage which incepts prior to the effective date of this policy; or
- (2) any occurrence, loss or claim of which the insurance had knowledge or notice prior to the effective date of this policy; or
- (3) any claim for injury or damage which is first asserted against the insured prior to the effective date of this policy.

32. Each of the Policies contains a pollution exclusion which states as follows:

**f. Pollution**

Any injury or damage which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

\* \* \*

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Notwithstanding the above, but subject to all other exclusions and to all other terms and conditions of the policy as amended by this endorsement, we will pay on behalf of the insured those sums that the insured shall become legally obligated to pay as damages because of a "pollution incident" that results in "bodily injury" or "property damage",

**PROVIDED ALWAYS THAT:**

- (1.) The "pollution incident" must:

- (a.) be neither expected nor intended from the standpoint of an insured;
- (b.) have first commenced during the “policy period”;
- (c.) be discovered by the “insured” within seventy-two (72) hours of commencement; and
- (d.) be reported to the Company, in writing, within thirty (30) days from the date of commencement.

\* \* \*

33. Each of the Policies contains the following definition of the term “pollution incident:”

“Pollution incident” means a discharge, dispersal, release or escape of “pollutants” into or upon land, the atmosphere or any water course or body of water, that arises from “insured operations.” All interrelated, repeated or continuous episodes of, and all “bodily injury” and “property damage” resulting from a “potential incident” shall be deemed to be a single “pollution incident” sustained at the specific time and date when the “pollution incident” occurred.

34. Each of the Policies contains the following definition of the term “pollutant:”

“Pollutants” means any solid, liquid, thermal or gaseous irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

#### **The Insurance Claim**

35. The *Kivalina* Plaintiffs filed the *Kivalina* Complaint on February 26, 2008.

36. AES was served with the *Kivalina* Complaint in March, 2008.

37. AES tendered a claim for coverage under the Policies, and Steadfast is currently providing a defense to AES in the underlying *Kivalina* Lawsuit under a reservation of rights. A copy of the reservation of rights letter is attached hereto as Exhibit “I.”

## FIRST CAUSE OF ACTION

### **(Declaration That the Underlying Complaint Does Not Allege Property Damage Caused by an “Occurrence”)**

38. Steadfast incorporates and states each and every allegation contained in the foregoing paragraphs by reference as if set forth herein.

39. The *Kivalina* Plaintiffs’ claims against AES are grounded upon the contention that carbon dioxide emissions have long been considered an inevitable product of electricity generation. *Kivalina* Complaint at ¶ 174.

40. The *Kivalina* Plaintiffs base their claims against AES on its alleged longstanding corporate knowledge relating to the emission of carbon dioxide, and, in particular, AES’s recognition in its 2002 Annual Report that it was “one of the largest emitters of CO<sub>2</sub> in the world” and that it therefore “must continue to strive to economically stabilize greenhouse gas concentrations.” *Kivalina* Complaint at ¶ 60.

41. Because the Policies apply only to claims arising from an “accident, including continuous or repeated exposure to substantially the same general harmful conditions,” and because the *Kivalina* Plaintiffs do not base their claims against AES on any such “accident,” the Policies do not apply to the *Kivalina* Plaintiffs’ claims. Accordingly, Steadfast is not obligated to provide either defense or indemnity coverage to AES for these claims.

## SECOND CAUSE OF ACTION

### **(Declaration That the Loss in Progress Endorsement Precludes Coverage Under the Policies)**

42. Steadfast incorporates and states each and every allegation contained in the foregoing paragraphs by reference as if set forth herein.

43. The Policies contain an endorsement stating that “[t]his insurance does not apply to: (1) any injury or damage which incepts prior to the effective date of this policy....”

44. The earliest “effective date” of the Policies at issue is September 5, 2003.

45. The *Kivalina* Complaint alleges that the December 2003 GAO Report (Exhibit “G”) addressed erosion in Alaska Native Villages and concluded that “[r]emaining on the island...is no longer a viable option for the community.” *Kivalina* Complaint at ¶185.

46. The *Kivalina* Complaint further alleges that the Army Corps of Engineers Report (Exhibit “H”) discussing erosion sustained by Alaska Native Villages concluded that global warming has affected and is continuing to impact the extent of the sea ice adjacent to Kivalina. *Kivalina* Complaint at ¶185.

47. The Army Corps of Engineers Report relied upon in the *Kivalina* Complaint alleges that: (1) erosion in Kivalina has been “more prevalent during the 30-year period of 1970 to 2000;” and (2) “erosion control efforts by the state from 1985 to 2002 totaled \$477,000....” See Exhibit “H” at p. 23.

48. The GAO Report relied upon in the *Kivalina* Complaint alleges that “[i]n 1990, the Corps placed sandbags around the southern tip of the island to stem the erosion, but that proved to be only a temporary solution.” See Exhibit “G” at p. 32.

49. Because the Policies do not apply to injury or damage which incepts prior to the effective date of each policy, and because the damages alleged by the *Kivalina* Plaintiffs incepted prior to September 2003, the earliest effective date of any of the Policies, the Policies do not apply to the *Kivalina* Plaintiffs’ claims. Accordingly, Steadfast is not obligated to provide either defense or indemnity coverage to AES for these claims.

### **THIRD CAUSE OF ACTION**

#### **(Declaration That the Pollution Exclusion Bars Coverage Under the Policies)**

50. Steadfast incorporates and states each and every allegation contained in the foregoing paragraphs by reference as if fully set forth herein at length.

51. The *Kivalina* Plaintiffs allege that their damages have been caused by the emission by AES and the other *Kivalina* defendants of greenhouse gases into the atmosphere, which they contend constitutes “air pollution” (*Kivalina* Complaint at ¶141 and ¶149).

52. The *Kivalina* Complaint also asserts that, upon emission, greenhouse gases “rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide and other greenhouse gases worldwide.” *Kivalina* Complaint at ¶254.

53. Each of the Policies contains a pollution exclusion that bars coverage for injury or damage “which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants,” unless each of several specified exceptions are met.

54. None of the exceptions required for pollution coverage under the Policies are satisfied by the *Kivalina* Plaintiffs’ claims. Specifically, the pollution alleged by the *Kivalina* Complaint was not unexpected, did not first commence during the period of any of the Policies, was not discovered by AES within 72 hours of commencement, and was not reported by AES within 30 days of commencement. The Policies therefore do not apply to the *Kivalina* Plaintiffs claims. Accordingly, Steadfast is not obligated to provide either defense or indemnity coverage to AES for these claims.

**WHEREFORE**, Steadfast hereby requests this Court grant it the following relief:

- A. Entry of an Order, pursuant to the First Cause of Action, declaring that Steadfast is not obligated to provide defense or indemnity coverage to AES under the Policies, and is entitled to reimbursement of its defense costs incurred to date, because the losses, injuries and/or damages allegedly sustained, and to be sustained, by the *Kivalina* Plaintiffs do not constitute property damage caused by an occurrence as defined by the Policies;
- B. Entry of an Order, pursuant to the Second Cause of Action, declaring that Steadfast is not obligated to provide defense or indemnity coverage to AES under the Policies, and is entitled to reimbursement of its defense costs incurred to date, because the losses, injuries and/or damages allegedly sustained, and to be

