THE STATE
of ALASKA
GOVERNOR SEAN PARNELL

Department of
Environmental Conservation

DIVISION OF SPILL PREVENTION & RESPONSE
Contaminated Sites Program

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The Honorable Fred Upton, Chairman
Energy and Commerce Committee
2183 Rayburn House Office Building
Washington, DC 20515

RE: H.R. 2318

Dear Congressman Upton;

The Alaska Department of Environmental Conservation Contaminated Sites Program is writing in support of Federal Facility Accountability Act of 2013, H.R. 2318. Of the states, Alaska contains the second largest percentage of federally owned land with 69% of Alaska being federally owned and managed. This 69% of federal land covers more than 200 million acres in Alaska—that is an area larger than the State of Texas. Alaska achieved statehood in 1959 and prior to that was under direct federal control as a territory. During World War II and the Cold War Alaska was at the forefront of military development leaving Alaska with a high number of legacy military and civilian agency facilities.

Because of these issues Alaska has extensive experience dealing with multiple federal agencies using their Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) delegated authority (Executive Order 12580) at multiple types of contaminated sites on land currently owned by the federal government or land that is contaminated by federal activities but is now in private or state ownership. The vast majority of the federal sites within Alaska are not on the National Priorities List (NPL) but are being addressed by the federal agencies using their delegated authority—we call these "federal non-NPL sites". Of the approximately 1,500 federal sites about 35% of these are addressing releases of CERCLA hazardous substances while the petroleum releases are being addressed through Alaska's environmental pollution control laws.

Over the 30 years that Alaska's Department of Environmental Conservation (ADEC) has been actively dealing with the federal agency cleanups, the issue of sovereign immunity has been raised as a bar to limit or even refute state involvement and oversight of these cleanups. In the late 1980's and early 1990's this was especially true at DoD sites where sovereign immunity was commonly invoked resulting in little or no state involvement. However, because of stakeholder efforts in the early 1990's such as the Federal Facilities Environmental Restoration Dialogue Committee and congressional pressure through the Defense Environmental Restoration Act, Alaska has seen slow

but steady improvements with DoD regarding the use of sovereign immunity as a means to exclude state regulatory oversight. The current DoD environmental leadership has supported and continues to support state involvement in DoD.

Unfortunately that is not the case with the all of the federal land managers. Some federal agencies such as Federal Aviation Administration work closely with ADEC and have a successful history of getting sites cleaned up and closed with ADEC approval. However, others use sovereign immunity to avoid state regulatory oversight. In these cases, the federal agency is acting as the responsible party and the regulator—in other words—they get to determine which laws apply, how safe the remedy needs to be and they also pay the bill. This conflict is untenable.
To avoid state involvement some federal agencies choose to use their CERCLA removal authority to circumvent the CERCLA provisions in Section 120(f) that require that remedial actions (not removal actions) "shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action". Two illustrations are below:

- An example of this is the work done by Bureau of Land Management (BLM) at Red Devil Mine. This abandoned mercury mine is on federal property and has extensive mercury contamination from mining operations which ceased in 1971. In 2002-3 BLM initiated a removal action to landfill highly contaminated mercury soils without ADEC approval. Informally, BLM representatives told ADEC that they were not required to obtain approvals from the State for the removal work. ADEC notified BLM about problems with the proposed CERCLA removal action because the work did not evaluate the contamination on site or the continued releases to Red Devil Creek and Kuskokim River and that land filling of mercury waste containing concentrations over 260 mg/kg without first retorting was a violation of federal Resource Conservation and Recovery Act (RCRA) laws.
- · From 2004 through 2008 the Alaska Division of the National Park Service was working with ADEC to develop a remedial investigation at the Nabesna Mine site that is on both National Park land and private property. However in 2010 the National Park Service informed ADEC that rather than do a remedial investigation they were now planning to do a CERCLA removal action and therefore the National Park Service had sovereign immunity and ADEC had no regulatory role—the site is still stalled with no work being done at the site to stop ongoing contamination releases.

Due to the inadequacy of BLM's removal work, ADEC requested that the U.S. Environmental Protection Agency (EPA) evaluate Red Devil Mine to determine if it qualified for placement on the National Priorities List. After extensive evaluation, in 2009 EPA concluded that the removal work was inadequate and that the site did merit being proposed for the NPL. Since that time BLM has begun working with ADEC and EPA on a CERCLA remedial investigation and feasibility study.

In Alaska we have another example of the U.S. Forest Service applying sovereign immunity to limit ADEC involvement. At the former mine site, Ross-Adams, ADEC followed our standard procedures and sent out a Potentially Responsible Party letter to the company responsible for contamination releases on both U.S. Forest Service and State of Alaska land. ADEC was informed by U.S. Forest Service legal council that they had sovereign immunity and the Forest Service was invoking their CERCLA lead agency authority to have a potentially responsible party (PRP) do a CERCLA removal. This event occurred in 2008 and to date the removal actions has still not started. These examples clearly show where federal agencies have a special advantage of being both the polluter and the decision maker for investigation and cleanup decisions at these non-NPL CERCLA

sites. The proposed Federal Facility Accountability Act of 2013 would greatly assist Alaska in making sure the federal government as accountable for cleaning up their contamination just as any other responsible party in Alaska. This legislation is long overdue and would ensure that federal agency environmental work be done adequately and to the same standard as other responsible parties.

If you would like additional information or clarification please contact me at via email at steve.bainbridge@alaska.gov; or telephone 907-269-2021.

Sincerely,

Steve Bainbridge
Program Manager