



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

CIVIL DIVISION

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April 22, 2022

Senate Finance Committee
Alaska State Capitol
Juneau, Alaska 99801
Senate.Finance@akleg.gov

Re: Requested written testimony re SB 121

Dear Co-Chairs Bishop and Stedman:

You have asked for a written version of the testimony I provided on April 20, 2022 during a bill hearing for SB 121.

Concern with Identifying Hazardous Substances:

There are two distinct ways that the Department of Environmental Conservation (DEC) can identify a substance as hazardous. First, DEC can make a determination based on the definition of hazardous substance contained at Alaska Statute 46.03.826(5). Second, it can list hazardous substances in its promulgated regulations.

When DEC makes a determination that a substance is hazardous according to the definition, and not by regulation, responsible parties have tried to evade liability by improperly arguing that the determination is not valid because it is not in regulation.

If this bill is enacted, it would name hazardous substances in statute. It is likely that responsible parties would then try to evade liability by claiming that any valid determination of hazardous substance must be in statute.

Drafting Concern:

The language of the bill is unclear as to whether the bill is redefining "hazardous substances" under state law to include PFAS. DEC's liability statute only imposes joint and several liability on releases of hazardous substances.

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State and Federal Liability Concerns:

Section 46.03.350(c) of the bill requires DEC to accept certain amounts of perfluoroalkyl and polyfluoroalkyl substances (PFAS) each year, all of which DEC must then dispose.

If, at any point in the future, the PFAS disposal site either has a release, or receives a determination as an inappropriate site for PFAS disposal, that site will be deemed a contaminated site, likely under state and federal law. Because DEC is the entity that disposed of PFAS at the site, the state will be held jointly and severally liable for addressing the contamination.

Additionally, this bill proposes holding the federal government liable under Alaska Statute 46.03.345(b) because the federal government requires the release of PFAS. However, any provision that names the federal government liable under a state statute would be subject to challenge unless there is a valid waiver of sovereign immunity.

The United States has sovereign immunity for lawsuits. For a waiver of sovereign immunity to be valid, Congress must be very specific about what it intends to waive, or courts will hold that waiver has not occurred.

In order to enforce Alaska Statute 46.03.345(b), the state would likely have to enter costly litigation, without likelihood of success, to attempt to hold the federal government liable.

Conclusion:

Thank you for allowing me to share these concerns with the committee. For additional questions, please contact the civil division legislative liaison, AAG Sharla Mylar, at 907-269-5171 or sharla.mylar@alaska.gov.

Sincerely,



Jenn Currie
Senior Assistant Attorney General
Section Chief, Environmental Conservation

cc: Governor's Legislative Office