Remarks by Attorney General Michael Geraghty
Re: BLM Cleanup Issues
April 3, 2013

By letter dated April 1, I was asked to address three somewhat related issues, which I will address in order:

1. What legal options does the state have to encourage or even force the BLM to take action?

Of course, legal options are generally directed to requiring some action to be taken, and so let me start with that first. The state could have a cause of action under the Resource Conservation Recovery Act (RCRA) to require both the cleanup of the solid waste and the closure of the abandoned wells. RCRA has a citizen suit provision which allows third-party enforcement of federal RCRA requirements. In order to make this claim, the state would have to establish: (1) that the conditions at these sites may present an imminent and substantial endangerment; (2) that the endangerment stems from the handling, storage, treatment, transportation or disposal of any solid or hazardous waste; and (3) that the responsible party, in this case BLM, has contributed or is contributing to such handling, storage, treatment, transportation or disposal.

The state would assert that BLM has waived sovereign immunity with respect to these state claims and, in fact, there is a waiver of sovereign immunity provision contained in RCRA. The waiver applies to the federal agency having jurisdiction over the disposal site or having engaged in activities resulting in the disposal of hazardous waste. In such cases, the federal government shall be subject to and comply with all federal, state, interstate, and local requirements, both substantive and procedural, respecting control and abatement of solid waste

or hazardous waste disposal and management in the same manner and to the same extent, as any person.

Using this waiver of sovereign immunity, the state would assert that the federal government is currently not in compliance with the AOGCC regulations governing the abandonment and plugging of wells, which is a requirement of state law in respecting the control and abatement of hazardous waste. It is also not in compliance with Alaska solid waste laws related to prohibitions of litter and polluted runoff which are state regulations concerning control and abatement of solid waste.

I foresee a number of obstacles with any legal action to require the proper abandonment and cleanup of these sites:

- BLM would argue that it has not waived its sovereign immunity. This is a legal defense and I am not going to delve into it anymore except to say that sovereign immunity is a robust defense that is asserted both by the state and federal governments. Whether it applies to this particular situation I would not hazard to predict today.
- There is a statute of limitations that could bar the state's claim. There is a five year statute for citizen suits under RCRA, and Congress has enacted a residual statute of six years that applies when no specific limitation is otherwise provided. Of course, these sites have existed for decades. There is an argument that they constitute a continuing violation, and so the state's claims remain timely and valid. Again, I would not hazard a prediction as to how this defense would fare, except to say that I think it would get serious attention from any judge reviewing this matter.

- As a practical matter, BLM has conceded that it is responsible for the cleanup of these sites. Typically, we go to court to resolve an issue of who is responsible. In this instance, simply seeking a declaration that BLM is legally responsible may not advance the ball too far.
- This brings me to the remedy. Even if the state were able to overcome these defenses and sustain a claim under RCRA or some other theory, I question how far a federal judge would go in mandating that BLM either alter its spending priorities, or create new spending priorities, within the vast realm of BLM's responsibilities. I suspect that is a step the court would be loathe to take. While a court might very well order BLM to cleanup the sites, it cannot require Congress to appropriate monies for the task.

In conclusion, as to this particular question, I believe the legal options available to require BLM to do something are not wholly satisfactory, and there is some level of uncertainty associated with how far those remedies would take us, if at all.

2. Is there opportunity for entities other than the federal government - private or public - to participate in the cleanup?

This issue is somewhat related to the earlier question in the sense of what options does the state have to "encourage" BLM to take action?

There are two options that I think merit consideration.

The first concerns possible ways to use the compensatory mitigation requirement associated with wetlands development to possibly provide funds for the cleanup.

As many of you know, development on properly recognized wetlands obligates a permittee, in many instances, to undertake compensatory mitigation - "actions taken to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources."

There are several methods of mitigation, including restoration, enhancement, and the establishment and preservation of wetlands.

There are also several mechanisms for providing mitigation, including mitigation banks and in-lieu fee (ILF) programs.

A mitigation bank is a for-profit business involved in the definition and acquisition of lands for mitigation purposes. It can also provide oversight for mitigation activities and the subsequent sale of mitigation "credits" to permittees.

The ILF program is similar to a mitigation bank, but it can only be operated by non-profits or government entities. In this program, mitigation is typically achieved after credits have been sold.

In Alaska there are relatively few disturbed wetland sites which are eligible for restoration/enhancement. Moreover, for a site to be eligible for preservation in order to meet mitigation requirements, it must be at risk of development. Preservation commonly involves the establishment of a perpetual conservation-type easement that limits the use and development of the land. Accordingly, from Alaska's perspective, where we have relatively few disturbed sites, and not much land in private hands, setting aside land in perpetuity for mitigation purposes is not a preferred alternative.

Reclamation of the legacy well sites represents a potential win-win opportunity to provide mitigation opportunities for North Slope development projects while addressing a pressing environmental need and assisting BLM with meeting its obligations. The cleanup and proper plugging and abandonment of these wells would be a net benefit to surrounding wetlands and surrounding surface and groundwater quality. An ILF program, or mitigation bank, would provide a mechanism for developers to purchase mitigation credits and to transfer mitigation liability from the developer to the ILF program or mitigation bank.

I want to emphasize that this idea is in its very early stages and much work remains to be done. I have tried to summarize in a couple of minutes what would be a complex and lengthy process, and might possibly require some federal legislation. However, I am informed the initial discussions have been positive, and we hope they continue.

Another potential option is the administration's Road to Resources program. One of the roads being discussed would be to Umiat. Again, this is in its very early stages, and to some extent may depend on the potential for exploration and development of resources in the area. A road to Umiat, if constructed, would substantially reduce the cost of cleaning up the contaminated sites in Umiat, and that appears where the biggest concentration is located. BLM contends that the environmental risk posed by many of these sites is at de minimus and, considering the lack of infrastructure and access, the cost would be prohibitive to address some of these sites now. If there were road access, it could make the cleanup effort considerably less expensive.

In conclusion, there may be other options out there, but I think those are two that merit consideration and hold real potential.

3. What sort of hurdles to remediation or future development are created by the National Historic Preservation Act of 1966 (NHPA)? What is the state's role and authority in that process?

The short answer: I don't believe it is a hurdle to remediation or future development. Given the age of some of these sites, it is simply a fact that the NHPA must be considered. However, in order for a site to be designated, it must have some "significance." The original Discovery well on the North Slope has been designated under the NHPA. I can appreciate that. However, with respect to the 137 test holes that were drilled as a result of the NPRA delineation process, it would be hard for me to understand how any particular well would be attached much significance.

The state of Alaska does have a State Historic Preservation Office (SHPO) which coordinates with federal agencies to carry out this responsibility. The SHPO can concur or not with the designation, but ultimately it is a federal decision. It is also possible for the feds to propose a programmatic agreement to deal with all of these sites in a collective fashion, which would avoid a piecemeal decision making process. Thus far that has not been proposed by BLM. The NHPA process is, at least as described to me, reasonably straightforward. It is not to be compared, for example, with drafting an Environmental Impact Statement, which is time consuming and expensive.

Furthermore, even if a site were designated under NHPA, it would not foreclose the abandonment or cleanup of a well, or the disposal of solid waste. Obviously that would take precedence.