Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

May 1, 2017

Dear Administrator Pruitt:

This letter requests a review of a matter now in dispute with Region 10 in Seattle, Washington regarding a six year old cleanup of "minor" importance according to EPA located in Anchorage, Alaska at the Post Road site.

Background Information

The Post Road site is owned by the Alaska Railroad Corporation, (ARRC) a nonprofit Agency of the State of Alaska. Post Rd is an industrial storage site of approximately 4 acres which was leased by San LLC (SAN) from the ARRC. This lease was executed in 2007 and continues through the present and includes an indemnification clauses for environmental matters between SAN and ARRC.

In 2010 SAN subleased 8,000sf of fenced and graveled yard area of the Post Rd. site (of 4 acres) to a William Vizzera dba PPMI (Precision Paving Maintenance, Inc.), a third party company of which there is no legal or other connection with SAN or ARRC. PPMI was a minority business owned and operated by Mr. Vizzera and his wife. They leased the property to securely store a computer operated highway painting vehicle. Additionally, in violation of their sublease they brought and stored drums on the site of highway paint and paint byproducts. Their primary customer was the State of Alaska Department of Transportation to paint highway markings on the roads. The State inspectors failed to oversee nor document the paint waste Mr. Vizzera had left over from the highway painting projects so he brought them to the leased Post Road yard space for storage. At no time was any material spilled or released from the storage drums at the site but the waste product was illegal as it contained highway paint and Tolulene (the spray equipment cleaning fluid).

Following an EPA investigation by the EPA Criminal Division in December of 2010, Mr. Vizzera was convicted in 2011 of criminal violations of federal statutes and was sentenced to ___ years in jail and to pay over $400,000 in restitution to SAN of which only $15, 617 has been paid. Mr. Vizzerra has been released from prison and his whereabouts are unknown to SAN which has no expectation of further payment from Mr. Vizzerra, who lacks sufficient assets from which to collect.

San was never implicated in the EPA criminal investigation and was issued a "victim" letter stating that SAN was a victim of Vizzerra/PPMI in this matter. See attached Exhibit A.

SAN is anxious to explain the mismanagement by EPA Region 10 of this site, WHICH SURELY LED TO EXPENSIVE and unnecessary costs which are not consistent with the National Contingency Plan (NCP). A very disjointed investigation occurred involving two back to back

criminal investigations, first by the U.S. Marshall Service/Department of Justice and then by EPA Criminal Division. This was followed by a separate civil investigation by Region 10. Despite numerous attempts and requests by SAN for an accounting of the costs for which EPA has demanded payment, EPA Region 10 refuses to give any serious accounting.

Only recently has EPA Region 10 provided some time sheets which are as close to backup documents as it has provided up to now. However these timesheets provide only dates and numbers of hours. No descriptions of work nor any facts which can verify that this claimed work was related to the civil investigation and cleanup which was carried out completely by SAN.

This mismanagement described above undoubtedly led to expenses which were not consistent with the NCP. For example, following the EPA criminal investigation, the area was returned to Mr. Vizerra/PPMI before he was indicted and convicted. During the criminal investigation, SAN was prohibited from access to the area since the area was under the control of the operator PPMI.

Subsequent to the criminal investigation (6 months later---5/31/11) EPA Region 10 issued the Unilateral Administrative Order, UAO, which required cleanup by SAN of the Post Road site even though all the cleanup was a result of the actions of Vizzerra/PPMI. See attached Exhibit B --UAO, dated May 30, 2011.

Nevertheless, EPA civil decided to issue the UAO demanding cleanup by SAN even though it was neither owner nor operator. This misguided and disjointed management mix-up not only contributed to confusion, but also increased the costs of cleanup which SAN was forced to undertake by the terms of the UAO

Without any admission of liability or responsibility as a potentially responsible party, SAN agreed to undertake the cleanup under the supervision of Mr. EARL Livermore of EPA Region 10 who described the clean up as a minor matter involving a few drums. Furthermore, he stated "I have no idea why such a simple drum removal required an UAO order". Mr. Livermore spent 2 days at the site and returned to Boise, Idaho.

SAN engaged an EPA approved third party company (Emerald Environmental) which developed and executed a cleanup plan approved by Mr. Livermore. That cleanup plan was accomplished in June-August 2011. There have been no further issues on this site or between SAN and EPA before or since the completion of the cleanup. At the conclusion of the cleanup EPA Region 10 issued no demand for any reimbursement of its alleged costs.

Nearly six years later, EPA demanded a reimbursement of $231,458.61 for costs it alleges it incurred for a civil investigation either concurrent or subsequent to the completion of the criminal investigation of which SAN was a victim. Note: EPA's actual cost invoices indicate 90% of the reimbursement is for costs incurred 12/10-3/10, which was 3-6 months PRIOR to the EPA issuance of the UAO order

SAN objects to this demand for cost reimbursement on a number of legal and factual grounds. Nevertheless, SAN has attempted to settle this EPA demand without success. At this point, EPA Region 10 and SAN have signed 4 Tolling Agreements, the latest of which expires

June 30, 2017. The ARRC has signed identical Tolling Agreements including one expiring June 30, 2017 and also the prior Agreements.

SAN seeks your assistance in settling this matter before this current Tolling Agreement expires.

Dispute Over Cost Reimbursement

As stated above, SAN does not think it is legally required to pay any demand for cost reimbursement on legal grounds

As a matter of law, SAN does not believe that it is a Potentially Responsible Party because it neither owned nor operated the site when the criminal and/or civil violations occurred. As a mere lessee of the site, it is not at all clear that SAN is responsible. See cited cases which state that as a general rule application of title rules for PRP follow the rules of title in each individual state. In Alaska, it is clear that a lessee such as SAN, LLC is neither Operator Nor Owner under CERCLA

In Alaska, it is clear that a mere lessee is not a potentially responsible party. See *Maddox v. Hardy* 187 P. 3d 486 , 491-2 (AK. 2011). SAN as a mere lessee of the property owned neither the underlying property nor this hazardous substance on which Region 10 grounds it claim for reimbursement of its alleged costs. Citing Alaska Statutes, AS46.03. 822, the Alaska Supreme Court found that the statute requires two elements:

"Unpermitted release of a hazardous substance that caused damages. The party sued must own the hazardous substance at the time of the release." Id, 491.

SANLLC satisfies neither requirement. The underlying property was owned by a third party and the hazardous substance was owned by a different third party, Mr. Vizzerra who was subsequently prosecuted and convicted in Alaska Federal District Court for which Mr. Vizzera served time in a federal facility and is still required to make over $400,000 dollars in restitution.

Further, the U.S. 9th Circuit Court of Appeals has found reliance on State law in the issue of ownership in cases such as SANLLC.

> "Because the definitions Congress provides in CERCLA for "owners and operators" are mere tautologies , this Court has looked to the common law--the state law of the property's location in cases when applying CERCLA for guidance in other cases when imposing CERCLA liability on possessors and owners of various property interests. See *Burlington Northern and Santa Fe Ry. Co. v United States* ---- U.S.----, 129 S.Ct. 1881, 173 L.Ed. 2d 81w (2009). "Congress intended the scope of liability to be determined from traditional and evolving principles of common law) (quoting *United States v Chem- Dye Corp*, 572 F. Supp. 802, 808 (S.D.Ohio 1983) *Long Beach Unified School District v B. Goodwin Cal. Living Trust,* 32 F. 3D 1364, 1368 (9th Cir. 1994) (looking to the common law,...to determine whether an easement holder is an "owner" under CERCLA).

" Given this common law distinction between ownership interests and possessory interests, and the juxtaposition of "owner " and " operator" in CERCLA... we conclude that Congress intended to give common law meaning ...that ...does not extend to mere possessory interests in land such as permittees, easement holders, or licensees whose possessory interests have been conveyed to them by the owners of real property."

For a full discussion of the above 9th Circuit analysis, see *City of Los Angeles v. San Pedro Boat Works* 635 F 3d 3140, 3143-50 which includes an exhaustive review other Circuits' law and the 9th Circuit concludes:

" we follow our Court's methodology in *Long Beach* looking to common law...that the holder of a permit for specific use of "real property" is not the owner where... the fee title owner retained power to control the permittee's use of the real property...such z possessory interest may be a leasehold interest. See *City of Los Angeles*, 635 F.3D 449.

Finally, in this part of the discussion, the 9th circuit restates its basic test for liability by citing *Long Beach* 32 F 3d at 1369. "However in enacting CERCLA, Congress did not intend to impose liability on everyone else who has any interest at all in land containing a toxic waste facility."

Conclusion: under Alaska common law and the application of this by the 9th Circuit as to distinction between owner or operator, SAN is neither and is not liable for the Region 10 demand of $231,458.61 for reimbursement of its claimed costs.

SAN is not liable for Reimbursement of EPA costs because it was found to be a Victim by Dept. of Justice.

On or about December, 2010, the U..S. Department of Justice undertook an extensive investigation of the status of the Post Road site. At the time of the investigation, DOJ took possession of the site and prevented SAN from having any access to the site. The investigation lasted six weeks. Following the investigation in which SAN cooperated fully, the Justice Department exonerated SAN from any possibility of responsibility for any release of any prohibited substance.

In fact, the DOJ found SAN to be a "victim" of the responsible "operator," William Vizzerra who as stated previously was indicted, convicted of criminal violations in the Post Road Matter. See attached victim letter issued date.

Additionally, the criminal division of the EPA previously, simultaneously or subsequently conducted its own investigation of the Post Road matter and also exonerated SANLLC. Like the DOJ, the criminal division of EPA found the responsible party to be William Vizzerra.

So the rhetorical question to be asked, is how can DOJ's victim finding lead to EPA's demand for SAN for reimbursement of EPA's alleged cleanup costs?

Even though SAN performed the Post Road Cleanup, it still contests EPA's reimbursement Demand as a matter of law.

SAN voluntarily undertook Cleanup of the Post Road site since Mr. Vizzerra refused to do his duty. At the time, this seemed the best solution to a then difficult problem and avoided costly judicial and administrative action by EPA. The cleanup was costly to SAN $442,934.04. Having undertaken the cleanup voluntarily, it now sees EPA Region 10 demand as inappropriate and overreaching.

Since the new demand for costs presents a new, final agency action, SAN believes, it can still contest the EPA decision that SANLLC is a Potentially Responsible Party under CERCLA as provided by *Sackett v. EPA* ----- U.S. ----, 132 S. Ct. 1367, 1374 182 L. Ed. 2d 367 (2012). As stated in *Sackett*, EP'A's compliance orders (including reimbursement demands) are appealable as final agency action, which can be asserted by SANLLC in any subsequent litigation between EPA and SANLLC.

EPA's Cleanup costs are almost entirely for work performed 3-6 months before the issuance of the UAO and cannot be proven or verified and should not be charged to SAN

As stated previously, EPA Region 10 has demanded a reimbursement of $231, 458.16 for what it claims EPA is owed for its costs during the Post Road cleanup matter. SANLLC has repeatedly requested verification of these costs. Region 10 has been very uncooperative in providing this verification. Most of the amount is stated to reimburse costs paid to EPA contractor Ecology and Environment whose work was ALL performed prior to the issuance of the UAO order.

Despite numerous requests, the Region has provided very little in backup documentation. For example, EPA Region 10 states that it was billed and paid $80,000 for 450 hours (56- 8 hour man days at $177.77 per hour for the contractor's work done). There is no adequate verification. SAN closely monitored the Ecology and Environment contractor's work as conducted in December 2010. Ecology and Environment billed EPA over $200,000 but as SAN's own consulting environmental company reported E & E was on the site for just a few hours over a 2-3 day period. The AUO order was issued May 30, 2011. Six months after the work was performed.

Additionally, after many requests, EPA Region 10 finally provided a little more explanation to SAN on November 22, 2016. SAN,LLC responded quickly in December 14, 2016 with a detailed letter by our attorney Steve Silver asking explanation for how individual contractor employees such as Lynn Marcus and Lynn Martin could charge multiples of an 8 hour day on Dec.11, 2010- Marcus and 38 hours on December 18 and Martin 20 hours on Dec. 11, 2011 and 40 on DEC. 18. These are not the only examples. See Mr. Silver's letter which details many multiple 8 hour days for a number of contractor employees and also travel charged to EPA on Christmas day 2010 by EPA employee Nuchin and other travel charged on New Year's day. the multiple 8 hour days and holiday travel strain credulity even though EPA Region 10states that these are for weekly and not daily charges.

What has been forthcoming is yet another Tolling Agreement, the 4th since this dispute began. What SAN has been seeking is a resolution/settlement of this issue. The Tolling Agreement expires on June30, 2017 SAN does not believe further discussions with Region 10 can be productive or lead to a settlement.

SAN offered to settle this matter early on for $22,500. This offer was rejected by Region 10. This settlement offer is not on the table at this point since detailed examination of the law and Region 10 backup has diminished Region 10's case for collection.

However, SAN still wants to settle. That is why this letter requests a meeting with you or key staff in your office to seek a rapid settlement and avoid a continuation of fruitless Tolling Agreements which simply push this issue down the road.

Thank you for your consideration of this request.

SINCERELY,

Bruce A. Chambers
Member
SAN, LLC

Jay Sutherland
Member
SAN, LLC

cc: Jennifer MacDonald Esq., EPA Region 10
David Heinick, Esq.