

LEGAL SERVICES

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MEMORANDUM

March 8, 2017

SUBJECT: Opioid epidemic (Work Order No. 30-LS0681\A)

TO: Senator David Wilson
Attn: Jody Simpson
Attn: Gary Zepp

FROM: Kate S. Glover 
Legislative Counsel

Attached is a draft bill extending Governor Walker's disaster declaration related to the opioid epidemic. Although you requested a concurrent resolution, I have drafted the request as a bill because, as explained in more detail in this memo, under the Alaska Supreme Court's decision in *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980), extending the disaster proclamation likely requires a bill. You have also asked several questions relating to the Alaska Disaster Act, AS 26.23. This memo responds to your questions.

Legislative authority:

1. Can a legislative resolution limit or expand the governor's authority?

The short answer to your question is probably not.

Although AS 26.23.020(c) states that the legislature may extend a disaster declaration by concurrent resolution, AS 26.23.025(b) provides that if a disaster occurs during the legislative session, any action the governor takes after the end of session is void if it was not "ratified by law adopted during that session." AS 26.23.025(c) allows the legislature to "terminate a disaster emergency at any time by law." The phrase "by law" does not include a resolution. In addition, the Alaska Supreme Court has held that the state constitution only allows the legislature to take actions affecting people outside the legislature by enacting a bill. A disaster declaration affects agencies and individuals outside the legislature. Therefore, any action the legislature takes to terminate, extend, or otherwise affect a disaster declaration must be taken by law.

In the *A.L.I.V.E. Voluntary* case, the Alaska Supreme Court considered whether the legislature has the power to annul a regulation adopted by an executive agency by concurrent resolution. The court held that the legislature could not exercise its legislative power without following the provisions of the constitution governing the enactment of a bill, including single subject, descriptive title, three readings in both houses, presentation

to the governor, and the opportunity for the governor to veto the bill. *See* 606 P.2d at 772. "The Alaska Constitution defines with specificity the mechanisms for legislation. Each provision has a purpose 'designed to engender a responsible legislative process worthy of the public trust.'" *Id.*, quoting *Plumely v. Hale*, 594 P.2d 497, 500 (Alaska 1979). "[W]hen the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having binding effect on those outside the legislature it may do so only by following the enactment procedures." *Id.* at 773.¹

The legislature does not have the power to authorize itself to take action by less formal means than that prescribed by the constitution. For that reason, despite the authorization in AS 26.23.020(c) to act by resolution, it is likely that the legislature cannot give itself the power to revise an act delegated to the governor by an informal means such as a concurrent resolution. "The legislature is bound to act in accordance with constraints provided in article II of the [Alaska] constitution. The fact that [the legislature] can delegate legislative powers to others who are not bound by article II does not mean that it can delegate the same power to itself and avoid the constraints under which it must operate." *Id.* at 777.

Extending the declaration:

1. Does a legislative resolution to extend the governor's original declaration also extend the governor's full authority as originally granted under statutes?

The short answer to your question is that extending the declaration continues the governor's authority, but the authority can be limited by the legislature if the legislature passes a law to extend the disaster.

In general, a legislative action extending the disaster declaration allows the governor to continue to spend money, compel action, transfer personnel, suspend certain regulatory procedures, commandeer private property, direct relocation of affected areas, control ingress and egress to a disaster area, suspend alcohol sales, and use state resources to address the disaster.² The governor's spending, however, is limited to a certain amount "per disaster declaration" unless further expenditures are approved by the legislature.³

¹ The Alaska Supreme court suggested that the only legislative veto power permitted by resolution was the type spelled out in the state constitution. Specifically, the court stated, "[t]he express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists." *Id.* at 774. The two express legislative veto provisions are art. III, sec. 23 (disapproval of executive orders) and art. X, sec. 12 (disapproval of municipal boundary changes), Constitution of the State of Alaska.

² The governor's powers are described in full under AS 26.23.020.

³ AS 26.23.020(i).

Extending the disaster declaration allows the governor to continue spending up to that limit, or as approved by the legislature.

As discussed above, extending a disaster declaration likely requires a bill. If the legislature passes a bill extending the disaster, the legislature could include measures in the bill to address the disaster or limit the governor's authority. The legislature may also decline to approve the governor's spending plan or to ratify the governor's actions, terminate the disaster by law, or pass laws to address the disaster or constrain the governor's authority.⁴

Spending authority:

1. What are the authority limits to what the governor can do (authority wise) with the spending authority?

The limits on the governor's spending authority are described in AS 26.23.020. For more detailed information about the governor's authority, you may want to review AS 26.23.020, 26.23.025, and 26.23.050. In particular, AS 26.23.020 (h) - (k) states:

(h) The Governor may expend during a fiscal year not more than \$500,000 of state funds per incident to prevent, minimize, or respond to the effects of an incident that may occur or occurs in the state and that, in the determination of the Governor, poses a direct and imminent threat of sufficient magnitude and severity to justify state action. Before expending funds under this subsection to respond to an incident, the Governor shall provide a financing plan to cope with the incident to the legislature in the same manner prescribed for disaster emergencies under AS 26.23.025(a).

(i) If the Governor declares a condition of disaster emergency, the Governor may expend during a fiscal year not more than \$1,000,000 of state funds per disaster declaration, including the assets of the disaster relief fund, to

(1) save lives, protect property and public health and safety, or lessen or avert the threat of the disaster that poses a direct and imminent threat of sufficient severity and magnitude to justify state action;

(2) implement provisions of law relating to disaster relief to cope with the disaster;

(3) alleviate the effects of the disaster by making grants or loans to persons or political subdivisions on terms the Governor considers appropriate or by other means the Governor considers appropriate.

(j) If the disaster described in the Governor's proclamation to declare a condition of disaster emergency is a fire, the Governor may expend state funds as necessary to save lives or protect property and public health and safety.

⁴ AS 26.23.020(k) describes legislative approval of a financing plan; AS 26.23.025 describes the legislature's role in a disaster emergency.

(k) The Governor may expend more than \$500,000 of state funds to cope with an incident under (h) of this section or more than \$1,000,000 of state funds to cope with a disaster under (i) of this section under the following circumstances:

(1) if the legislature is in session, the legislature approves a financing plan to cope with the incident or disaster that identifies the amount in excess of the expenditure limits that is to be expended from state funds; or

(2) if the legislature is not in session, either

(A) the Governor convenes a special session of the legislature within five days after declaring the condition of disaster emergency or within five days after providing a financing plan to cope with an incident to the legislature and the legislature convenes in special session and approves a financing plan to cope with the incident or disaster that identifies the amount in excess of the expenditure limits that is to be expended from state funds; or

(B) the presiding officers of both the house of representatives and the senate agree that a special session should not be convened and so advise the Governor in writing.^[5]

In addition to this authority to spend state funding, the Alaska Disaster Act gives the governor authority to apply to the federal government for loans and accept federal grants to address a disaster declared by the President at the governor's request. This authority is described in AS 26.23.080 and 26.23.090.

2. Is the spending authority contained to the executive branch?

The Alaska Disaster Act gives the governor authority to spend state funds during a disaster, but requires legislative approval of a financial plan for expenditures above a certain amount. "If the declaration of a disaster emergency occurs while the legislature is in session . . . actions taken by the Governor . . . after the close of the session that are not ratified by law adopted during that session are void."⁶ In addition, the legislature always has authority over appropriations and may make additional appropriations for a disaster if it chooses to do so.

⁵ Under AS 26.23.020(g)(11), the governor may also

(11) use money from the oil and hazardous substance release response account in the oil and hazardous substance release prevention and response fund, established by AS 46.08.010, to respond to a declared disaster emergency related to an oil or hazardous substance discharge.

This authority does not appear to be relevant to the opioid epidemic disaster declaration.

⁶ AS 26.23.025(b).

3. Can the governor use funding from the general fund if federal funds are not available?

Yes, the governor may use funding from the general fund to respond to a disaster if the funds have been appropriated by the legislature for any purpose. Under AS 26.23.050, the governor is directed to first spend money regularly appropriated to state and local agencies, next, money in the disaster relief fund⁷ (or appropriate oil and hazardous substances response funds), and finally, money appropriated for other purposes, or borrowed money.

4. Can the governor use funding from the Permanent Fund Earnings reserve account if federal funds are not available?

Maybe. The governor may use "state funds" to respond to a disaster. The term "state funds" is not defined, but could be interpreted to include the permanent fund earnings reserve account, even though this is a separate account not in the general fund.⁸ Even if the permanent fund earnings reserve account is considered "state funds," however, the governor may only spend money that has already been appropriated. AS 26.23.050(b) allows the governor to "transfer and spend money appropriated for other purposes" Therefore, it may be possible for the governor to spend money that has already been appropriated from the permanent fund earnings reserve account, but the governor cannot spend money that is in the account if it has not been appropriated. In addition, the governor is first required to spend money appropriated to state and local agencies and disaster relief funds. In this case, Governor Walker's letter to the legislature accompanying his financial plan for the disaster declaration indicates that the costs for response will be funded entirely through federal grants.⁹

5. Is the dollar limit associated with the governor's declaration?

Yes, the dollar limit is associated with the declaration. Generally, the governor may spend up to \$500,000 of state funds per incident (without declaring a disaster emergency) during a fiscal year to prevent, minimize, or respond to an emergency, but the governor must provide a financing plan to the legislature. If the governor declares a disaster emergency, the governor may spend up to \$1,000,000 of state funds per disaster declaration during a fiscal year to save lives, implement relevant provisions of law, and alleviate the effects of the disaster by making grants or loans. For certain types of disasters (i.e. fires and oil spills) there is additional spending authority. To spend more

⁷ The Disaster relief fund is established in AS 26.23.300.

⁸ The account is established in AS 37.13.145.

⁹ See Letter from Gov. Bill Walker to the Hon. Pete Kelly and the Hon. Bryce Edgmon (Feb. 15, 2017); *available at* https://gov.alaska.gov/wp-content/uploads/sites/5/20170215_President-Kelly-Speaker-Edgmon-Opioid-Disaster-Notification.pdf.

than the \$500,000 or \$1,000,000 limit, the governor must obtain legislative approval of a financial plan.

Scope of the disaster declaration:

1. Is the governor's declaration limit[ed] to one executive branch agency or is it unlimited?

No, a disaster declaration allows the governor to exercise authority with respect to all state agencies.

The Alaska Disaster Act provides the governor with broad authority to "use all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency"¹⁰ This includes transferring personnel and altering the functions of state agencies to respond to the emergency. For more information about the governor's authority, please review AS 26.23.020.

With respect to the current disaster declaration, Governor Walker has directed "all departments" to evaluate and apply for grants, including federal grants, to provide prevention and treatment services and assist with monitoring and management of controlled substances. The State Medical Officer is directed to coordinate the response, the Department of Corrections is directed to develop a treatment program for inmates at the point of release from custody, and the Department of Public Safety is directed to identify pathways through which illegal drugs enter the state.¹¹

2. Is the governor limited, in scope, to his original declaration?

The governor is likely limited to actions within the scope of the original declaration, but may be able to revise the declaration or actions taken to respond to the disaster as long as the revised declaration addresses the same disaster.

3. Can the governor issue a second declaration to expand the original scope?

There is no specific provision authorizing the governor to expand his declaration, either by revising the original proclamation or by issuing a second declaration. The governor can take actions within the scope of the disaster declaration for the 30 days that it is in effect. After that, it may only be extended by the legislature.¹² A "disaster emergency" is defined as "*the condition* declared by proclamation of the Governor" (emphasis

¹⁰ AS 26.23.020(g)(2).

¹¹ See Administrative Order No. 283 (Feb. 16, 2017).

¹² AS 26.23.0020(c).

added).¹³ This definition limits the disaster to the condition (singular) declared in the governor's proclamation. In this case, the condition is described as "an outbreak and a condition of public health disaster emergency exists statewide, and this condition is of sufficient severity and magnitude to warrant a public health disaster emergency declaration in order to provide assistance."¹⁴ This relates to the definition of disaster in AS 26.23.900(2)(E). The governor's letter to the legislature further describes the epidemic as an outbreak of "the disease of opioid and heroin addiction and abuse"¹⁵ The governor can probably expand the actions he takes in response to the disaster by issuing new administrative orders as long as the actions are intended to address the disaster as it is defined in the February 14, 2017, disaster declaration. If the governor wishes to address a different emergency, the governor would have to issue a different declaration specifying the different emergency.

As discussed above, however, the legislature can decline to approve the governor's financial plan or pass a bill to limit the governor's authority. If the declaration occurs during session, any actions the governor takes later that are not ratified by the legislature by law are void.¹⁶

Conclusion and a drafting note

In the short time available to respond to your request, I have not been able to do an exhaustive review of available legal resources. However, much of the information requested is expressed in AS 26.23.010 – 26.23.240, as previously explained.

Please note that the bill includes a retroactivity clause and immediate effective date, so if the bill takes effect after the expiration of the disaster declaration, it will be retroactive to the date the disaster declaration would otherwise expire.

If I may be of further assistance, please advise.

KSG:mlp
17-098.mlp

Attachment

¹³ AS 26.23.900(3).

¹⁴ Gov. Bill Walker, State of Alaska Declaration of Disaster Emergency (Feb. 14, 2017).

¹⁵ Letter from Gov. Bill Walker to the Hon. Pete Kelly and the Hon. Bryce Edgmon (Feb. 15, 2017).

¹⁶ AS 26.23.025(c).