

HB

407

Revision Date: _____ Department Affected: Environmental Conservation
 Title: Immunity for SERC, LEPCs, and HSSTRC BRU: Spill Prevention and Response
 Component: Spill Prevention, Planning and Management
 Sponsor: Governor
 Requestor: Governor COMPONENT SERIAL NO.

1	4	3	0
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Janice Adair Phone: 465-5050
 Division: Commissioner's Office Date: December 10, 1991
 Approved by Commissioner: Janice Adair for John Sandoe
 Agency: Department of Environmental Conservation Date: December 10, 1991

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

Page ___ of ___

COMMITTEE COPY

Revision Date: _____
 Title: An Act providing for immunity for the Alaska Emergency
 Response Comm. _____
 Sponsor: Rules Committee
 Requestor: Governor

Department Affected: Administration
 BRU: Risk Management
 Component: Risk Management

COMPONENT SERIAL NO.

0	0	7	1
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: No impact on the Division of Risk Management's budget.

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: Donald J. Hitchcock
 Division: Risk Management

Phone: 465-2180
 Date: 12.10.91

Approved by Commissioner: Nancy Bear Usara
 Agency: Administration

Nancy Bear Usara
 Date: Dec. 10, 1991

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

CONTINUATION OF FISCAL NOTE ANALYSIS
HB 407

An act providing statutory immunity for the Alaska State Emergency Response Commission and the Hazardous Substance Spill Technology Review Council and their members while acting within the course and scope of their official duties unless gross negligence or intentional misconduct is involved. Gross negligence, intentional misconduct or acts which fall under federal law are excluded from this immunity statute.

This bill will make it easier to get qualified members to serve on these very sensitive and important Commissions. The Division of Risk Management is in favor of this legislation.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 WILLOUGHBY AVENUE, SUITE 105
JUNEAU, AK 99801-1795

Phone: (907) 465-5000
Fax: (907) 465-5070

April 22, 1992

The Honorable Dave Donley
Chairman
House Judiciary Committee
P.O. Box V
Juneau. AK 99811

Dear Representative Donley:

HB 407 was recently referred to your committee from the House Resources Committee. This bill would provide immunity to the members of the Alaska State Emergency Response Commission (SERC), the Local Emergency Planning Committees (LEPCs) created under the SERC, and the Hazardous Substance Spill Technology Review Council (HSSTRC or TRC) for their acts or omissions which are in accordance with their official duties, unless the act or omission constitutes gross negligence or intentional misconduct or which may be the subject of relief under an applicable federal law.

As explained in the Governor's transmittal letter, state officials and members of the public serve on the SERC, the LEPCs and the RTC. Each of these entities is charged with tasks relating to hazardous substance emergency planning and preparedness, community right-to-know reporting, toxic substance release reporting, and the management of hazardous substances. The potential exposure to liability arising from these statutorily mandated activities may discourage qualified individuals from accepting appointments to the SERC, LEPCs and RTC.

The success of the SERC, LEPCs and RTC are critical to the success of the State of Alaska in emergency preparedness when dealing with oil spills or other hazardous substance releases. Enclosed herewith is a legal opinion relating to this issue that may be of interest to the members of your committee when reviewing HB 407. While the opinion is long, the pertinent part begins on page 32. We are also enclosing statutes from other states which have adopted this kind of immunity for members of their SERC, and the federal law allowing for citizen suits against members of a SERC.

The Honorable Dave Donley

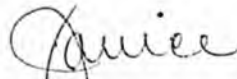
-2-

April 22, 1992

We respectfully ask that you schedule this bill for a hearing at the earliest possible convenience. We look forward to your favorable action.

If you need any further information, please do not hesitate to contact me, at 465-5010.

Sincerely,



Janice Adair
Assistant Commissioner

JA/vr/ars (asdir\donley.407)

Enclosures: Legal Opinion
Statutes

cc: Paul Fuhs, Governor's Office

(9)
Date Referred: March 9, 1992

HOUSE COMMITTEE REPORT
FURTHER REFERRALS:

JUDICIARY

Date of Committee Action: 4/9/92

The RESOURCES Committee considered:

HB 407

HOUSE BILL NO. 407

IMMUNITY FOR ACTIONS TAKEN UNDER AS 46.13

"An Act providing immunity for the Alaska State Emergency Response Commission, the local emergency planning committees, and the Hazardous Substance Spill Technology Review Council and their members for actions taken under AS 46.13; and providing for an effective date."

- RECOMMENDATIONS:
- be replaced with ~~HB 407~~ the same title a new title
- have attached amendments(s)
- do pass
- do not pass
- no recommendations
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) _____

SIGNING <u>DO PASS</u>	DP	<u>OTHER RECOMMENDATIONS</u>	DNP	NR	AM
<i>Clyde Davidson</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
<i>Tom Meyer</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
<i>Loren A. Berman</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
		<i>[Signature]</i>		<input checked="" type="checkbox"/>	

Clyde Davidson
CHAIRMAN'S SIGNATURE

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. John A. Sandor
Commissioner
Department of
Environmental Conservation

DATE: March 31, 1992

FILE NO: 663-91-0483

TEL. NO: 465-3600

SUBJECT: Tort liability and
emergency response
planning

FROM: *Marie Sansone*
Marie Sansone
Assistant Attorney General
Natural Resources Section--Juneau

The attached memorandum of advice was prepared in response to the State Emergency Response Commission's (SERC's) request for advice dated May 13, 1991, concerning SERC authority and the liability of responders. In addition, this memorandum of advice supersedes the memorandum dated October 29, 1990, which was prepared in response to SERC's request for advice dated July 30, 1990, concerning the liability of the state and the members of the SERC, the local emergency planning committees (LEPCs), and the Hazardous Substance Spill Technology Review Council (HSSTRC) for actions taken under AS 46.13. The Department of Law had indicated in that memorandum that further legal analysis would be undertaken in connection with proposed immunity legislation for these entities and their members.

Also attached for your convenience are copies of House Bill No. 407 and Senate Bill No. 359, the proposed immunity legislation, along with the governor's transmittal letters dated January 16, 1992, and the Memorandum of Agreement (Indemnity Agreement), executed June 13, 1991 which provides the members of the SERC, the LEPCs, and the HSSTRC a guarantee of defense and indemnification for negligence claims until such time as immunity legislation is enacted.

Please do not hesitate to contact me at the number indicated above if you have any questions regarding this matter.

MS:tg

Enclosures

cc w/enc.: Janice Adair, DEC, Special Assistant
Amy Skilbred, DEC, SERC Coordinator
Camille Stephens, DEC, DSPAR

received
4-2-92

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. John A. Sandor
Commissioner
Dep't of Env'tl. Conservation

DATE: March 31, 1992

FILE NO.: 663-91-0483

TEL. NO.: 465-3600

SUBJECT: Tort liability and
emergency response
planning

Marie Sansone

FROM: Marie Sansone
Assistant Attorney General
Natural Resources Section - Juneau

On behalf of the Alaska State Emergency Response Commission, you have asked whether the commission may delegate to a committee the authority to grant interim approval of emergency plans. The statutes that create the commission and specify its powers do not authorize the delegation of authority; therefore, the commission may not delegate interim approval authority.

You also requested our advice concerning the potential tort liability associated with response actions carried out in accordance with emergency plans. A number of statutes that provide immunity under specified circumstances are discussed below, as is AS 09.50.250(1), which establishes the "discretionary function exception" to state tort liability. In addition, in a memorandum dated October 29, 1990, the Department of Law advised you that the potential liability of the Alaska State Emergency Response Commission, the local emergency planning committees, and the Hazardous Substance Spill Technology Review Council and their members would be addressed in greater detail in connection with proposed immunity legislation. House Bill No. 407 and Senate Bill No. 359, which would provide immunity, were introduced in the legislature on January 16, 1992, and the potential tort liability of these entities and their members is discussed below. Conclusions and recommendations are found beginning on page 35.

BACKGROUND

The Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C.A. §§ 11001--11050 (1991) (Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III)), which provides the legal framework for emergency planning for extremely hazardous substances, was passed in response to the tragic chemical accident in 1984 at Bhopal, India. H.R. Rep. No. 99-253(I), 99th Cong., 1st Sess., Vol. 4, at 258 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2932. SARA Title III has two distinct parts: an emergency planning mechanism and community right-to-know provisions. The emergency planning provisions

require the governor of each state to establish an emergency planning commission and to appoint to the commission persons with technical expertise in emergency response. The commission in turn sets up emergency planning districts and appoints an emergency planning committee for each district. Using information provided by facilities that store, use, or release certain chemicals, the local committees are required to prepare emergency plans. 42 U.S.C.A. §§ 11001--11005.

I. ADMINISTRATIVE ENTITIES ESTABLISHED BY AS 46.13

A. The Alaska State Emergency Response Commission and the Local Emergency Planning Committees

The Alaska State Emergency Response Commission (Alaska SERC), established as of September 24, 1990, by AS 46.13.010, is a continuation of the commission established on October 21, 1987, by Administrative Order No. 103. Sec. 25, ch. 190, SLA 1990. AS 46.13.020 prescribes its composition:

The commission consists of the commissioners of community and regional affairs, environmental conservation, fish and game, health and social services, labor, natural resources, public safety, and transportation and public facilities, or the designees of the commissioners, the adjutant general of the Department of Military and Veterans' Affairs or a designee, and seven members of the public to be appointed by the governor. . . .

Under SARA Title III, a state emergency response commission is required to establish emergency planning districts to facilitate the preparation and implementation of emergency response plans. Two state statutes govern district boundaries. Under AS 46.13.040(2), the Alaska SERC is given the authority to designate and revise as necessary district boundaries, using the boundaries of regions established by the Department of Environmental Conservation (DEC) under AS 46.04.200--46.04.210 for the state master and the regional master oil and hazardous substance discharge prevention and contingency plans (state master plan and regional master plans) and of political subdivisions where appropriate. Under AS 46.13.060, unless otherwise designated by the Alaska SERC, the boundaries for the districts are the regions designated by DEC for the regional master plans. The Alaska SERC has created 25 local emergency planning districts.

The Alaska SERC appoints the members of a local emergency planning committee (LEPC) for each district. Each LEPC

must include representatives from each of the following groups: elected state and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to SARA Title III (covered facilities). The Alaska SERC may revise its appointments to the LEPCs as it deems appropriate. In addition, interested persons may petition the commission to modify the membership of an LEPC. 42 U.S.C.A. § 11001(c)-(d); AS 46.13.040(5). Under SARA Title III, state emergency response commissions were required to establish an LEPC for each local emergency planning district by August 1987. 42 U.S.C.A. § 11001(c). The Alaska SERC has currently appointed 11 LEPCs for 25 districts, and thus is not in compliance with SARA Title III.

The Alaska SERC supervises and coordinates the activities of the LEPCs. 42 U.S.C.A. § 11001(a); AS 46.13.040(6). The duties of the LEPCs are prescribed throughout SARA Title III and in AS 46.13.080. Under SARA Title III, the LEPCs were required to develop emergency response plans for extremely hazardous substances by October 17, 1988, and to review the plans at least annually thereafter. 42 U.S.C.A. § 11003(a). SARA Title III requires each LEPC to submit its plans to the Alaska SERC for review and recommendations as may be necessary to ensure coordination with the plans of other districts. Id., § 11003(e). State law requires in addition that the plans prepared by the LEPCs include procedures to be followed in the event of a hazardous substance release. AS 46.13.090(a)(2). Under AS 46.13.040(4) and AS 46.13.045(a), the Alaska SERC must review and approve the extremely hazardous substances and hazardous substances emergency plans.

The Alaska SERC also reviews and approves the state and regional master plans and the state, interjurisdictional, and local plans prepared under the Alaska Disaster Act, AS 26.23, to the extent the latter plans pertain to hazardous substance response. AS 26.23.215; AS 46.13.040(3)-(4). The Alaska SERC is directed to use the criteria established by AS 46.13.045¹ for

¹ AS 46.13.045 provides:

PLAN APPROVAL; INCIDENT COMMAND SYSTEMS.
(a) The commission shall review and exercise approval authority over local, interjurisdictional, regional, and state plans for hazardous substance discharge response, including plans prepared under AS 26.23, AS 46.04.200--46.04.210,

(continued...)

the review and approval of the various plans, and to adopt regulations to carry out the purposes of AS 46.13 and the emergency planning provisions of SARA Title III. AS 46.13.040(4) and (11).

B. The Hazardous Substance Spill Technology Review Council

The legislature established the Hazardous Substance Spill Technology Review Council (HSSTRC) in the Alaska SERC to assist in the identification of containment and cleanup products and procedures for arctic and sub-arctic hazardous substance releases and to make recommendations to state agencies regarding their use. AS 46.13.100--46.13.110. The HSSTRC consists of the commissioner of DEC, the adjutant general of the Department of Military and Veterans' Affairs (DMVA), a representative of the University of Alaska appointed by the governor, the governor's senior science advisor, a representative of the Prince William Sound Science Center appointed by the governor, and four members, appointed by the governor, with broad expertise in physical or biological science; oil technology, transportation, or management; fisheries; economics; environmental engineering; or law. The U.S. Coast Guard and the U.S. Environmental Protection Agency (EPA) may each appoint an employee to the council to represent their agencies as nonvoting members. AS 46.13.110(b).

¹ (...continued)
and this chapter.

(b) Before approving a plan, the commission shall ensure that the plan includes an incident command system that describes the respective roles of affected persons and agencies in a clear and specific manner and that the respective roles of state agencies are consistent with their statutory duties. The commission shall also ensure that the plans are well-integrated with related plans.

(c) To the extent consistent with other law, an incident command system approved under this section must provide the Alaska division of emergency services has a major role in mobilization of personnel and resources, communications, transportation planning, and other logistics involved in a state response to an imminent or actual hazardous substance discharge.

The HSSTRC is charged with a variety of tasks related to hazardous substance research. The council recommends research topics to DEC; establishes DEC spill technology testing protocols; identifies research funding sources; makes proposals to the governor, the Alaska SERC, and other entities to encourage and fund discharge prevention and response; compiles and maintains information related to containment and cleanup technology, hazardous substances management, industry and government practices and laws, and DEC research; and performs other functions as requested by the Alaska SERC. AS 46.13.120.

II. EMERGENCY PLANS

A. Emergency Planning for Hazardous and Extremely Hazardous Substances Under AS 46.13 and SARA Title III

The emergency response plans prepared by the LEPCs establish the procedures to be followed in the event of a release of extremely hazardous substances, as defined by federal law, plus the procedures to be followed in the event of a release of

hazardous substances as defined by state law.² Each plan must include:

(1) Identification of covered facilities, routes likely to be used to transport extremely hazardous substances, and additional facilities contributing or subjected to additional risk due to their proximity to covered facilities, such as hospitals or natural gas facilities;

(2) Procedures to be followed by facilities and local emergency and medical personnel to respond to a release of hazardous or extremely hazardous substances;

² Emergency planning under SARA Title III pertains to some 360 substances on EPA's List of Extremely Hazardous Substances, which is published at 40 C.F.R. Part 355 appendices A-B (1991). The list establishes threshold planning quantities for each substance. See 42 U.S.C.A. § 11002(a). Except for emergency notification procedures applicable to covered facilities, SARA Title III does not apply to the transportation or storage incident to transportation of extremely hazardous substances. 42 U.S.C.A. § 11047.

In contrast, AS 46.13.090(a)(2) requires that the emergency plans contain procedures to be followed in the event of a release of "hazardous substances." "Hazardous substance" is defined very broadly to mean:

(A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found;

(B) oil; or

(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14) [Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)].

(3) Designation of a community emergency coordinator and facility emergency coordinators to make determinations necessary to implement the emergency plan;

(4) Procedures for notification of a release by the facility emergency coordinators to persons designated in the emergency plan and to the public;

(5) Methods for determining whether a release has occurred and the area or population likely to be affected;

(6) A description of available emergency equipment and facilities;

(7) Evacuation plans;

(8) Training programs for local emergency response and medical personnel; and

(9) Methods and schedules for emergency plan drills.

See 42 U.S.C.A. § 11003(c); AS 46.13.090(a). In addition, each plan must include an incident command system that describes the respective roles of affected persons and agencies. AS 46.13.090(b).

B. State and Regional Master Oil and Hazardous Substance Discharge Prevention and Contingency Plans

The Alaska SERC is responsible for reviewing and approving state and regional master plans prepared by DEC. AS 46.13.040(3)-(4); AS 46.04.200(c)(5); AS 46.04.210(b). These plans must:

(1) take into consideration the elements of an oil discharge prevention and contingency plan approved or submitted for approval under AS 46.04.030;³

³ AS 46.04.030 requires oil discharge prevention and contingency plans for oil terminal facilities, exploration and production facilities, pipelines, tank vessels, and oil barges. DEC is the only state agency that may approve, modify, or revoke these plans. AS 46.04.030(h).

(2) include an incident command system that specifies the responsibilities for the assessment, containment, and cleanup of oil or hazardous substance discharges on the part of DEC, DMVA Division of Emergency Services, and other state agencies; municipalities; federal agencies; operators of facilities; private parties whose property may be affected by a discharge; and other parties having an interest in or the resources to assist in containment and cleanup;

(3) include incident command systems for an emergency response under AS 26.23, AS 46.03.865, or AS 46.04.080;⁴

(4) identify actions necessary to reduce the likelihood of catastrophic oil discharges and significant discharges of hazardous substances; and

(5) designate locations where oil and hazardous substance emergency response supply and equipment storage depots should be established and where emergency response corps personnel should be available.

See AS 46.04.200--AS 46.04.210.

C. The State Emergency Plan and Local and Interjurisdictional Plans Prepared Under the Alaska Disaster Act

Under AS 46.13.040(3)-(4) and AS 46.13.045, the Alaska SERC is also responsible for reviewing and approving local, interjurisdictional, and state emergency plans for hazardous substance discharge response prepared under the Alaska Disaster Act, AS 26.23.⁵ The Alaska Disaster Act defines "disaster" to

⁴ AS 26.23 is the Alaska Disaster Act. AS 46.03.865 defines the authority of DEC in cases of emergency. AS 46.04.080 concerns the role of DEC and the Division of Emergency Services with respect to catastrophic oil discharges.

⁵ AS 26.23.215 clarifies the relationship between the emergency plans prepared under the Alaska Disaster Act and the other plans approved by the Alaska SERC:

(continued...)

include "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, including . . . the release of oil or a hazardous substance, if the release requires prompt action to avert environmental danger or damage." AS 26.23.900(1)(B).

AS 26.23.040(a) requires the Division of Emergency Services to prepare and maintain a state emergency plan. The plan may include measures for:

- (1) Preventing and minimizing injury and damage;
- (2) Prompt and efficient response;
- (3) Emergency relief;
- (4) Identification of geographical areas, municipalities, or villages especially vulnerable to a disaster;
- (5) Recommendations for zoning, building, and land use controls; safety measures for securing nonpermanent or semipermanent structures; and other preventive and preparedness measures;
- (6) Assistance to local officials in designing local emergency plans;

⁵ (...continued)

Relationship to other planning statutes. To the extent that the state emergency plan, interjurisdictional plans, and local plans prepared under this chapter relate to action required to avert damage from a release of oil or a hazardous substance, the plans must be substantially equivalent in relevant respects to the local emergency plans prepared under AS 46.13 and the state and regional master plans prepared by the Department of Environmental Conservation under AS 46.04.200--46.04.210, use the same incident command systems used in those plans, and be approved by the Alaska State Emergency Response Commission under AS 46.13.045.

(7) Authorization and procedures for the construction of temporary works designed to protect against or mitigate danger or loss;

(8) Organization of manpower and chains of command;

(9) Coordination of federal, state, and local disaster activities;

(10) Coordination of the state emergency plan with federal disaster plans; and

(11) Other matters necessary to carry out the Alaska Disaster Act.

See AS 26.23.040(a).

Each local and interjurisdictional disaster agency is required to prepare and keep current a disaster emergency plan for its area. AS 26.23.060(e). The state emergency plan and the local and interjurisdictional plans, insofar as they contain provisions relating to the release of oil or hazardous substances, must be substantially equivalent to the local emergency response plans prepared by the LEPCs and the state and regional master plans prepared by DEC, use the same incident command systems, and be approved by the Alaska SERC. AS 26.23.215.

DISCUSSION

To respond to your request for advice, the topics of discussion have been arranged in the following order: delegation of authority; preliminary definitions relating to tort liability; the status of the LEPCs for purposes of liability; immunity statutes; the effect on liability of the state of completion of the plans; personal liability of the members of the Alaska SERC, the LEPCs, and the HSSTRC; and overall conclusions and recommendations.

Your questions concerning the potential tort liability associated with response actions carried out during various stages of emergency response plan development and approval pose several difficulties. First, there are an infinite variety of circumstances under which a hazardous substance release could occur and under which an emergency response or the failure to respond could cause injury. While it's possible to outline the contours of tort law, the application of the law in any given circumstance to determine whether negligence exists and whether

liability will be imposed ultimately depends on the unique facts of each case. Even slight differences in facts may lead to different findings regarding liability and immunity. Moreover, the law of torts changes frequently as the Alaska Supreme Court and the state legislature create new rights and remedies. The following discussion therefore highlights a number of statutes which provide protection from liability under the specific circumstances described in the statutes. In some instances, these statutes protect only the governmental entity mentioned; in others, the statutes limit personal liability. Because there may be instances where these statutes would not apply, the statutory "discretionary function exception" to state tort liability (statutory sovereign immunity) and the common law "official immunity" for state officers are discussed at length.

A second difficulty posed by your request is that the Department of Law may provide advice only to state agencies and state officials. To the extent your request seeks advice concerning the liability of local governments, responders, and plan holders, it would be more appropriate for these entities to obtain advice from their own counsel. The potential liability of the LEPCs as state agencies, however, is discussed; and some background information is presented, although not analyzed, which concerns the liability of entities other than the state as these entities play an integral role in emergency planning.

I. DELEGATION OF AUTHORITY

In general, apart from ministerial functions, an administrative entity cannot delegate authority and functions which under the law may be exercised only by that entity. 73 C.J.S. Public Administrative Law and Procedure § 56 at 513 (1983). Unless authorized by statute, "administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment; and subordinate officials have no power with respect to such duties." Id. at 513-14 (footnote omitted). See also 2 Am. Jur. 2d Administrative Law § 221, at 51 (1962).

The Alaska SERC is composed of nine department heads or their designees and seven members of the public appointed by the governor. AS 46.13.020. The public members serve at the pleasure of the governor for staggered terms of three years. AS 46.13.030. While the nine department heads may delegate their authority to designees, the seven public members may not do so. See City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346, 351-53 (Alaska 1990).

The Alaska SERC adopted bylaws on November 2, 1990, which provide for the establishment of committees. Under Article VIII, section 2, "The chair of the Commission may appoint persons other than Commission members or their designees to serve on committees." With respect to the approval of hazardous substance emergency response plans, Article IX, section 5, of the commission's bylaws states:

Any hazardous substance Emergency response plan subject to approval by the Commission under AS 46.13 shall first be referred to an appropriate committee for review, consideration, and its recommendation.

To facilitate the approval process, the Alaska SERC has proposed a procedure whereby an emergency response committee could grant interim approval or interim approval with conditions to the plans, pending review and approval by the full commission.

The statute which establishes the Alaska SERC and sets forth its powers and duties, AS 46.13, does not authorize the commission to delegate its powers and duties. Moreover, as discussed below at pages 23 to 28, the review and approval of emergency response plans is largely a discretionary function which requires the exercise of judgment. Based on established administrative law cited above, AS 46.13.020, which specifies the composition of the commission and requires that its seven public members be appointed by the governor, should be interpreted to require that the Alaska SERC function as a whole, with the benefit of the expertise and experience of all its members. Without statutory authorization, the Alaska SERC cannot delegate its power to approve emergency response plans to a committee.

II. PRELIMINARY DEFINITIONS RELATING TO TORT LIABILITY

SARA Title III authorizes citizen suits against a state governor or state emergency response commission, but not an LEPC,

for failure to comply with certain requirements of the Act.⁶
42 U.S.C.A. § 11046(a)(1)(C)-(D). SARA Title III also provides:

Nothing in this section [authorizing citizen suits] shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator [of EPA] or a State agency).

Id., § 11046(g). Thus, any person who believes he or she has been injured by an act or omission of the Alaska SERC or an LEPC or their members may file a tort claim in state court.

EPA, in a report entitled "Tort Liability in Emergency Planning," provides a helpful definition of the word "tort":

A tort is an action that harms another person, business, or group. It occurs when a person acts or fails to act, without right, and thus harms another directly or indirectly. A tort is an act for which a civil action for personal injuries or property damage [may be brought], rather than a criminal suit.

Each state, through its laws, regulations, and court decisions, recognizes certain rights of individuals and businesses. A state's tort law protects these rights by providing a means for a

⁶ SARA Title III authorizes citizen suits against a state governor or a state emergency response commission for failure to provide access to an emergency response plan, material safety data sheets, lists of hazardous chemicals, inventory forms, toxic chemical release forms, and follow up emergency notices and for failure to respond to a request for tier II information. 42 U.S.C.A. § 11046(a)(1)(C)-(D). The Act does not authorize financial penalties; however, a court may award the costs of litigation, including reasonable attorney's fees and expert witness fees, to the prevailing or substantially prevailing party. Id., § 11046(f).

SARA Title III also provides for criminal penalties against any person who knowingly and willfully discloses trade secrets entitled to protection under the Act. Id., § 11045(d)(2).

person or business to seek compensation for losses or harm caused by another.

EPA, Tort Liability in Emergency Planning 2 (Jan. 1989).

"Negligence" is the failure to use reasonable care. State v. Abbott, 498 P.2d 712, 725 (Alaska 1972). In a negligence case, the plaintiff must prove all four of the following elements:

(1) A duty requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

(2) A failure on his or her part to conform to the standard required.

(3) Proximate cause, that is, a reasonably close causal connection between the conduct and the resulting injury.

(4) Actual loss or damage.

Id.

Statutes which provide immunity often distinguish between negligence and gross negligence or intentional misconduct. "Gross negligence" or "reckless misconduct" occurs when one has full knowledge of the hazards he or she is creating, so as to evidence a reckless disregard of the possible consequences and an indifference to the rights of others. Leavitt v. Gillaspie, 443 P.2d 61, 65 (Alaska 1968). Gross negligence differs from ordinary negligence in several important respects:

[Reckless misconduct or gross negligence] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be

reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligence is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

Restatement (Second) of Torts § 500 comment g at 590 (1965),
quoted in id.

"Intentional misconduct" occurs when a person acts or fails to act, either for the purpose of causing harm to another or knowing that there is a substantial certainty of causing harm to another. See Restatement, supra.

The Alaska SERC, which is placed within DEC, and the HSSTRC, which is placed within the Alaska SERC, are state agencies. Any questions regarding the potential tort liability of these entities and their members must be answered with reference to state tort law concerning the liability of state agencies and state officials. The legal status of the LEPCs for purposes of tort liability requires further examination.

III. STATUS OF THE LEPCs AND LEPC MEMBERS FOR PURPOSES OF TORT LIABILITY

In a previous memorandum, we advised you that for purposes of receiving and expending money, LEPCs are state agencies. 1992 Inf. Op. Att'y Gen. (Jan. 23; 663-92-0131). However, an entity may be considered a state agency for one purpose but not another. Each circumstance requires an independent analysis. Alaska Commercial Fishing & Agricultural Bank v. O/S Alaska Coast, 715 P.2d 707, 709 n.5 (Alaska 1986). Applying the criteria listed in our prior memorandum, we conclude that the LEPCs are state agencies for purposes of tort liability.

For purposes of emergency planning, the Alaska SERC establishes the boundaries of the local emergency planning districts based on regional boundaries established by DEC for the regional master plans or where appropriate, based on the boundaries of political subdivisions. The Alaska SERC may revise the boundaries of the districts. Although SARA Title III permits the designation of existing political subdivisions as emergency planning districts, 42 U.S.C.A. § 11001(b), the state statute

does not designate existing political subdivisions as such, but merely provides that if the Alaska SERC deems it appropriate, the boundaries of the emergency planning districts may coincide geographically with the boundaries of the political subdivisions of the state. AS 46.13.040(2); AS 46.13.060.

The Alaska SERC appoints the members of the LEPCs and may revise the membership of the LEPCs. It also supervises and coordinates the activities of the LEPCs, and provides guidance, training, and funding for the LEPCs. See AS 46.13.040(5)-(6).

Under SARA Title III, the Alaska SERC is required to review and make recommendations to the LEPCs on the local emergency response plans; under AS 46.13, the Alaska SERC is further required to approve the plans. The Alaska SERC is required to ensure that the plans prepared by the LEPCs contain an incident command system and that the plans are well integrated with related emergency plans. This coordination promotes efficiency in emergency response actions at the local, state, and federal levels, and assures that the agencies involved will not be working at cross purposes. Any accident involving hazardous substances has the potential to impact the health and safety of communities far beyond the area immediately affected, as well as their environmental and economic well-being. Thus, the work performed by the LEPCs is part of a statewide, coordinated emergency planning effort.

The Alaska SERC plays a large role in emergency planning at the local level, and has a great deal of control over the LEPCs. SARA Title III does not authorize citizen suits against the LEPCs for their failure to meet the requirements of the Act, but rather, against the governor and the Alaska SERC. See 42 U.S.C.A. § 11046. Neither SARA Title III nor AS 46.13 impose emergency planning duties on the boroughs or municipalities. Based on the above, for purposes of tort liability, the LEPCs are state agencies.

Since the LEPCs are state agencies for purposes of tort liability, it follows that LEPC members are state officers for purposes of tort liability. EPA concluded:

A Local Emergency Planning Committee that is created by a State Emergency Response Commission and whose members are appointed by the state commission is also an agency of the state. If the members of the local committee are appointed by the state commission, then they represent the state rather than a city, county, or other political subdivision.

EPA, Tort Liability in Emergency Planning 10 (1989).

With respect to the individual members of LEPCs, EPA found that

[m]any Local Emergency Planning Committee members serve in a dual capacity as a member of the committee and as an employee of the political subdivision (city fire service, police department, or emergency management agency)

Depending upon the circumstances . . . the court could conclude that the actions of the committee member were outside his role and authority as a committee member, but were within his capacity as a local governmental employee. Actions outside their committee role could be viewed by the courts as acts of the local governmental employer. This distinction could result in a determination that the local government, for example, was liable for the act of the employee rather than the state which appointed the individual to the committee. Committee members should therefore understand their authorized role and responsibilities.

Many local committee members are self-employed, employed by or represent a private business or non-profit corporation, or are a private citizen who is not employed. The actions of these local committee members would be considered state actions on behalf of the state as long as:

- (1) The local committee members are appointed by the state commission;
- (2) The state commission has the necessary state authority to appoint local committee members;
- (3) Both the state commission and the local committee are agencies of the state;
- (4) State law recognizes the local committee members as agents of the state; and
- (5) The committee member is acting within the scope of his authority.

Under these circumstances, the state courts would ordinarily perceive suits against local committee members as suits in their official capacity or suits against the state and such suits would not subject the individual to personal liability.

Id. at 11.

The EPA report, thus, supports the conclusion that provided the members of the LEPCs are acting within the scope of their statutory authority under SARA Title III and AS 46.13.080, they are state officers for purposes of tort liability and immunity.

IV. IMMUNITY STATUTES

A. Limitation of Liability for Negligence in Response Actions, AS 46.03.822

AS 46.03.822 imposes strict liability on certain persons for various costs incurred as a result of a release of hazardous substances.⁷ Subsection (h) provides the state and local governments immunity from liability under AS 46.03.822 in connection with certain response actions:

The state, a municipality, or a village is not liable under this section for costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance generated by or from a facility or vessel owned by another person unless the actions taken by the state, the municipality, or the village constitute gross negligence or intentional misconduct.

AS 46.03.822(h).

⁷ For purposes of this statute, "hazardous substances" is defined in AS 46.03.826(5), quoted above in footnote 2 on page 6.

B. Limitation of Liability for Negligence in Response
Actions for Certain Oil and Hazardous Substance
Discharges, AS 46.08.160

AS 46.08.160 limits the liability of the state, employees of the state, and members of the DMVA Oil and Hazardous Substance Response Corps for costs and damages resulting from actions taken in response to certain oil and hazardous substance discharges.⁸ AS 46.08.160 provides:

The state, an employee of the state, and a member of the corps are not liable for costs or damages as a result of actions taken under AS 46.08.100--46.08.190 in response to a release or threatened release unless the actions taken by the state, the employee, or the member of the corps constitute gross negligence or intentional misconduct.

This statute applies to (1) a catastrophic oil discharge that constitutes an emergency under AS 46.04.080(a), (2) a discharge of oil or hazardous substances declared an emergency

⁸ For purposes of this statute, "hazardous substances" is defined in AS 46.08.900(6) to mean:

(A) an element or compound that, when it enters into or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to the public health or welfare, or to fish, animals, vegetation, or any part of the natural habitat in which fish, animals, or wildlife may be found; or (B) a substance defined as a hazardous substance under 42 U.S.C. 9601--9657 [CERCLA]; "hazardous substance" does not include uncontaminated crude oil or uncontaminated refined oil in an amount of 10 gallons or less.

"Oil" is defined as:

petroleum products of any kind and in any form, whether crude, refined, or a petroleum by-product, including petroleum, fuel oil, gasoline, lubricating oils, oily sludge, oily refuse, oil mixed with other wastes, liquified natural gas, propane, butane, and other liquid hydrocarbons regardless of specific gravity.

AS 46.08.900(7).

under AS 46.03.865, (3) discharges declared an emergency by the governor under AS 26.23, (4) discharges or potential discharges that the commissioner of DEC reasonably believes may qualify under categories (1)-(3) above, and (5) discharges or potential discharges that the commissioner reasonably believes pose an imminent and substantial threat to public health or welfare or to the environment. AS 46.08.130(b).

C. Limited Liability for Response Action Contractors,
AS 46.03.823 and AS 46.03.825

Third, under certain circumstances, AS 46.03.823 limits the liability of "response action contractors" whose acts or omissions are not contrary to a response plan or order by a state agency having jurisdiction over the release. This statute applies only to response action contractors as that term is defined in AS 46.03.826(11).⁹ Similarly, under certain circumstances, AS 46.03.825 limits the liability of oil spill response action contractors. However, AS 46.03.825 is repealed effective July 1, 1992. Secs. 10, 12, ch. 92, SLA 1991.

⁹ AS 46.03.826(11) defines "response action contractor" as:

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release;

(B) a person who is retained or hired by and is under control of a person described in (A) of this paragraph to provide services related to the response action contract; and

(C) a person who acts as a volunteer and is engaged in a response action.

Effective July 1, 1992, AS 46.03.826(11) is repealed. AS 46.03.823(g) is also repealed and reenacted, and will contain in subsection (g)(3) this definition of response action contractor, with the exception of subparagraph (C) relating to volunteers, which is omitted. Secs. 7, 12, ch. 92, SLA 1991.

D. Limited Liability for Responding to Disaster,
AS 09.65.091

AS 09.65.091(a) limits the liability of persons providing equipment or services at the request of a government agency during a declared state of emergency:

A person who provides equipment or services on the request of a police agency, fire department, rescue or emergency squad, or other governmental agency during a state of emergency declared by an authorized representative of the state or local government is not liable for the death of or injury to any person or damage to any property caused by that person's actions, except when the trier of facts finds that the person acted intentionally, recklessly, or with gross negligence.

E. Limitation on Liability for Emergency Aid, AS 09.65.090

Under certain circumstances, AS 09.65.090 limits the liability associated with rescue and emergency care, and states:

(a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

(b) A member of an organization that exists for the purpose of providing emergency services is not liable for civil damages for injury to a person that results from an act or omission in providing first aid, search, rescue, or other emergency services to the person, regardless of whether the member is under a preexisting duty to render assistance, if the member provided the service while acting as a volunteer member of the organization; in this paragraph, "volunteer" means a person who is paid not more than \$10 a day and a total of not more than \$500 a year, not including ski lift tickets and reimbursement for expenses actually incurred, for providing emergency services.

. . . .
(d) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct.

F. Immunity From Suits Against Incorporated Units of Local Government, AS 09.65.070(c)-(d)

In 1977, the legislature enacted a broad immunity statute, AS 09.65.070, which protects local governments. For purposes of immunity, a municipality is defined as "a political subdivision incorporated under the laws of the state that is a home rule or general law city, a home rule or general law borough, or a unified municipality," AS 01.10.060, and includes a public corporation established by a municipality. AS 09.65.070(e)(1). A "village" is an "unincorporated community where at least 25 people reside as a social unit." AS 09.65.070(e)(2).

This statute contains a "discretionary function exception" which has been interpreted by the Alaska Supreme Court in the same manner as the state discretionary function exception. See Urethane Specialties, Inc. v. City of Valdez, 620 P.2d 683, 687-88 (Alaska 1980). There is, however, one important difference: AS 09.50.250 applies only to the state; AS 09.65.070(d) protects a municipality as well as its agents, officers, and employees.

AS 09.65.070 provides in part:

(c) No action may be maintained against an employee or member of a fire department operated and maintained by a municipality or village if the claim is an action for tort . . . and is based upon the act or omission of the employee or member of the fire department in the execution of a function for which the department is established.

(d) No action for damages may be brought against a municipality or any of its agents, officers or employees if the claim

(1) is based on a failure of the municipality, or its agents, officers, or employees, when the municipality is neither owner nor lessee of the property involved,

(A) to inspect property for a violation of any statute, regulation or ordinance, or a hazard to health or safety;

(B) to discover a violation of any statute, regulation, or ordinance, or a hazard to health or safety if an inspection of property is made; or

(C) to abate a violation of any statute, regulation or ordinance, or a hazard to health or safety discovered on property inspected;

(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;

(3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning;

(4) is based on the exercise or performance during the course of gratuitous extension of municipal services on an extraterritorial basis; or

(5) is based upon the exercise or performance of a duty or function upon the request of, or by the terms of an agreement or contract with, the state to meet emergency public safety requirements.

All of these provisions could come into play with respect to emergency response actions, and provide local governments and their employees, officers, and agents considerable protection from tort liability.

G. The "Discretionary Function Exception" to State Tort Liability, AS 09.50.250(1)

The legislature created a cause of action for tort claims against the state in AS 09.50.250, and provided limited statutory immunity for discretionary functions. AS 09.50.250(1) provides:

A person or corporation having a . . . tort claim against the state may bring an action against the state in the superior court However, an action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.

In the many cases construing this statute, the Alaska Supreme Court has emphasized the second clause, the "discretionary function exception," when a state agency is sued. See, e.g., Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 155 (Alaska 1987).

Before determining whether statutory immunity applies in any given case, it is first necessary to determine whether the state is liable in the absence of immunity. Division of Corrections v. Neakok, 721 P.2d 1121, 1125 (Alaska 1986). The court adopted the following three-part test for determining whether the state will be immunized: (1) did the state have a duty to take some action; (2) was the state's duty, if any, owed to the plaintiff; and, (3) if the state is liable under the first two requirements, is the state immunized by AS 09.50.250(1) because the actions or inactions complained of were discretionary? Adams v. State, 555 P.2d 235, 239-40 (Alaska 1976).

1. An actionable duty of care is owed to the public

A duty of care may be imposed by the common law or by statute, or it may arise from the voluntary assumption of responsibility. See Adams, 555 P.2d at 240-41. Whether an actionable duty of care exists is a public policy question involving the following factors:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the

extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555 (Alaska 1981). When the public is the intended beneficiary of a duty of care, the duty of care extends to anyone foreseeably endangered by the state's conduct. Neakok, 721 P.2d at 1125-32, 1136.

With respect to emergency response plans, the various statutes which require emergency planning impose a duty of care on the Alaska SERC and the LEPCs. The public is the intended beneficiary of the plans, and it is foreseeable that in the absence of emergency plans or in the event of deficient plans, people could be injured and property damaged.¹⁰ The state could thus be found liable if the duty of care is breached. The final prong of the analysis is to determine whether the discretionary function exception would provide immunity.

2. The discretionary function exception

The court has often remarked that when there is negligence, liability is the rule, immunity the exception. See, e.g., Japan Air Lines Co., Ltd. v. Alaska, 628 P.2d 934, 937 (Alaska 1981) (JAL). In State v. Abbott, 498 P.2d 712 (Alaska 1972), the first case to interpret the discretionary function language, the court adopted the "planning versus operational" or "discretionary versus ministerial" test. Application of the "planning-operational" distinction regarding levels of decision-making involves "delicate degrees of judgmental values," State v. I'Anson, 529 P.2d 188, 194 (Alaska 1974), and must take into account the underlying purposes of the discretionary function exception. Abbott, 498 P.2d at 721-22.

¹⁰ For example, the House Conference Report on SARA Title III states, "The Senate amendment and House amendment both establish programs to provide the public with important information on the hazardous chemicals in their communities, and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 3374. See also Williams v. Leybold Technologies, Inc., ___ F. Supp. ___, 1992 WL 26730 at 3 (N.D. Cal. 1992).

The discretionary function exception recognizes (1) the need to preserve separation of powers by limiting judicial re-examination of decisions made by other branches of government; (2) the fact that the courts are not equipped to investigate and balance all the factors that go into an executive or legislative decision; and (3) the public interest in preventing the enormous and unpredictable liability that would result from judicial reexamination of the decisions of other branches of government. Id. Decisions regarding funding and the allocation of scarce resources are generally considered to be made at the policy level and, therefore, are likely to be immune. Industrial Indemnity Co. v. State, 669 P.2d 561, 564-65 (Alaska 1983).

However, not all decisions involving an element of discretion fall within the discretionary function exception. Wainscott v. State, 642 P.2d 1355, 1356 (Alaska 1982). Moreover, policy decisions cannot be implemented negligently. Johnson v. State, 636 P.2d 47, 65 (Alaska 1981). In contrast to discretionary acts, operational or ministerial acts are those which concern routine, everyday matters, not requiring evaluation of broad policy factors. I'Anson, 529 P.2d at 194.

Application of the planning-operational test has proven difficult, and has resulted in numerous appellate decisions. The following examples may help illustrate the difference between planning and operational decisions.

Not immune: Once initial policy decision was made to maintain the Seward Highway during the winter by salting, sanding, and plowing, district engineer's decisions on how to allocate personnel and machinery were not immune. Abbott, 498 P.2d at 722. Negligent placement of highway signs and road stripes was not immune. I'Anson, 529 P.2d at 193-94. Negligent performance of hotel inspection by state fire officials was not immune. (By voluntarily undertaking fire inspection, upon discovery of extreme life hazard, state assumed a common law duty to protect occupants). Adams, 555 P.2d 240-44. Upon discovery of safety violations at pipe installation site, the Department of Labor's failure to take actions which would have prevented electrocution of worker was not immune. Wallace v. State, 557 P.2d 1120, 1124 (Alaska 1976). The state's negligent design of a runway at the Anchorage airport was not immune. JAL, 628 P.2d at 938. Once the policy decision had been made to reconstruct an overlapping road and railroad crossing, the approval of the reconstruction plans and the failure to place a sign at the crossing warning bicyclists of the particular hazard presented by the crossing were operational level decisions and not immune. Johnson, 636 P.2d at 64-66. The state's failure to control a dangerous parolee or warn his potential victims was not immune.

Neakok, 721 P.2d at 1132-35. The City of Kotzebue was not immune when city police failed to respond to a telephone call in which caller identified himself, his location, and the likely scene of the crime, and informed police that he intended to kill a friend of his. City of Kotzebue v. McLean, 702 P.2d 1309, 1313-15 (Alaska 1985).

Immune: The state did not undertake to inspect hotel and abate fire hazards; and therefore, was immune. State v. Jennings, 555 P.2d 248, 250 (Alaska 1976). Decisions whether or not to designate intersection which was at considerable distance from school as a school safety zone or to undertake any other safety measures were discretionary and therefore immune. Jennings v. State, 566 P.2d 1304, 1311-13 (Alaska 1977). Decision to issue warning against fly-by-night operators who install highly flammable insulation was immune, but decisions regarding contents of warning were not immune. Urethane Specialties v. City of Valdez, 620 P.2d 683, 688 (Alaska 1980). Decision to install flashing amber and red light instead of red, amber, and green traffic light was immune. Wainscott, 642 P.2d at 1357. Decision whether or not to install guardrail was immune. Industrial Indemnity, 669 P.2d at 563. Decision not to use dust control procedures on the Dalton Highway was immune. Freeman v. State, 705 P.2d 918, 920 (Alaska 1985). Decision to order removal of fence encroaching into right-of-way following disastrous storm was immune, but not the manner in which the fence was removed. Gates v. City of Tenakee Springs, 822 P.2d 455 (Alaska 1991).

3. Conclusion

The decision to undertake emergency planning is an immune policy decision. Executive implementation of a policy decision is immune "if the decisionmaker is authorized to consider basic political, social or economic policy factors and in fact considers them." Freeman, 705 P.2d at 920. Alaska SERC decisions are high level executive branch decisions which require the exercise of judgment. The emergency planning performed by the LEPCs likewise involves a significant amount of discretion. Some of the planning decisions concern funding and the allocation of personnel. To a great extent, the decisions of the Alaska SERC and the LEPCs are likely to be immune.¹¹

¹¹ Only two cases were found in which an action has been brought against a state emergency response commission, neither of which involves tort liability. In Ohio Chamber of Commerce v.

On the other hand, the various emergency planning statutes differ in degree of requirements. The Alaska Disaster Act is worded very broadly and affords much room for discretion. SARA Title III and AS 46.13.090 are very precise; many requirements are straight forward and ministerial; for example, the identification of covered facilities, designation of facility emergency coordinators, and description of available emergency equipment and facilities would rarely require the exercise of discretion. Many of the planning tasks do not involve funding decisions, but rather entail the compilation of information, much of which is furnished by covered facilities pursuant to statutory requirements. Negligent errors and omissions in the plans with respect to those matters which are ministerial in nature may not be immunized.

The HSSTRC is not involved in the preparation of emergency plans, but rather its functions are advisory in nature, and largely related to research, policy, and funding. In the unlikely event a claim for negligence is brought against the council, the discretionary function exception would probably provide immunity.

V. EFFECT OF THE STATUS OF THE EMERGENCY RESPONSE PLANS ON LIABILITY

A factual determination of whether negligence, gross negligence, or intentional misconduct exists as a result of the emergency planning performed by the Alaska SERC or the LEPCs may very well take into account the existence and status of the emergency response plans.

¹¹ (...continued)

State Emergency Response Comm'n, Nos. 91AP-173, 91AP-174, 1991 WL 94447 (May 1, 1991), the court held that commission rules which required annual detailed facilities site plans showing the location of hazardous substances exceeded the scope of the commission's statutory authority and were unlawful. McCormick v. Anshutz Mining Corp., 29 ERC 1701 (Jan. 29, 1989), involved in part an action against the Missouri State Emergency Response Commission for failure to disseminate tier II information. The claim was dismissed because the plaintiffs had never requested the information and a regional commission had already promised to provide the information.

A. No Plan

The various planning statutes impose upon the state, the Alaska SERC, and the LEPCs the duty to develop and keep current emergency plans. SARA Title III requires local emergency response plans for extremely hazardous substances to have been completed by October 1988. 42 U.S.C.A. § 11003(a). SARA Title III does not provide an enforcement mechanism for this deadline;¹² however, as discussed below, inaction and unreasonable delay can provide the basis for a tort claim. The state planning statutes do not impose deadlines.

1. Potential Alaska SERC and LEPC liability

Inaction can result in liability, as can unreasonable delay. Adams v. State, 555 P.2d 235, 240 (Alaska 1976); State v. Guinn, 555 P.2d 520, 536-37 (Alaska). EPA has observed:

State law may require a State Emergency Response Commission or a Local Emergency Planning Committee to develop a current emergency preparedness or hazardous materials response plan. The failure to develop this plan and keep it current could be the basis for a suit against the state commission or local committee by individuals who believe that they were harmed by the failure of the commission or committee to carry out the law; i.e., that the committee was negligent in fulfilling its responsibilities.

EPA, Tort Liability in Emergency Planning 5 (Jan. 1989).

Further, the Federal Emergency Management Agency concluded:

[A] state statutory duty to have a current emergency preparedness disaster plan imposes an obligation on the governmental jurisdiction to prepare a plan. Failure to carry out a statutory

¹² The House Report accompanying the bill which provided much of the text for SARA Title III states, "There is no penalty for violation of the timeframes outlined above, but the Committee feels that the strong public sentiment for emergency planning will ensure prompt action." H.R. Rep. No. 99-253(I), 99th Cong., 1st Sess., Vol. 4, at 113 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2895.

duty might lead to liability even though the emergency management statute includes an immunity provision The statutory immunity in the emergency preparedness law might not protect a jurisdiction that failed to carry out a legal duty (to develop and maintain an emergency plan . . . where the immunity is provided only during a designated disaster.

John C. Pine, Federal Emergency Management Agency, Tort Liability of Governmental Units in Emergency Actions and Activities 12 (July 1988).

Thus, the failure to develop a plan or to keep it current arguably might provide the basis for a negligence claim against the state.

2. Liability of responders

In the absence of an emergency response plan, those persons involved in a response action have a common law duty to use due care and may have a statutory duty to meet applicable statutory or regulatory standards of care.

B. Plan Under Development

1. Potential Alaska SERC and LEPC liability

A plan under development, including interim plans, may potentially provide some guidance during a response action. However, as discussed above, negligence may be found where inaction or inexcusable delay result in injury.

2. Liability of responders

Responders have a common law duty to use due care and may have a statutory duty of care derived from applicable statutory requirements.

C. Approved Plan

1. Potential Alaska SERC and LEPC liability

With respect to highway engineering plans, the court has remarked, "The state need not guarantee a perfect plan or

results. But the state is liable for a failure to exercise reasonable care and skill." Moloso v. State, 644 P.2d 205, 217 (Alaska 1982). By analogy, provided the Alaska SERC and the LEPCs exercise reasonable care and skill in the preparation, review, and approval of the emergency response plans and follow applicable statutory requirements, the state will most likely enjoy immunity from any claim for damages arising from negligence in the planning process.

2. Liability of responders

Evidence of conduct in accordance with an emergency plan or departing from a plan may be weighed in determining liability. For example, in State v. Abbott, 498 P.2d 712 (Alaska 1972), the plaintiff introduced into evidence the Department of Highways' Standard Operating Procedures (S.O.P.s) for wintertime highway maintenance.¹³ With respect to the S.O.P.s, the court noted, "Failure to comply with the S.O.P.s would seem to be operational negligence rather than policy-making discretion." 498 P.2d at 722 n.30. The S.O.P. quoted in footnote 13 resembles in level of detail many of the provisions that would be found in an emergency plan. To the degree the various emergency plans may be analogized to the S.O.P.s, and depending on the circumstances of the response, the failure to comply with a plan may be found to be operational negligence and not immune.

¹³ S.O.P. 4301-06, for example, provided:

Sanding crews must be dispatched at the first indication that traffic is having difficulty, with particular attention given to intersection and grades. Maintenance crews in outlying areas must keep steep grades and sharp curves well sanded, working overtime and at night if conditions warrant. Maintenance foreman must be alert to this condition and plan accordingly, and employees should be instructed to report for duty when inclement weather threatens. Sanding operations must continue as long as conditions warrant. First priorities should be given to hills, intersections and curves.

Quoted in Abbott, 498 P.2d at 722 n.30.

VI. PERSONAL LIABILITY OF THE MEMBERS OF THE ALASKA SERC, THE
LEPCs, AND THE HSSTRC

The personal liability of the members of the Alaska SERC, the LEPCs, and the HSSTRC has been of concern, and during this legislative session, House Bill No. 407 and Senate Bill No. 359, which would provide immunity from personal liability, were introduced into the legislature. These bills would also immunize the Alaska SERC, the LEPCs, and the HSSTRC as state agencies. To further respond to the members' concerns, the common law on official immunity is discussed below. To the extent the Department of Law previously advised you that AS 09.50.250(1) provides state employees immunity from personal liability, that advice was incorrect and should be disregarded. As discussed below, AS 09.50.250(1) only immunizes the state and state employees acting in their official capacity, not state employees in their personal capacity. See Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 162 n.29 (Alaska 1987).

A. Official Capacity Suits Versus Personal Capacity Suits

A lawsuit which names an individual in his or her official capacity is a suit against the state, not the individual. The plaintiff, if successful, recovers the judgment from the state, not the individual. Hafer v. Melo, ___ U.S. ___, 60 U.S.L.W. 4001, 4002 (Nov. 3, 1991); Vest v. Schafer, 757 P.2d 588, 599 (Alaska 1988). When a state official is sued in his or her personal capacity, the plaintiff does not collect the judgment from the state. Rather, the plaintiff may recover from the individual's assets, his or her liability insurance, any official bond he or she may have and possibly, from an indemnification agreement. See Vest, 757 P.2d at 600 n.45.

B. Common Law Official Immunity

The Alaska Supreme Court has created a common law immunity for public officers, called "official immunity." Aspen Exploration Corp. v. Sheffield, 739 P.2d 150 (Alaska 1987). Official immunity applies only to administrative officials, that is, members of the executive branch of government or members of bodies which do not strictly belong to any of the three traditional branches of government. Id. at 153 n.7. Thus, members of the Alaska SERC, LEPCs, and HSSTRC are protected by the doctrine of official immunity.

For executive acts alleged to violate common law rights, the court has adopted a two-step analysis: First, it

must be determined whether or not the doctrine of official immunity applies to the public officer's alleged negligent conduct. If it does, the scope of that immunity must be determined. Absolute immunity immunizes an official from suit as well as damages; qualified immunity extends only to damages. Id. at 154, 158 n.17, n.19.

The doctrine of official immunity applies if the officer's actions are within the scope of his or her authority and are discretionary in nature. "Discretionary" in this context has a different meaning than that discussed above in connection with the discretionary function exception to state tort liability. The planning-operational distinction does not come into play. Instead, the court has described a public officer's discretionary acts as those involving a mistake in judgment or discretion, an erroneous interpretation and application of the law, or discretionary-policy decisions. Discretionary acts in this context require personal deliberation, decision, and judgment; while ministerial acts consist of obedience of orders or the performance of a duty in which the officer is left with no choice of his or her own. Id. at 155.

Some examples may clarify the difference between discretionary and ministerial acts. In Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alaska 1962), the court held that officers of the Alaska Housing Authority were immune from personal liability for damages when the plaintiff's buildings were demolished for an urban renewal project under an illegal declaration of taking. The officers were acting within the scope of their official duties, but had made a mistake in the exercise of a discretionary function in that they believed they had the power to use a declaration of taking when in fact they only had the power of eminent domain.

In State v. Stanley, 506 P.2d 1284 (Alaska 1973), an official of the Alaska Department of Fish and Game was not immune from personal liability for damages resulting from the sinking of a crab boat in the state's possession. The officer's failure to inspect the boat and to give proper instructions to department personnel on securing the boat or to permit the owner to secure the boat occurred at the ministerial level.

A state trooper who ordered the speed limit reduced on a road under construction because of perceived hazardous conditions was found immune in Earth Movers of Fairbanks, Inc. v. State, 691 P.2d 281 (Alaska 1984). The court observed that the trooper "was not confronted with a simple set of tasks to perform. He had complaints to investigate, a highway to examine, and a difficult judgment call to make." Id. at 285.

Finally, the investment decisions of borough officials were found discretionary in Integrated Resources Equity Corp. v. Fairbanks North Star Borough, 799 P.2d 295 (Alaska 1990). The court, however, also held that the borough officials could be found personally liable if, in performing an alleged discretionary function, they violated a statute or ordinance that could be characterized as "clearly established law," unless they could prove that they non-negligently were not aware of the law. Id. at 301.

To determine whether a public officer is entitled to absolute versus qualified immunity, the court considers the following factors:

(1) The nature and importance of the function that the officer performed to the administration of government (i.e. the importance to the public that this function be performed; that it be performed correctly; that it be performed according to the best judgment of the officer unimpaired by extraneous matters);

(2) The likelihood that the officer will be subjected to frequent accusations of wrongful motives and how easily the officer can defend against these allegations; and

(3) The availability to the injured party of other remedies or other forms of relief (i.e. whether the injured party can obtain some other kind of judicial review of the correctness or validity of the officer's action).

Aspen, 739 P.2d at 160. If, as a matter of law, the court determines that immunity should be absolute, any allegations of improper motive are irrelevant and the case is dismissed. If, on the other hand, qualified immunity is appropriate, motive becomes relevant. Under qualified immunity, a public officer is shielded from liability only when discretionary acts within the scope of the officer's authority are performed in good faith and are not malicious or corrupt. Id. at 158-60.

For example, in Bauman v. State, 768 P.2d 1097 (Alaska 1989), an action by a parent and child against a state trooper arising out of an investigation of an anonymous complaint of sexual abuse, the court found that all of the trooper's actions appeared to be within the scope of his authority and discretionary in nature. In an affidavit, the trooper had portrayed his investigation as objectively reasonable, undertaken in good

faith, not malicious, and not corrupt. In the absence of evidence to the contrary, the trooper was entitled to qualified immunity.

Applying the balancing test established in Aspen, the members of the Alaska SERC, the LEPCs, and the HSSTRC would probably enjoy qualified immunity. There is little reason to shield the members of these entities from liability for actions which are undertaken in bad faith or which are malicious or corrupt. Qualified immunity will protect the members from personal liability for discretionary acts that are within the scope of the member's statutory authority and that are performed in good faith. The members are not shielded from personal liability for negligence in performing ministerial acts or acts outside the scope of their statutory authority.

CONCLUSIONS AND RECOMMENDATIONS

1) Without statutory authorization, the Alaska SERC may not delegate interim approval authority over emergency response plans to a committee. To facilitate the approval process, the Alaska SERC may wish to adopt by regulation a procedure whereby plans which essentially fulfill all statutory requirements, but require a limited degree of fine-tuning, could be given partial approval or conditional approval, subject to resolution of all items of concern within a specified timeframe.

2) Under SARA Title III, local emergency response plans for extremely hazardous substances were to have been completed by October 1988. Both inaction and unreasonable delay might provide a basis for a tort claim. It is incumbent upon the LEPCs and the Alaska SERC to meet the federal requirements for these plans as soon as reasonably possible.

For those districts where it has proven difficult to establish an LEPC, the Alaska SERC should continue with its efforts to establish LEPCs, but at the same time, may wish to consider alternative means of preparing emergency response plans, if those districts would otherwise be without plans for a significant length of time. Under AS 46.13.040(8), the Alaska SERC is authorized to "perform other coordinating, advisory, or planning tasks related to hazardous substance emergency planning and preparedness" This statute provides the commission a measure of flexibility and discretion in establishing priorities and accommodating the planning process to the unique needs of the state of Alaska. Once an LEPC is formed; however, the LEPC must assume the emergency planning responsibilities assigned to LEPCs under SARA Title III and AS 46.13.

3) Alaska SERC policies which have the effect of regulations or standards of general application are regulations and, to be valid, must be adopted according to the Administrative Procedures Act, AS 44.62.¹⁴ Compliance with statutory and regulatory requirements will reduce the state's liability exposure; therefore, under AS 46.13.040(11), the Alaska SERC should begin preparing regulations in accordance with the Administrative Procedures Act in order to carry out the provisions of AS 46.13 and the emergency planning provisions of SARA Title III. The development and promulgation of regulations will undoubtedly be a long term project and will entail considerable public participation. The Alaska SERC may wish begin this process by identifying those policies which should be promulgated as regulations.

4) The Alaska SERC, the LEPCs, and the HSSTRC are state agencies for purposes of tort liability and immunity. Many of the emergency planning activities of the Alaska SERC and the LEPCs are discretionary in nature and thus, the state is likely to be immune from liability for negligence in planning under AS 09.50.250(1). However, at least some planning activities occur at the operational or ministerial level, and the state would not be shielded from liability for negligence in these activities. In addition, the failure of the LEPCs or the Alaska SERC to complete their plans or unreasonable delay in the completion of the plans could expose the state to liability. Further, action outside the scope of statutory authority is not immunized.

House Bill No. 407 and its identical counterpart, Senate Bill No. 359, would clarify the law with respect to the state's liability in emergency planning for hazardous substances and oil spills by providing that a civil action for damages and costs may not be brought against the Alaska SERC, LEPCs established by the Alaska SERC, or the HSSTRC for any act or omission occurring within the course and scope of their duties under AS 46.13, unless the act or omission constitutes gross negligence or intentional misconduct. Unlike the discretionary function exception of AS 09.50.250(1), these bills would shield the state from liability for negligence occurring at the operational level.

5) A lawsuit against a member of the Alaska SERC, the LEPCs, or the HSSTRC in his or her official capacity is a suit against the state, not the individual.

6) Members of the Alaska SERC, the LEPCs, and the HSSTRC currently enjoy common law official immunity from personal

¹⁴ See Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 906 (Alaska 1981).

liability for discretionary acts occurring within the scope of their statutorily authorized activities. In addition, under a Memorandum of Agreement executed June 13, 1991, between the Department of Law, the Department of Administration, and DEC, the state agreed to defend and indemnify the members of these entities against claims arising out of their acts or omissions occurring within the scope of their statutorily authorized activities on behalf of these administrative entities. The state will not indemnify for judgments resulting from gross negligence or intentional misconduct or for punitive damages. The indemnity agreement provides broader coverage than common law immunity in that the agreement extends to ministerial acts. The indemnity agreement was intended to provide interim protection from tort liability until such time as immunity legislation is enacted.

House Bill No. 407 and Senate Bill No. 359 would provide clarity and certainty for the members of the Alaska SERC, the LEPCs, and the HSSTRC by providing immunity from personal liability for any act or omission occurring within the course and scope of the member's official duties under AS 46.13, unless the act or omission constitutes gross negligence or intentional misconduct. Unlike common law immunity, which only extends to discretionary acts, these bills would shield the members from personal liability arising from negligence in performing ministerial acts.

Regardless of whether the members are protected under the common law, the indemnity agreement, or the proposed legislation, there are limits to the protection afforded. That is, the members of these entities may be held personally liable for gross negligence, intentional misconduct, or conduct that exceeds the scope of their statutory authority.

7) To varying degrees, a number of statutes protect responders, including governmental entities and their employees or agents, during emergency response actions, provided the criteria specified in the statutes are met. Local governments, in particular, enjoy broad immunity.

If you have any questions regarding this matter, please do not hesitate to contact me.

MS:tg

MEMORANDUM OF AGREEMENT

1. Recitals

There currently exist liability concerns by persons who contribute their time and service to the State Emergency Response Commission ("SERC"), Local Emergency planning Committees ("LEPCs"), and the Hazardous Substance Spill Technology Review Council ("HSSTRC"). By providing protection against liability costs, this memorandum of agreement is intended as an interim method of insuring that such persons will be willing to provide assistance to the SERC, LEPCs, and the HSSTRC. This agreement is entered into between the Department of Law, the Division of Risk Management in the Department of Administration, and the Commissioner of Environmental Conservation on behalf of the SERC, LEPCs, and the HSSTRC.

2. State Defense of Claims

The State of Alaska (State) agrees to defend the SERC and its members, SERC-approved LEPCs and their members, and the HSSTRC and its members against all non-insured claims arising from their acts or omissions occurring within the course and scope of statutorily authorized activities on behalf of the SERC, SERC-approved LEPCs, and the HSSTRC. When defense is provided under this agreement, the State will select and retain counsel to represent the members and entities covered by this agreement. The State will not be obligated to pay expenses of defense counsel

independently retained by members and entities without the approval of the Division of Risk Management.

3. Indemnification

The State agrees to indemnify the SERC, SERC-approved LEPCs, the HSSTRC, and their members for non-insured judgments arising from their acts or omissions occurring within the course and scope of statutorily authorized activities on behalf of the SERC, SERC-approved LEPCs, the HSSTRC, except that the State will not indemnify for judgments for damages resulting from gross negligence or intentional misconduct, or for punitive damages.

4. Definition of Non-Insured Claims and Judgments

As used in this agreement, "non-insured claims" and "non-insured judgments" refer to all portion of a claim or judgment (including a settlement) for which a member or entity covered by this agreement or a member's employer is not protected by a policy of insurance. Where a portion of a claim is insured, the State will endeavor to arrive at a cooperative agreement with the insurer for proration of defense costs and assignment of defense counsel. In the event of inability to reach such agreement, the State will, with prior written approval, reimburse the member covered by this agreement for reasonable non-insured defense costs and attorney fees incurred in defense of claims.

5. Notice of Claim

A member or entity covered by this agreement against whom a claim is made must submit a written request for defense to the State of Alaska, Division of Risk Management within 30 days of knowledge or receipt of a claim.

6. Conditions

The State will appear and defend a member or entity covered by this agreement unless and until it is determined by the State that the claim does not arise out of acts or omissions occurring within the course and scope of statutorily authorized activities on behalf of the SERC, SERC-approved LEPCs, or the HSSTRC, or that the acts or omissions complained of amounted to gross negligence or willful misconduct, in which case the State may reject defense of the claim. The State's obligation to defend and indemnify is further conditioned upon cooperation of the member or entity in defense against the claim. The member or entity shall not, except at their own cost, admit liability, voluntarily make any payment, assume any obligation, or incur any expense, without prior approval of the Division of Risk Management. Failure to provide timely notice of a claim, conduct prejudicial to the State's position, or failure to cooperate in defense voids the State's obligations under this agreement.

7. Recision of this Agreement

This memorandum of agreement may be revoked by the State upon 30 days notice to the entities covered by this agreement.

DATED: 6-12-91

Charles E. Cole
Charles E. Cole
Attorney General
Department of Law

DATED: 6/13/91

Brad Thompson
Brad Thompson, Deputy Director
Division of Risk Management
Department of Administration

DATED: 6/13/91

John Sandor
John Sandor
Commissioner
Department of Environmental
Conservation

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 WILLOUGHBY AVENUE, SUITE 105
JUNEAU, AK 99801-1795

Phone: (907) 465-5000
Fax: (907) 465-5070

January 27, 1992

The Honorable Bill Hudson
Chairman
House Special Committee on
Oil and Gas
P.O. Box V
Juneau, AK 99811

Dear Representative Hudson:

HB 407 was recently referred to your committee after introduction by the Governor. This bill would provide immunity to the members of the Alaska State Emergency Response Commission (SERC), the Local Emergency Planning Committees (LEPCs) created under the SERC, and the Hazardous Substance Spill Technology Review Council (HSSTRC or TRC) for their acts or omissions which are in accordance with their official duties, unless the act or omission constitutes gross negligence or intentional misconduct or which may be the subject of relief under an applicable federal law.

As explained in the Governor's transmittal letter, state officials and members of the public serve on the SERC, the LEPCs and the RTC. Each of these entities is charged with tasks relating to hazardous substance emergency planning and preparedness, community right-to-know reporting, toxic substance release reporting, and the management of hazardous substances. The potential exposure to liability arising from these statutorily mandated activities may discourage qualified individuals from accepting appointments to the SERC, LEPCs and RTC.

The success of the SERC, LEPCs and RTC are critical to the success of the State of Alaska in emergency preparedness when dealing with oil spills or other hazardous substance releases. Enclosed herewith is a legal opinion relating to this issue that may be of interest to the members of your committee when reviewing HB 407. We are also enclosing statutes from other states which have adopted this kind of immunity for members of their SERC, and the federal law allowing for citizen suits against members of a SERC. HB 407 would not affect this federal law.

The Honorable Bill Hudson

-2-

January 27, 1992

We respectfully ask that you schedule this bill for a hearing at the earliest possible convenience. We look forward to your favorable action.

If you need any further information, please do not hesitate to contact Janice Adair, the Department's legislative liaison, at 465-5050.

Sincerely,


John A. Sandor
Commissioner

JA/vr (CO-comm\hudson.407)

Enclosures: Legal Opinion
Statutes

cc: Paul Fuhs, Governor's Office

MEMORANDUM

State of Alaska

RECEIVED
JUL 30 1980
JUL 31 1980

TO: Douglas B. Baily
Attorney General
Department of Law

DATE:

FILE NO:

TELEPHONE NO:

STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL QUALITY

FROM: Dennis D. Kelso
Commissioner
Department of Environmental
Conservation

SUBJECT: Liability of State,
Members of the State
Emergency Response
Commission (SERC),
Local Emergency
Planning Committees
(LEPCs) and the
Hazardous Substance
Spill Technology
Review Council

On behalf of the State Emergency Response Commission (SERC), I am requesting an opinion concerning the potential liability arising from the activities of the SERC, the Hazardous Substance Spill Technology Review Council, or the Local Emergency Planning Committees (LEPCs). Members of the SERC are appointed by the Governor under the Superfund Amendments and Reauthorization Act, Title III (SARA Title III), Administrative Order 103, and House Bill 566 which passed last session. The SERC is required by law to review and approve membership on the LEPCs. The Hazardous Substance Spill Technology Review Council was established within the SERC by HB 566. Seven of its nine members are appointed by the Governor.

The SERC and LEPCs have many planning and coordinating functions imposed by federal and recently passed state statutes (AS 46.13). However, neither has any direct administrative function. Response to hazardous substance and oil spill incidents remains the responsibility of Department of Environmental Conservation (DEC), the Department of Military and Veterans Affairs (DMVA), and other local, state, and federal agencies.

For SERC, the LEPCs, and the Council to be effective in their mission, there must be a large pool of potential members representing the various roles and expertise necessary to prepare an emergency response plan for hazardous substance and oil spill incidents. This is especially true at the local level. SERC policy has encouraged LEPCs to establish strong ties with, and even organize under the auspices of, a local government and the strive for the broadest possible representation on the committee. In many cases, LEPC membership exceeds the minimum number of participants mandated by state and federal law.

This policy encourages the level of public participation necessary to effectively carry out the goals of SARA Title III and HB 566. However, it is jeopardized by growing fears on the part of the local governments and the LEPC members about what, if any, liability may be attached to membership on an LEPC. This uncertainty now extends to the SERC members as well and impedes our ability to accomplish our statutory duties. Although members of the Council have not yet been appointed, it is reasonable to assume the same questions will arise in relation to its activities and members. This concern may result in some candidates being unwilling to accept appointment without reassurance about the degree of potential liability they may be assuming.

Before narrowing this request to the specific questions, I want you to know that I appreciate the likelihood that most fear of liability is hypothetical. However, the fear is real and no one wants to take any significant chance, or perhaps even a slight chance, of being sued for damages associated with a hazardous substance or oil spill incident. The cost of defense alone, as we well know could bankrupt anyone.

Specifically our questions are:

1. What liability, if any, may exist for the SERC or the Council as state agencies or entities?
2. What liability, if any, do the members of the SERC accrue due to their activities, or inactivity, as SERC members? If there is liability, will the state represent and indemnify the members should an award be made? (It is important to remember that some members are appointed to represent business, local governments, and other specific interests.)
3. If the state will represent and indemnify the SERC members, are there any limits, (for example gross negligence or intentional acts)? If there are such limits, please give examples of what may constitute such acts.
4. Questions 2 and 3 also pertain to the Hazardous Substance Spill Technology Review Council and its members.
5. Where an LEPC is formed under the auspices of a local government, does the local government run the risk of liability?
6. What are the liability risks to an LEPC or its individual members?

7. If there are liability risks associated with activities of an LEPC, will the State represent and indemnify the LEPC, the local government under which it is formed, and its members? Are there limits to the coverage for gross negligence or intentional acts? If so what are examples of acts that might trigger a limitation on coverage.

I have not tried to list the duties of the SERC, LEPCs or Council, although it is apparent that the answers to the questions are driven by the duties. The best source is the laws themselves, especially since SARA Title III is still relatively new and HB 566 was just ~~passed~~^{signed} by the Governor.

Should your review suggest there is any significant risk of liability for the members of any of these three entities, especially if the state will not fully represent and indemnify them, I would appreciate suggestions for a legislative "fix". The goals of SARA Title III and HB 566 cannot be met if the participants in the activities, local governments, or the State are subject to liability for their participation.

There are voluminous materials concerning SERC and SARA Title III that may be relevant to liability issues. An attached December 28, 1987, memo from a Kentucky Assistant Attorney General may be particularly helpful. Also attached are memos from two LEPC chairs expressing their liability concerns.

Please feel free to contact me or Camille Stephens of DEC's Spill Prevention, Planning and Management staff at 465-2630.

Thank for your assistance with this important matter.

Attachments

bcc: Camille Stephens

MEMORANDUM

State of Alaska

Department of Law
October 29, 1990
Page 1

TO: Hon. Dennis D. Kelso
Department of Environmental
Conversation

DATE:

FILE NO.:

TEL. NO.:

Honorable Dennis D. Kelso
Commissioner
Department of Environmental
Conversation

SUBJECT: October 29, 1990

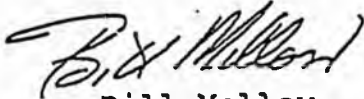
FROM:

RECEIVED

OCT 31 1990

465-3603

Liability of SERC, LEPC
and HSSTRC members



Bill Mellow
Assistant Attorney General
Special Litigation-Juneau

STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL QUALITY

Your opinion request seeks answers concerning potential liability of members of the above identified committees. I could go into a lengthy legal analysis of tort liability exposure, governmental immunities and qualified immunities but time constraints ^{1/} require that for now the solution to your concerns be met with a general statement of the law plus a state assurance of protection from non-insured liability exposure.

The short answer to liability exposure is that, generally, there is liability exposure for negligence which has been a legal cause of injury unless immunity is granted by law or court decision. Governmental agencies and employees are immune from liability for discretionary function negligence. AS 09.65.070 (municipalities); AS 09.50.250 (state). This form of immunity extends to high level planning activities which probably would be found by our courts to encompass most official actions of SERC, LEPC and HSSTRC members. Additionally, "member[s] of the governing body, a commission, or a citizen's advisory committee of a municipality of the state" are immune from liability for ordinary negligence occurring within the course and scope of official duties. AS 09.17.050.

As you acknowledge in your opinion request letter, liability is mostly hypothetical but the fear is real enough to

^{1/} The file was assigned to me while I was away most of the summer farming in Oregon. I am retiring from state employment at the end of October and thus, I am unable to devote the necessary research time needed for a careful analysis. Additionally, I have been advised by Camille Stephens that, most important, is an assurance of protection which can be given at the November 3, SERC meeting.

RECEIVED

SEP 19 1991

A.D.E.C.
COMMISSIONER'S OFFICE

justify a request for some degree of protection. As above noted, there exists only a slight potential for liability for negligence in planning for and implementation of responses to discharges of oil and hazardous substances. The best way to resolve the fear of liability and the cost of defense against the threat of liability is by contractual or legislative indemnification.

Attached is a proposed memorandum of agreement. The agreement extends a guarantee of defense of claims arising within the authority granted the respective committees and their members by state and federal law. The agreement also extends a guarantee of indemnification for damages for negligence. This memorandum of agreement should quell fears of committee members and will provide interim protection pending legislatively extended protection.

Concerning legislative action, I or my successor will draft a proposed bill which would immunize members from liability but, as you are well aware, such a bill would not easily pass into law and may well be watered down substantially as it winds its way through the hearing committees. I would anticipate that as a part of preparation of an explanation for justification of such a law that an extensive legal opinion memorandum will be prepared. The department's analysis will be provided to you.

Following is a restatement of questions raised by your letter along with an answer.

Question 1. What liability, if any, may exist for the SERC or the Council as state agencies or entities.

Answer. State agencies are liable for non-discretionary negligence. Discretionary (immune) activities are high level planning activities which are determined on a case by case basis. To quote the Alaska Supreme Court, the distinction between planning level (immune) and operational level (not immune) activities depends upon "the type of decision that is being made, examined within an analytical framework which is sensitive to the policies underlying the discretionary function or duty exception." Carlson v. State, 598 P.2d 969, 972 (Alaska 1979).

Question 2. What liability, if any, do the members of the SERC accrue due to their activities, or inactivity, as SERC members? If there is liability, will the state represent and indemnify the members should an award be made?

Answer. Planning decisions by SERC members are usually going to fall within the category of "discretionary" immune

activities. 2/ Where activities or inaction cross the line into operational negligence, members will be protected pursuant to the terms of the Memorandum of Agreement (MOA).

Question 3. If the state will represent and indemnify the SERC members, are there any limits?

Answer. The state will represent, without monetary limit, for ordinary negligence claims occurring within the course and scope of authority granted by law. By way of example, the state would represent the member on a claim that while intoxicated, the member slandered a SERC consultant if the state's initial investigation led to a conclusion that the conduct occurred within the course and scope of official duty but, at most, only ordinary negligence occurred. If the state investigative determination was proven to be wrong concerning the degree of negligence, the state would not pay a judgment where the fact finder determined that the defendant's conduct rose to the level of gross negligence or intentional misconduct.

Question 4. [Are the answers to questions 2 and 3 the same as to the HSSTRC and its members?]

Answer.. Yes.

Question 5. Where a LEPC is formed under the auspices of a local government, does the local government run the risk of liability?

Answer. Yes, the local government runs the same risk as the state but the MOA will protect against non-insured liability.

Question 6. What are the liability risks to an LEPC or its individual members?

Answer. If a LEPC is "a commission, or a citizen's advisory committee of a municipality of the state" its members are immune for ordinary negligence for action or inaction within the course and scope of official duties but are subject to liability for gross negligence. AS 09.17.050(a)(4). If a LEPC is a state agency commission the answer to question 2 would be applicable along with the caveat of footnote 2 concerning "employees." The

2/ AS 09.50.250 protects "employees" of the state. It is probable that the court would broadly construe "employee" to include the seven public members listed as potential appointees in AS 46.13.010.

MOA provides indemnification for those circumstances where otherwise there would be liability exposure because the commission is a state rather than municipal agency or where the individual defendant happens to be a non-governmental person.

Question 7. If there are liability risks associated with activities of an LEPC, will the State represent and indemnify the LEPC, the local government under which it is formed, and its members? Are there limits to the coverage for gross negligence or intentional acts? If so what are examples of acts that might trigger a limitation on coverage?

Answer. The MOA provides for representation of the LEPC and its members to the extent that no insurer has coverage obligations. If a local government is the alter ego of the LEPC, the municipality would also be defended where the plaintiff named the municipality as a defendant. The state will represent where there has been a determination that, at most, the defendant's conduct was only ordinary negligence but will not indemnify for conduct found to constitute gross negligence or intentional misconduct.

It is not possible to predict the degree of negligence for any specific type of conduct. Negligence may be ordinary, gross, or willful. Ordinary negligence is the failure to use ordinary care. Gross negligence is a failure to exercise even that care which a careless person would use, while willful negligence describes intentional conduct in disregard of an obvious risk occurring under circumstances that make it probable that harm to the plaintiff will result. W. Prosser, The Law of Torts § 180-85 (4th ed. 1971).

WGM:jal
Attachment

cc w/enc.: Camille Stephens

PROPOSED MEMORANDUM OF AGREEMENT

1. The State agrees to defend members of the State Emergency Response Commission (SERC), SERC approved Local Emergency Planning Committees (LEPCs) and their members and members of the Hazardous Substance Spill Technology Review Council (HSSTRC), against all non-insured claims arising from acts or omissions occurring within the course and scope of statutorily authorized activities on behalf of SERC, SERC approved LEPCs, and the HSSTRC. The State further agrees to indemnify SERC members, SERC approved LEPCs and their members, and HSSTRC members for non-insured judgments against SERC members, approved LEPCs and their members, and HSSTRC members with the exception that the State will not indemnify for judgments for damages resulting from gross negligence or intentional misconduct.

2. As used in paragraph 1 of this agreement, "non-insured claims" and "non-insured judgments" refer to all or a portion of a claim or judgment for which the defendant or the defendant's employer are not protected by a policy of insurance. Where a portion of a claim is insured, the State will endeavor to arrive at a cooperative agreement with the insurer for proration of costs and assignment of counsel. In the event of inability to reach such agreement, the State will reimburse the defendant for non-insured costs and attorney fees incurred in defense of claims.

3. A defendant against whom a claim is made must submit a written request for defense with the State of Alaska, Division

of Risk Management within 30 days of knowledge or receipt of a claim. The State will appear and defend the defendant unless after investigation it is determined that the claim does not arise out of acts or omissions occurring within the course and scope of statutorily authorized activities or that the acts or omissions complained of amounted to gross negligence or willful misconduct, in which case the State may reject defense of the claim. The State's obligation to defend and indemnify is further conditioned upon cooperation of the defendant in defense against the claim. Failure to provide timely notice of a claim, conduct prejudicial to the State's position or failure to cooperate in defense voids the State's obligations under this agreement.

4. It is understood that there currently exists genuine liability concerns by persons who contribute their time and service to the SERC, LEPCs and the HSSTRC. By providing protection against liability costs, this memorandum of agreement is intended as an interim method of insuring that such persons will be willing to provide assistance to the SERC, LEPCs and the HSSTRC. It is further understood that the State will present a bill and seek legislation which will provide defense and indemnification similar to that provided by this agreement. This memorandum of agreement may be revoked by the State upon 30 days notice.

DATED: _____

Douglas B. Baily
Attorney General

DATED: _____

Division of Risk Management



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 16, 1992

*The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182*

Dear Speaker Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill providing immunity for the Alaska State Emergency Response Commission (Alaska SERC), local emergency planning committees (LEPCs) established by Alaska SERC, and the Hazardous Substance Spill Technology Review Council (HSSTRC) and their members from civil damages and costs resulting from any acts or omissions occurring within the course and scope of their official duties under AS 46.13, unless the act or omission constitutes gross negligence or intentional misconduct or may be the subject of relief under an applicable federal law.

This bill adds a new section to AS 46.13 which at present does not address the question of the liability of the Alaska SERC, LEPCs, or HSSTRC nor the personal liability of the members of these entities.

State officials and members of the public serve on Alaska SERC, LEPCs, and HSSTRC. In performing tasks related to hazardous substance emergency planning and preparedness, community right-to-know reporting, toxic chemical release reporting, and the management of hazardous substances, the individuals appointed to these entities serve to protect the health and welfare of the citizens of this state.

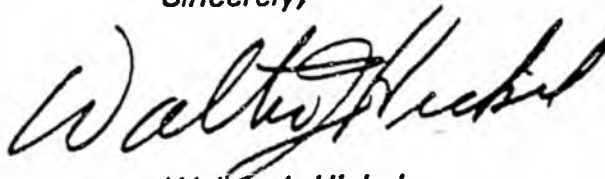
The potential exposure to liability arising from these statutorily authorized activities may dissuade qualified and otherwise interested members of the public from accepting appointments to the Alaska SERC, LEPCs, and HSSTRC. In order for the

*The Honorable Ben Grussendorf
January 16, 1992
Page 2*

Alaska SERC, LEPCs, and HSSTRC to function effectively and to encourage the participation of qualified individuals, AS 46.13 should provide immunity for these entities and their members for any act or omission occurring within the course and scope of their statutorily authorized activities, except for those acts or omissions which constitute gross negligence or intentional misconduct or which may be the subject of relief under applicable federal law.

I urge your prompt consideration and passage of this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter J. Hickel". The signature is written in a cursive, flowing style with some loops and flourishes.

*Walter J. Hickel
Governor*

MEMORANDUM

TO: COLONEL MIKE MOLLOY
CHAIRMAN, KENTUCKY EMERGENCY RESPONSE COMMISSION

FROM: GREG HOLMES, ASSISTANT ATTORNEY GENERAL *gh*

RE: ASSESSMENT OF LIABILITY OF STATE COMMISSION AND
LOCAL COMMITTEES APPOINTED PURSUANT TO SARA

DATE: DECEMBER 28, 1987

At your request I have prepared the following assessment of the potential liability of the state commission and the local committees appointed pursuant to Title III of the Super Fund Amendments and Reauthorization Act of 1986 (hereinafter "SARA"). This assessment constitutes my legal opinion based on an analysis of existing statutes and case law.

The potential liability of the commission or committee must be thought of in two distinct ways: the liability of the commission or committee itself and the liability of the individual commissioners or committee members. It appears that the commission or committee itself will not be liable unless it fails to comply with a mandatory requirement spelled out in Title III of SARA. For example, should the commission or a committee fail to comply with the time table mandated in the federal statute, and should any future damages to any person or company accrue from such failure, there could be potential liability under the provisions of Title III. Title III does authorize persons to seek injunctive relief (that is orders from the federal courts requiring the commission or committee to undertake a mandated activity or to refrain from a forbidden activity) in matters concerning the enforcement of the provisions of the statute.

With regard to the potential liability of individual commission or committee members, all attorneys with whom I have spoken as well as my own research indicate that while we cannot be certain, it appears at this point that individual commission and committee members would not be liable unless: a) they fail to comply with the mandated requirement as discussed in the paragraph above; and b) such failure was due to gross negligence or willful misconduct.

Finally, it is important to note that commission and committee members, being appointed pursuant to state law to carry out state-mandated functions, are agents of the state with all the attendant immunities from liability conferred by law upon appointees to other state boards, commissions, and agencies.

NORTH SLOPE BOROUGH

BARROW GAS FIELD DEVELOPMENT PROJECT
P.O. Box 1120 Barrow, Alaska 99723 .

Phone: 907-852-7779
Fax 907-852-8971



April 3, 1990

Ms. Linda Van Houten
SARA Title 111 Coordinator
Department of Environmental Conservation
P.O. Box 0
Juneau, Alaska 99811-1800

Dear Ms. Van Houten;

The Prudhoe Bay Area LEPC membership is concerned about the area of liability in regards to their participation and activity within the framework of the LEPC.

As coordinator, I have been requested to query SERC and relay a response regarding potential liability in the following areas:

1. What is the nature of liability coverage for LEPC members?
2. What is the extent of liability coverage?
3. Who is responsible for liability coverage for members?
4. When is the membership covered and how?
5. Is the membership covered professionally and personally?
6. Is the membership covered against civil or criminal liability?

I understand that the question of liability for LEPC membership is an area yet to be completely clarified. However, the subject remains a timely concern for the Prudhoe Bay Area membership. I appreciate your address to this topic. Our next meeting is scheduled for April 23, 1990. If your schedule permits, please respond before this date. If I can be of further assistance to you, please contact me at your convenience, 852-2611, ext. 247.

Sincerely,

T.R. Rail
Coordinator, Prudhoe Bay Area LEPC

cc: David McDowell
Division of Emergency Services

TO: Commissioner Dennis Kelso, Chair
State Emergency Response Commission

FROM: Steven O'Connor, Interim Chair
Kenai Peninsula Local Emergency Planning Committee

SUBJ: LEPC Budget and concerns

DATE: January 10, 1990

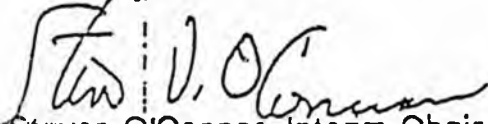
The Kenai Peninsula Local Emergency Planning Committee would like to submit a draft budget for consideration by the State Emergency Response Commission. This budget is just a preliminary draft as we have not had time to develop a workplan. As soon as the workplan is complete we will have a better idea of our fiscal needs.

Our LEPC has met and established a steering committee to draft bylaws and look at short term work objectives. The next full meeting of the Kenai Peninsula LEPC is scheduled for January 22, 1990. At that meeting the draft bylaws will be presented for consideration along with this budget. Dave McDowell is also scheduled to review the SERC workplan with the group with an emphasis on how the SERC workplan will provide guidance for the development of our local workplan. I have attached an agenda for your consideration.

Also attached are some concerns that have come up that the LEPC would appreciate your office or the State Emergency Response Commission addressing for us. These questions may have already been addressed in other areas. If you have any questions to clarify the attached questions please feel free to call Ross Kinney, Finance Director or Phil Reeves, Assistant Borough Attorney for the Kenai Peninsula Borough at 262-4441.

At this time I intend to be present at the SERC meeting scheduled for January 12, 1990 to answer any questions. Thank you for your time and consideration.

Sincerely,



Steven O'Connor, Interim Chair
Kenai Peninsula Local Emergency
Planning Committee

cc: Linda VanHouten
cc: Dave McDowell

enclosures (5)

QUESTIONS FOR SERC REGARDING LEPC FINANCING
AND LIABILITIES OF MEMBERS OF A LEPC

1. Will the SERC account for and allocate funding/expenditures of the LEPC's or will the LEPC's control their own finances? If the latter, we propose that the Borough administer LEPC finances as an agency fund; i.e., account for receipts and disbursements of funds based on the LEPC's budget which remains under the LEPC's discretion and control. This will allow the LEPC to meet the State and Federal single-audit requirements without additional expense.

2. LEPC members are apparently covered by the State of Alaska workmen's compensation coverage under AS 23.30.242. Will volunteer subcommittee members of the LEPC who are not LEPC members, approved by the State be covered by State worker's comp policies, and what will be the procedure for notification and acceptance of such subcommittee members by the CERC for such compensation coverage?

3. Are LEPC members (and subcommittee members) covered under the State's general liability coverage particularly for automobile liability? Are there any particular insurance requirements which the State will impose upon LEPC and subcommittee members for utilization of their personal automobiles in connection with their LEPC service?

4. Are LEPC members covered by any state public officials liability coverage? Will the State commit to providing legal defense for LEPC members in the event they are named defendant in a legal action based upon their LEPC service?

Comment. AS 09.50.250 provides immunity for the State and its agencies from tort actions arising from discretionary activities. This is obviously a limited immunity, and our Borough Risk Management policy is to insure our elected officials who are covered by a similar (but broader) municipal immunity under AS 09.65.070. AS 26.20.140 provides a much broader immunity for the State, its agents and representatives in activities under that chapter on civil defense. There is no similar immunity provided under AS 26.23 which is the Alaska Disaster Act. While we are aware that some people have cited AS 26.20.140 in discussing immunity provisions for disaster actions, we question this interpretation particularly considering AS 26.23.210 which sets out the relationship of the Alaska Disaster Act to the civil defense statute by stating: "The Alaska civil defense statute (AS 26.20), applies to preparedness, response, and recovery from disasters caused by enemy attack and other hostile military or paramilitary action. The provisions of this chapter [AS 26.23], other than AS 26.23.130, apply to preparedness, response, and recovery in cases of natural and nonmilitary man-made disasters." It would seem that AS 26.23.210 expressly denies application of AS 26.20.140 immunities to actions undertaken under AS Chapter 26.23.

corporation, is an employee of the corporation under this chapter. However, an executive officer of a corporation may waive coverage under this chapter, subject to the approval of the commissioner of labor, notwithstanding AS 23.30.245(b). Notwithstanding any other provision of this chapter, an executive officer of a municipal corporation or of a charitable, religious, educational, or other nonprofit corporation may be brought within the coverage of its insurance contract by the corporation by specifically including the officer in the contract of insurance. The election to bring an executive officer within the coverage continues in force for the period the contract of insurance is in effect. During that period an executive officer brought within the coverage of the insurance contract is an employee of the corporation under this chapter. (§ 2(8) ch 193 SLA 1959; am ch 146 SLA 1962)

NOTES TO DECISIONS

Stated in *Gordon v. Burgess Constr. Co.*, Sup. Ct. Op. No. 401 (File No. 716), 425 P.2d 602 (1967).

Cited in *Gordon v. Burgess Constr. Co.*, Sup. Ct. Op. No. 401 (File No. 716), 425 P.2d 602 (1967).

Collateral references. — 51 Am. Jur. 2d, *Workmen's Compensation*, § 177.

Sec. 23.30.241. Special officers as employees. (2) A special officer appointed under AS 18.65.010(a) is considered an employee under this chapter only when the person is actually traveling or working as a special officer. The weekly wage earned in the special officer's regular employment shall be used in computing the amount of compensation to be awarded. If a special officer has no regular employment, the minimum wage paid a full-time state trooper shall be used in computing the amount of compensation to be awarded.

(b) Annual appropriations to fund the coverage provided for in (2) of this section shall be provided for in the budget of the Department of Public Safety. (§ 1 ch 6 SLA 1978)

Sec. 23.30.242. Members of state boards and commissions as employees. (2) A member of a state board or commission is considered an employee under this chapter only while the member is actually traveling or working as a member of the board or commission. The maximum weekly wage shall be used in computing the amount of compensation to be awarded.

(b) Annual appropriations to fund the coverage provided for in (a) of this section shall be provided for in the budget of the Office of the Governor. (§ 1 ch 105 SLA 1969; am § 54 ch 69 SLA 1970)

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Edgar Blatchford, Commissioner
Department of Community & Regional Affairs
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Juneau, AK 99811-2100

PH: 465-4700
FAX: 465-2948

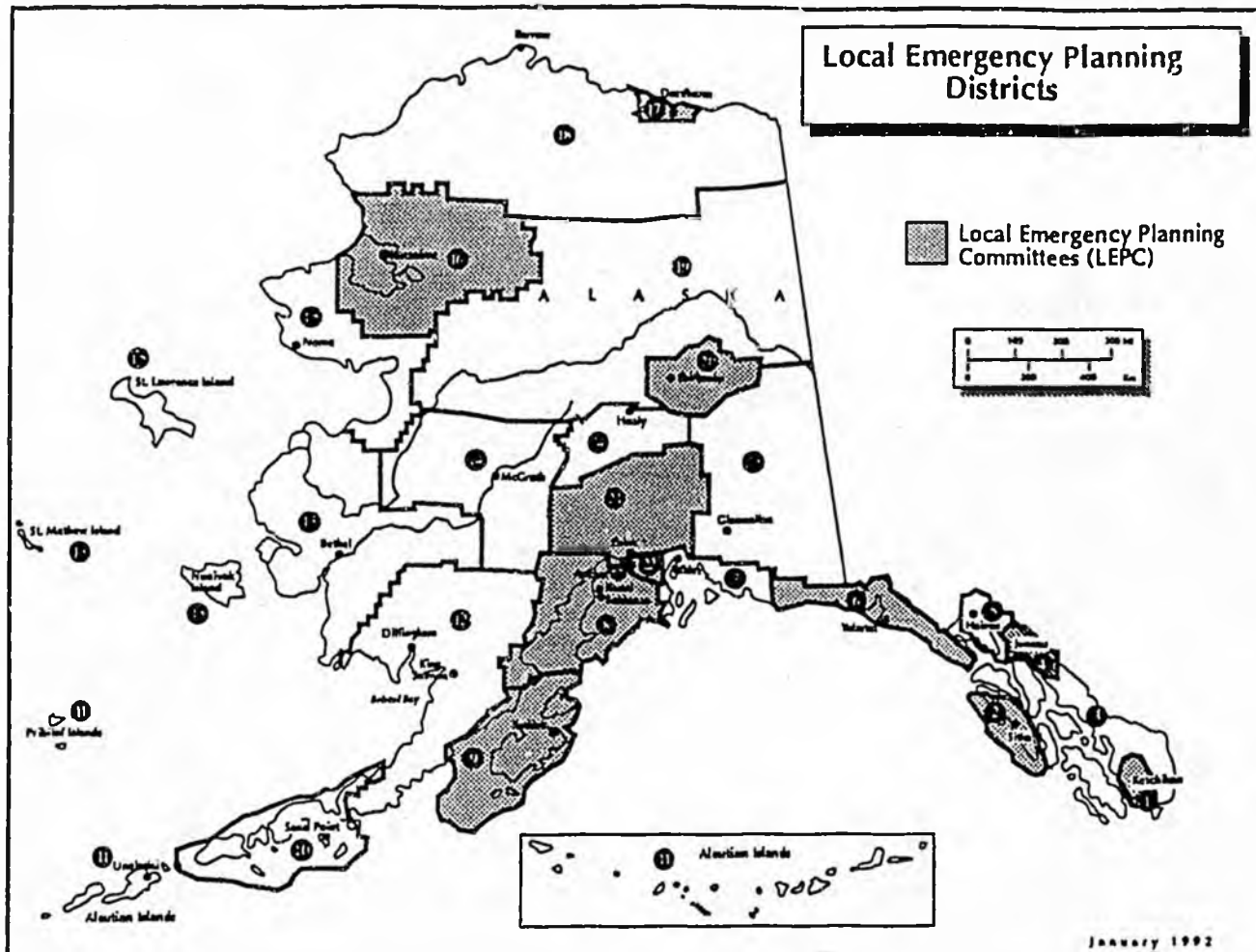
(Commissioner representative)
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Department of Community & Regional Affairs
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Anchorage, AK 99501

PH: 269-4500
FAX: 269-4520

Staff

Amy Skilbred, SERC Coordinator
Department of Environmental Conservation
P.O. Box O
Juneau, AK 99811-1800

PH: 465-5220
FAX: 465-5244



Map Key	Local Emergency Planning District (LEPD)	Principal City	LEPC appointed by SERC
1	KETCHIKAN GATEWAY BOROUGH	Ketchikan	April 4, 1991
2	CITY & BOROUGH OF SITKA	Sitka	May 14, 1990
3	Southeast	Juneau	
4	CITY AND BOROUGH OF JUNEAU	Juneau	January 29, 1992
5	Lynn Canal	Haines	
6	CITY OF YAKUTAT	Yakutat	September 18, 1989
7	Prince William Sound	Valdez	
8	KENAI PENINSULA BOROUGH	Soldotna	June 9, 1989
9	KODIAK ISLAND BOROUGH	Kodiak	June 9, 1979
10	Aleutians East Borough	Sand Point	
11	Aleutian Islands	Unalaska	
12	Bristol Bay	Dillingham	
13	Yukon Delta	Bethel	
14	Southwestern Interior	McGrath	
15	Northwestern	Nome	
16	NORTHWEST ARCTIC BOROUGH	Kotzebue	June 14, 1991
17	PRUDHOE BAY	NA	June 14, 1991
18	North Slope Borough	Barrow	
19	Interior Alaska	Fairbanks	
20	FAIRBANKS NORTHSTAR BOROUGH	Fairbanks	June 9, 1989
21	MATANUSKA-SUSITNA BOROUGH	Palmer	June 14, 1991
22	MUNICIPALITY OF ANCHORAGE	Anchorage	June 14, 1991
23	Southeastern Interior	Glenallen	
24	Denali Borough	Healy	

Approved LEPCs in Alaska

LEPC	Members	Chair
Greater Ketchikan	13	Mike Holman
City and Borough of Sitka	21	Nancy Hope
City and Borough of Juneau	20	Lissa Nelson Barnaby Dow
City of Yakutat	14	Larry Powell
Kenai Peninsula Borough	30	Keith Laurie
Kodiak Island Borough	22	Jerome Selby
Northwest Arctic Borough	24	Ron Monson
Prudhoe Bay	13	Gary Stewart
Fairbanks North Star Borough	22	Mike Oden
Matanuska-Susitna Borough	21	James MacIntosh
Municipality of Anchorage	18	Bruce Harding

CURRENT MEMBERSHIP

Revision Date: 5/24/91

BOARDS AND COMMISSIONS CONTACT ROSTER
HAZARDOUS SUBSTANCE SPILL TECHNOLOGY REVIEW COUNCIL

<u>MEMBER</u>	<u>APPT</u>	<u>RAPPT</u>	<u>RAPPT</u>	<u>TERM</u>
Randy Bayliss 119 Seward Street, No. 10 Juneau 99801 (H) 364-3259 (W) 586-6813 (Fax) 586-6819 Public/Restricted/ 1st JD	90/10/30	0/00/00	0/00/00	91/09/24
Edward J. Brown Water Research Center-UAF Fairbanks 99775-1760 (H) (W) 474-7350 (Fax) 474-6087 University of Alaska Rep.	90/10/30	0/00/00	0/00/00	91/09/24
Dr. Luis Proenza University of Alaska, Fairbanks Chancellor for Research 306 Signers Hall UAF Fairbanks, Alaska 99775-1720 (H) (W) 474-7314 (Fax) 474-7720 Governor's Senior Science Advisor	90/10/30	0/00/00	0/00/00	0/00/00
Jim Butchart Department of Emergency Service E. 3401 Bogard Road Wasilla, Alaska 99687 (H) (W) 376-2337 (Fax) Designee for Adjutant General/DMVA	90/12/27	0/00/00	0/00/00	0/00/00
Gordon W. Ito P. O. Box 307 Kotzebue 99752 (H) 442-3680 (W) (Fax) Public/Restricted/2nd JD	90/10/30	0/00/00	0/00/00	92/09/24

John (Randy) R. McGovern 1611 Carr Fairbanks 99701 (H) 451-0124 (W) 456-4248 (Fax) Public/Restricted/4th JD	90/11/15	0/00/00	0/00/00	93/09/24
Peter G. Mickelson PWS Science Center/Box 705 Cordova 99574 (H) 424-5111 (W) 424-5800 (Fax) Prince William Sound Science Center/Cordova/Rep.	90/10/30	0/00/00	0/00/00	92/09/24
Walter B. Parker 3724 Campbell Airstrip Road Anchorage 99504 (H) (W) 333-5189 (Fax) Public/Restricted/3rd JD	90/10/30	0/00/00	0/00/00	93/09/24
Mead Treadwell Deputy Commissioner - DEC Commissioner's Office/DEC P. O. Box 0 Juneau 99811 (H) (W) 465-2600 (Fax) 465-2617	90/12/03	0/00/00	0/00/00	0/00/00
Commander Edward E. Page Seventeenth Coast Guard Dist. P. O. Box 3-5000 Juneau, Alaska 99802 (H) 789-4970 (W) 463-2210 (Fax) 463-2218 Coast Guard Rep./Nonvoting	00/00/00	0/00/00	0/00/00	0/00/00
Carl Lautenberger EPA, Federal Bldg. Rm. 537 222 West 7th Ave. #19 Anchorage, AK 99501-5126 (H) (W) 271-5083 (Fax) EPA Rep./Nonvoting	00/00/00	0/00/00	0/00/00	0/00/00

Colorado Revised Statutes

1991 CUMULATIVE SUPPLEMENT

VOLUME 10A

1988 REPLACEMENT VOLUME

GOVERNMENT I A

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REVISOR OF STATUTES,
AND THE
OFFICE OF LEGISLATIVE LEGAL SERVICES

*To be Reenacted by the General Assembly of the State of Colorado
as the Statutory Law of Colorado of a General and Permanent
Nature in the 1992 Session*

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h moneys shall not be deposited in
ate of Colorado or any other fund.
ctive July 1.

15

EMERGENCY PLANNING COMMISSION

le III of superfund act. (1) The gen-
s that the implementation of the fed-
nity Right-to-Know Act of 1986", 42
the federal "Superfund Amendments
. 99-499, is a matter of statewide con-

ty is the state agency responsible for
mergency Planning and Community
C. sec. 11001 et seq., Title III of the
Reauthorization Act of 1986", P.L.
amended.

ffective May 31.

ns used in this part 15 shall have the
ederal "Emergency Planning and Com-
", 42 U.S.C. sec. 11001 et seq., P.L.
ffered to in this part 15 as the "federal

ffective May 31.

y planning commission - creation - duties.
eartment of public safety the Colorado
ich shall exercise its powers and perform
eartment of public safety as if the same
t by a type 2 transfer. The commission
our of the eleven members shall be the
vernment or their designees: The director
eartment of public safety, the director
t in the department of local affairs, the
r emergency services in the department
airperson, and the director of the division
isible for hazardous materials and waste
ochairperson. The remaining seven mem-
appointed by the governor for two-year
vo shall represent local governments, two
t groups or community groups, one shall
ning committee, and two shall represent
hall fill any vacancy by appointment.

(2) Members of the commission shall receive no compensation or per diem for their services on the commission; except that members may be reimbursed for travel expenses incurred in connection with activities other than attending meetings of the commission.

(3) The commission shall conduct an assessment of available resources and identify methods needed to utilize the available resources at the federal, state, and local levels to react to emergency response situations, investigate and evaluate the ability of local jurisdictions to implement the federal act, and make recommendations about administrative and legislative changes needed to implement the federal act. In making its report, the commission shall make recommendations on the administration and implementation of the federal act. The commission shall submit its report to the general assembly on or before January 1, 1991.

(4) The commission shall also assist in the appropriate training of personnel to react to emergency response situations.

Source: Added, L. 90, p. 1219, § 1, effective May 31.

24-33.5-1504. Local emergency planning committees - creation and duties.

(1) The commission shall designate local emergency planning districts to develop emergency response and preparedness capabilities in accordance with the federal act. The boundaries of such districts shall be the same as the boundaries of either a county, municipality, or a combination thereof.

(2) Upon the request of the commission, the primary governing body having jurisdiction over the local emergency planning district, the county commissioners, or the city council, as the case may be, shall provide nominations for membership on the local emergency planning committee. The commission shall appoint members of a local emergency planning committee for each emergency planning district in accordance with the federal act. For local emergency planning districts for which no nominations have been submitted by the governing body, the commission may designate either the county commissioners or city council, as the case may be, to serve as the local emergency planning committee.

(3) Local emergency planning committees shall perform the duties described under the federal act.

Source: Added, L. 90, p. 1219, § 1, effective May 31.

24-33.5-1505. Immunity. (1) No state commission or agency or county or municipal agency, including local emergency planning committees, fire protection districts, volunteer fire, ambulance, or emergency service groups, nor their officers, officials, directors, employees, or volunteers, when engaged in emergency service or response activities involving a hazardous material release at a facility or transportation accident site, shall be liable for the death of or injury to persons or loss or damage to property or the environment resulting from that hazardous material release, except for acts or omissions which constitute willful misconduct.

(2) No member of the commission or any local emergency planning committee shall be liable for the death of or any injury to persons or loss or

damage to property or the environment or any civil damages resulting from any act or omission arising out of the performance of the functions, duties, and responsibilities of the commission or local emergency planning committee, except for acts or omissions which constitute willful misconduct.

(3) Nothing in this section shall be construed to abrogate or limit the immunity or exemption from civil liability of any agency, entity, or person under any statute, including the "Colorado Governmental Immunity Act", article 10 of this title, or section 13-21-108.5, C.R.S.

Source: Added, L. 90, p. 1220, § 1, effective May 31.

ARTICLE 34

Department of Regulatory Agencies

PART 1

ORGANIZATION

- 24-34-104. General assembly review of regulatory agencies and functions for termination, continuation, or reestablishment.
24-34-104.1. General assembly review of new regulation of occupations and professions.
24-34-104.3. General assembly review of reprocessing fee - motor vehicle registration.
24-34-104.4. Excise tax on fees.
24-34-104.5. Cost of reports - charges.

PART 3

COLORADO CIVIL RIGHTS DIVISION - COMMISSION - PROCEDURES

- 24-34-301. Definitions.
24-34-303. Civil rights commission - membership.
24-34-304. Division and commission subject to termination - repeal of part.
24-34-305. Powers and duties of commission.
24-34-306. Charge - complaint - hearing - procedure - exhaustion of administrative remedies.
24-34-307. Judicial review and enforcement.

PART 4

EMPLOYMENT PRACTICES

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DELAWARE CODE
ANNOTATED

REVISED 1974

1990 Cumulative Supplement

Prepared under the Supervision of
The Delaware Code Revisors

DANIEL F. WOLCOTT, JR. AND BRUCE A. ROGERS

by

The Editorial Staff of the Publishers

Under the Direction of

ADRIAN D. KOWALSKY, DEBORAH S. TUSSEY, PATRICE M.
CUSHMAN AND EDITH M. MAWYER

VOLUME 9

1983 REPLACEMENT

*Including Legislation Enacted
by the 135th General
Assembly*

Annotated through 576 A.2d 138. For complete scope of annotations,
see Preface in Supplement to Volume 1.

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VOLUME I

CODE OF IOWA

1991

CONTAINING

ALL STATUTES OF A GENERAL
AND PERMANENT NATURE

Including the Acts of a permanent nature
of the Seventy-third General Assembly, 1989, 1990



Published under the authority of Iowa Code chapter 14
by the
Legislative Service Bureau
GENERAL ASSEMBLY OF IOWA
Des Moines

1990

30.10 Powers of local emergency planning committees.

The local emergency planning committee appointed by the commission for each local emergency planning district has the powers necessary to carry out the functions and duties specified in state law and the Emergency Planning and Community Right-to-know Act.

89 Acts, ch 204, §11

30.11 Liability of committee members.

A person appointed as a member of a local emergency planning committee is not personally liable for a claim based upon an act or omission of the person performed in the discharge of the functions and duties specified in the state law and the Emergency Planning and Community Right-to-know Act, except for acts and omissions which involve intentional misconduct or knowing violation of the law, or for a transaction from which the person derives an improper personal benefit.

89 Acts, ch 204, §12

30.12 Civil action.

1. The commission may commence a civil action against an owner or operator of a facility who has violated federal requirements to do any of the following:

a. Provide notification under section 302(c) of the Emergency Planning and Community Right-to-know Act, 42 U.S.C. § 11002(c).

b. Submit a material safety data sheet or a list under section 311(a) of the Emergency Planning and Community Right-to-know Act, 42 U.S.C. § 11021(a).

c. Make available information requested under section 311(c) of the Emergency Planning and Community Right-to-know Act, 42 U.S.C. § 11021(c).

d. Complete and submit an inventory form under section 312(a) of the Emergency Planning and Community Right-to-know Act, 42 U.S.C. § 11022(a), containing tier I information unless tier II information is submitted for the same period of time.

e. Provide information under section 303(d) of the Emergency Planning and Community Right-to-know Act, 42 U.S.C. § 11003(d).

f. Submit tier II information under section 312(e)(1) of the Emergency Planning and Community Right-to-know Act, 42 U.S.C. § 11022(e)(1).

2. The Iowa district court shall have jurisdiction over actions brought under this section and may grant any appropriate relief.

89 Acts, ch 204, §13

CHAPTER 31

STATE BANNER — DISPLAY OF FLAG — RECOGNITION DAYS

- 31.1 Specifications of state banner.
- 31.2 Use of state banner.
- 31.3 Flags on public buildings.
- 31.4 Mother's Day — Father's Day.
- 31.5 Independence Sunday.

- 31.6 Columbus Day.
- 31.7 Veterans Day.
- 31.8 Youth Honor Day.
- 31.9 Herbert Hoover Day.
- 31.10 Dr. Martin Luther King, Jr. Day.

31.1 Specifications of state banner.

The banner designed by the Iowa society of the Daughters of the American Revolution and presented to the state, which banner consists of three vertical stripes of blue, white, and red, the blue stripe being nearest the staff and the white stripe* being in the center, and upon the central white stripe being depicted a spreading eagle bearing in its beak blue streamers on which is inscribed, in white letters, the state motto, "Our liberties we prize and our rights we will maintain" and with the word "Iowa" in red letters below such streamers, as such design now appears on the banner in the office of the governor of the state of Iowa, is hereby adopted as a distinctive

state banner, for use on all occasions where a distinctive state symbol in the way of a banner may be fittingly displayed.

[C24, 27, 31, 35, 39, §468; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §31.1]

*Editor's Note: On the original design, the white stripe was about equal to the sum of the others

31.2 Use of state banner.

Such design may be used as a distinctive state banner and may as such be displayed on all proper occasions where the state is officially represented as distinct from other states, either at home or abroad, or wherever it may be proper to distinguish the citi-

1990
CUMULATIVE
SUPPLEMENT
to the
REVISED STATUTES
of the
STATE OF MISSOURI
1986

Comprising all statute laws of a general nature adopted by the First and Second Regular Sessions of the Eighty-fourth General Assembly 1987-1988, the First Regular Session of the Eighty-fifth General Assembly 1989, the First Extraordinary Session 1989, and the Second Regular Session of the Eighty-fifth General Assembly 1990.

EFFECTIVE DATES

1987	Effective September 28, 1987
1988	Effective August 13, 1988
1989	Effective August 28, 1989
1990	Effective August 28, 1990

Except where another effective date
is listed beneath the section.

Cite sections contained in this pamphlet as RSMo Supp. 1990.

Compiled, arranged, classified and indexed
under the direction of

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secretary of state. The secretary of state shall publish in the Missouri Register as soon as practicable, an order withdrawing the rule. No other provisions of chapter 536, RSMo, regarding notice, publication, or nonjudicial review of any rule promulgated by the commission shall be applicable to such rules. Any person seeking judicial review of any such rule shall be deemed to have exhausted all administrative review procedures. The provisions of sections 292.600 to 292.625 are nonseverable and the grant of rule-making authority is essentially dependent on the review power vested with the joint committee on administrative rules. If the review power is held unconstitutional or invalid, the grant of rule-making authority shall also be invalid or void. (L. 1988 S.B. 765)

292.615. Violations of law, attorney general to restrain and seek penalties for—penalties assessed, payable to general revenue.—The attorney general shall bring an action in circuit court against any employer knowingly and intentionally violating the provisions of sections 292.600 to 292.625. In any such action the circuit court shall have jurisdiction to restrain violations of the provisions of sections 292.600 to 292.625 and to levy appropriate penalties, including reasonable attorney's fees and costs, of not more than five thousand dollars per violation for each day of violation. Any civil penalty assessed for the violation of any of the provisions of sections 292.600 to 292.625 shall be payable to the general revenue fund.

(L. 1985 H.B. 507 & 139 § 4, A.L. 1987 H.B. 655, A.L. 1988 S.B. 765)

292.617. Explosive or blasting agents, temporary storage—notification of local fire department and certain others—contents of report, exceptions—visible markings on buildings, rooms and containers, requirements, exceptions—motor vehicles, rolling stock and airplanes, markings by federal government.—1. Owners and operators of facilities where one hundred pounds or more of explosives or blasting agents as defined in Title 49, Code of Federal Regulations, Part 173, Subpart C are temporarily stored shall file such reports as required under section 292.605 whenever such explosive materials are stored in a particular facility for more than fifteen days and each time such explosive materials are relocated to a new site for storage of more than fifteen days duration, except that when such explosive materials are stored in any facility for less than fifteen days such reports shall not be required and the facility owner or operator shall, within twenty-four

hours of the arrival of such explosive materials at the facility, notify the local fire department in the jurisdiction where the facility is located that such explosive materials are temporarily stored in that facility and shall describe the contents and amount of the explosive materials stored therein. The provisions of this subsection concerning explosive materials shall apply to owners and operators of facilities where explosives are temporarily stored prior to use at that facility or location and shall not apply to storage by manufacturers and distributors prior to sale or to such material while in transit provided that the transporter is in compliance with the United States Department of Transportation regulation.

2. All facilities required to submit reports under sections 292.600 to 292.625, except those facilities having an emergency response policy or facilities located in a fire protection district or municipality having a fire protection code, shall provide visible markings on the outside of buildings, rooms and containers where hazardous substances are present. These markings shall conform to the National Fire Protection Association Standard Number 704 or with other federal laws or regulations, or in the case of containers, may as an option comply with Safety and Health Administration Hazard Communication Rule, 29 CFR 1910.1200(f). To avoid duplication of markings, marking requirements of the United States Department of Transportation shall satisfy the requirements in regard to motor vehicles, rolling stock and aircraft.

(L. 1989 H.B. 77, et al., A.L. 1990 S.B. 719)

292.620.—(Repealed L. 1988 S.B. 765 § A)

292.623. Immunity from liability for official actions by members of commission and local emergency planning committee, exceptions.—Members of the Missouri emergency response commission and members of local emergency planning committees appointed by the commission shall not be liable for damages incurred as a result of actions taken by them when acting in their capacities pursuant to sections 292.600 to 292.625, or the federal act. This protection from liability shall not apply for acts or omissions which result from intentional wrongdoing or gross negligence.

(L. 1989 H.B. 77, et al.)

292.625. Additional duties of department.—The department shall:

(1) Exercise general supervision of the administration and enforcement of sections 292.600 to 292.625 and all rules and regulations adopted or issued hereunder;

NEW JERSEY STATUTES ANNOTATED

Official Classification

Title 2A

**Administration of Civil and Criminal Justice
2A:44 to 2A:65A**

1991

Cumulative Annual Pocket Part

[For Use In 1991-1992]

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1990 First Annual Session**

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interest community by its willful, wanton or grossly negligent act of commission or omission.

L.1989, c. 9, § 2, eff. Jan. 30, 1989.

Historical and Statutory Notes

Statement: Committee Statement to Assembly,
No. 2443—L.1989, c. 9, sec § 2A:62A-12.

2A:62A-14. By-laws to provide immunity from liability; vote; operative date

a. No bylaws shall be amended in accordance with section 2 of this act¹ unless the amendment is approved by the owners of at least $\frac{2}{3}$ of the units held by unit owners other than the developer in the qualified common interest community.

b. Bylaws adopted in accordance with section 2 of this act shall apply to actions for injuries sustained on or after the operative date of the bylaws.

L.1989, c. 9, § 3, eff. Jan. 30, 1989.

¹ Section 2A:62A-13.

Historical and Statutory Notes

Statement: Committee Statement to Assembly,
No. 2443—L.1989, c. 9, sec § 2A:62A-12.

2A:62A-15. Members of local emergency planning committee; immunity from liability; exceptions

Notwithstanding any other provision of law to the contrary, no person serving as a member of a local emergency planning committee organized pursuant to the "Super Fund Amendments and Reauthorization Act of 1986," Pub.L. 99-499 (42 U.S.C. 9601 et seq.) and Executive Order 161 of 1986 shall be liable:

a. For damages resulting the exercise of judgment or discretion unless the actions evidence a reckless disregard for the duties imposed by the position; or

b. For damages resulting from acts of commission or omission arising out of and in the course of rendering volunteer service or assistance; provided, however, that nothing in this subsection shall be deemed to grant immunity to any person causing damage by his willful, wanton or grossly negligent act of commission or omission, nor for any damage caused to any person as the result of the negligent operation of a motor vehicle.

L.1989, c. 351, § 1, eff. Jan. 16, 1990.

Senate Judiciary Committee Statement

Assembly, No. 2800—L.1989, c. 351

The Senate Judiciary Committee reports favorably and with committee amendments Assembly Bill No. 2800(1R).

Under the provisions of the federal "Superfund Amendments and Reauthorization Act of 1986," Pub.L.99-498 (42 U.S.C. 9601 et seq.), the states are directed to establish local emergency planning committees to coordinate responses to emergency situations, such as the release of hazardous chemicals. These committees must include elected state and local officials and representatives of community groups and the media. This bill is intended to provide civil immunity to persons serving on local emergency planning committees. The committee amendments are technical in nature and are intended to make this bill consistent with the provisions of N.J.S.A. 2A:53A-7.1 which grants civil immunity to volunteers serving with certain nonprofit organizations. The amendments rearrange the language in the bill so that "reckless disregard of duties" is applicable to discretionary decisions only and not to negligent acts or omissions which involve a gross negligence standard.

Last additions in text indicated by underline; last deletions by ~~strikeouts~~

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**Chapter 74
Environmental Improvement
Pamphlet 120**



1990 REPLACEMENT PAMPHLET

This pamphlet includes laws enacted through the First Special Session of the Thirty-Ninth Legislature (1990) and annotations through 784 P.2d 1372, 110 S. Ct. 857, 893 F.2d 348, 727 F. Supp. 635, 128 F.R.D. 294, and 108 Bankr. 853.

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74-4E-1. Short title.

Sections 1 through 9 [74-4E-1 to 74-4E-9 NMSA 1978] of this act may be cited as the "Hazardous Chemicals Information Act".

History: Laws 1989, ch. 149, § 1.
Effective dates. — Laws 1989, ch. 149, § 18

makes the Hazardous Chemicals Information Act effective on July 1, 1989.

74-4E-2. Purpose of act.

The purpose of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] is to ensure that current information on the nature and location of hazardous chemicals is available to local emergency planning committees, emergency responders and the public as required by Title III.

History: Laws 1989, ch. 149, § 2.
Effective dates. — Laws 1989, ch. 149, § 18
makes the Hazardous Chemicals Information Act effective on July 1, 1989.

Meaning of Title III. — See Subsection H of 74-4E-3 NMSA 1978.

74-4E-3. Definitions.

As used in the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978]:

- A. "commission" means the state emergency response commission;
- B. "department" means the public safety department;
- C. "emergency responder" means any law enforcement officer, firefighter, medical services professional or other person trained and equipped to respond to hazardous chemical releases;
- D. "hazardous chemical" means any hazardous chemical, extremely hazardous substance, toxic chemical or hazardous material as defined by Title III;
- E. "facility owner or operator" means any individual, trust, firm, joint stock company, corporation, partnership, association, state agency, municipality or county having legal control or authority over buildings, equipment, structures and other stationary items which are located on a single site or on contiguous or adjacent sites. For the purposes of Section 5 [74-4E-5 NMSA 1978] of the Hazardous Chemicals Information Act, the term includes owners or operators of motor vehicles, rolling stock and aircraft;
- F. "local emergency planning committee" means any local group appointed by the commission to undertake chemical release contingency planning;
- G. "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment of any hazardous chemical, extremely hazardous substance or toxic chemical. "Release" includes the abandonment or discarding of barrels, containers and other closed receptacles; and
- H. "Title III" means the federal Emergency Planning and Community Right-to-Know Act of 1986.

History: Laws 1989, ch. 149, § 3.
Effective dates. — Laws 1989, ch. 149, § 18
makes the Hazardous Chemicals Information Act effective on July 1, 1989.
Emergency Planning and Community Right-

to-Know Act of 1986. — The federal Emergency Planning and Community Right-to-Know Act of 1986, referred to in Subsection H, appears as 42 U.S.C. §§ 11001 to 11005, 11021 to 11023, and 11041 to 11050.

74-4E-4. Commission created; membership; terms; duties; immunity granted.

A. The "state emergency response commission" is created. The commission shall consist of seven members who shall be qualified voters of the state of New Mexico. All members shall be appointed by the governor. Among the members appointed, there shall be representatives of private industry, federal facilities, public health and public safety.

Appointments shall be made for four-year terms to expire on January 1 of the appropriate year. Commission members shall serve staggered terms as determined by the governor at the time of their initial appointments. Annually, the governor shall designate, from among the members, a chairman of the commission.

B. The commission shall:

- (1) exercise supervisory authority to implement Title III within New Mexico;
- (2) prescribe all reporting forms required by the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978];
- (3) provide direction to the emergency management task force and the hazardous materials safety board;
- (4) report periodically to the radioactive and hazardous materials committee; and
- (5) report annually to the governor and the legislature.

C. The commission may solicit and accept grants from federal or private sources for undertakings that further the purpose of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] or the Emergency Management Act [Chapter 74, Article 4B NMSA 1978] and may make contracts necessary to carry out the purposes of both of those acts.

D. Commission members shall not vote by proxy. A majority of the members constitute a quorum for the conduct of business.

E. Commission members shall not be paid but shall receive per diem and mileage expenses as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

F. Immunity from tort liability for emergency response actions, including planning or preparation therefore, is granted to the state, its subdivisions and all their agencies, officers, agents and employees. Any waiver of immunity from tort liability granted under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall not be applicable to disaster or emergency response or planning.

History: Laws 1989, ch. 149, § 4.

Effective dates. — Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

Meaning of Title III. — See Subsection H of 74-4E-3 NMSA 1978.

74-4E-5. Notices and reports required; deadlines set.

A. Any facility owner or operator who is required by any section of Title III to file a written notice or report to the commission shall file that notice or report on or before the required deadline with the department. With the exception of the written follow-up emergency notice required in Section 304(c) of Title III, all notices shall be filed annually and shall confirm or amend information previously filed. Facility owners or operators shall file with the department:

- (1) notice that an extremely hazardous substance, at or above a specified quantity, is present at a facility;
- (2) notice that a release of any chemical substance has occurred at or above reportable quantities determined by the commission. The contents of the notice shall be determined by the commission. The notice shall be filed as soon as practicable following a release;
- (3) an inventory form covering each hazardous material. This form shall be filed annually on or before March 1; and
- (4) a toxic chemical release inventory form. This reporting requirement shall apply to facility owners and operators that have ten or more employees and that are in standard industrial classification codes 20 through 39, as in effect July 1, 1985. The form shall be filed annually on or before July 1.

B. The commission may simplify forms to be used for reporting, set deadlines for filing written notices or reports and adopt other regulations for the enforcement of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978].

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Title 63

Public Health and Safety

§§ 91 to End

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49

and plans;

and regulations consistent with Title III of the Superfund authorization Act of 1986. Any rule or regulation promulgated pursuant to the Oklahoma Emergency Response and Notification Act shall be more stringent than any such federal act;

rules. Any rule or regulation promulgated by any member of the Oklahoma Emergency Response and Notification Act shall not be more stringent than any such federal rules;

actions, inquiries and inspections;

actions;

relative penalties;

and;

to purchase and administer grants, allotments, gifts, devise for the improvement of emergency response performance in the state;

to disseminate information as requested regarding emergency response implementation; and

to identify member agencies where applicable to eliminate redundancy in the activities of the various state, federal and local agencies enforcing laws relating to handling, storage, spills and training.

Nothing in this section shall be deemed to repeal any provision of the Oklahoma Emergency Response and Notification Act which shall be deemed guilty of a misdemeanor, and upon conviction punishable by a fine of not more than Ten Thousand Dollars or imprisonment for not more than one (1) year, or by both such fine and imprisonment.

The Hazardous Materials Emergency Response Commission shall: (a) coordinate emergency planning districts to facilitate preparation and implementation of plans; and

(b) select a local emergency planning committee for each emergency response district. Each committee shall include, at a minimum, representation from the following groups or organizations:

(1) State and local officials,

(2) State and local emergency response personnel;

(3) State and local emergency response organizations;

(4) State and local emergency response organizations;

(5) State and local emergency response organizations;

(6) State and local emergency response organizations;

(7) State and local emergency response organizations;

(8) State and local emergency response organizations;

(9) State and local emergency response organizations;

(10) State and local emergency response organizations;

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(32) State and local emergency response organizations;

(33) State and local emergency response organizations;

(34) State and local emergency response organizations;

(35) State and local emergency response organizations;

(36) State and local emergency response organizations;

Hazardous Materials Emergency Response Commission to modify the membership of a local emergency planning committee.

I. The members of the local emergency planning committee shall meet to elect a chairman who shall hold office according to rules adopted by the committee. The committee shall establish rules by which it shall function. Such rules shall include provisions for public notification of committee activities, public meetings to discuss the emergency plan, public comments, response to such comments by the committee, and distribution of the emergency plan. The local emergency planning committee shall establish procedures for receiving and processing requests from the public for information. Such procedures shall include the designation of an official to serve as coordinator for information.

J. Each local emergency planning committee shall:

1. complete preparation of an emergency plan in accordance with the federal Superfund Amendments and Reauthorization Act of 1986. After completion of an emergency plan under this paragraph for an emergency planning district, the local emergency planning committee shall submit a copy of the plan to the Oklahoma Hazardous Materials Emergency Response Commission. The Commission shall review the plan and make recommendations to the committee on revisions of the plan that may be necessary to ensure coordination of such plan with emergency response plans of other emergency planning districts. To the maximum extent practicable, such review shall not delay implementation of such plan. The committee shall review such plan once a year, or more frequently as changed circumstances in the community or at any facility may require;

2. evaluate the need for resources necessary to develop, implement, and exercise the emergency plan, and shall make recommendations with respect to additional resources that may be required and the means for providing such additional resources;

3. comply with the Oklahoma Open Meeting Law;² and

4. take such other action as may be required by the Oklahoma Hazardous Materials Emergency Response Commission or as otherwise deemed necessary to implement the provisions of this act or the federal Superfund Amendments and Reauthorization Act of 1986.

Added by Laws 1989, c. 166, § 1, emerg. eff. May 8, 1989. Amended by Laws 1991, c. 292, § 2, eff. July 1, 1991.

¹ 42 U.S.C.A. § 9601.

² Section 301 et seq. of title 25.

§ 689.1B. Member agencies—Annual budgets

Each member agency, in cooperation with the Oklahoma Hazardous Material Emergency Response Commission, shall prepare an annual budget for the implementation and administration of its respective Commission responsibilities, and submit the same as an inclusion in its agency budget to the Oklahoma Legislature for appropriations to cover the costs of performance of the requirements of the Oklahoma Emergency Response and Notification Act.¹

Added by Laws 1991, c. 292, § 4, eff. July 1, 1991.

¹ Section 689 of this title.

§ 689.2. Local emergency planning committees—Immunity of members from civil liability

A. The Legislature finds that individuals appointed to the local emergency planning committees in developing effective comprehensive local emergency response plans serve to protect the health, safety, and welfare of the citizens and the environment of this state. The Legislature, in addition, finds that potential exposure to liability has a detrimental effect on the participation of the individuals on local emergency planning committees and that in order for these local emergency planning committees to function effectively, individuals serving on such committees shall be exempt from civil liability, except as otherwise provided by this act,¹ for any act.

42 USCS § 11046

PUBLIC HEALTH AND WELFARE

(vi) Render a decision in response to a petition under section 322(d) [42 USCS § 11042(d)] within 9 months after receipt of the petition.

(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 324(a) [42 USCS § 11044(a)].

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 312(e)(3) [42 USCS § 11022(e)(3)] within 120 days after the date of receipt of the request.

(2) State or local suits. (A) Any State or local government may commence a civil action against an owner or operator of a facility for failure to do any of the following:

(i) Provide notification to the emergency response commission in the State under section 302(c) [42 USCS § 11002(c)].

(ii) Submit a material safety data sheet or a list under section 311(a) [42 USCS § 11021(a)].

(iii) Make available information requested under section 311(c) [42 USCS § 11021(c)].

(iv) Complete and submit an inventory form under section 312(a) [42 USCS § 11022(a)] containing tier I information unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 USCS § 11022(a)(2)].

(B) Any State emergency response commission or local emergency planning committee may commence a civil action against an owner or operator of a facility for failure to provide information under section 303(d) [42 USCS § 11003(d)] or for failure to submit tier II information under section 312(e)(1) [42 USCS § 11022].

(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 322(g) [42 USCS § 11042(g)].

(b) Venue. (1) Any action under subsection (a) against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(2) Any action under subsection (a) against the Administrator may be brought in the United States District Court for the District of Columbia.

(c) Relief. The district court shall have jurisdiction in actions brought under subsection (a) against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in actions brought under subsection (a) against the Administrator to order the Administrator to perform the act or duty concerned.

(d) Notice. (1) No action may be commenced under subsection (a)(1)(A) prior to 60 days after the plaintiff has given notice of the alleged

violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) or (a)(1)(C) prior to 60 days after the date on which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(e) **Limitation.** No action may be commenced under subsection (a) against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act [42 USCS §§ 11001 et seq.] with respect to the violation of the requirement.

(f) **Costs.** The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) **Other rights.** Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency).

(h) **Intervention.** (1) By the United States. In any action under this section the United States or the State, or both, if not a party, may intervene as a matter of right.

(2) By persons. In any action under this section, any person may intervene as a matter of right when such person has a direct interest which is or may be adversely affected by the action and the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest unless the Administrator or the State shows that the person's interest is adequately represented by existing parties in the action.

(Oct. 17, 1986, P. L. 99-499, Title III, § 326, 100 Stat. 1755.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Brackets are inserted around the first period in subsec. (a)(2)(A)(iv) to indicate the probable intent of Congress to omit such punctuation.

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

(5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

(Oct. 17, 1986, P. L. 99-499, Title III, § 311, 100 Stat. 1736.)

HISTORY; ANCHILARY LAWS AND DIRECTIVES

References in text:

"The Occupational Safety and Health Act of 1970", referred to in this section, is Act Dec. 29, 1970, P. L. 91-596, 84 Stat. 1590, which appears generally as 29 USCS §§ 651 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

§ 11022. Emergency and hazardous chemical inventory forms

(a) **Basic requirement.** (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this title referred to as an "inventory form") to each of the following:

- (A) The appropriate local emergency planning committee.
- (B) The State emergency response commission.
- (C) The fire department with jurisdiction over the facility.

(2) The inventory form containing tier I information (as described in subsection (d)(1)) shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. The preceding sentence does not apply if an owner or operator provides, by the same deadline and with respect to the same calendar year, tier II information (as described in subsection (d)(2)) to the recipients described in paragraph (1).

(3) An owner or operator may meet the requirements of this section with respect to a hazardous chemical which is a mixture by doing one of the following:

- (A) Providing information on the inventory form on each element or compound in the mixture which is a hazardous chemical. If more than one mixture has the same element or compound, only one listing on the inventory form for the element or compound at the facility is necessary.
- (B) Providing information on the inventory form on the mixture itself.

(b) **Thresholds.** The Administrator may establish threshold quantities for hazardous chemicals covered by this section below which no facility shall be subject to the provisions of this section. The threshold quantities may,

in the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(c) **Hazardous chemicals covered.** A hazardous chemical subject to the requirements of this section is any hazardous chemical for which a material safety data sheet or a listing is required under section 311 [42 USCS § 11021].

(d) **Contents of form.** (1) Tier I information. (A) Aggregate information by category. An inventory form shall provide the information described in subparagraph (B) in aggregate terms for hazardous chemicals in categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act.

(B) Required information. The information referred to in subparagraph (A) is the following:

(i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year.

(ii) An estimate (in ranges) of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year.

(iii) The general location of hazardous chemicals in each category.

(C) Modifications. For purposes of reporting information under this paragraph, the Administrator may—

(i) modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act by requiring information to be reported in terms of groups of hazardous chemicals which present similar hazards in an emergency, or

(ii) require reporting on individual hazardous chemicals of special concern to emergency response personnel.

(2) Tier II information. An inventory form shall provide the following additional information for each hazardous chemical present at the facility, but only upon request and in accordance with subsection (c):

(A) The chemical name or the common name of the chemical as provided on the material safety data sheet.

(B) An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.

(C) An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.

(D) A brief description of the manner of storage of the hazardous chemical.

(E) The location at the facility of the hazardous chemical.

(F) An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 324 [42 USCS § 11044].

(e) **Availability of tier II information.** (1) Availability to state commissions, local committees, and fire departments. Upon request by a State emergency planning commission, a local emergency planning committee, or a fire department with jurisdiction over the facility, the owner or operator of a facility shall provide tier II information, as described in subsection (d), to the person making the request. Any such request shall be with respect to a specific facility.

(2) Availability to other state and local officials. A state or local official acting in his or her official capacity may have access to tier II information by submitting a request to the State emergency response commission or the local emergency planning committee. Upon receipt of a request for tier II information, the State commission or local committee shall, pursuant to paragraph (1), request the facility owner or operator for the tier II information and make available such information to the official.

(3) Availability to public. (A) In general. Any person may request a State emergency response commission or local emergency planning committee for tier II information relating to the preceding calendar year with respect to a facility. Any such request shall be in writing and shall be with respect to a specific facility.

(B) Automatic provision of information to public. Any tier II information which a State emergency response commission or local emergency planning committee has in its possession shall be made available to a person making a request under this paragraph in accordance with section 324 [42 USCS § 11044]. If the State emergency response commission or local emergency planning committee does not have the tier II information in its possession, upon a request for tier II information the State emergency response commission or local emergency planning committee shall, pursuant to paragraph (1), request the facility owner or operator for tier II information with respect to a hazardous chemical which a facility has stored in an amount in excess of 10,000 pounds present at the facility at any time during the preceding calendar year and make such information available in accordance with section 324 [42 USCS § 11044] to the person making the request.

(C) Discretionary provision of information to public. In the case of tier II information which is not in the possession of a State emergency response commission or local emergency planning committee and which is with respect to a hazardous chemical which a facility has stored in an amount less than 10,000 pounds present at the facility at any time during the preceding calendar year, a request from a person must include the general need for the information. The State emergency response commission or local emergency planning committee

may, pursuant to paragraph (1), request the facility owner or operator for the tier II information on behalf of the person making the request. Upon receipt of any information requested on behalf of such person, the State emergency response commission or local emergency planning committee shall make the information available in accordance with section 324 [42 USCS § 11044] to the person.

(D) Response in 45 days. A State emergency response commission or local emergency planning committee shall respond to a request for tier II information under this paragraph no later than 45 days after the date of receipt of the request.

(f) Fire department access. Upon request to an owner or operator of a facility which files an inventory form under this section by the fire department with jurisdiction over the facility, the owner or operator of the facility shall allow the fire department to conduct an on-site inspection of the facility and shall provide to the fire department specific location information on hazardous chemicals at the facility.

(g) Format of forms. The Administrator shall publish a uniform format for inventory forms within three months after the date of the enactment of this title [enacted Oct. 17, 1986]. If the Administrator does not publish such forms, owners and operators of facilities subject to the requirements of this section shall provide the information required under this section by letter. (Oct. 17, 1986, P. L. 99-499, Title III, § 312, 100 Stat. 1738.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Occupational Safety and Health Act of 1970", referred to in this section, is Act Dec. 29, 1970, P. L. 91-596, 84 Stat. 1590, which appears generally as 29 USCS §§ 651 et seq. For full classification of such Act, consult USCS Tables volumes.

"This title", referred to in this section, is Act Oct. 17, 1986, P. L. 99-499, Title III, 100 Stat. 1728, which generally appears as 42 USCS §§ 11001 et seq. For full classification of such Title, consult USCS Tables volumes.

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

§ 11023. Toxic chemical release forms

(a) Basic requirement. The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) for each toxic chemical listed under subsection (c) that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) during the preceding calendar year at such facility. Such form shall be

(5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

(Oct. 17, 1986, P. L. 99-499, Title III, § 311, 100 Stat. 1736.)

HISTORY; ANCHILARY LAWS AND DIRECTIVES

References in text:

"The Occupational Safety and Health Act of 1970", referred to in this section, is Act Dec. 29, 1970, P. L. 91-596, 84 Stat. 1590, which appears generally as 29 USCS §§ 651 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

§ 11022. Emergency and hazardous chemical inventory forms

- (a) **Basic requirement.** (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this title referred to as an "inventory form") to each of the following:
- (A) The appropriate local emergency planning committee.
 - (B) The State emergency response commission.
 - (C) The fire department with jurisdiction over the facility.
- (2) The inventory form containing tier I information (as described in subsection (d)(1)) shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. The preceding sentence does not apply if an owner or operator provides, by the same deadline and with respect to the same calendar year, tier II information (as described in subsection (d)(2)) to the recipients described in paragraph (1).
- (3) An owner or operator may meet the requirements of this section with respect to a hazardous chemical which is a mixture by doing one of the following:
- (A) Providing information on the inventory form on each element or compound in the mixture which is a hazardous chemical. If more than one mixture has the same element or compound, only one listing on the inventory form for the element or compound at the facility is necessary.
 - (B) Providing information on the inventory form on the mixture itself.
- (b) **Thresholds.** The Administrator may establish threshold quantities for hazardous chemicals covered by this section below which no facility shall be subject to the provisions of this section. The threshold quantities may,

in the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(c) **Hazardous chemicals covered.** A hazardous chemical subject to the requirements of this section is any hazardous chemical for which a material safety data sheet or a listing is required under section 311 [42 USCS § 11021].

(d) **Contents of form.** (1) Tier I information. (A) Aggregate information by category. An inventory form shall provide the information described in subparagraph (B) in aggregate terms for hazardous chemicals in categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act.

(B) Required information. The information referred to in subparagraph (A) is the following:

(i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year.

(ii) An estimate (in ranges) of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year.

(iii) The general location of hazardous chemicals in each category.

(C) Modifications. For purposes of reporting information under this paragraph, the Administrator may—

(i) modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act by requiring information to be reported in terms of groups of hazardous chemicals which present similar hazards in an emergency, or

(ii) require reporting on individual hazardous chemicals of special concern to emergency response personnel.

(2) Tier II information. An inventory form shall provide the following additional information for each hazardous chemical present at the facility, but only upon request and in accordance with subsection (e):

(A) The chemical name or the common name of the chemical as provided on the material safety data sheet.

(B) An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.

(C) An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.

(D) A brief description of the manner of storage of the hazardous chemical.

(E) The location at the facility of the hazardous chemical.

(F) An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 324 [42 USCS § 11044].

(e) **Availability of tier II information.** (1) Availability to state commissions, local committees, and fire departments. Upon request by a State emergency planning commission, a local emergency planning committee, or a fire department with jurisdiction over the facility, the owner or operator of a facility shall provide tier II information, as described in subsection (d), to the person making the request. Any such request shall be with respect to a specific facility.

(2) Availability to other state and local officials. A state or local official acting in his or her official capacity may have access to tier II information by submitting a request to the State emergency response commission or the local emergency planning committee. Upon receipt of a request for tier II information, the State commission or local committee shall, pursuant to paragraph (1), request the facility owner or operator for the tier II information and make available such information to the official.

(3) Availability to public. (A) In general. Any person may request a State emergency response commission or local emergency planning committee for tier II information relating to the preceding calendar year with respect to a facility. Any such request shall be in writing and shall be with respect to a specific facility.

(B) Automatic provision of information to public. Any tier II information which a State emergency response commission or local emergency planning committee has in its possession shall be made available to a person making a request under this paragraph in accordance with section 324 [42 USCS § 11044]. If the State emergency response commission or local emergency planning committee does not have the tier II information in its possession, upon a request for tier II information the State emergency response commission or local emergency planning committee shall, pursuant to paragraph (1), request the facility owner or operator for tier II information with respect to a hazardous chemical which a facility has stored in an amount in excess of 10,000 pounds present at the facility at any time during the preceding calendar year and make such information available in accordance with section 324 [42 USCS § 11044] to the person making the request.

(C) Discretionary provision of information to public. In the case of tier II information which is not in the possession of a State emergency response commission or local emergency planning committee and which is with respect to a hazardous chemical which a facility has stored in an amount less than 10,000 pounds present at the facility at any time during the preceding calendar year, a request from a person must include the general need for the information. The State emergency response commission or local emergency planning committee

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may, pursuant to paragraph (1), request the facility owner or operator for the tier II information on behalf of the person making the request. Upon receipt of any information requested on behalf of such person, the State emergency response commission or local emergency planning committee shall make the information available in accordance with section 324 [42 USCS § 11044] to the person.

(D) Response in 45 days. A State emergency response commission or local emergency planning committee shall respond to a request for tier II information under this paragraph no later than 45 days after the date of receipt of the request.

(f) Fire department access. Upon request to an owner or operator of a facility which files an inventory form under this section by the fire department with jurisdiction over the facility, the owner or operator of the facility shall allow the fire department to conduct an on-site inspection of the facility and shall provide to the fire department specific location information on hazardous chemicals at the facility.

(g) Format of forms. The Administrator shall publish a uniform format for inventory forms within three months after the date of the enactment of this title [enacted Oct. 17, 1986]. If the Administrator does not publish such forms, owners and operators of facilities subject to the requirements of this section shall provide the information required under this section by letter. (Oct. 17, 1986, P. L. 99-499, Title III, § 312, 100 Stat. 1738.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Occupational Safety and Health Act of 1970", referred to in this section, is Act Dec. 29, 1970, P. L. 91-596, 84 Stat. 1590, which appears generally as 29 USCS §§ 651 et seq. For full classification of such Act, consult USCS Tables volumes.

"This title", referred to in this section, is Act Oct. 17, 1986, P. L. 99-499, Title III, 100 Stat. 1728, which generally appears as 42 USCS §§ 11001 et seq. For full classification of such Title, consult USCS Tables volumes.

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

§ 11023. Toxic chemical release forms

(a) Basic requirement. The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) for each toxic chemical listed under subsection (c) that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) during the preceding calendar year at such facility. Such form shall be

(2) Written statement of need. The written statement of need shall be a statement that describes with reasonable detail one or more of the following health needs for the information:

(A) To assess exposure of persons living in a local community to the hazards of the chemical concerned.

(B) To conduct or assess sampling to determine exposure levels of various population groups.

(C) To conduct periodic medical surveillance of exposed population groups.

(D) To provide medical treatment to exposed individuals or population groups.

(E) To conduct studies to determine the health effects of exposure.

(F) To conduct studies to aid in the identification of a chemical that may reasonably be anticipated to cause an observed health effect.

(d) **Confidentiality agreement.** Any person obtaining information under subsection (a) or (c) shall, in accordance with such subsection (a) or (c), be required to agree in a written confidentiality agreement that he will not use the information for any purpose other than the health needs asserted in the statement of need, except as may otherwise be authorized by the terms of the agreement or by the person providing such information. Nothing in this subsection shall preclude the parties to a confidentiality agreement from pursuing any remedies to the extent permitted by law.

(e) **Regulations.** As soon as practicable after the date of the enactment of this title [enacted Oct. 17, 1986], the Administrator shall promulgate regulations describing criteria and parameters for the statement of need under subsection (a) and (c) and the confidentiality agreement under subsection (d).

(Oct. 17, 1986, P. L. 99-499, Title III, § 323, 100 Stat. 1750.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

§ 11044. Public availability of plans, data sheets, forms, and followup notices

(a) **Availability to public.** Each emergency response plan, material safety data sheet, list described in section 311(a)(2) [42 USCS § 11021(a)(2)], inventory form, toxic chemical release form, and followup emergency notice shall be made available to the general public, consistent with section 322 [42 USCS § 11042], during normal working hours at the location or locations designated by the Administrator, Governor, State emergency response commission, or local emergency planning committee, as appropriate. Upon request by an owner or operator of a facility subject to the

requirements of section 312 [42 USCS § 11022], the State emergency response commission and the appropriate local emergency planning committee shall withhold from disclosure under this section the location of any specific chemical required by section 312(d)(2) [42 USCS § 11022(d)(2)] to be contained in an inventory form as tier II information.

(b) **Notice of public availability.** Each local emergency planning committee shall annually publish a notice in local newspapers that the emergency response plan, material safety data sheets, and inventory forms have been submitted under this section. The notice shall state that followup emergency notices may subsequently be issued. Such notice shall announce that members of the public who wish to review any such plan, sheet, form, or followup notice may do so at the location designated under subsection (a). (Oct. 17, 1986, P. L. 99-499, Title III, § 324, 100 Stat. 1752.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

§ 11045. Enforcement

(a) **Civil penalties for emergency planning.** The Administrator may order a facility owner or operator (except an owner or operator of a facility designated under section 302(b)(2) [42 USCS § 11002(b)(2)]) to comply with section 302(c) [42 USCS § 11002(c)] and section 303(d) [42 USCS § 11003(d)]. The United States district court for the district in which the facility is located shall have jurisdiction to enforce the order, and any person who violates or fails to obey such an order shall be liable to the United States for a civil penalty of not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.

(b) **Civil, administrative, and criminal penalties for emergency notification.**

(1) **Class I administrative penalty.** (A) A civil penalty of not more than \$25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section 304 [42 USCS § 11004].

(B) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation.

(C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(2) **Class II administrative penalty.** A civil penalty of not more than \$25,000 per day for each day during which the violation continues may

paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(Oct. 17, 1986, P. L. 99-499, Title III, § 325, 100 Stat. 1753.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.

SERC Liability under Federal law

11046. Civil actions

(A) Authority to bring civil actions. (1) Citizen suits. Except as provided in subsection (e), any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

- (i) Submit a followup emergency notice under section 304(c) [42 USCS § 11004(c)].
- (ii) Submit a material safety data sheet or a list under section 311(a) [42 USCS § 11021(a)].
- (iii) Complete and submit an inventory form under section 312(a) [42 USCS § 11022(a)] containing tier I information as described in section 312(d)(1) [42 USCS § 11022(d)(1)] unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 USCS § 11022(a)(2)].
- (iv) Complete and submit a toxic chemical release form under section 313(a) [42 USCS § 11023(a)].

(B) The Administrator for failure to do any of the following:

- (i) Publish inventory forms under section 312(g) [42 USCS § 11022(g)].
- (ii) Respond to a petition to add or delete a chemical under section 313(e)(1) [42 USCS § 11023(e)(1)] within 180 days after receipt of the petition.
- (iii) Publish a toxic chemical release form under 313(g) [42 USCS § 11023(g)].
- (iv) Establish a computer database in accordance with section 313(j) [42 USCS § 11023(j)].
- (v) Promulgate trade secret regulations under section 322(c) [42 USCS § 11042(c)].

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(vi) Render a decision in response to a petition under section 322(d) [42 USCS § 11042(d)] within 9 months after receipt of the petition.

(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 324(a) [42 USCS § 11044(a)].

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 312(e)(3) [42 USCS § 11022(e)(3)] within 120 days after the date of receipt of the request.

(2) State or local suits. (A) Any State or local government may commence a civil action against an owner or operator of a facility for failure to do any of the following:

(i) Provide notification to the emergency response commission in the State under section 302(c) [42 USCS § 11002(c)].

(ii) Submit a material safety data sheet or a list under section 311(a) [42 USCS § 11021(a)].

(iii) Make available information requested under section 311(c) [42 USCS § 11021(c)].

(iv) Complete and submit an inventory form under section 312(a) [42 USCS § 11022(a)] containing tier I information unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 USCS § 11022(a)(2)].

(B) Any State emergency response commission or local emergency planning committee may commence a civil action against an owner or operator of a facility for failure to provide information under section 303(d) [42 USCS § 11003(d)] or for failure to submit tier II information under section 312(e)(1) [42 USCS § 11022].

(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 322(g) [42 USCS § 11042(g)].

(h) Venue. (1) Any action under subsection (a) against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(2) Any action under subsection (a) against the Administrator may be brought in the United States District Court for the District of Columbia.

(c) Relief. The district court shall have jurisdiction in actions brought under subsection (a) against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in actions brought under subsection (a) against the Administrator to order the Administrator to perform the act or duty concerned.

(d) Notice. (1) No action may be commenced under subsection (a)(1)(A) prior to 60 days after the plaintiff has given notice of the alleged

violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) or (a)(1)(C) prior to 60 days after the date on which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(e) **Limitation.** No action may be commenced under subsection (a) against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act [42 USCS §§ 11001 et seq.] with respect to the violation of the requirement.

(f) **Costs.** The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) **Other rights.** Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency).

(h) **Intervention.** (1) By the United States. In any action under this section the United States or the State, or both, if not a party, may intervene as a matter of right.

(2) By persons. In any action under this section, any person may intervene as a matter of right when such person has a direct interest which is or may be adversely affected by the action and the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest unless the Administrator or the State shows that the person's interest is adequately represented by existing parties in the action.

(Oct. 17, 1986, P. L. 99-499, Title III, § 326, 100 Stat. 1755.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Brackets are inserted around the first period in subsec. (a)(2)(A)(iv) to indicate the probable intent of Congress to omit such punctuation.

Effective date of section:

Act Oct. 17, 1986, P. L. 99-499, § 4, 100 Stat. 1614, which appears as 42 USCS § 9601 note, provides that this section is effective on enactment on Oct. 17, 1986.