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DIVISION OF LEGAL SERVICES
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MEMORANDUM

April 12, 1991

APR 13 1991

SUBJECT: Oil and Hazardous Substance Release Response Fund

TO: Senator Jay Kerttula, Co-chair
Senate Finance Committee

FROM: Tamara Brandt Cook *TBC*
Director

You have asked for an explanation of the purposes for which money in the Oil and Hazardous Substance Release Response Fund may be used. As a preliminary matter, let me note that the legislature in the exercise of its constitutional power of the purse may appropriate unencumbered money from the fund for any purpose. However, several statutes have been enacted that set out with particularity the types of expenditures that may be made with money from the fund.

AS 26.23.020(g)(11) and AS 46.08.040(b) permits the governor to use money from the fund to respond to a declared disaster emergency related to an oil or hazardous substance discharge. This money is supposed to be used only if money regularly appropriated to state agencies is not available to meet the need. (AS 26.23.050)

The fund is established under AS 46.08.010 and subsection (c) provides

The fund shall be used for actual expenses incurred under AS 46.08.040. The fund may not be used for capital improvements. ←

The commissioner of environmental conservation is authorized to use money in the fund to "investigate and evaluate the release or threatened release of oil or a hazardous substance, and contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous substance that poses an imminent and substantial threat to the public health or welfare, or to the environment." (AS 46.08.040(a)(1))

The commissioner may use money in the fund for some other designated purpose, but only if the money has been made available from an appropriation to the fund

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specifically for that purpose. (AS 46.08.040(c)) These purposes are set out in AS 46.08.040(a)(2)-(7) as follows:

- (2) pay all costs incurred to
 - (A) establish and maintain the oil and hazardous substance response office;
 - (B) review oil discharge prevention and contingency plans submitted under AS 46.04.030;
 - (C) conduct training, response exercises, inspections, and tests, in order to verify equipment inventories and ability to prevent and respond to oil and hazardous substance release emergencies, and to undertake other activities intended to verify or establish the preparedness of the state, a municipality, or a party required by AS 46.04.030 to have an approved contingency plan to act in accordance with that plan; and
 - (D) verify or establish proof of financial responsibility required by AS 46.04.040;
- (3) pay the expenses incurred by the Alaska division of emergency services for the oil and hazardous substance response corps and the oil and hazardous substance response depots when presented with appropriate documentation by the division;
- (4) provide matching funds for participation in federal oil discharge cleanup activities and under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980);
- (5) recover the cost to the state or to a municipality of a containment and cleanup resulting from the release or the threatened release of oil or a hazardous substance;
- (6) prepare, review, and revise
 - (A) the state's master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.200; and
 - (B) a regional master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.210; and
- (7) restore the environment by addressing the effects of an oil or hazardous substance release.

The commissioner is also required to use money from the fund to reimburse the Legislative Council for expenditures of the Citizens' Oversight Council on Oil and Other Hazardous Substances. (AS 46.08.040(d)) The Department of Law has issued an opinion that this funding mechanism violates the separation of powers doctrine and has advised that the legislature should directly appropriate money from the fund for expenditures of the Oversight Council. A copy of that opinion is attached.

Lastly, let me point out that several sources of money have been specifically identified by statute as sources that the legislature may use for appropriations to the

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fund. (AS 43.55.220, conservation surcharge on oil; AS 46.08.020) The legislature is not required to appropriate money to the fund from these sources, nor, of course, is it prohibited from appropriating money from other sources.

TBC:gc
91-215.glc

Enclosure

MEMORANDUM**State of Alaska****Department of Law**

TO: The Hon. John A. Sandor
Commissioner
Dep't of Environmental
Conservation

DATE:

February 20, 1991

FILE NO.:

663-91-0316

TEL. NO.:

465-3600

SUBJECT:

Funding of the
Citizens' Oversight
Council

FROM: Lawrence Ostrovsky
Assistant Attorney General
Natural Resources Section-Juneau

Introduction

The Sixteenth Alaska Legislature created the Citizens' Oversight Council on Oil and Hazardous Substances (hereafter "Oversight Council"). Sec. 2, ch. 199, SLA 1990. For its funding, AS 24.20.600(e) provides that the Oversight Council is to request money it considers necessary for staff and other expenses from the Legislative Council. The Legislative Council, in turn, is directed by AS 46.08.040(d) to seek reimbursement from the Commissioner of the Department of Environmental Conservation (hereafter "DEC") for expenditures that it makes for the operations of the Oversight Council. AS 46.08.040(d) also provides that the commissioner of DEC use money from the Oil and Hazardous Substance Release Response Fund for that reimbursement.

In your January 28, 1991, memo to Attorney General Cole, you requested an opinion regarding the validity of this funding mechanism and the alternatives that are available if it is not valid.

Short Answer

The funding mechanism for the Oversight Council, as set out in AS 24.20.600(e) and 46.08.040(d), is of questionable legality because it calls for the executive branch to expend funds without a specific appropriation. Additionally, executive branch functions funded by the Hazardous Substance Release Response Fund AS 46.08.010 are potentially affected by the funding requirements of a legislative branch agency. Therefore, this funding mechanism may require an invalid blending of the executive with the legislative functions. This may violate the separation of powers doctrine.

In fact, the Sixteenth Alaska Legislature did not fund the Oversight Council through the mechanism provided in AS 24.20.600(e) and AS 46.08.040(d). Rather, the legislature appropriated from the Hazardous Substance Release Response Fund directly for expenses of the Oversight Council. This is a

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preferable method.

If AS 46.08.040(d) were repealed, the legislature could continue to finance the Oversight Council through similar appropriations. This would avoid the constitutional questions that may arise when an executive agency draws funds for the expenses of a legislative branch agency from an account the executive agency administers.

Background

The Oversight Council is an agency of the legislature, with all members appointed by the Legislative Council. It is charged with, among other duties, investigating and making recommendations on the performance of state and federal agencies in preventing oil and hazardous waste discharges. In the course of carrying out its functions, the Oversight Council may expend money upon approval of the Legislative Council.

AS 24.20.600(e) provides:

The oversight council shall make a formal request to the Alaska Legislative Council for money it considers necessary for staff, per diem, travel, and contractual expenses. Money distributed to the oversight council is to be disbursed and accounted for under procedures required by the Legislative Affairs Agency. The chair of the oversight council shall approve all expenditure documents.

Alaska statutes further require that the Legislative Council's expenditures for the Oversight Council be reimbursed by the commissioner of DEC, out of the Oil and Hazardous Substance Release Response Fund.

AS 46.08.040(d) provides:

Upon a request from the Alaska Legislative Council, the commissioner shall use money from the fund to reimburse the Alaska Legislative Council for expenditures that it makes for the operation of the Citizens' Oversight Council on Oil and Other Hazardous Substances, established under AS 24.20.600.

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Since its inception, the Oversight Council has been financed by a specific appropriation. In the 1990 operating budget appropriations Act, the legislature appropriated \$236,000 for operations of the Oversight Council. Sec. 36, ch. 209, SLA 1990. The source of the \$236,000 was the Oil and Hazardous Release Response Fund. As a result, there has been no need, to date, for the Legislative Council to seek reimbursement from the commissioner of DEC under AS 46.08.040(d).

Analysis

A number of scenarios are possible in which the Legislative Council might require reimbursement from the commissioner of DEC. For example, the Oversight Council's expenses might exceed its appropriation, or the legislature might not approve any appropriation for its expenses in a given year.

In any case, the amount that the commissioner of DEC would have to withdraw from the fund is uncertain. Under AS 24.20.600(e), the only limitation on the Oversight Council's expenses is that they be approved by the Legislative Council.

Appropriations enacted by law do not have this inherent uncertainty. Article IX, section 13, of the Alaska Constitution states, in relevant part, "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law". AS 24.08.030 sets out the specific requirements for appropriations bills: "Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner and other related conditions of payment."

As noted above, the Sixteenth Legislature made an appropriation for the activities of the Oversight Council. If the legislature had not made an appropriation and had relied on the method set out under AS 24.20.600(e) and AS 46.08.040(d) to finance the Oversight Council, there would seem to be no restrictions as to the amount the Oversight Council could spend. Additionally, funding could conceivably continue year after year without additional appropriations. Therefore, taken together, AS 24.20.600(e) and AS 46.08.040(d) set out a method of funding that does not meet the requirements of the Alaska Constitution and AS 24.08.030.

An additional consideration of this method of funding is that it poses the potential for an intrusion of the legislative branch into executive branch authority, a violation of the separation of powers doctrine. This doctrine has been recognized in Alaska, Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975), and prohibits the blending of governmental powers in

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the absence of an express constitutional provision. Bradner v Hammond, 583 P.2d 1 (Alaska 1976).

Depending on the expenses of the Oversight Council and the subsequent draw on the fund by the Legislative Council, there could, potentially, be no money available for the activities that the commissioner of DEC is charged to carry out under AS 46.08.040. That is, if the commissioner's authority to reimburse the Legislative Council is not discretionary, the Legislative Council alone, merely by approving expenses of the Oversight Council and seeking reimbursement from the fund, may impact the commissioner's discretion to administer the fund for the purposes set out in statute.

Conversely, if the commissioner's authority to administer the fund, with regard to AS 46.08.040(d), is, to some extent, discretionary, then the issue arises as to the propriety of an executive branch officer administering and approving the expenses of a legislative committee.

The above examples point to the problematic nature of this type of funding. A far more preferable method would be direct appropriation from the fund, as was done by the Sixteenth Legislature.

I hope this addresses your questions. Please feel free to contact me if you have additional questions or concerns.

LZO:nml:prm

cc: Head Treadwell