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SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/16/92

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

Resources Committee considered SB 360

"An Act authorizing the Alaska Department of Environmental Conservation to award grants for local emergency planning committees; and providing for an effective date."

and recommends:

replace with _____ CS _____ (_____)

same title
 new title
 technical
title change
(HB only)

attaches amendment(s)

adopts _____ Letter of Intent

further referral to the _____

do pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES: Dept/Date

zero fiscal notes _____

fiscal notes _____

appropriation--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

Governor's bill with fiscal notes:

zero fiscal notes _____

fiscal notes _____

DO PASS:

OTHER RECOMMENDATIONS:

Chair: Signature and Recommendation

AB362

WALTER J. HICKEL
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 16, 1992

*The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182*

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill authorizing the Department of Environmental Conservation (DEC) to award grants for the purposes of forming or operating local emergency planning committees (LEPCs) under AS 46.13.070.

Under AS 46.13.040(5), the Alaska State Emergency Response Commission in DEC is required to establish, supervise, and coordinate LEPCs for emergency planning districts across the state. LEPCs play a vital role in developing community awareness, training of community resources, and planning for hazardous substances emergencies in their areas.

This bill amends AS 46.03.020 to give DEC the authority to award grants so that LEPCs may be formed or operated.

I urge your prompt consideration and passage of this bill.

Sincerely,

Walter J. Hickel
Governor

FISCAL NOTE

No. 1

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: SB 360

(S) Publish Date: 1/16/92

Revision Date: _____ Department Affected: Environmental Conservation
 Title: Authorizing DEC to award grants for LEPC; efd BRU: Spill Prevention & Response
 Sponsor: Governor and Management
 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:						

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.)

DEC has received funds for the past two fiscal years, and is requesting funding for FY 93, to use for LEPC formation and operation. This legislation would allow the Department to enter into grant agreements for this purpose.

Prepared By: Janice Adair Phone: 465-5050
 Division: Commissioner's Office Date: December 12, 1991
 Approved by Commissioner: Janice Adair for John Sender
 Agency: Department of Environmental Conservation Date: December 12, 1991

FISCAL NOTE

No. 2

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: SB 360

(S) Publish Date: 1/16/92

Revision Date: _____ Department Affected: Administration

Title: "An Act Authorizing the AK. DEC to award grants for local emergency planning..." BRU: Finance

Component: Finance

Sponsor: Rules Committee

Requestor: _____ COMPONENT SERIAL NO.

59			
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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: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Don Wanie *DW 12/16* Phone: 465-2240

Division: Finance Date: 12/16/91

Approved by Commissioner: Nancy Bear Usura *NBU*

Agency: Administration Date: 12/18/91

MEMORANDUM

State of Alaska
Department of Law

TO: Hon. John A. Sandor, Comm'r
Dep't of Env'tl. Conservation

DATE: January 23, 1992

FILE NO. 663-92-0131

TEL NO. 465-3600

SUBJECT Status of Local Emergency
Planning Committees for
receiving and expending
funds

FROM: *Beth Kerttula*
Elizabeth J. Kerttula
Assistant Attorney General
Natural Resources Section - Juneau

You have asked if Local Emergency Planning Committees ("LEPCs") are state agencies. If LEPCs are state agencies you have further asked if LEPCs are considered to be within the Alaska Department of Environmental Conservation ("DEC"), or whether they are independent of it. Finally, you have asked whether DEC may give funds to a Coastal Resource Service Area (CRSA) for the purpose of forming a LEPC.

As your concern about whether LEPCs are state agencies revolves around funding and expenditure issues, this opinion is limited to those issues. 1/ Our answer is that, for purposes of receiving and expending money, LEPCs must be considered state agencies.

Under Title III of the Federal Superfund Amendments and Reauthorization Act of 1986 ("SARA, Title III," or "SARA"), Pub. L. 99-499, in the "Community Right to Know" chapter, all governors were required to appoint state emergency response commissions (SERCs). 42 U.S.C.A. 11001(a) (1986). SERCs, in turn, must appoint LEPCs. 42 U.S.C.A. 11001(c) (1986). LEPCs are responsible for preparing emergency plans for community to respond to the release of hazardous substances. 42 U.S.C.A. 11003 (1986). Under the federal law, the SERCs "shall review [LEPCs' emergency] plan[s] and make recommendations" to the LEPCs. 42 U.S.C.A. 11003(e) (1986). SARA made it clear that nothing in the Community Right to Know chapter preempted state or local law, 42 U.S.C.A. 11041(a)(1) (1986), and that, except for the material safety data sheet requirement, nothing in it "otherwise affect[ed]"

1/ In Alaska Commercial Fishing & Agricultural Bank v. O/S Alaska Coast, 715 P.2d 707, 709 n.5 (Alaska 1986) (the "CFAB" case), the Alaska Supreme Court clarified that an entity may be considered a state agency for one purpose and not for another. The court noted that different circumstances "required independent analysis," *id.*, and that just because an entity was a state agency for one purpose the entity was not automatically a "state agency for all purposes." *Id.*

Hon. John A. Sandor, Comm'r
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Our file #663-92-0131

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any State or local law or the authority of any State or local government to adopt or enforce any State or local law" 42 U.S.C.A. 1104(a)(2) (1986). Thus, states were free to adopt more stringent review requirements if they wished.

In 1990 the Alaska Legislature established the Alaska State Emergency Response Commission. AS 46.13.010 et seq.; ch. 190, SLA 1990. Under this law it is clear that the SERC itself is a state agency. AS 46.13.010(a) places the SERC directly within DEC, and the composition of the SERC "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 public members to be appointed by the governor." AS 46.13.020. In establishing the SERC, the legislature required the SERC to impose a more stringent review of Alaskan LEPCs' emergency plans than required by federal law. Instead of merely reviewing and making recommendations as the federal law requires, state law demands the SERC "review and exercise approval authority over local . . . plans." AS 46.13.045(a). The SERC must also establish all Alaskan LEPCs, which includes appointing and "revis[ing] as necessary, the membership of each [LEPC]." AS 46.13.040(5); and see AS 46.13.070. 2/ The SERC must also "supervise and coordinate the activities of [LEPCs]," AS 46.13.040(6); "perform other coordinating, advisory, or planning tasks related to hazardous substance emergency planning and preparedness," AS 46.13.040(8); and generally "facilitate the preparation and implementation of emergency plans for hazardous substance response, including . . . plans prepared under this chapter [which include the plans prepared by LEPCs]." AS 46.13.040(3). Finally, the SERC "must designate and revise as necessary, the boundaries of [the] emergency planning districts [for which the LEPCs prepare emergency plans]." AS 46.13.040(2).

Thus, Alaska's law makes the connection between the SERC and LEPCs very close. Although LEPCs appoint a chair and prepare and periodically review their emergency plans, AS 46.13.080(3)-(4),

2/ Under AS 46.13.070, the SERC is required to appoint "at a minimum, representatives from each of the following groups or organizations [to each LEPC]: elected state and local officials; law enforcement; civil defense; fire fighting; first aid; health; local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the requirements of [SARA III]."

it is clear that the SERC, not the LEPCs, controls the approval of local emergency plans, including ensuring that each plan "includes an incident command system" and that "plans are well-integrated with related plans." AS 46.13.045(b).

Under the state supreme court's ruling in Alaska Commercial Fishing & Agricultural Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986) ("CFAB"), the court outlined a number of factors it weighs to determine whether or not an entity is a state agency for a particular purpose. Among the factors in favor of finding that an entity is a state agency are:

- (1) whether the entity is expressly placed within a principal department of state government;
- (2) whether the head of a department is a member of the entity;
- (3) whether there is potential for a state official to influence the entity;
- (4) whether the governor appoints the members of the entity;
- (5) whether the entity has to report to the governor or the legislature;
- (6) whether the entity is audited by state officials;
- (7) whether the legislature has to approve the final dissolution of the entity;
- (8) whether funds received by the entity are deposited into an account held by the state Department of Revenue;
- (9) whether copies of minutes must be sent to the governor;
- (10) whether there is anything in the Administrative Procedures Act expressly excluding the entity from its provisions;
- (11) whether the legislature funds the entity;
- (12) whether the entity was created to pursue a governmental task/public purpose (such as furnishing education);
- (13) whether the State Personnel Act covers the entity's employees;
- (14) whether a state department has the "final say" over an entity's plans;

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- (15) whether title to the entity's property remained with a state department;
 - (16) whether a state department had to perform important tasks for the entity; and
 - (17) whether the source of the entity's powers can be traced to state statute.

Id. at 709-12.

The above factors must be balanced against the following, which weigh against finding that an entity is a state agency:

- (1) whether there is a clear legislative history that the state considers the entity to be private;
- (2) whether the entity has a high degree of autonomy from the state;
- (3) whether the entity reports to its members, not directly to the state;
- (4) whether the entity's employees are statutorily excluded from the definitions of state employees and employees of a public organization;
- (5) whether the entity can enter into contracts;
- (6) whether the entity can sue and be sued;
- (7) whether the entity can adopt administrative rules;
- (8) whether the entity can formulate its own policy;
- (9) whether the entity can accept grants and loans from the government; and
- (10) whether the entity can manage its own assets.

Id. at 710-11. As the court noted in CFAB, analyzing whether an entity is a state agency "requires us to balance an entity's autonomy against the state's retained control." 715 P.2d at 711.

In the case of LEPCs, the scales tip heavily in favor of finding that for purposes of receiving and expending funds, they are state agencies. As the supreme court said in one of the precursors to CFAB, "[T]he distinction would appear to be one of degree of control." Kenai Peninsula Borough v. State, 532 P.2d

1019, 1022 (Alaska 1975). 3/ Utilizing the factors listed by our supreme court, and noting the great control the SERC has over LEPCs in Alaska, we conclude that for purposes of receiving and expending funds LEPCs are "state agencies." Although SARA seems to intend LEPCs to be locally based, the Alaska statute puts ultimate authority for LEPCs and emergency plans in the SERC. Furthermore, it has been the state, not local entities, which has funded LEPCs. (Indeed, local communities may not have the funds necessary to deal with emergencies that require a high degree of technical expertise such as responding to a release of hazardous substance.) Further, dealing with hazardous substances is of statewide, not simply local, concern. Alaska statutes require the SERC to organize LEPCs and their plans to cohesively mesh together, utilizing an incident command system. AS 46.13.090(b). Rather than having many plans working at odds with one another, the statute contemplates one smooth operation that, it is hoped, will effectively deal with any release of hazardous substances.

As LEPCs are "state agencies" for the purposes of receiving and expending funds, the state's procurement code applies to them. Under AS 36.38.850(b), the procurement code (which requires certain procedures to be followed in the expenditure of state money) applies to "every expenditure of state funds . . . by the state, acting through an agency, under a contract" Under AS 36.30.990(1), "'agency' means a department, institution, board, commission, division, authority, public corporation . . . or other administrative unit of the executive branch of state government" LEPCs are an "administrative unit of the executive branch of state government," and thus the procurement code will apply to any expenditure it makes. 4/

3/ Kenai Peninsula Borough v. State, 532 P.2d 1019 (Alaska 1975), concerns whether or not the state was liable for the actions of one of its agencies. Liability questions pose their own unique analysis, and this opinion does not cover that issue. However, attorney general opinions in two states, New York and Connecticut, have analyzed whether LEPCs are state agencies for the purpose of indemnification or immunity for their members. New York found that LEPCs are not state agencies for these purposes; Connecticut found that they are. New York did not have a state law dealing with LEPCs at the time, and Connecticut seemed to have only "guidelines." Both opinions relied heavily on the description of LEPCs in SARA III. 1989 Op. Att'y Gen. New York (Feb 12); 1988 Op. Att'y Gen. Connecticut (Oct. 19).

4/ There are some exceptions to the procurement code. See AS 36.30.850(b)(1) (grants).

Hon. John A. Sandor, Comm'r
Dep't of Env'tl. Conservation
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With regard to the receipt of funds by LEPCs, as they are state agencies the state may transfer funds to them just as it would any other state agency. Because the SERC is so clearly "within" DEC, AS 46.13.010(a), and because of the constitutional requirement that except for "regulatory, quasi-judicial, and temporary agencies," all agencies "shall be allocated by law among and within . . . twenty principal departments," we think that LEPCs may be considered part of DEC for the purpose of transferring funds to them. Alaska Constitution art. III, § 22. 5/ This answers your second question about whether LEPCs are in essence a part of DEC for funding purposes.

Your final question was whether DEC may give funds to a Coastal Resource Service Area (CRSA) for the purpose of forming a LEPC. DEC lacks authority to grant money to a CRSA. See 1983 Inf. Op. Att'y Gen. (Sept. 2; 366-060-84); memo from Assistant Attorney General James L. Baldwin to Robert Link, Director, Division of General Services and Supply, Department of Administration, Sept. 4, 1986 (attached). DEC may, however, contract with a CRSA (following the procurement code) for LEPC formation. As we have previously said, CRSAs may receive funds from any source as long as the transfer does not violate any condition on the source's use of the funds, and as long as the funds are spent on items relating to coastal management. 1991 Inf. Op. Att'y Gen. (Feb. 19; 663-91-0277). As coastal management encompasses "the use, management, restoration and enhancement of the overall quality of the coastal environment; [and] the development of industrial or commercial enterprises which are consistent with the social, cultural, historic, economic and environmental interests of the people of the state," the formation of LEPCs are within the purposes of the coastal management program. AS 46.40.020. Forming LEPCs will create a system to protect Alaskans and the coastal zone in case of release of a hazardous substance. Therefore, DEC may not grant CRSAs funds to form LEPCs, but it may contract with them to form LEPCs.

5/ Alaska Const. art. III, § 22, states:

All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.

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We hope this answers your questions. If you have further concerns, please contact us.

EJK:bga

Attachment

MEMORANDUM

State of Alaska

Department of Law

TO Hon. John A. Sandor, Comm'r
Dep't of Env'tl. Conservation

DATE February 4, 1992

FILE NO: 663-92-0361

TEL. NO: 465-3600

SUBJECT DEC granting authority
for the purpose of
forming LEPCs

Beau Kerttula

FROM: Elizabeth J. Kerttula
Assistant Attorney General
Natural Resources Section - Juneau

You have asked whether the Alaska Department of Environmental Conservation may give grants for the purposes of forming Local Emergency Planning Committees (LEPCs). At present, DEC lacks any general or specific statutory authority to give grants for this purpose. Without a change in DEC's statutory authority, DEC may contract for the formation of LEPCs, but may not give grants.

You previously asked whether DEC could give funds to a Coastal Resource Service area (CRSA) for the purpose of forming a LEPC. As we said concerning that issue, "DEC lacks authority to grant money to a CRSA." 1992 Inf. Op. Att'y Gen. at 6 (Jan. 23; 663-92-0131). We now clarify that DEC lacks the authority to give a grant to any entity (not just CRSAs) for the formation of LEPCs. As with CRSAs, DEC may contract to form LEPCs, but it may not give grants for this purpose. Id.

SB 360 and HB 408 (introduced this session) would allow DEC granting authority for the purpose of forming LEPCs. We would note that in accordance with our recent opinion cited above, which found that LEPCs are "state agencies" for the purposes of receiving and expending funds, one section in each of those bills should be deleted. In both bills, on line 5, after the words "award grants for the purposes of forming," the words "or operating" should be removed. As LEPCs are state agencies, they would receive their funds just as any state agency does, and granting authority for the purpose of "operation" is unnecessary. 1992 Inf. Op. Att'y Gen. at 6 (Jan. 23; 663-92-0131).

We hope this answers your question. If you have further concerns, please contact us.

EJK:bga