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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)].

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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
Attorney General
Department of Law

DATED: 6/13/91

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

DATED: 6/13/91

John Sandor
Commissioner
Department of Environmental Conservation

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:

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(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)].

(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.

EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW

EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986 [EPCRTKA § _____]

(42 U.S.C.A. §§ 11001 to 11050)

CHAPTER 116—EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW

SUBCHAPTER I—EMERGENCY PLANNING AND NOTIFICATION

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(b) Establishment of emergency planning districts.
(c) Establishment of local emergency planning committees.
(d) Revisions.
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WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this pamphlet.

SUBCHAPTER I—EMERGENCY PLANNING AND NOTIFICATION

§ 11001. Establishment of State commissions, planning districts, and local committees [EPCRTKA § 301]

(a) Establishment of State emergency response commissions

Not later than six months after October 17, 1986, the Governor of each State shall appoint a State emergency response commission. The Governor may designate as the State emergency response commission one or more existing emergency response organizations that are State-sponsored or appointed. The Governor shall, to the extent practicable, appoint persons to the State emergency response commission who have technical expertise in the emergency response field. The State emergency response commission shall appoint local emergency planning committees under subsection (c) of this section and shall supervise and coordinate the activities of such committees. The State emergency response commission shall establish procedures for receiving and processing requests from the public for information under section 11044 of this title, including tier II information under section 11022 of this title. Such procedures shall include the designation of an official to serve as coordinator for information. If the Governor of any State does not designate a State emergency response commission within such period, the Governor shall operate as the State emergency response commission until the Governor makes such designation.

(b) Establishment of emergency planning districts

Not later than nine months after October 17, 1986, the State emergency response commission shall designate emergency planning districts in order to facilitate preparation and implementation of emergency plans. Where appropriate, the State emergency response commission may designate existing political subdivisions or multijurisdictional planning organizations as such districts. In emergency planning areas that involve more than one State, the State emergency response commissions of all potentially affected States may designate emergency planning districts and local emergency planning committees by agreement. In making such designation, the State emergency response commission shall indicate which facilities subject to the requirements of this subchapter are within such emergency planning district.

(c) Establishment of local emergency planning committees

Not later than 30 days after designation of emergency planning districts or 10 months after October 17, 1986, whichever is earlier, the State emergency response commission shall appoint members of a local emergency planning committee for each emergency planning district. Each committee shall include, at a minimum, representatives from each of the following groups or organizations: 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 the requirements of this subchapter. Such committee shall appoint a chairperson and shall establish rules by which the committee 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 under section 11044 of this title, including tier II information under section 11022 of this title. Such procedures shall include the designation of an official to serve as coordinator for information.

(d) Revisions

A State emergency response commission may revise its designations and appointments under subsections (b) and (c) of this section as it deems appropriate. Interested persons may petition the State emergency response commission to modify the membership of a local emergency planning committee.

(Pub.L. 99-499, Title III, § 301, Oct. 17, 1986, 100 Stat. 1729.)

Effective Date

Section 4 of Pub.L. 99-499, Oct. 17, 1986, 100 Stat. 1614, provided that title III of Pub.L. 99-499 [this chapter] is effective Oct. 17, 1986.

CERCLA and Administrator

Section 2 of Pub.L. 99-499, Oct. 17, 1986, 100 Stat. 1613, provided that, as used in this chapter—

(1) CERCLA.—The term "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.A. § 9601 et seq.].

(2) Administrator.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

Short Title

Section 300(a) of Pub.L. 99-499, Title III, Oct. 17, 1986, 100 Stat. 1729, provided that: "This title [enacting this chapter] may be cited as the 'Emergency Planning and Community Right To Know Act of 1986'."

Library References

Health and Environment ⇐25.5(9).
C.J.S. Health and Environment §§ 65, 66, 103, 107, 110 et seq.

§ 11002. Substances and facilities covered and notification [EPCRTKA § 302]

(a) Substances covered

(1) In general

A substance is subject to the requirements of this subchapter if the substance is on the list published under paragraph (2).

(2) List of extremely hazardous substances

Within 30 days after October 17, 1986, the Administrator shall publish a list of extremely hazardous substances. The list shall be the same as the list of substances published in November 1985 by the Administrator in Appendix A of the "Chemical Emergency Preparedness Program Interim Guidance".

(3) Thresholds

(A) At the time the list referred to in paragraph (2) is published the Administrator shall—

(i) publish an interim final regulation establishing a threshold planning quantity for each substance on the list, taking into account the criteria described in paragraph (4), and

(ii) initiate a rulemaking in order to publish final regulations establishing a threshold planning quantity for each substance on the list.

(B) The threshold planning quantities may, at the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(C) If the Administrator fails to publish an interim final regulation establishing a threshold planning quantity for a substance within 30 days after October 17, 1986, the threshold planning quantity for the substance shall be 2 pounds until such time as the Administrator publishes regulations establishing a threshold for the substance.

(4) Revisions

The Administrator may revise the list and thresholds under paragraphs (2) and (3) from time to time. Any revisions to the list shall take into account the toxicity, reactivity, volatility, dispersability, combustability, or flammability of a substance. For purposes of the preceding sentence, the term "toxicity" shall include any short- or long-term health effect which may result from a short-term exposure to the substance.

(b) Facilities covered

(1) Except as provided in section 11004 of this title, a facility is subject to the requirements of this subchapter if a substance on the list referred to in subsection (a) of this section is present at the facility in an amount in excess of the threshold planning quantity established for such substance.

(2) For purposes of emergency planning, a Governor or a State emergency response commission may designate additional facilities which shall be subject to the requirements of this subchapter, if such designation is made after public notice and opportunity for comment. The Governor or State emergency response commission shall notify the facility concerned of any facility designation under this paragraph.

(c) Emergency planning notification

Not later than seven months after October 17, 1986, the owner or operator of each facility subject to the requirements of this subchapter by reason of subsection (b)(1) of this section shall notify the State emergency response commission for the State in which such facility is located that such facility is subject to the requirements of this subchapter. Thereafter, if a substance on the list of extremely hazardous substances referred to in subsection (a) of this section first becomes present at such facility in excess of the threshold planning quantity established for such substance, or if there is a revision of such list and the facility has present a substance on the revised list in excess of the threshold planning quantity established for such substance, the owner or operator of the facility shall notify the State emergency response commission and the local emergency planning committee within 60 days after such acquisition or revision that such facility is subject to the requirements of this subchapter.

(d) Notification of Administrator

The State emergency response commission shall notify the Administrator of facilities subject to the requirements of this subchapter by notifying the Administrator of—

(1) each notification received from a facility under subsection (c) of this section, and

(2) each facility designated by the Governor or State emergency response commission under subsection (b)(2) of this section.

(Pub.L. 99-499, Title III, § 302, Oct. 17, 1986, 100 Stat. 1730.)

Library References

Health and Environment ⇐25.5(6).
C.J.S. Health and Environment §§ 91, 92, 106, 109, 129 to 131.

§ 11003. Comprehensive emergency response plans [EPCRTKA § 303]

(a) Plan required

Each local emergency planning committee shall complete preparation of an emergency plan in accordance with this section not later than two years after October 17, 1986. The committee shall review such plan once a year, or more frequently as changed circumstances in the community or at any facility may require.

(b) Resources

Each local emergency planning committee shall 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.

(c) Plan provisions

Each emergency plan shall include (but is not limited to) each of the following:

(1) Identification of facilities subject to the requirements of this subchapter that are within the emergency planning district, identification of routes likely to be used for the transportation of substances on the list of extremely hazardous substances referred to in section 11002(a) of this title, and identification of additional facilities contributing or subjected to additional risk due to their proximity to facilities subject to the requirements of this subchapter, such as hospitals or natural gas facilities.

(2) Methods and procedures to be followed by facility owners and operators and local emergency and medical personnel to respond to any release of such substances.

(3) Designation of a community emergency coordinator and facility emergency coordinators, who shall make determinations necessary to implement the plan.

(4) Procedures providing reliable, effective, and timely notification by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, and to the public, that a release has occurred (consistent with the emergency notification requirements of section 11004 of this title).

(5) Methods for determining the occurrence of a release, and the area or population likely to be affected by such release.

(6) A description of emergency equipment and facilities in the community and at each facility in the community subject to the requirements of this subchapter, and an identification of the persons responsible for such equipment and facilities.

(7) Evacuation plans, including provisions for a precautionary evacuation and alternative traffic routes.

(8) Training programs, including schedules for training of local emergency response and medical personnel.

(9) Methods and schedules for exercising the emergency plan.

(d) Providing of information

For each facility subject to the requirements of this subchapter:

(1) Within 30 days after establishment of a local emergency planning committee for the emergency planning district in which such facility is located, or within 11 months after October 17, 1986, whichever is earlier, the owner or operator of the facility shall notify the emergency planning committee (or the Governor if there is no committee) of a facility representative who will participate in the emergency planning process as a facility emergency coordinator.

(2) The owner or operator of the facility shall promptly inform the emergency planning committee of any relevant changes occurring at such

facility as such changes occur or are expected to occur.

(3) Upon request from the emergency planning committee, the owner or operator of the facility shall promptly provide information to such committee necessary for developing and implementing the emergency plan.

(e) Review by the State emergency response commission

After completion of an emergency plan under subsection (a) of this section for an emergency planning district, the local emergency planning committee shall submit a copy of the plan to the State emergency response commission of each State in which such district is located. 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.

(f) Guidance documents

The national response team, as established pursuant to the National Contingency Plan as established under section 9605 of this title, shall publish guidance documents for preparation and implementation of emergency plans. Such documents shall be published not later than five months after October 17, 1986.

(g) Review of plans by regional response teams

The regional response teams, as established pursuant to the National Contingency Plan as established under section 9605 of this title, may review and comment upon an emergency plan or other issues related to preparation, implementation, or exercise of such a plan upon request of a local emergency planning committee. Such review shall not delay implementation of the plan.

(Pub.L. 99–499, Title III, § 303, Oct. 17, 1986, 100 Stat. 1731.)

Library References

Health and Environment ⇐25.5(9).
C.J.S. Health and Environment §§ 65, 66, 103, 107, 140 et seq.

§ 11004. Emergency notification [EPCRTKA § 304]

(a) Types of releases

(1) 11002(a) substance which requires CERCLA notice

If a release of an extremely hazardous substance referred to in section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.A. § 9603(a)] (hereafter in this section referred to as "CERCLA") (42 U.S.C. 9601 et seq.), the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section.

(2) Other section 11002(a) substance

If a release of an extremely hazardous substance referred to in section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release is not subject to the notification requirements under section 103(a) of CERCLA [42 U.S.C.A. § 9603(a)] the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section, but only if the release—

(A) is not a federally permitted release as defined in section 101(10) of CERCLA [42 U.S.C.A. § 9601(10)],

(B) is in an amount in excess of a quantity which the Administrator has determined (by regulation) requires notice, and

(C) occurs in a manner which would require notification under section 103(a) of CERCLA [42 U.S.C.A. § 9603(a)].

Unless and until superseded by regulations establishing a quantity for an extremely hazardous substance described in this paragraph, a quantity of 1 pound shall be deemed that quantity the release of which requires notice as described in subsection (b) of this section.

(3) Non-11002(a) substance which requires CERCLA notice

If a release of a substance which is not on the list referred to in section 11002(a) of this title occurs at a facility at which a hazardous chemical is produced, used, or stored, and such release requires notification under section 103(a) of CERCLA [42 U.S.C.A. § 9603(a)], the owner or operator shall provide notice as follows:

(A) If the substance is one for which a reportable quantity has been established under section 102(a) of CERCLA [42 U.S.C.A. 9602(a)], the owner or operator shall provide notice as described in subsection (b) of this section.

(B) If the substance is one for which a reportable quantity has not been established under section 102(a) of CERCLA [42 U.S.C.A. § 9602(a)]—

(i) Until April 30, 1988, the owner or operator shall provide, for releases of one pound or more of the substance, the same notice to the community emergency coordinator for the local emergency planning committee, at the same time and in the same form, as notice is provided to the National Response Center under section 103(a) of CERCLA [42 U.S.C.A. § 9603(a)].

(ii) On and after April 30, 1988, the owner or operator shall provide, for releases of one pound or more of the substance, the notice as described in subsection (b) of this section.

(4) Exempted releases

This section does not apply to any release which results in exposure to persons solely within the site or sites on which a facility is located.

(b) Notification

(1) Recipients of notice

Notice required under subsection (a) of this section shall be given immediately after the release by the owner or operator of a facility (by such means as telephone, radio, or in person) to the community emergency coordinator for the local emergency planning committees, if established pursuant to section 11001(c) of this title, for any area likely to be affected by the release and to the State emergency planning commission of any State likely to be affected by the release. With respect to transportation of a substance subject to the requirements of this section, or storage incident to such transportation, the notice requirements of this section with respect to a release shall be satisfied by dialing 911 or, in the absence of a 911 emergency telephone number, calling the operator.

(2) Contents

Notice required under subsection (a) of this section shall include each of the following (to the extent known at the time of the notice and so long as no delay in responding to the emergency results):

(A) The chemical name or identity of any substance involved in the release.

(B) An indication of whether the substance is on the list referred to in section 11002(a) of this title.

(C) An estimate of the quantity of any such substance that was released into the environment.

(D) The time and duration of the release.

(E) The medium or media into which the release occurred.

(F) Any known or anticipated acute or chronic health risks associated with the emergency and, where appropriate, advice regarding medical attention necessary for exposed individuals.

(G) Proper precautions to take as a result of the release, including evacuation (unless such information is readily available to the community emergency coordinator pursuant to the emergency plan).

(H) The name and telephone number of the person or persons to be contacted for further information.

(c) Followup emergency notice

As soon as practicable after a release which requires notice under subsection (a) of this section, such owner or operator shall provide a written followup emergency notice (or notices, as more information becomes available) setting forth and updating the information required under subsection (b) of this section, and including additional information with respect to—

(1) actions taken to respond to and contain the release,

(2) any known or anticipated acute or chronic health risks associated with the release, and

(3) where appropriate, advice regarding medical attention necessary for exposed individuals.

(d) Transportation exemption not applicable

The exemption provided in section 11047 of this title (relating to transportation) does not apply to this section.

(Pub.L. 99-499, Title III, § 304, Oct. 17, 1986, 100 Stat. 1733.)

Library References

Health and Environment ⇐25.5(5).
C.J.S. Health and Environment §§ 91, 92, 106, 109, 129 to 131.

Code of Federal Regulations

Emergency planning and notification, see 40 CFR 355.10 et seq.

§ 11005. Emergency training and review of emergency systems [EPCRTKA § 305]

(a) Emergency training

(1) Programs

Officials of the United States Government carrying out existing Federal programs for emergency training are authorized to specifically provide training and education programs for Federal, State, and local personnel in hazard mitigation, emergency preparedness, fire prevention and con

trol, disaster response, long-term disaster recovery, national security, technological and natural hazards, and emergency processes. Such programs shall provide special emphasis for such training and education with respect to hazardous chemicals.

(2) State and local program support

There is authorized to be appropriated to the Federal Emergency Management Agency for each of the fiscal years 1987, 1988, 1989, and 1990, $5,000,000 for making grants to support programs of State and local governments, and to support university-sponsored programs, which are designed to improve emergency planning, preparedness, mitigation, response, and recovery capabilities. Such programs shall provide special emphasis with respect to emergencies associated with hazardous chemicals. Such grants may not exceed 80 percent of the cost of any such program. The remaining 20 percent of such costs shall be funded from non-Federal sources.

(3) Other programs

Nothing in this section shall affect the availability of appropriations to the Federal Emergency Management Agency for any programs carried out by such agency other than the programs referred to in paragraph (2).

(b) Review of emergency systems

(1) Review

The Administrator shall initiate, not later than 30 days after October 17, 1986, a review of emergency systems for monitoring, detecting, and preventing releases of extremely hazardous substances at representative domestic facilities that produce, use, or store extremely hazardous substances. The Administrator may select representative extremely hazardous substances from the substances on the list referred to in section 11002(a) of this title, for the purposes of this review. The Administrator shall report interim findings to the Congress not later than seven months after October 17, 1986, and issue a final report of findings and recommendations to the Congress not later than 18 months after October 17, 1986. Such report shall be prepared in consultation with the States and appropriate Federal agencies.

(2) Report

The report required by this subsection shall include the Administrator's findings regarding each of the following:

(A) The status of current technological capabilities to (i) monitor, detect, and prevent, in a timely manner, significant releases of extremely hazardous substances, (ii) determine the magnitude and direction of the hazard posed by each release, (iii) identify specific substances, (iv) provide data on the specific chemical composition of such releases, and (v) determine the relative concentrations of the constituent substances.

(B) The status of public emergency alert devices or systems for providing timely and effective public warning of an accidental release of extremely hazardous substances into the environment, including releases into the atmosphere, surface water, or groundwater from facilities that produce, store, or use significant quantities of such extremely hazardous substances.

(C) The technical and economic feasibility of establishing, maintaining, and operating perimeter alert systems for detecting releases of such extremely hazardous substances into the atmosphere, surface water, or groundwater, at facilities that manufacture, use, or store significant quantities of such substances.

(3) Recommendations

The report required by this subsection shall also include the Administrator's recommendations for—

(A) initiatives to support the development of new or improved technologies or systems that would facilitate the timely monitoring, detection, and prevention of releases of extremely hazardous substances, and

(B) improving devices or systems for effectively alerting the public in a timely manner, in the event of an accidental release of such extremely hazardous substances.

(Pub.L. 99–499, Title III, § 305, Oct. 17, 1986, 100 Stat. 1735.)

Library References

Health and Environment ⇐25.5(9), (10).
C.J.S. Health and Environment §§ 65, 66, 103 to 113, 139 to 150 et seq.

SUBCHAPTER II—REPORTING REQUIREMENTS

Library References

Health and Environment ⇐25.5(5).
C.J.S. Health and Environment §§ 91, 92, 106 to 109, 129 to 131

§ 11021. Material safety data sheets [EPCRTKA § 311]

(a) Basic requirement

(1) Submission of MSDS or list

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 [29 U.S.C.A. § 651 et seq.] shall submit a material safety data sheet for each such chemical, or a list of such chemicals as described in paragraph (2), 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) Contents of list

(A) The list of chemicals referred to in paragraph (1) shall include each of the following:

(i) A list of the hazardous chemicals for which a material safety data sheet is required under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act, grouped in categories of health and physical hazards as set forth under such Act and regulations promulgated under such Act, or in such other categories as the Administrator may prescribe under subparagraph (B).

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

(iii) Any hazardous component of each such chemical as provided on the material safety data sheet.

(B) For purposes of the list under this paragraph, the Administrator may modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] 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.

(3) Treatment of mixtures

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) Submitting a material safety data sheet for, or identifying on a list, 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 material safety data sheet, or one listing, of the element or compound is necessary.

(B) Submitting a material safety data sheet for, or identifying on a list, the mixture itself

(b) Thresholds

The Administrator may establish threshold quantities for hazardous chemicals 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) Availability of MSDS on request

(1) To local emergency planning committee

If an owner or operator of a facility submits a list of chemicals under subsection (a)(1) of this section, the owner or operator, upon request by the local emergency planning committee, shall submit the material safety data sheet for any chemical on the list to such committee.

(2) To public

A local emergency planning committee, upon request by any person, shall make available a material safety data sheet to the person in accordance with section 11044 of this title. If the local emergency planning committee does not have the requested material safety data sheet, the committee shall request the sheet from the facility owner or operator and then make the sheet available to the person in accordance with section 11044 of this title.

(d) Initial submission and updating

(1) The initial material safety data sheet or list required under this section with respect to a hazardous chemical shall be provided before the later of—

(A) 12 months after October 17, 1986, or

(B) 3 months after the owner or operator of a facility is required to prepare or have available a material safety data sheet for the chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act

(2) Within 3 months following discovery by an owner or operator of significant new information concerning an aspect of a hazardous chemical for which a material safety data sheet was previously submitted to the local emergency planning committee under subsection (a) of this section, a revised sheet shall be provided to such person.

(e) "Hazardous chemical" defined

For purposes of this section, the term "hazardous chemical" has the meaning given such term by section 1910.1200(c) of title 29 of the Code of Feder

al Regulations, except that such term does not include the following:

(1) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.

(2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.

(3) Any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public.

(4) Any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual.

(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.

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

§ 11022. Emergency and hazardous chemical inventory forms [EPCRTKA § 312]

(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 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this chapter 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) of this section) 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) of this section) 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 11021 of this title.

(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 [29 U.S.C.A. § 651 et seq.] 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 [29 U.S.C.A. § 651 et seq.] 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) of this section:

(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 11044 of this title.

(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) of this section, 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 11044 of this title. 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 11044 of this title 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 com-

mittee shall make the information available in accordance with section 11044 of this title 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 October 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.

(Pub.L. 99-499, Title III, § 312, Oct. 17, 1986, 100 Stat. 1738.)

Code of Federal Regulations

Hazardous chemical reporting, community right to know, see 40 CFR 370.1 et seq.

§ 11023. Toxic chemical release forms [EPCRTKA § 313]

(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) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

(b) Covered owners and operators of facilities

(1) In general

(A) The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

(B) The Administrator may add or delete Standard Industrial Classification Codes for purposes of subparagraph (A), but only to the extent necessary to provide that each Standard Industrial Code to which this section applies is relevant to the purposes of this section.

(C) For purposes of this section—

(i) The term "manufacture" means to produce, prepare, import, or compound a toxic chemical.

(ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce—

(I) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or

(II) as part of an article containing the toxic chemical.

(2) Discretionary application to additional facilities

The Administrator, on his own motion or at the request of a Governor of a State (with regard to facilities located in that State), may apply the requirements of this section to the owners and operators of any particular facility that manufactures, processes, or otherwise uses a toxic chemical listed under subsection (c) of this section if the Administrator determines that such action is warranted on the basis of toxicity of the toxic chemical, proximity to other facilities that release the toxic chemical or to population centers, the history of releases of such chemical at such facility, or such other factors as the Administrator deems appropriate.

(c) Toxic chemicals covered

The toxic chemicals subject to the requirements of this section are those chemicals on the list in Committee Print Number 99-169 of the Senate Committee on Environment and Public Works, titled "Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986" [42 U.S.C.A. § 11023] (including any revised version of the list as may be made pursuant to subsection (d) or (e) of this section).

(d) Revisions by Administrator

(1) In general

The Administrator may by rule add or delete a chemical from the list described in subsection (c) of this section at any time.

(2) Additions

A chemical may be added if the Administrator determines, in his judgment, that there is sufficient evidence to establish any one of the following:

(A) The chemical is known to cause or can reasonably be anticipated to cause significant adverse acute human health effects at concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring, releases.

(B) The chemical is known to cause or can reasonably be anticipated to cause in humans—

(i) cancer or teratogenic effects, or

(ii) serious or irreversible—

(I) reproductive dysfunctions,

(II) neurological disorders,

(III) heritable genetic mutations, or

(IV) other chronic health effects.

(C) The chemical is known to cause or can reasonably be anticipated to cause, because of—

(I) its toxicity,

(II) its toxicity and persistence in the environment, or

(III) its toxicity and tendency to bioaccumulate in the environment,

a significant adverse effect on the environment of sufficient seriousness, in the judgment of the Administrator, to warrant reporting under this section. The number of chemicals included on the list described in subsection (c) of this section on the basis of the preceding sentence may constitute in the aggregate no more than 25 percent of the total number of chemicals on the list.

A determination under this paragraph shall be based on generally accepted scientific principles or laboratory tests, or appropriately designed and conducted epidemiological or other population studies, available to the Administrator.

(3) Deletions

A chemical may be deleted if the Administrator determines there is not sufficient evidence to establish any of the criteria described in paragraph (2).

(4) Effective date

Any revision made on or after January 1 and before December 1 of any calendar year shall take effect beginning with the next calendar year. Any revision made on or after December 1 of any calendar year and before January 1 of the next calendar year shall take effect beginning with the calendar year following such next calendar year.

(e) Petitions

(1) In general

Any person may petition the Administrator to add or delete a chemical from the list described in subsection (c) of this section on the basis of the criteria in subparagraph (A) or (B) of subsection (d)(2) of this section. Within 180 days after receipt of a petition, the Administrator shall take one of the following actions:

(A) Initiate a rulemaking to add or delete the chemical to the list, in accordance with subsection (d)(2) or (d)(3) of this section.

(B) Publish an explanation of why the petition is denied.

(2) Governor petitions

A State Governor may petition the Administrator to add or delete a chemical from the list described in subsection (c) of this section on the basis of the criteria in subparagraph (A), (B), or (C) of subsection (d)(2) of this section. In the case of such a petition from a State Governor to delete a chemical, the petition shall be treated in the same manner as a petition received under paragraph (1) to delete a chemical. In the case of such a petition from a State Governor to add a chemical, the chemical will be added to the list within 180 days after receipt of the petition, unless the Administrator—

(A) initiates a rulemaking to add the chemical to the list, in accordance with subsection (d)(2) of this section, or

(B) publishes an explanation of why the Administrator believes the petition does not meet the requirements of subsection (d)(2) of this section for adding a chemical to the list.

(f) Threshold for reporting

(1) Toxic chemical threshold amount

The threshold amounts for purposes of reporting toxic chemicals under this section are as follows:

(A) With respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year.

(B) With respect to a toxic chemical manufactured or processed at a facility—

(i) For the toxic chemical release form required to be submitted under this section on or before July 1, 1988, 75,000 pounds of the toxic chemical per year.

(ii) For the form required to be submitted on or before July 1, 1989, 50,000 pounds of the toxic chemical per year.

(iii) For the form required to be submitted on or before July 1, 1990, and for each form thereafter, 25,000 pounds of the toxic chemical per year.

(2) Revisions

The Administrator may establish a threshold amount for a toxic chemical different from the amount established by paragraph (1). Such revised threshold shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section. The amounts established under this paragraph may, at the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(g) Form

(1) Information required

Not later than June 1, 1987, the Administrator shall publish a uniform toxic chemical release form for facilities covered by this section. If the Administrator does not publish such a form, owners and operators of facilities subject to the requirements of this section shall provide the information required under this subsection by letter postmarked on or before the date on which the form is due. Such form shall—

(A) provide for the name and location of, and principal business activities at, the facility;

(B) include an appropriate certification, signed by a senior official with management responsibility for the person or persons completing the report, regarding the accuracy and completeness of the report; and

(C) provide for submission of each of the following items of information for each listed toxic chemical known to be present at the facility:

(i) Whether the toxic chemical at the facility is manufactured, processed, or otherwise used, and the general category or categories of use of the chemical.

(ii) An estimate of the maximum amounts (in ranges) of the toxic chemical present at the facility at any time during the preceding calendar year.

(iii) For each wastestream, the waste treatment or disposal methods employed, and an estimate of the treatment efficiency typically achieved by such methods for that wastestream.

(iv) The annual quantity of the toxic chemical entering each environmental medium

(2) Use of available data

In order to provide the information required under this section, the owner or operator of a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such data are not readily available, reasonable estimates of the amounts involved. Nothing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation. In order to assure consistency, the Administrator shall require that data be expressed in common units.

(h) Use of release form

The release forms required under this section are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities. The release form shall be available, consistent with section 11044(a) of this title, to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes.

(i) Modifications in reporting frequency

(1) In general

The Administrator may modify the frequency of submitting a report under this section, but the Administrator may not modify the frequency to be any more often than annually. A modification may apply, either nationally or in a specific geographic area, to the following:

(A) All toxic chemical release forms required under this section.

(B) A class of toxic chemicals or a category of facilities.

(C) A specific toxic chemical

(D) A specific facility.

(2) Requirements

A modification may be made under paragraph (1) only if the Administrator—

(A) makes a finding that the modification is consistent with the provisions of subsection (b) of this section, based on—

(i) experience from previously submitted toxic chemical release forms, and

(ii) determinations made under paragraph (3), and

(B) the finding is made by a rulemaking in accordance with section 553 of Title 5.

(3) Determinations

The Administrator shall make the following determinations with respect to a proposed modification before making a modification under paragraph (1).

(A) The extent to which information relating to the proposed modification provided on the toxic chemical release forms has been used by the Administrator or other agencies of the Federal Government, States, local governments, health professionals, and the public.

(B) The extent to which the information is (i) readily available to potential users from other sources, such as State reporting programs, and (ii) provided to the Administrator under another Federal law or through a State program.

(C) The extent to which the modification would impose additional and unreasonable burdens on facilities subject to the reporting requirements under this section.

(4) 5-year review

Any modification made under this subsection shall be reviewed at least once every 5 years. Such review shall examine the modification and ensure that the requirements of paragraphs (2) and (3) still justify continuation of the modification. Any change to a modification reviewed under this paragraph shall be made in accordance with this subsection.

(5) Notification to Congress

The Administrator shall notify Congress of an intention to initiate a rulemaking for a modification under this subsection. After such notification, the Administrator shall delay initiation of the rulemaking for at least 12 months, but no more than 24 months, after the date of such notification.

(6) Judicial review

In any judicial review of a rulemaking which establishes a modification under this subsection, a court may hold unlawful and set aside agency action, findings, and conclusions found to be unsupported by substantial evidence.

(7) Applicability

A modification under this subsection may apply to a calendar year or other reporting period beginning no earlier than January 1, 1993.

(8) Effective date

Any modification made on or after January 1 and before December 1 of any calendar year shall take effect beginning with the next calendar year. Any modification made on or after December 1 of any calendar year and before January 1 of the next calendar year shall take effect beginning with the calendar year following such next calendar year.

(j) EPA management of data

The Administrator shall establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section. The Administrator shall make these data accessible by computer telecommunication and other means to any person on a cost reimbursable basis.

(k) Report

Not later than June 30, 1991, the Comptroller General, in consultation with the Administrator and appropriate officials in the States, shall submit to the Congress a report including each of the following:

(1) A description of the steps taken by the Administrator and the States to implement the requirements of this section, including steps taken to make information collected under this section available to and accessible by the public.

(2) A description of the extent to which the information collected under this section has been used by the Environmental Protection Agency, other Federal agencies, the States, and the public, and the purposes for which the information has been used.

(3) An identification and evaluation of options for modifications to the requirements of this section for the purpose of making information collected under this section more useful.

(f) Mass balance study

(1) In general

The Administrator shall arrange for a mass balance study to be carried out by the National Academy of Sciences using mass balance information collected by the Administrator under paragraph (3). The Administrator shall submit to Congress a report on such study no later than 5 years after October 17, 1986.

(2) Purposes

The purposes of the study are as follows:

(A) To assess the value of mass balance analysis in determining the accuracy of information on toxic chemical releases.

(B) To assess the value of obtaining mass balance information, or portions thereof, to determine the waste reduction efficiency of different facilities, or categories of facilities, including the effectiveness of toxic chemical regulations promulgated under laws other than this chapter.

(C) To assess the utility of such information for evaluating toxic chemical management practices at facilities, or categories of facilities, covered by this section.

(D) To determine the implications of mass balance information collection on a national scale similar to the mass balance information collection carried out by the Administrator under paragraph (3), including implications of the use of such collection as part of a national annual quantity toxic chemical release program.

(3) Information collection

(A) The Administrator shall acquire available mass balance information from States which currently conduct (or during the 5 years after October 17, 1986, initiate) a mass balance-oriented annual quantity toxic chemical release program. If information from such States provides an inadequate representation of industry classes and categories to carry out the purposes of the study, the Administrator also may acquire mass balance information necessary for the study from a representative number of facilities in other States.

(B) Any information acquired under this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that the information (or a particular part thereof) to which the Administrator or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of Title 18, such information or part shall be considered confidential in accordance with the purposes of that section, except that such information or part may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this section.

(C) The Administrator may promulgate regulations prescribing procedures for collecting mass balance information under this paragraph.

(D) For purposes of collecting mass balance information under subparagraph (A), the Administrator may require the submission of information by a State or facility.

(4) Mass balance definition

For purposes of this subsection, the term "mass balance" means an accumulation of the annual quantities of chemicals transported to a facility, produced at a facility, consumed at a facility, used at a facility, accumulated at a facility, released from a facility, and transported from a facility as a waste or as a commercial product or byproduct or component of a commercial product or byproduct.

(Pub.L. 99-499, Title III, § 313, Oct. 17, 1986, 100 Stat. 1741.)

SUBCHAPTER III—GENERAL PROVISIONS

§ 11041. Relationship to other law [EPCRTKA § 321]

(a) In general

Nothing in this chapter shall—

(1) preempt any State or local law,

(2) except as provided in subsection (b) of this section, otherwise affect any State or local law or the authority of any State or local government to adopt or enforce any State or local law, or

(3) affect or modify in any way the obligations or liabilities of any person under other Federal law.

(b) Effect on MSDS requirements

Any State or local law enacted after August 1, 1985, which requires the submission of a material safety data sheet from facility owners or operators shall require that the data sheet be identical in content and format to the data sheet required under subsection (a) of section 11021 of this title. In addition, a State or locality may require the submission of information which is supplemental to the information required on the data sheet (including information on the location and quantity of hazardous chemicals present at the facility), through additional sheets attached to the data sheet or such other means as the State or locality considers appropriate.

(Pub.L. 99-499, Title III, § 321, Oct. 17, 1986, 100 Stat. 1747.)

Library References

Health and Environment 4-25(5.5).
C.J.S. Health and Environment §§ 91, 92, 106, 109, 129 to 131.

§ 11042. Trade secrets [EPCRTKA § 322]

(a) Authority to withhold information

(1) General authority

(A) With regard to a hazardous chemical, an extremely hazardous substance, or a toxic chemical, any person required under section 11003(d)(2), 11003(d)(3), 11021, 11022, or 11023 of this title to submit information to any other person may withhold from such submittal the specific chemical identity (including the chemical name and other specific identification), as defined in regulations prescribed by the Administrator under subsection (e) of this section, if the person complies with paragraph (2).

(B) Any person withholding the specific chemical identity shall, in the place on the submittal where the chemical identity would normally be included, include the generic class or category of the hazardous chemical, extremely hazardous substance, or toxic chemical (as the case may be).

(2) Requirements

(A) A person is entitled to withhold information under paragraph (1) if such person—

(i) claims that such information is a trade secret, on the basis of the factors enumerated in subsection (b) of this section,

(ii) includes in the submittal referred to in paragraph (1) an explanation of the reasons why such information is claimed to be a trade secret, based on the factors enumerated in subsection (b) of this section, including a specific description of why such factors apply, and

(iii) submits to the Administrator a copy of such submittal, and the information withheld from such submittal.

(B) In submitting to the Administrator the information required by subparagraph (A)(ii), a person withholding information under this subsection may—

(i) designate, in writing and in such manner as the Administrator may prescribe by regulation, the information which such person believes is entitled to be withheld under paragraph (1), and

(ii) submit such designated information separately from other information submitted under this subsection.

(3) Limitation

The authority under this subsection to withhold information shall not apply to information which the Administrator has determined, in accordance with subsection (c) of this section, is not a trade secret.

(b) Trade secret factors

No person required to provide information under this chapter may claim that the information is entitled to protection as a trade secret under subsection (a) of this section unless such person shows each of the following:

(1) Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee, an officer or employee of the United States or a State or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

(2) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal or State law.

(3) Disclosure of the information is likely to cause substantial harm to the competitive position of such person.

(4) The chemical identity is not readily discoverable through reverse engineering.

(c) Trade secret regulations

As soon as practicable after October 17, 1986, the Administrator shall prescribe regulations to implement this section. With respect to subsection (b)(1) of this section, such regulations shall be equivalent to comparable provisions in the Occupational Safety and Health Administration Hazard Communication Standard (29 C.F.R. 1910.1200) and any revisions of such standard prescribed by the Secretary of Labor in accordance with the final ruling of the courts of the United States in United Steelworkers of America, AFL-CIO-CLC v. Thorne G. Auchter.

(d) Petition for review

(1) In general

Any person may petition the Administrator for the disclosure of the specific chemical identity of a hazardous chemical, an extremely hazardous substance, or a toxic chemical which is claimed as

a trade secret under this section. The Administrator may, in the absence of a petition under this paragraph, initiate a determination, to be carried out in accordance with this subsection, as to whether information withheld constitutes a trade secret.

(2) Initial review

Within 30 days after the date of receipt of a petition under paragraph (1) (or upon the Administrator's initiative), the Administrator shall review the explanation filed by a trade secret claimant under subsection (a)(2) of this section and determine whether the explanation presents assertions which, if true, are sufficient to support a finding that the specific chemical identity is a trade secret.

(3) Finding of sufficient assertions

(A) If the Administrator determines pursuant to paragraph (2) that the explanation presents sufficient assertions to support a finding that the specific chemical identity is a trade secret, the Administrator shall notify the trade secret claimant that he has 30 days to supplement the explanation with detailed information to support the assertions.

(B) If the Administrator determines, after receipt of any supplemental supporting detailed information under subparagraph (A), that the assertions in the explanation are true and that the specific chemical identity is a trade secret, the Administrator shall so notify the petitioner and the petitioner may seek judicial review of the determination.

(C) If the Administrator determines, after receipt of any supplemental supporting detailed information under subparagraph (A), that the assertions in the explanation are not true and that the specific chemical identity is not a trade secret, the Administrator shall notify the trade secret claimant that the Administrator intends to release the specific chemical identity. The trade secret claimant has 30 days in which he may appeal the Administrator's determination under this subparagraph to the Administrator. If the Administrator does not reverse his determination under this subparagraph in such an appeal by the trade secret claimant, the trade secret claimant may seek judicial review of the determination.

(4) Finding of insufficient assertions

(A) If the Administrator determines pursuant to paragraph (2) that the explanation presents insufficient assertions to support a finding that the specific chemical identity is a trade secret, the Administrator shall notify the trade secret claimant that he has 30 days to appeal the determination to the Administrator, or, upon a showing of good cause, amend the original explanation by providing supplementary assertions to support the trade secret claim.

(B) If the Administrator does not reverse his determination under subparagraph (A) after an appeal or an examination of any supplementary assertions under subparagraph (A), the Administrator shall so notify the trade secret claimant and the trade secret claimant may seek judicial review of the determination.

(C) If the Administrator reverses his determination under subparagraph (A) after an appeal or an examination of any supplementary assertions under subparagraph (A), the procedures under paragraph (3) of this subsection apply.

(e) Exception for information provided to health professionals

Nothing in this section, or regulations adopted pursuant to this section, shall authorize any person to withhold information which is required to be provided to a health professional, a doctor, or a nurse in accordance with section 11043 of this title.

(f) Providing information to the Administrator; availability to public

Any information submitted to the Administrator under subsection (a)(2) of this section or subsection (d)(3) of this section (except a specific chemical identity) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that the information (or a particular part thereof) to which the Administrator has access under this section if made public would divulge information entitled to protection under section 1905 of Title 18, such information or part shall be considered confidential in accordance with the purposes of that section, except that such information or part may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter.

(g) Information provided to State

Upon request by a State, acting through the Governor of the State, the Administrator shall provide to the State any information obtained under subsection (a)(2) of this section and subsection (d)(3) of this section.

(h) Information on adverse effects

(1) In any case in which the identity of a hazardous chemical or an extremely hazardous substance is claimed as a trade secret, the Governor or State emergency response commission established under section 11001 of this title shall identify the adverse health effects associated with the hazardous chemical or extremely hazardous substance and shall assure that such information is provided to any person requesting information about such hazardous chemical or extremely hazardous substance.

(2) In any case in which the identity of a toxic chemical is claimed as a trade secret, the Administrator shall identify the adverse health and environmental effects associated with the toxic chemical and shall assure that such information is included in the computer database required by section 11023(j) of this title and is provided to any person requesting information about such toxic chemical.

(i) Information provided to Congress

Notwithstanding any limitatio[1] contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available to a duly authorized committee of the Congress upon written request by such a committee.

(Pub.L. 99-499, Title III, § 322, Oct. 17, 1986, 100 Stat 1717.)

[1] So in original. Probably should be "limitation".

Library References

Health and Environment ⇐25.5(5), 191.
C.J.S. Health and Environment §§ 65, 66, 91, 92, 103 to 109, 129 to 140 et seq.

§ 11043. Provision of information to health professionals, doctors, and nurses [EPCRTKA § 323]

(a) Diagnosis or treatment by health professional

An owner or operator of a facility which is subject to the requirements of section 11021, 11022, or 11023 of this title shall provide the specific chemical identity, if known, of a hazardous chemical, extremely hazardous substance, or a toxic chemical to any health professional who requests such information in writing if the health professional provides a written statement of need under this subsection and a written confidentiality agreement under subsection (d) of this section. The written statement of need shall be a statement that the health professional has a reasonable basis to suspect that—

(1) the information is needed for purposes of diagnosis or treatment of an individual,

(2) the individual or individuals being diagnosed or treated have been exposed to the chemical concerned, and

(3) knowledge of the specific chemical identity of such chemical will assist in diagnosis or treatment.

Following such a written request, the owner or operator to whom such request is made shall promptly provide the requested information to the health professional. The authority to withhold the specific chemical identity of a chemical under section 11042 of this title when such information is a trade secret shall not apply to information required to be provided under this subsection, subject to the provisions of subsection (d) of this section.

(b) Medical emergency

An owner or operator of a facility which is subject to the requirements of section 11021, 11022, or 11023 of this title shall provide a copy of a material safety data sheet, an inventory form, or a toxic chemical release form, including the specific chemical identity, if known, of a hazardous chemical, extremely hazardous substance, or a toxic chemical, to any treating physician or nurse who requests such information if such physician or nurse determines that—

(1) a medical emergency exists,

(2) the specific chemical identity of the chemical concerned is necessary for or will assist in emergency or first aid diagnosis or treatment, and

(3) the individual or individuals being diagnosed or treated have been exposed to the chemical concerned.

Immediately following such a request, the owner or operator to whom such request is made shall provide the requested information to the physician or nurse. The authority to withhold the specific chemical identity of a chemical from a material safety data sheet, an inventory form, or a toxic chemical release form under section 11042 of this title when such information is a trade secret shall not apply to information required to be provided to a treating physician or nurse under this subsection. No written confidentiality agreement or statement of need shall be required as a precondition of such disclosure, but the owner or operator disclosing such information may require a written confidentiality agreement in accordance with subsection (d) of this section and a statement setting forth the items listed in paragraphs (1) through (3) as soon as circumstances permit.

(c) Preventive measures by local health professionals

(1) Provision of information

An owner or operator of a facility subject to the requirements of section 11021, 11022, or 11023 of

this title shall provide the specific chemical identity, if known, of a hazardous chemical, an extremely hazardous substance, or a toxic chemical to any health professional (such as a physician, toxicologist, or epidemiologist)--

(A) who is a local government employee or a person under contract with the local government, and

(B) who requests such information in writing and provides a written statement of need under paragraph (2) and a written confidentiality agreement under subsection (d) of this section.

Following such a written request, the owner or operator to whom such request is made shall promptly provide the requested information to the local health professional. The authority to withhold the specific chemical identity of a chemical under section 11042 of this title when such information is a trade secret shall not apply to information required to be provided under this subsection, subject to the provisions of subsection (d) of this section.

(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) of this section shall, in accordance with such subsection (a) or (c) of this section, 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 October 17, 1986, the Administrator shall promulgate regulations describing criteria and parameters for the statement of need under subsection[1] (a) and (c) of this section and the confidentiality agreement under subsection (d) of this section.

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

[1] So in original. Probably should be "subsections".

§ 11044. Public availability of plans, data sheets, forms, and followup notices [EPCRTKA § 321]

(a) Availability to public

Each emergency response plan, material safety data sheet, list described in section 11021(a)(2) of this title, inventory form, toxic chemical release form, and followup emergency notice shall be made available to the general public, consistent with section 11042 of this title, 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 11022 of this title, 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 11022(d)(2) of this title 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) of this section.

(Pub.L. 99-499, Title III, § 324, Oct. 17, 1986, 100 Stat. 1752.)

Library References

Health and Environment ⇐25.5(5.5)
C.J.S. Health and Environment §§ 91, 92, 166, 167, 169 to 171

Law Review Commentaries

Environmental liability and the limits of insurance. Kenneth S. Abraham, 88 Columbia L.Rev. 942 (1988).

§ 11045. Enforcement [EPCRTKA § 325]

(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 11002(b)(2) of this title) to comply with section 11002(c) of this title and section 11003(d) of this title. 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 11004 of this title.

(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 be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title. In the case of a second or subsequent violation the amount of such penalty may be not more than $75,000 for each day during which the violation continues. Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15. In any proceeding for the assessment of a civil penalty under this subsection the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures.

(3) Judicial assessment

The Administrator may bring an action in the United States District court for the appropriate district to assess and collect a penalty of not more than $25,000 per day for each day during which the violation continues in the case of a violation of the requirements of section 11004 of this title. In the case of a second or subsequent violation, the amount of such penalty may be not more than $75,000 for each day during which the violation continues.

(4) Criminal penalties

Any person who knowingly and willfully fails to provide notice in accordance with section 11004 of this title shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than two years, or both (or in the case of a second or subsequent conviction, shall be fined not more than $50,000 or imprisoned for not more than five years, or both).

(c) Civil and administrative penalties for reporting requirements

(1) Any person (other than a governmental entity) who violates any requirement of section 11022 or 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

(2) Any person (other than a governmental entity) who violates any requirement of section 11021 or 11043(b) of this title, and any person who fails to furnish to the Administrator information required under section 11042(a)(2) of this title shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

(3) Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation.

(4) The Administrator may assess any civil penalty for which a person is liable under this subsection by administrative order or may bring an action to assess and collect the penalty in the United States district court for the district in which the person from whom the penalty is sought resides or in which such person's principal place of business is located.

(d) Civil, administrative, and criminal penalties with respect to trade secrets

(1) Civil and administrative penalty for frivolous claims

If the Administrator determines—

(A)(i) under section 11042(d)(4) of this title that an explanation submitted by a trade secret claimant presents insufficient assertions to support a finding that a specific chemical identity is a trade secret, or (ii) after receiving supplemental supporting detailed information under section 11042(d)(3)(A) of this title, that the specific chemical identity is not a trade secret; and

(B) that the trade secret claim is frivolous,

the trade secret claimant is liable for a penalty of $25,000 per claim. The Administrator may assess the penalty by administrative order or may bring an action in the appropriate district court of the United States to assess and collect the penalty.

(2) Criminal penalty for disclosure of trade secret information

Any person who knowingly and willfully divulges or discloses any information entitled to protection under section 11042 of this title shall, upon conviction, be subject to a fine of not more than $20,000 or to imprisonment not to exceed one year, or both.

(e) Special enforcement provisions for section 11043

Whenever any facility owner or operator required to provide information under section 11043 of this title to a health professional who has requested such information fails or refuses to provide such information in accordance with such section, such health professional may bring an action in the appropriate United States district court to require such facility owner or operator to provide the information. Such court shall have jurisdiction to issue such orders and take such other action as may be necessary to enforce the requirements of section 11043 of this title.

(f) Procedures for administrative penalties

(1) Any person against whom a civil penalty is assessed under this section may obtain review thereof in the appropriate district court of the United States by filing a notice of appeal in such court within 30 days after the date of such order and by simultaneously sending a copy of such notice by certified mail to the Administrator. The Administrator shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the Administrator may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record.

(2) The Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this section. In case of contumacy or refusal to obey a subpoena issued pursuant to this 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.

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

Library References

Health and Environment ⇐25.5(10), 38.
C.J.S. Health and Environment §§ 49, 50, 103 et seq., 113, 131 to 156.

§ 11046. Civil actions [EPCRTKA § 326]

(a) Authority to bring civil actions

(1) Citizen suits

Except as provided in subsection (e) of this section, 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 11004(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

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

(i) Publish inventory forms under section 11022(g) of this title.

(ii) Respond to a petition to add or delete a chemical under section 11023(e)(1) of this title within 180 days after receipt of the petition.

(iii) Publish a toxic chemical release form under[1] 11023(g) of this title.

(iv) Establish a computer database in accordance with section 11023(j) of this title.

(v) Promulgate trade secret regulations under section 11042(c) of this title.

(vi) Render a decision in response to a petition under section 11042(d) of this title 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 11044(a) of this title.

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 11022(e)(3) of this title 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 11002(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Make available information requested under section 11021(c) of this title.

(iv) Complete and submit an inventory form under section 11022(a) of this title containing tier I information unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(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 11003(d) of this title or for failure to submit tier II information under section 11022(e)(1) of this title.

(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 11042(g) of this title.

(b) Venue

(1) Any action under subsection (a) of this section 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) of this section 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) of this section 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) of this section 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) of this section 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) of this section 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) of this section 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 chapter 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.

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

[1] So in original. Probably should be preceded by "section".

Law Review Commentaries

Environmental liability and the limits of insurance. Kenneth S. Abraham, 88 Columbia L.Rev. 942 (1988).

§ 11047. Exemption [EPCRTKA § 327]

Except as provided in section 11004 of this title, this chapter does not apply to the transportation, including the storage incident to such transportation, of any substance or chemical subject to the requirements of this chapter, including the transportation and distribution of natural gas.

(Pub.L. 99-499, Title III, § 327, Oct. 17, 1986, 100 Stat. 1757.)

Library References

Health and Environment ⇐25.5(5.5).
C.J.S. Health and Environment §§ 91, 92, 106, 109, 129 to 131.

§ 11048. Regulations [EPCRTKA § 328]

The Administrator may prescribe such regulations as may be necessary to carry out this chapter.

(Pub.L. 99-499, Title III, § 328, Oct. 17, 1986, 100 Stat. 1757.)

Library References

Health and Environment ⇐25.5(1).
C.J.S. Health and Environment §§ 91 et seq., 91 et seq., 106, to 133 et seq.

§ 11049. Definitions [EPCRTKA § 329]

For purposes of this chapter—

(1) Administrator

The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) Environment

The term "environment" includes water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.

(3) Extremely hazardous substance

The term "extremely hazardous substance" means a substance on the list described in section 11002(a)(2) of this title.

(4) Facility

The term "facility" means all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). For purposes of section 11004 of this title, the term includes motor vehicles, rolling stock, and aircraft.

(5) Hazardous chemical

The term "hazardous chemical" has the meaning given such term by section 11021(e) of this title.

(6) Material safety data sheet

The term "material safety data sheet" means the sheet required to be developed under section 1910.1200(g) of title 29 of the Code of Federal Regulations, as that section may be amended from time to time.

(7) Person

The term "person" means any individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, associa-

tion, State, municipality, commission, political subdivision of a State, or interstate body.

(8) Release

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any hazardous chemical, extremely hazardous substance, or toxic chemical.

(9) State

The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, and any other territory or possession over which the United States has jurisdiction.

(10) Toxic chemical

The term "toxic chemical" means a substance on the list described in section 11023(c) of this title.

(Pub.L. 99-499, Title III, § 329, Oct. 17, 1986, 100 Stat. 1757.)

Library References

Health and Environment ⇐25.5(6.5).
C.J.S. Health and Environment §§ 91, 92, 106, 109, 129 to 131.

§ 11050. Authorization of appropriations [EPCRTKA § 330]

There are authorized to be appropriated for fiscal years beginning after September 30, 1986, such sums as may be necessary to carry out this chapter.

(Pub.L. 99-499, Title III, § 330, Oct. 17, 1986, 100 Stat. 1758.)

Library References

United States ⇐85.
C.J.S. United States § 121.

Citizens' Groups in Alaska with Duties Related to Oil and Hazardous Substances

FEDERAL

- **Regional Citizens' Advisory Councils (RCAC)**

  The federal Oil Pollution Act (OPA) of 1990 established **RCACs** in Prince William Sound and Cook Inlet to oversiee crude oil tanker and terminal operations in those areas. **RCACs** serve as advisory groups to the President, U.S. Congress, and industry.

  RCACs are funded by industry as required in OPA 90.

STATE

LEGISLATIVE BRANCH

- **Citizens' Oversight Council (COC)**

  The **COC** is an advisory group to the Legislature established by HB 578 in 1990. The Council is responsible for evaluating whether state and federal agencies are carrying out legislatively mandated programs related to oil and hazardous substance discharge prevention, and response. The **COC** may also make recommendations to the State regarding ways to prevent releases. [AS 24.20.600]

  The **COC** is funded by the Oil and Hazardous Substance Release Response Fund. [AS 46.08]

EXECUTIVE BRANCH

- **State and Local Oil and Hazardous Substance Emergency Planning**

  The federal Emergency Planning and Community Right-to-Know Act (EPCRA) required states to establish a **State Emergency Response Commission (SERC)** to oversee local hazardous substance emergency planning programs. [42 USC 11001-11050]

  Under Alaska law, the **SERC** oversees the development of response plans for oil and hazardous substance releases which are prepared by LEPCs and the State, and reviews and approves them as specified in state law. [AS 46.13]

  The SERC appoints **Local Emergency Planning Committees (LEPC). LEPCs** are responsible for developing a local response plan for oil and hazardous substance releases.

- **Hazardous Substance Spill Technology Review Council (HSSTRC)**

  The **HSSTRC** evaluates existing cleanup technologies for potential application in arctic/sub-arctic conditions and proposes research to development new ones.

- The SERC, LEPCs, and the HSSTRC are funded by the Oil and Hazardous Substance Release Response Fund [AS 46.08].

Prepared by the Department of Environmental Conservation February 26, 1991

Citizens' Groups in Alaska with Duties Related to Oil and Hazardous Substances

Federal and state laws passed since 1986 provide citizens with greater opportunities to play an active role in making sure that Alaskans and their environment are safer from the negative impacts of hazardous substance releases. These groups and a brief description of their responsibilities are summarized below.

OVERSIGHT GROUPS

- **Citizen Oversight of Industry Operations**

  Regional Citizens' Advisory Councils (RCAC) in Prince William Sound and Cook Inlet were created under the federal Oil Pollution Act of 1990. Their primary responsibility is to monitor crude oil tanker and terminal operations. These Councils serve in an advisory capacity to industry and the federal government on issues related to crude oil tanker and terminal operations. RCACs are funded by industry.

- **Legislative Oversight of State Programs**

  Citizens' Oversight Council (COC) was established in the Legislature in 1990. Their chief function is to monitor and evaluate state and federal agencies efforts to carry out their responsibilities for programs related to preventing and responding to oil and hazardous substance releases. The Council may recommend to the Legislature, the Governor, the federal government, and private entities, policies and actions for preventing releases. [AS 24.20.600] The COC is funded by the Oil and Hazardous Substance Release Response Fund.

STATE AND LOCAL HAZARDOUS SUBSTANCE PLANNING GROUPS

- **State Planning**

  As required by federal law, the State Emergency Response Commission (SERC) was established in 1990. The Commission has sixteen members, including seven representing the public. The SERC is primarily responsible for ensuring that response plans for oil and hazardous substance releases prepared by Local Emergency Planning Committees (below) and the State are effective and coordinated. [AS 46.13]

- **Local Planning**

  Local Emergency Planning Committees (LEPC) are appointed by the State Emergency Response Commission (SERC). LEPCs are responsible for developing local response plans for oil and hazardous substances. [AS 46.13]

TECHNOLOGY REVIEW AND DEVELOPMENT

- **Hazardous Substance Spill Technology Review Council**

  The Hazardous Substance Spill Technology Review Council is responsible for reviewing existing spill containment and cleanup technology or procedures for their potential use in arctic/sub-arctic conditions. The Council may recommend research projects to develop new technology. The Council is also responsible for proposing ways to improve the ability of government agencies and industry to prevent and respond to releases. [AS 46.13]

Prepared by the Department of Environmental Conservation February 26, 1991

SB

360

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 _____(_____)

[ ] attaches amendment(s)

[ ] same title
[ ] new title
[ ] technical title change
(HB only)

[ ] 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

SB362

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

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

Component: Spill Prevention, Planning and Management

Sponsor: Governor

Requestor: Governor

COMPONENT SERIAL NO. 1430

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						
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 Sandor

Agency: Department of Environmental Conservation Date: December 12, 1991

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

Rev 10/7/91

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

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
REVENUE FUND SOURCE:	0	0	0	0	0	0

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 12/11 Phone: 465-2240

Division: Finance Date: 12/16/91

Approved by Commissioner: Nancy Bear Usera

Agency: Administration Date: 12/18/91

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

Rev 10/7/91

MEMORANDUM

State of Alaska
Department of Law

TO: Hon. John A. Sandor, Comm'r
Dep't of Envtl. 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: 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 communities 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.

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),

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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;

(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).

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.

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 Envtl. Conservation

DATE: February 4, 1992

FILE NO.: 663-92-0361

TEL. NO.: 465-3600

SUBJECT: DEC granting authority for the purpose of forming LEPCs

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

SB

369

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/24/92

FURTHER: (Resources) Finance

Date of 5-Day Notice: 2/4/92
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 2-18-92

Senate Special Committee on Oil and Gas considered SB 369

"An Act ratifying an agreement settling litigation between the State of Alaska and the Arctic Slope Regional Corporation; establishing procedures for implementing the agreement; and providing for an effective date."

and recommends:

[ ] replace with _____ CS _____ (_____)

and a majority of the committee recommends do pass

[ ] 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 2/13/92 DNR

fiscal notes _____

DO PASS:

Stevens
Crafft
Hoffman

OTHER RECOMMENDATIONS:

Do Pass

Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 369

Revision Date: 18-Feb-92
Department Affected: Natural Resources
Title: Short Title: ASRC Settlement
BRU: Natural Resources
Components:
Sponsor: Senate Rules
Requestor: Senate Oil and Gas
COMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

GENERAL FUND	N/A					
FEDERAL FUNDS						
OTHER Funding Source:						
TOTAL	N/A	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Bob Loeffler
Phone: 762-2578
Division: Oil and Gas
Date: 18-Feb-92

Approved by Commissioner: Harold C. Heinze
Date: 18-Feb-92
Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB

REV 10/91

Fiscal Note(s) DNR + Attachment

FISCAL NOTE

No. 1

Bill Version: SB 369

(S) Publish Date: 1/24/92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. _____

Revision Date: _____ Department Affected: Natural Resources & Law

Title: Short Title: ASRC Settlement BRU: Division of Oil & Gas

Components: _____

Sponsor: Rules Committee

Requestor: Governor COMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

GENERAL FUND	N/A					
FEDERAL FUNDS						
OTHER Funding Source:						
TOTAL	N/A	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact: _____

ANALYSIS: (Attach a separate page if necessary)

See Attachment

Prepared by: Bob Loeffler Phone: 762-2578

Division: Oil & Gas Date: 15-Jan-92

Approved by Commissioner: Harold C. Heinze Date: 1/15/92

Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

REV 10/91

Attachment

Arctic Slope Regional Corporation Settlement Agreement

If the agreement is approved by the Legislature, no additional funds or positions will be needed to implement it.

If the agreement is not approved by the Legislature, the Department of Law would expend significant funds litigating the dispute. The Department of Natural Resources would need a portion of a position to support the litigation.

In addition, the settlement is needed if the state is to lease lands in the Nuiqsut area now scheduled for sale Oil and Gas Lease Sale 75 during December, 1992. If the agreement is approved this year, the lease sale could include approximately 60,000 acres of land covered in the agreement (about one quarter of the total acreage of Sale 75). If the agreement is not approved this session, the Nuiqsut acreage (assuming the litigation is settled) could not be leased until 1995 because of oil and gas lease sale procedural requirements. The Nuiqsut area lands have moderate oil and gas potential. Including them in the lease sale would bring significant new revenues to the state.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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February 10, 1992

The Honorable Cliff Davidson
Chairman, House Resources Committee
State Capitol, Room 108
Juneau, AK 99801-1182

Dear Representative Davidson:

During the February 5 hearing on HB 416, which ratifies the ASRC Settlement, two important questions were asked. I asked staff from the Attorney General's Office and the Division of Oil and Gas to provide detailed answers. Their response is enclosed.

I hope this information is useful. Please let me know if you have additional questions.

Sincerely,

Harold C. Heinze

Harold C. Heinze
Commissioner

Enclosure

cc: Committee Members
Paul Fuhs, Legislative Liaison
Office of the Governor

10-J9LH

House Resources
Questions + Answers

Questions and Answers
HB 416 House Resources Committee Hearing
February 5, 1992

Why does the legislature have to approve this settlement? It doesn't approve most settlements.

First, the settlement requires the state to convey a portion of its mineral interest to ASRC. Alienation of the state's mineral interest is prohibited by Section 6(i) of the Alaska Statehood Act. In 1976, however, Congress amended Section 22(f) of ANCSA to permit the state to enter into exchanges of land "for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes." Exchanges must be of equal value unless found to be in the public interest "by the appropriate Secretary." The United States has confirmed that its consent to the exchange is not required and that the requirements of Section 6(i) of the Statehood Act and 22(f) of ANCSA will be satisfied as long as the legislature finds the exchange to be in the public interest.

Second, AS 38.50 which provides authority for exchanges of interests in state lands does not provide an appropriate vehicle for the settlement of litigation. Among other things, Chapter 50 contemplates a voluntary exchange for equal values, and requires appraisals and a series of public hearings on proposed exchanges. Although the state and ASRC believe that the consideration given and received in the exchange is roughly equal, no effort has been made to appraise the lands. The terms of the exchange are influenced by factors other than land values (which are highly speculative, in any event), including each side's assessment of the risks of litigation. Because the agreement does not fit the process of AS 38.50, legislative approval provides the authority necessary to effectuate the exchange.

Third, Article VIII, Section 10 of the Alaska Constitution requires that "[n]o disposals...of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interests as may be prescribed by law." Public involvement in the settlement is provided through the process of legislative ratification, in order to avoid any potential constitutional infirmity.

How are funds accounted for? Does this settlement evade the legislature's appropriation authority?

Funds accruing to the state from oil and gas leases on state land go in part to the general fund and in part to the permanent fund. Leases issued under the ASRC agreement are no different. The agreement divides interests in land, but all revenue from the state's interest belongs to the state and is handled like "normal" state revenues. In addition, it is the lessee's responsibility to pay the appropriate share directly to the state and to ASRC. This divided payment is unusual for Alaska, but is a frequent occurrence in other parts of the United States where land status is more complex.

If, for example, the lessee owes $100 in rent under the lease made under this agreement, and that lease happens to be on land that the state owns a 60% undivided interest and ASRC owns a 40% undivided interest, then the lessee must send $60 to the state, and $40 to ASRC. That $60 is accounted for like other oil and gas revenues. Part goes to the general fund and part goes to the permanent fund.

SUMMARY SHEET -- HB416/SB369

* Ratifies the settlement of protracted litigation between the State and the Arctic Slope Regional Corporation ("ASRC") over title to lands in the Colville Delta and Point Lay areas.

* Improves marketability of title by merging State and Native Corporation subsurface interests, settling all submerged lands conflicts, and providing for joint leasing of lands under the administration of the Commissioner of Natural Resources.

* Clears obstacles to the leasing of State lands in the Colville Delta 12 miles west of the Kuparuk oil field at a time of industry interest in the area.

* Forms an historic partnership between the State and ASRC and provides a model for resolution of other disputes between the State and Native Corporations.

* Will not affect State control over submerged lands beneath navigable waters.

* Insures that leasing will comply with all statutory and regulatory safeguards, including environmental reviews, applicable to state lease sales.

Summary Sheet
SB 369

EXPLANATION OF HB416/SB369[1]

"An Act relating to the approval of an agreement settling litigation between the State of Alaska and Arctic Slope Regional Corporation; and providing for an effective date."

The "1991 Settlement Agreement Between Arctic Slope Regional Corporation and State of Alaska" ("1991 Agreement") is an historically significant attempt to resolve disputes and forge new partnerships between the State of Alaska and Alaska Native Regional Corporations. The 1991 Agreement proposes to resolve a long-standing dispute between the State and the Arctic Slope Regional Corporation ("ASRC") over ownership of potentially valuable mineral lands on the North Slope. More importantly, it proposes to do so in a way that will remove impediments to title marketability and create a long term partnership between the State and ASRC aimed at maximizing revenues for both parties. Because the 1991 Agreement involves an exchange of the State's mineral estate and contemplates conferring new management powers on the Commissioner of Natural Resources unique to the 1991 Agreement, legislative approval is required.

The purpose of this memorandum is to acquaint you with the

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[1] This document is a draft prepared by counsel for Arctic Slope Regional Corporation. It is being supplied to House and Senate staff to assist in analysis of HB416/SB369. Additional information and details are still being gathered and will be supplied to staff at a later date. Please refer any questions regarding this draft to counsel for ASRC, David C. Crosby (586-6262).

the 1991 Agreement and HB416/SB369. This memorandum is organized in three parts: Section I explains the historical setting that gave rise to the 1991 Agreement. Section II is a more detailed section-by-section explanation of the 1991 Agreement. Section III explains the provisions of the Bill.

I. HISTORY OF THE DISPUTE LEADING TO NEGOTIATION OF THE 1991 AGREEMENT.

In ____ the State of Alaska filed selections in the delta of the Colville River immediately east of the National Petroleum Reserve No. 4 (since renamed the National Petroleum Reserve - Alaska, or "NPRA"). These lands are located approximately __ miles west of Prudhoe Bay, and at the time of their selection were believed to be prospective for oil and gas. The selections were Tentatively Approved by the Secretary of the Interior in ____. Some of the lands in the Colville Delta were leased by the State in ____. An exploration program conducted in ____ resulted in several dry holes.

In ____ the Arctic Slope Native Association filed aboriginal land claims to much of the North Slope, including the Colville Delta. The pendency of these and other Native claims led to the infamous Secretarial land freeze order of 1968, and the eventual settlement of the claims of Alaska Natives by Congress in the Alaska Native Claims Settlement Act of 1971 ("ANCSA"). The basic

land settlement contemplated selection of surface estate surrounding historic village cites by Village Corporations, with conveyance of the subsurface estate under the village land to the appropriate Native Regional Corporation. ANCSA identified roughly 200 Native villages and withdrew __ townships of land, including lands previously Tentatively Approved to the State, in the vicinity of each village. Within this area, eligible Village Corporations organized under ANCSA were permitted to select and receive title to up to three townships (69,120 acres) of lands Tentatively Approved to the State of Alaska.

The Colville Delta was the site of the historic Native Village of Nuiqsut (or "Nooiksut"), which was listed in Section 11(b) of ANCSA as a "Native village subject to this Act." That section also required the Secretary of the Interior to review the eligibility of listed Villages to determine whether they met the eligibility requirement of 25 or more residents as of the 1970 census. The Secretary's regulations defined "residence" broadly in terms of traditional Native occupancy patterns.

In ____ the Secretary certified eight Inupiat villages in the Arctic Slope region as eligible to receive land benefits under ANCSA. The State of Alaska appealed the certification of two of these villages -- Nuiqsut and Pt. Lay -- on the ground that they did not satisfy the residency requirements for certification. Of the three villages, Nuiqsut, because of its

proximity to Prudhoe Bay and the possibility that ASRC would receive up to three townships of State TA'd lands in the Colville Delta if its certification were upheld, was of the greatest concern. The appeals were contested by ASRC on behalf of its villages.

While the appeals were pending before the Alaska Native Claims Appeals Board, ASRC proposed to settle the certification disputes by relinquishing its ANCSA entitlement to the Colville Delta subsurface. In return, the State would withdraw its selections and permit ASRC to select and receive conveyance to the surface and subsurface of approximately _____ acres of lands that had previously been TA'd to the State in the Point Lay area. When the federal government refused to cooperate on the ground that the Secretary had no discretion not to convey the subsurface estate under village surface conveyances, the settlement was hastily recast as a two party exchange of ASRC's subsurface in the Colville Delta for a slightly smaller amount of land owned by the State in fee in the Pt. Lay area. The deal was finalized in a "1974 Settlement Agreement" and the State's appeal of the village certifications was dismissed.

Although the 1974 Settlement Agreement contemplated an immediate exchange of quitclaim deeds to the parties' respective interests, the Department of Natural Resources declined ASRC's proffered conveyance, stating that it would prefer to await

ASRC's receipt of conveyances to the Nuiqsut subsurface before finalizing the exchange. In 197_, the Alaska Supreme Court's ruled in _____ that an attempt to exchange the State's mineral estate with the Cook Inlet Regional Corporation violated Section 6 of the Alaska Statehood Act and was void. The ruling cast a cloud on the the State's ability to convey any mineral estate to ASRC at Pt. Lay.

Following inquiries by ASRC in 1977, neither side showed any further interest in implementing the 1974 Settlement Agreement until Texaco announced a discovery in the Colville Delta in 1985. When the Commissioner of Natural Resources served a demand that ASRC consummate the 1974 Settlement Agreement, ASRC filed suit in federal District Court asserting that the exchange provisions of the 1974 Settlement Agreement violated Section 6 of the Statehood Act and were unenforceable. The State countered by filing suit for specific performance of the 1974 Settlement Agreement in Superior Court.

The litigation posed significant problems for both parties. On the one hand, ASRC appeared to be renegging on deal. On the other hand, the State was forced to concede that it had no authority to deliver a significant portion of the agreed upon consideration -- the Pt. Lay mineral estate. To further complicate matters, subsequent events seemed to suggest that the Texaco discovery might not be as significant as it was initially believed to be and the Pt. Lay lands were known to contain

substantial coal deposits that could prove valuable in the future.

Faced with the uncertainties of litigation and highly speculative values of both the Nuiqsut and Pt. Lay parcels, then Commissioner of Natural Resources Esther Wannicke and ASRC reached an agreement in principle in ____ to settle the litigation by splitting the disputed lands in such a way that each side would receive half of the disputed lands at Pt. Lay and half of the disputed lands at Nuiqsut. In this manner, neither side "lost," and both sides spread the risk that one or the other of the two speculative tracts might prove to be substantially more valuable than the other. This "50/50" remains at the heart of the 1991 Settlement Agreement.

After shaking hands on a conceptual settlement that was believed to be fair to both sides, the negotiations bogged down over the description of the lands that were subject to the settlement. The difficulties focused on the State's claims of ownership to submerged lands underlying bodies of water alleged to be navigable. ASRC took the position that a 1942 public land order (PLO 82) withdrew the entire North Slope of Alaska for national defense purposes and precluded the State from acquiring title to any submerged lands as a matter of law. The matter had been clarified to some extent in the Colville Delta by Section 1431(n) of ANILCA, which retained ownership of the principal

channels (often referred to as the "named channels") of the Colville River "in public ownership" (without specifing whether "public" meant federal or State ownership). Since the United States concede the right of the State of Alaska tc select submerged lands in the area covered by the former PLO 82 withdrawal (which was rescinded shortly after statehood), and the State had selected all available lands in the Colville Delta, there was no question that the State was the undisputed owner of submerged lands under the named channels. There agreement ended.

The State contended that the extent of submerged lands under the named channels was substantially greater than ASRC was prepared to concede. In addition, the State claimed exclusive ownership of a number of other smaller channels and sloughs in the Colville Delta, as well as the Kukpowruk River running through the Pt. Lay lands, and a number of lakes in both places. ASRC contended that submerged lands, other than the named channels of the Colville mentioned in Section 1431(n) of ANILCA, should be treated as subject to the settlement and divided 50/50. The State insisted that since ANCSA did not entitled ASRC to receive conveyance to any submerged lands under navigable waters, these submerged lands were not subject to the settlement. To further complicate matters, the law provides that title to submerged lands changes as the banks and shores of water bodies shift due to accretion, reliction and erosion. The boundary line between State and ASRC lands would be constantly shifting,

especially in the Colville Delta. This fact alone would tend to make titles uncertain and decrease the marketability of title for both owners. Future litigation over the existence and extent of State ownership was almost a certainty.

Ultimately, the parties concluded that the settlement should attempt to anticipate and resolve as many future disputes as possible, even if those disputes did not, strictly speaking have to be resolved in order to settle the controversy over the 1974 Settlement Agreement. The parties concluded that the optimal settlement would (1) dispose of the dispute regarding the enforceability of the exchange provisions of the 1974 Settlement Agreement; (2) lay to rest disputes regarding the existence and extent of State owned submerged lands; (3) resolve the ambiguity created by the problem of accretion, reliction and erosion; and (4) provide for common management of uplands and submerged lands.

The parties had already agreed in principle to a 50/50 split of lands subject to the exchange provisions of the 1974 Settlement Agreement. They next agreed to quantify the extent of State owned by submerged lands by spliting the difference between the State's calculations and those of ASRC. Title problems were resolved by pooling the interests of the State and ASRC on a section-by-section basis with each party receiving an undivided percentage ownership reflecting a 50/50 division of the stipulated uplands within the section, with the State receiving full (i.e., 100 percent) credit for any stipulated submerged

lands within the section. (The State retains full sovereign powers over submerged lands, nothwithstanding ASRC's undivided interest.) In order to eliminate any possible future disputes over the boundary of the settlement area on the coastline and the NPRA boundary (where the original 1974 settlement area followed the sinuosity of the constantly shifting ocean boundary and the west bank of the Nechelik Channel of the Colville River), the parties agreed to extend section lines into the ocean and accross the NPRA boundary so that the area subject to the 1991 Agreement will include only full sections whose location can be protracted at any time without reference to changes brought about by accretion, reliction and erosion. In this manner, approximately ___ of ocean submerged lands owned by the State outside the 1974 Settlement Agreement area and approximately ___ of NPRA subsurface owned by ASRC and outside the 1974 Settlement Agreement area were included in the 1991 Agreement. In each instance the parties' undivided percentage interest in each section so extended was adusted to provide a 100 percent credit for lands outside the original 1974 Settlement Agreement area.

Finally, the parties agreed that the State of Alaska would be the executive rights holder for both parties interests. As defined by the 1991 Agreement, the State is authorized to enter into leases on behalf of both ASRC and the State. Lease sales will be conducted in the usual manner as provided by Title 38 of Alaska Statutes, subject to all legal requirements otherwise

applicable to leasing of State lands. The 1991 Agreement includes provisions to insure that ASRC is treated fairly in the leasing process.

Thus, the 1991 Agreement not only settles long-standing litigation between ASRC and the State, it anticipates and resolves disputes regarding the existence, extent and location of submerged lands owned by the State of Alaska. Finally, ASRC and the Department believe that by merging title to uplands and submerged lands and vesting executive rights in the State, the 1991 Agreement will result in maximum certainty and predictability for potential lessees, which in turn will make the interests of both the State and ASRC more marketable.

On _____ the United States District Court for the District of Alaska approved the agreement in principle, including the section-by-section percentages set out in Exhibit __. (These percentages have been adjusted slightly by mutual agreement to correct errors in calculation and make allowance for contingencies relating to future disposition of Native allotment claims.)

II. SECTION-BY SECTION ANALYSIS OF THE 1991 AGREEMENT

The following section provides a more detailed section-by-section explanation of the terms of the 1991 Agreement. No

effort has been made to treat each subsection individually. Emphasis is placed on drawing attention to significant provisions and summarizing complex technical provisions.

Introduction. This section explains that the purpose of the agreement is to settle pending litigation between ASRC and the State regarding the enforceability of the 1974 Settlement Agreement and to eliminate the potential for future ownership disputes over submerged lands by exchanging undivided interests in the subsurface of submerged lands and uplands and establishing fixed revenue sharing percentages for the settlement lands that will not change in the event of accretion, reliction or avulsion.

Section 1: LEGISLATIVE APPROVAL. This section provides for submission of the 1991 Agreement to the legislature (1.1) and commits the parties to the form of the legislation approving the same (1.2). The parties may withdraw at any time prior to enactment of an acceptable bill approving the 1991 Agreement (1.3(a)). If an acceptable bill is enacted, the litigation will be dismissed (1.4) and the 1991 Agreement will supercede the obligations of the parties under the 1974 Settlement Agreement, unless the statute, the 1991 Agreement or any conveyance authorized by the 1991 Agreement is set aside by the courts (1.3(b)). The parties commit not to create any third party interests in the lands subject to the 1991 Agreement pending deliberations on the bill (1.5).

2. LANDS SUBJECT TO THE 1991 SETTLEMENT AGREEMENT

2.1 describes the intent of the parties with respect to inclusion of submerged lands in the 1991 Agreement, including offshore lands under the Beaufort Sea, the Chukchi Sea and the Kasegaluk Lagoon necessary to describe settlement lands by full sections.

2.2 describes the current ownership of the Nuiqsut subsurface, including ASRC's right to receive future conveyances, the status of outstanding third party interests created by either the State or ASRC, and State claims of ownership to submerged lands.

2.3 explains possible changes regarding ownership of the Nuiqsut subsurface (and corresponding corrections to ownership percentages) contingent upon disposition of pending Native allotment applications and possible exclusion sections from the settlement area in the event Kuukpik Corporation does not receive title to the surface estate.

2.4 provides a comparable analysis the State's title to the Point Lay subsurface.

3. CONVEYANCE OF INTEREST IN LANDS

3.1 commits ASRC to convey to the State the applicable percentage undivided interest, according to Exhibit E, in each section of ASRC's Nuiqsut subsurface as soon as that section has been fully conveyed to ASRC, retaining to itself its own percentage interest, also according to Exhibit E. (Conveyances are not called for until all title contingencies have been resolved.)

3.2(a) commits the State to convey the applicable percentage undivide interest in the Point Lay subsurface, including any submerged lands therein, as set forth in Exhibit F, to ASRC within 30 days of the final effective date of the 1991 Agreement, retaining its own percentage interest, also as described in Exhibit F.

3.2(b) obligates the State to make a cross conveyance to ASRC of the applicable undivided percentage interest in the Nuiqsut subsurface, including any submerged lands therein, as set forth in Exhibit E, retaining the applicable percentage interest to itself, also as described in Exhibit E.

3.3 states that no change in the boundary, location or extent of submerged lands or uplands with affect the percentage undivided interest conveyed pursuant to the 1991 Agreement.

The net effect of the cross-conveyance called for in Section

3 is an exchange of undivided interests in the subsurface estate such that the title to submerged lands and uplands has been merged and the parties, for all time, will own their respective undivided percentage interest in each section according to the schedule set forth in Exhibit E. This percentage is fixed and will not change regardless of the amount or location of submerged lands that may be contained in the section from time to time.

4. SUBSURFACE AGREEMENTS AFFECTING NUIQSUT SUBSURFACE AND POINT LAY SUBSURFACE; GRANT OF RIGHTS TO EXECUTIVE; RIGHTS AND DUTIES OF EXECUTIVE.

4.1 ASRC grants to the State of Alaska executive rights in the Point Lay and Nuiqsut subsurface. Executive rights are defined in section 11.8 as the right to formulate and issue Subsurface Agreement Solicitations and to negotiate and execute Subsurface Agreements -- primarily oil and gas leases -- on behalf of ASRC with respect to ASRC's interest in the Nuiqsut and Point Lay subsurface.

4.2 requires that the State will be held to a prudent landowner standard, except to the extent that obligations imposed on the State by law require it to act otherwise. The State must treat ASRC's interest in the same manner as it treats its own and may not act so as to benefit itself at the expense of ASRC. The limited prudent landowner standard does not create a fiduciary duty to ASRC by the State. The State may not assign its

executive rights without the consent of ASRC (7.2).

4.3 provides for notice to and consultation with ASRC prior to exercise of executive rights by the State. It also provides a mechanism for resolving disputes if the two parties are unable to agree on the substantive terms of subsurface agreements or solicitations. ASRC may refer disputes to a member of a panel of qualified independent consultants who is charged with determining whether the action proposed by the State is consistent with the limited prudent landowner standard. A decision in favor of the State is binding on ASRC without right of appeal. The State is not bound by a decision in favor of ASRC, but is exposed to future damages if it procedes and a court subsequently upholds the qualified independent consultant.

4.6 provides that the executive rights of the State with respect to a subsurface agreement cease upon execution of the agreement. Thereafter, each side may execute amendments or changes with respect to its own undivided interest only.

4.8 relieves the State, as executive rights holder, of any obligation to conduct operations on the lands. Rather, the 1991 Agreement contemplates that the State will fulfill its obligations by entering into agreements with third parties.

4.9 provides that the State has no right, obligation, or duty to enforce the terms of subsurface agreements once they are

executed. ASRC is responsible for enforcing the terms of any such agreement as they relate to its interests, and the State is not exposed to any liability for failure to enforce such agreements.

In order to acquire title to subsurface within NPRA, ASRC enterred into an agreement with the surface owner, Kuukpik Corporation, not to develop the subsurface of any NPRA subsurface without first obtaining Kuukpik's consent. Approximately ___ acres (all deemed to be 100 owned by ASRC) are affected by this consent. Kuukpik may also have consent rights for lands in the vicinity of the village under Section 14(f) of ANCSA. Although the State will hold executive rights to all of this acreage, it is not liable for failure to lease any such land if Kuukpik's consent is required and cannot be obtained. The 1991 Agreement resolves title disputes between ASRC and the State of Alaska. It does not purport to affect the rights of Kuukpik as against ASRC or the State (or vice versa). Kuukpik and its counsel have been fully informed of the negotiations and have been supplied with copies of the Agreement, which it supports.

4.14 precludes communitizing settlement acreage in a lease with non-settlement acreage. Nor will the inclusion of two or more sections of acreage in a common lease result in pooling or communitizing of the interests in those sections. Revenues are shared strictly on a section-by-section basis according to the

respective percentages set out in Exhibit E. This section prevents prejudice that might result to either party if unproductive section could be averaged in with productive sections.

4.15 provides that until sections become fully conveyed such that the parties are obligated to execute cross conveyances with respect to that section, neither party will grant third party interests in any such sections with the consent of the other party.

5. MINIMUM COVENANTS REQUIRED IN ALL SUBSURFACE AGREEMENTS

This section describes certain minimum requirements for all subsurface agreements executed by the State in the exercise of its executive rights. Subsection 5.2 provides a limited exception to the general rule that the executive powers of the State cease following execution of a subsurface agreement. In the event the State exercises its discretion under a lease containing a term permitting the Commissioner to set or adjust royalty valuation, the Commissioner's determination shall bind ASRC's interest as well. This section does require the Commissioner to exercise his discretion under such and lease and does not expose the State to any liability for the Commissioner's exercise (or refusal to exercise) of discretion.

6. SUSPENSION OF EXECUTIVE RIGHTS

The 1991 Agreement contemplates that the State, in the exercise of its executive rights, will be bound by all provisions of State law governing its conduct as a public land owner and sovereign. The 1991 Agreement further contemplates that occasions may arise in which the State concludes that entering into a subsurface agreement would not be in the public interest or would conflict with with sovereign obligations. The State is not liable to ASRC in such instances. Section 6.1 (a) provides that after giving appropriate notice to the State, however, executive rights are suspended ASRC is then free to lease its own interest. Executive rights return to the State if ASRC rescinds its election to suspend executive rights under Section 6.1(a) prior to executing a subsurface agreement with respect to its interest (6.3(a)). The State's executive rights are also suspended if either the State or ASRC exercise their power to terminate a subsurface agreement and the other party elects not to do so (6.1(b)). Executive rights return to the State automatically at such time as neither the State's nor ASRC's interest is subject to a subsurface agreement (6.3).

During any period of time that executive rights is suspended, the rights and duties of the parties to one another are governed by the law of cotenancy in common. Either party may develop the subsurface and the other will still receive its

percentage share of the proceeds, after deduction of the cotenant's costs of development.

7 MISCELLANEOUS RESTRICTIONS ON BOTH PARTIES

7.1 provides that while the State holds executive rights, neither the State nor ASRC may become a lessee of the lands or engage in self-development without the consent of the other.

7.3 provides that neither side may convey its interest in the Point Lay subsurface or the Nuiqsut subsurface with the consent of the other, and any such consent may be conditioned on termination of executive rights. In such case, the respective holders of the percentage interests would be cotenants in common.

8. STATE'S RIGHTS AS SOVEREIGN

8.1 explicitly provides that nothing in the agreement diminishes or affects the sovereign rights of the State with respect to regulation or management of submerged lands, fish and game, or natural resources. ASRC's only recourse is under subsection 8.2 to challenge the constitutionality of a statute, or the validity of a regulation, if it feels that the statute or regulation singles out settlement lands for different treatment from that accorded to other land in the State, or causes injury-in-fact to any rights expressly granted to ASRC under the 1991

Agreement.

9. PREEXISTING LEASES OF THE NUIQSUT SUBSURFACE

This section describes the current status of leases affecting the Nuiqsut subsurface, provides for separate administration and enforcement of the parties respective percentage interests in existing leases, and provides for an equitable division of revenues received by either party with respect to leased lands prior to the effective date of the 1991 Agreement. The Section is complicated by the fact that ASRC has not received from the United States for all the conveyances of Nuiqsut subsurface to which it is entitled. 1991 Agreement does not contemplate an exchange of interests with respect to any section until that section has become fully conveyed to ASRC (as defined in Section 11.12). Also, the State has waived its administration rights with respect to leases on some of the lands conveyed to ASRC by the United States, but has not waived with respect to other lands so conveyed. Consequently, it took a lot of verbiage to allign all the preexisting legal relationships so that they conform to the basic pattern contemplated by the 1991 Agreement. The principles, however, are straightforward.

10. MISCELLANEOUS

This section contains a number of routine provisions

relating to interpretation and administration of the 1991 Agreement. Notable provisions include a requirement that subsurface data be shared to the maximum extent permitted by preexisting legal constraints (10.3), subject to strict confidentially requirements (10.1); subsection 10.11 commits the parties to joint defense of the 1991 Agreement, unless the challenge relates to ASRC's revenue sharing obligations to other ANCSA Corporations, in which case ASRC must defend, indemnify and hold the State harmless from such claims.

11. DEFINITIONS

This Section defines key terms used throughout the 1991 Agreement.

EXHIBITS

Exhibits include the form of proposed legislation (Exhibit A, discussed in Section III, below), maps of the lands subject to the 1991 Agreement (Exhibits C and D), schedules of the respective percentage undivided interest in each section of land subject to the 1991 Agreement (Exhibits E and F), and specimen copies of various instruments called for in the 1991 Agreement (Exhibits G - J).

III. SECTION-BY-SECTION EXPLANATION OF ___ BILL NO. ___.

Section 1. PURPOSE. Provides that the purpose of the Bill is to provide for the settlement of outstanding litigation between the State and ASRC.

Section 2. RATIFICATION. This Section ratifies the 1991 Agreement "notwithstanding any other provision of law." Because the 1991 Agreement involves an exchange of the State's mineral interests in the Nuiqsut and Point Lay subsurface, legislative approval is required. Alienation of the State's mineral interest is prohibited by Section 6(i) of the Alaska Statehood Act. In 1976, however, Congress amended Section 22(f) of the Alaska Native Claims Settlement Act to permit the State of Alaska to enter into exchanges of land "for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes." Exchanges must be of equal value unless found to be in the public interest "by the appropriate Secretary." The United States has confirmed that its consent to the exchange is not required and that the requirements of Section 6(i) of the Statehood Act and 22(f) of ANCSA will be satisfied as long as the appropriate State approving authority finds the exchange to be in the public interest.

Chapter 50 of Title 38 of Alaska Statutes provides authority for exchanges of the State's mineral estate, including the mineral estate in submerged lands. For a variety of reasons, however, that Chapter does not provide an appropriate vehicle for

the settlement of litigation. Among other things, Chapter 50 contemplates a voluntary exchange for equal values and requires appraisals and a series of public hearings on proposed exchanges. Although the State and ASRC believe that the consideration given and received in the exchange is roughly equal, no effort has been made to appraise the lands. The terms of the exchange are influenced by factors other than land values (which are highly speculative, in any event), including each side's assessment of the risks of litigation. Finally, settlement negotiations have necessarily and appropriately been conducted in closed sessions. Public involvement is provided through the process of legislative ratification, but could not realistically have been provided earlier in the process, as contemplated for a voluntary exchange under Chapter 50. The "notwithstanding any other provision of Alaska law" will clarify that the exchange contemplated by the 1991 Agreement is not subject to the requirements of Chapter 50.

In addition to AS 38.50, the "notwithstanding any other provision of Alaska law" is intended satisfy any other provision of State law that might subsequently be raised to defeat the settlement itself. The Bill deliberately uses broad language to accomplish this result. Among other things, this language is intended to make it clear that in carring out the provisions of the settlement the Commissioner is acting pursuant to the mandate of the legislature and <u>not</u> exercising his discretion under other statutory provisions that authorize administrative disposition of

state lands. Specifically, this language, together with section 3 of the Bill discussed below, relieve the Commissioner of any further notice, hearing or public interest finding requirements prior to making the conveyances required by the 1991 Agreement.

This exemption extends only to those actions mandated by the 1991 Agreement necessary to carry out the settlement and ratified by the Bill. Since the 1991 Agreement contemplates that the Commissioner will exercise his executive rights consistent with statutory constraints and does not waive any sovereign powers of the State of Alaska, any development activities that occur subsequent to the exchange will be fully subject to the normal statutory and regulatory procedures normally applicable to administration of State lands. Specifically, lease sales will be conducted in the normal manner and all regulatory requirements will be observed, including coastal zone consistency and public interest findings. To the extent that ASRC exercises powers as a landowner, this legislation does not exempt ASRC from federal, state or local requirements otherwise applicable to private landowners.

Section 2 also provides that "no statutory or common law rules against perpetuities or restraints of alienation of property shall apply to the the settlement agreement or to any interest or power created by it." The 1991 Agreement commits the State and ASRC permanently to merge their titles with no right of

partition, to jointly lease and develop their interests, and to take a number of other steps with respect to their lands for an indefinite period of time. The law is generally hostile to such perpetual restrictions or restraints on alienation that might be deemed unreasonable. AS 34.27.010, for example, provides that an interest that would violate the rule against perpetuities may be reformed by a court. If the rules apply, the 1991 Agreement could be challenged at any time by the State or ASRC (or possibly in a citizen suit) and stricken down or modified in ways that were never intended.

A major consideration of both the State and ASRC in entering into the 1991 Agreement is improving marketability of title. This objective, and the benefits of the settlement, would be frustrated if the merging of title, prohibition against partition of those interests and executive rights provisions were ever successfully challenged as violative of the rule against perpetuities or as an unreasonable restraint on alienation. Accordingly, Section 2 exempts the 1991 Agreement from these requirements.

Section 3. COMMISSIONER AUTHORITY. This section affirmatively authorizes and directs [**THIS LANGUAGE SHOULD BE ADDED TO THE BILL**] the Commissioner to carry out the exchange and makes it clear that in doing so he carring out the mandate of the legislature. The Commissioner is not authorized, however, to

materially amend the 1991 Agreement without coming back to the legislature for approval.

Section 4. RECORDATION. This section requires to the Commissioner to record the 1991 Agreement in the appropriate recording office, incorporate it into the DNR lands record sysstem, and deposit a signed original with the State Archivist, and incorporate.

Section 5. ACTIONS. In order to minimize the possibility that the exchange will have to be unwound after the State and ASRC have committed themselves to making the conveyances and taking the other actions required by the 1991 Agreement, this section provides that any action challenging the legality of the 1991 Agreement must be commenced within thirty days of the effective date of the legislation. The Act itself may not be construed as creating any rights in any party not privy to the 1991 Agreement to challenge that Agreement or the Act. Finally, the Section waives the sovereign immunity of the State of Alaska to any suit brought by ASRC to enforce the 1991 Agreement, provided that any such action is commenced in a Superior Court of the State of Alaska.

Section 6. EFFECTIVE DATE. This Section provides for an immediate effective date in accordance with AS 01.10.070(c).

SENATE COMMITTEE REPORT

DATE: 2/18/92 FURTHER: Finance

DATE TURNED INTO OFFICE: Feb 26, 1992

Resources Committee considered SENATE BILL NO. 369

"An Act ratifying an agreement settling litigation between the State of Alaska and the Arctic Slope Regional Corporation; establishing procedures for implementing the agreement; and providing for an effective date."

and recommends:

[ ] replace with _____ CS _____(_____)
or [ ] adopt previous_____ CS _____(_____)
[ ] attaches amendment(s)

[ ] same title
[ ] new title
[ ] technical title change (HB only)

[ ] adopts _____ Letter of Intent
[ ] further referral to the _____

[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations

NEW FISCAL NOTES: Dept/Date	PREVIOUS FISCAL NOTES: Dept/Date
[ ] zero fiscal notes _____	[X] zero fiscal notes 1/15/92 DNR
[ ] fiscal notes _____	[ ] fiscal notes _____

[ ] appropriation--no fiscal note

DO PASS:

OTHER RECOMMENDATIONS:

Chair: Signature and Recommendation

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/24/92

FURTHER: Resources
Finance

Date of 5-Day Notice: 2/4/92
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 2-18-92

Senate Special Committee on Oil and Gas considered SB 369

"An Act ratifying an agreement settling litigation between the State of Alaska and the Arctic Slope Regional Corporation; establishing procedures for implementing the agreement; and providing for an effective date."

and recommends:

and a majority of the committee recommends do pass

[ ] 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 2/15/92 DNR

fiscal notes _____

DO PASS: Stev Craft Hoffman

OTHER RECOMMENDATIONS:

Do Pass

Chair: Signature and Recommendation

Attachment

Arctic Slope Regional Corporation Settlement Agreement

If the agreement is approved by the Legislature, no additional funds or positions will be needed to implement it.

If the agreement is not approved by the Legislature, the Department of Law would expend significant funds litigating the dispute. The Department of Natural Resources would need a portion of a position to support the litigation.

In addition, the settlement is needed if the state is to lease lands in the Nuiqsut area now scheduled for sale Oil and Gas Lease Sale 75 during December, 1992. If the agreement is approved this year, the lease sale could include approximately 60,000 acres of land covered in the agreement (about one quarter of the total acreage of Sale 75). If the agreement is not approved this session, the Nuiqsut acreage (assuming the litigation is settled) could not be leased until 1995 because of oil and gas lease sale procedural requirements. The Nuiqsut area lands have moderate oil and gas potential. Including them in the lease sale would bring significant new revenues to the state.

1991 SETTLEMENT AGREEMENT

BETWEEN

ARCTIC SLOPE REGIONAL CORPORATION

AND

THE STATE OF ALASKA

1991 SETTLEMENT AGREEMENT BETWEEN ARCTIC SLOPE REGIONAL CORPORATION AND THE STATE OF ALASKA

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1991 SETTLEMENT AGREEMENT BETWEEN ARCTIC SLOPE REGIONAL CORPORATION AND THE STATE OF ALASKA

Introduction

The State of Alaska ("State") and Arctic Slope Regional Corporation ("ASRC") sued each other, in two separate lawsuits, over the validity of a March 1974 Agreement ("1974 Agreement"). The lawsuits were entitled:

(1) *State of Alaska v. Arctic Slope Regional Corporation*, 3AN-85-15523 Civil, Alaska Superior Court, Third Judicial District, filed November 7, 1985.

(2) *Arctic Slope Regional Corporation v. Lennie Boston-Gorsuch and Gary C. Gustafson*, Civil No. J85-026, United States District Court For Alaska, in Juneau, filed October 2, 1985.

In 1990, the federal court lawsuit was dismissed without prejudice to ASRC's right to refile it. The State and ASRC now wish to dismiss the state court lawsuit, also without prejudice, and settle claims and counterclaims made in the two lawsuits.

The State and ASRC have fully and independently analyzed the strength of their respective litigation positions regarding the enforceability of the 1974 Agreement. In settling, the parties[1/] understand that each gives up the right to discover fully the strength or weakness of the other party's position in exchange for the certainties of settlement and in order to avoid the risk of an unfavorable outcome in the litigation. Resolution of the litigation and uncertainties relating to titles as set out in this Settlement Agreement will result in material benefit both to the State and its citizens and to ASRC, and is in the best interests of the public.

The litigation concerns a dispute between ASRC and the State over the ownership of lands located near Nuiqsut and Point Lay. To settle the dispute, the State and ASRC have agreed in

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[1/]Words and phrases printed in the text of this Agreement in boldface are defined in Section 11.

this Settlement Agreement to effect an exchange of undivided interests in the subsurface of all the disputed lands, as authorized under section 22(f) of ANCSA, so as to cause the subsurface in all these lands to be owned in undivided interests by the State and ASRC. The disputed lands have numerous bodies of water within or adjacent to them. The State claims that many of these bodies of water cover submerged lands which it wholly owns by virtue of the United States Constitution's equal footing doctrine and the federal Submerged Lands Act. For various reasons, ASRC disputes the State's claims. Moreover, the extensive nature of the bodies of water and seacoast makes the boundaries between uplands and submerged lands within portions of the areas subject to the potential of accretion, reliction, and avulsion. The possibility of future disputes about the ownership of and the boundaries between uplands and submerged lands would make it extremely difficult for either the State or ASRC to exploit the lands, whichever party a court might decide owned them. Therefore, in order to eliminate the potential for future ownership disputes, in this Settlement Agreement ASRC and the State have agreed to exchange undivided interests in the subsurface in the submerged lands and in the uplands and to establish a fixed revenue sharing percentage for the lands which would not change in the event of accretion, reliction, or avulsion.

Except as provided below in section 6 (governing consequences of separate termination of a Subsurface Agreement) and subsection 9.5 (governing division of revenue from certain leases), this Settlement Agreement provides that all subsurface revenues related to, or generated by the exploration, development, production, or other exploitation of, or the lease, sale, or other disposition of, any interest in the Nuiqsut subsurface and the Point Lay subsurface will belong to ASRC or the State, respectively, as the owner of that interest pursuant to Section 3.

ASRC and the State further agree as follows: