

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

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Tort liability and
emergency response
planning

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

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

BACKGROUND

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

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

I. ADMINISTRATIVE ENTITIES ESTABLISHED BY AS 46.13

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

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

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

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

The Alaska SERC appoints the members of a local emer-

gency planning committee (LEPC) for each district. Each LEPC must include representatives from each of the following groups: elected state and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to SARA Title III (covered facilities). The Alaska SERC may revise its appointments to the LEPCs as it deems appropriate.

In addition, interested persons may petition the commission to modify the membership of an LEPC. 42 U.S.C.A. • 11001(c)-(d); AS 46.13.040(5). Under SARA Title III, state emergency response commissions were required to establish an LEPC for each local emergency planning district by August 1987. 42 U.S.C.A. • 11001(c). The Alaska SERC has currently appointed 11 LEPCs for 25 districts, and thus is not in compliance with SARA Title III.

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

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

¹ AS 46.13.045 provides:

PLAN APPROVAL; INCIDENT COMMAND SYSTEMS.

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

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

B. The Hazardous Substance Spill Technology Review Council

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

(..continued)
and this chapter.

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

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

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

II. EMERGENCY PLANS

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

The emergency response plans prepared by the LEPCs establish the procedures to be followed in the event of a release of extremely hazardous substances as defined by federal law, plus the procedures to be followed in the event of a release of hazardous substances as defined by state law.² Each plan must

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

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

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

include:

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

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

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

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

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

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

(7) Evacuation plans;

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

(9) Methods and schedules for emergency plan

(..continued)

(B) oil; or

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

AS 46.03.826(5); see AS 46.13.900(3).

drills.

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

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

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

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

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

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

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

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

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

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

See AS 46.04.200--AS 46.04.210.

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

Under AS 46.13.040(3)-(4) and AS 46.13.045, the Alaska SERC is also responsible for reviewing and approving local, interjurisdictional, and state emergency plans for hazardous substance discharge response prepared under the Alaska Disaster Act, AS 26.23.⁵ The Alaska Disaster Act defines "disaster" to include "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, including . . . the release of oil or a hazardous substance, if the release requires prompt action to avert environmental danger or damage." AS 26.23.900(1)(B).

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

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

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

- (1) Preventing and minimizing injury and damage;
- (2) Prompt and efficient response;
- (3) Emergency relief;
- (4) Identification of geographical areas, municipalities, or villages especially vulnerable to a disaster;
- (5) Recommendations for zoning, building, and land use controls; safety measures for securing nonpermanent or semipermanent structures; and other preventive and preparedness measures;
- (6) Assistance to local officials in designing local emergency plans;
- (7) Authorization and procedures for the construction of temporary works designed to protect against or mitigate danger or loss;
- (8) Organization of manpower and chains of command;
- (9) Coordination of federal, state, and local disaster activities;
- (10) Coordination of the state emergency plan with federal disaster plans; and
- (11) Other matters necessary to carry out the Alaska Disaster Act.

See AS 26.23.040(a).

Each local and interjurisdictional disaster agency is required to prepare and keep current a disaster emergency plan for its area. AS 26.23.060(e). The state emergency plan and the local and interjurisdictional plans, insofar as they contain provisions relating to the release of oil or hazardous substances, must be substantially equivalent to the local emergency

response plans prepared by the LEPCs and the state and regional master plans prepared by DEC, use the same incident command systems, and be approved by the Alaska SERC. AS 26.23.215.

DISCUSSION

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

Your questions concerning the potential tort liability associated with response actions carried out during various stages of emergency response plan development and approval pose several difficulties. First, there are an infinite variety of circumstances under which a hazardous substance release could occur and under which an emergency response or the failure to respond could cause injury. While it's possible to outline the contours of tort law, the application of the law in any given circumstance to determine whether negligence exists and whether liability will be imposed ultimately depends on the unique facts of each case. Even slight differences in facts may lead to different findings regarding liability and immunity. Moreover, the law of torts changes frequently as the Alaska Supreme Court and the state legislature create new rights and remedies. The following discussion therefore highlights a number of statutes which provide protection from liability under the specific circumstances described in the statutes. In some instances, these statutes protect only the governmental entity mentioned; in others, the statutes limit personal liability. Because there may be instances where these statutes would not apply, the statutory "discretionary function exception" to state tort liability (statutory sovereign immunity) and the common law "official immunity" for state officers are discussed at length.

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

concerns the liability of entities other than the state as these entities play an integral role in emergency planning.

I. DELEGATION OF AUTHORITY

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

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

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

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

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

The statute which establishes the Alaska SERC and sets forth its powers and duties, AS 46.13, does not authorize the

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

II. PRELIMINARY DEFINITIONS RELATING TO TORT LIABILITY

SARA Title III authorizes citizen suits against a state governor or state emergency response commission, but not an LEPC, for failure to comply with certain requirements of the Act.⁶ 42 U.S.C.A. • 11046(a)(1)(C)-(D). SARA Title III also provides:

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

Id., • 11046(g). Thus, any person who believes he or she has been injured by an act or omission of the Alaska SERC or an LEPC

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

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

or their members may file a tort claim in state court.

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

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

Each state, through its laws, regulations, and court decisions, recognizes certain rights of individuals and businesses. A state's tort law protects these rights by providing a means for a person or business to seek compensation for losses or harm caused by another.

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

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

- (1) A duty requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
- (2) A failure on his or her part to conform to the standard required.
- (3) Proximate cause, that is, a reasonably close causal connection between the conduct and the resulting injury.
- (4) Actual loss or damage.

Id.

Statutes which provide immunity often distinguish between negligence and gross negligence or intentional misconduct. "Gross negligence" or "reckless misconduct" occurs when one has full knowledge of the hazards he or she is creating, so as to evidence a reckless disregard of the possible consequences and an indifference to the rights of others. Leavitt v.

Gillaspie, 443 P.2d 61, 65 (Alaska 1968). Gross negligence differs from ordinary negligence in several important respects:

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

The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligence is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

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

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

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

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

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

For purposes of emergency planning, the Alaska SERC establishes the boundaries of the local emergency planning districts based on regional boundaries established by DEC for the regional master plans or where appropriate, based on the boundaries of political subdivisions. The Alaska SERC may revise the boundaries of the districts. Although SARA Title III permits the designation of existing political subdivisions as emergency planning districts, 42 U.S.C.A. • 11001(b), the state statute does not designate existing political subdivisions as such, but merely provides that if the Alaska SERC deems it appropriate, the boundaries of the emergency planning districts may coincide geographically with the boundaries of the political subdivisions of the state. AS 46.13.040(2); AS 46.13.060.

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

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

The Alaska SERC plays a large role in emergency planning at the local level, and has a great deal of control over the

LEPCs. SARA Title III does not authorize citizen suits against the LEPCs for their failure to meet the requirements of the Act, but rather, against the governor and the Alaska SERC. See 42 U.S.C.A. • 11046. Neither SARA Title III nor AS 46.13 impose emergency planning duties on the boroughs or municipalities. Based on the above, for purposes of tort liability, the LEPCs are state agencies.

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

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

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

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

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

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

Many local committee members are self-employed, employed by or represent a private business or

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

(1) The local committee members are appointed by the state commission;

(2) The state commission has the necessary state authority to appoint local committee members;

(3) Both the state commission and the local committee are agencies of the state;

(4) State law recognizes the local committee members as agents of the state; and

(5) The committee member is acting within the scope of his authority.

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

Id. at 11.

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

IV. IMMUNITY STATUTES

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

AS 46.03.822 imposes strict liability on certain persons for various costs incurred as a result of a release of hazardous substances.⁷ Subsection (h) provides the state and

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

local governments immunity from liability under AS 46.03.822 in connection with certain response actions:

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

AS 46.03.822(h).

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

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

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

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

"Oil" is defined as:

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

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

This statute applies to (1) a catastrophic oil discharge that constitutes an emergency under AS 46.04.080(a), (2) a discharge of oil or hazardous substances declared an emergency under AS 46.03.865, (3) discharges declared an emergency by the governor under AS 26.23, (4) discharges or potential discharges that the commissioner of DEC reasonably believes may qualify under categories (1)-(3) above, and (5) discharges or potential discharges that the commissioner reasonably believes pose an imminent and substantial threat to public health or welfare or to the environment. AS 46.08.130(b).

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

Third, under certain circumstances, AS 46.03.823 limits the liability of "response action contractors" whose acts or omissions are not contrary to a response plan or order by a state agency having jurisdiction over the release. This statute applies only to response action contractors as that term is defined in AS 46.03.826(11).⁹ Similarly, under certain circum-

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butane, and other liquid hydrocarbons regardless of specific gravity.

AS 46.08.900(7).

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

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

(B) a person who is retained or hired by and

stances, AS 46.03.825 limits the liability of oil spill response action contractors. However, AS 46.03.825 is repealed effective July 1, 1992. Secs. 10, 12, ch. 92, SLA 1991.

D. Limited Liability for Responding to Disaster, AS 09.65.091

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

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

E. Limitation on Liability for Emergency Aid, AS 09.65.090

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

(a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need

(..continued)

is under control of a person described in (A) of this paragraph to provide services related to the response action contract; and

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

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

of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

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

. . . .

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

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

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

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

protects a municipality as well as its agents, officers, and employees.

AS 09.65.070 provides in part:

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

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

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

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

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

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

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

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

(4) is based on the exercise or perfor-

mance during the course of gratuitous extension of municipal services on an extraterritorial basis; or

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

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

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

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

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

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

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

Before determining whether statutory immunity applies in any given case, it is first necessary to determine whether the

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

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

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

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

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

With respect to emergency response plans, the various statutes which require emergency planning impose a duty of care on the Alaska SERC and the LEPCs. The public is the intended beneficiary of the plans, and it is foreseeable that in the absence of emergency plans or in the event of deficient plans, people could be injured and property damaged.¹⁰ The state could

¹⁰ For example, the House Conference Report on SARA Title III states, "The Senate amendment and House amendment both establish programs to provide the public with important information on the hazardous chemicals in their communities, and to establish emer-

thus be found liable if the duty of care is breached. The final prong of the analysis is to determine whether the discretionary function exception would provide immunity.

2. The discretionary function exception

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

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

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

(..continued)

gency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 3374. See also Williams v. Leybold Technologies, Inc., ___ F. Supp. ___, 1992 WL 26730 at 3 (N.D. Cal. 1992).

policy factors. I'Anson, 529 P.2d at 194.

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

Not immune: Once initial policy decision was made to maintain the Seward Highway during the winter by salting, sanding, and plowing, district engineer's decisions on how to allocate personnel and machinery were not immune. Abbott, 498 P.2d at 722. Negligent placement of highway signs and road stripes was not immune. I'Anson, 529 P.2d at 193-94. Negligent performance of hotel inspection by state fire officials was not immune. (By voluntarily undertaking fire inspection, upon discovery of extreme life hazard, state assumed a common law duty to protect occupants). Adams, 555 P.2d 240-44. Upon discovery of safety violations at pipe installation site, the Department of Labor's failure to take actions which would have prevented electrocution of worker was not immune. Wallace v. State, 557 P.2d 1120, 1124 (Alaska 1976). The state's negligent design of a runway at the Anchorage airport was not immune. JAL, 628 P.2d at 938. Once the policy decision had been made to reconstruct an overlapping road and railroad crossing, the approval of the reconstruction plans and the failure to place a sign at the crossing warning bicyclists of the particular hazard presented by the crossing were operational level decisions and not immune. Johnson, 636 P.2d at 64-66. The state's failure to control a dangerous parolee or warn his potential victims was not immune. Neakok, 721 P.2d at 1132-35. The City of Kotzebue was not immune when city police failed to respond to a telephone call in which caller identified himself, his location, and the likely scene of the crime, and informed police that he intended to kill a friend of his. City of Kotzebue v. McLean, 702 P.2d 1309, 1313-15 (Alaska 1985).

Immune: The state did not undertake to inspect hotel and abate fire hazards; and therefore, was immune. State v. Jennings, 555 P.2d 248, 250 (Alaska 1976). Decisions whether or not to designate intersection which was at considerable distance from school as a school safety zone or to undertake any other safety measures were discretionary and therefore immune. Jennings v. State, 566 P.2d 1304, 1311-13 (Alaska 1977). Decision to issue warning against fly-by-night operators who install highly flammable insulation was immune, but decisions regarding contents of warning were not immune. Urethane Specialties v. City of Valdez, 620 P.2d 683, 688 (Alaska 1980). Decision to install flashing amber and red light instead of red,

amber, and green traffic light was immune. Wainscott, 642 P.2d at 1357. Decision whether or not to install guardrail was immune. Industrial Indemnity, 669 P.2d at 563. Decision not to use dust control procedures on the Dalton Highway was immune. Freeman v. State, 705 P.2d 918, 920 (Alaska 1985). Decision to order removal of fence encroaching into right-of-way following disastrous storm was immune, but not the manner in which the fence was removed. Gates v. City of Tenakee Springs, 822 P.2d 455 (Alaska 1991).

3. Conclusion

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

On the other hand, the various emergency planning statutes differ in degree of requirements. The Alaska Disaster Act is worded very broadly and affords much room for discretion. SARA Title III and AS 46.13.090 are very precise; many requirements are straight forward and ministerial; for example, the identification of covered facilities, designation of facility emergency coordinators, and description of available emergency

¹¹ Only two cases were found in which an action has been brought against a state emergency response commission, neither of which involves tort liability. In Ohio Chamber of Commerce v. State Emergency Response Comm'n, Nos. 91AP-173, 91AP-174, 1991 WL 94447 (May 1, 1991), the court held that commission rules which required annual detailed facilities site plans showing the location of hazardous substances exceeded the scope of the commission's statutory authority and were unlawful. McCormick v. Anshutz Mining Corp., 29 ERC 1701 (Jan. 29, 1989), involved in part an action against the Missouri State Emergency Response Commission for failure to disseminate tier II information. The claim was dismissed because the plaintiffs had never requested the information and a regional commission had already promised to provide the information.

equipment and facilities would rarely require the exercise of discretion. Many of the planning tasks do not involve funding decisions, but rather entail the compilation of information, much of which is furnished by covered facilities pursuant to statutory requirements. Negligent errors and omissions in the plans with respect to those matters which are ministerial in nature may not be immunized.

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

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

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

A. No Plan

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

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

1. Potential Alaska SERC and LEPC liability

Inaction can result in liability, as can unreasonable delay. Adams v. State, 555 P.2d 235, 240 (Alaska 1976); State v. Guinn, 555 P.2d 530, 536-37 (Alaska). EPA has observed:

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

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

Further, the Federal Emergency Management Agency concluded:

[A] state statutory duty to have a current emergency preparedness disaster plan imposes an obligation on the governmental jurisdiction to prepare a plan. Failure to carry out a statutory duty might lead to liability even though the emergency management statute includes an immunity provision The statutory immunity in the emergency preparedness law might not protect a jurisdiction that failed to carry out a legal duty (to develop and maintain an emergency plan . . . where the immunity is provided only during a designated disaster.

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

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

2. Liability of responders

In the absence of an emergency response plan, those

persons involved in a response action have a common law duty to use due care and may have a statutory duty to meet applicable statutory or regulatory standards of care.

B. Plan Under Development

1. Potential Alaska SERC and LEPC liability

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

2. Liability of responders

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

C. Approved Plan

1. Potential Alaska SERC and LEPC liability

With respect to highway engineering plans, the court has remarked, "The state need not guarantee a perfect plan or results. But the state is liable for a failure to exercise reasonable care and skill." Moloso v. State, 644 P.2d 205, 217 (Alaska 1982). By analogy, provided the Alaska SERC and the LEPCs exercise reasonable care and skill in the preparation, review, and approval of the emergency response plans and follow applicable statutory requirements, the state will most likely enjoy immunity from any claim for damages arising from negligence in the planning process.

2. Liability of responders

Evidence of conduct in accordance with an emergency plan or departing from a plan may be weighed in determining liability. For example, in State v. Abbott, 498 P.2d 712 (Alaska 1972), the plaintiff introduced into evidence the Department of Highways' Standard Operating Procedures (S.O.P.s) for wintertime highway maintenance.¹³ With respect to the S.O.P.s, the court

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

noted, "Failure to comply with the S.O.P.s would seem to be operational negligence rather than policy-making discretion." 498 P.2d at 722 n.30. The S.O.P. quoted in footnote 13 resembles in level of detail many of the provisions that would be found in an emergency plan. To the degree the various emergency plans may be analogized to the S.O.P.s, and depending on the circumstances of the response, the failure to comply with a plan may be found to be operational negligence and not immune.

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

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

(..continued)

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

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

A. Official Capacity Suits Versus Personal Capacity Suits

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

B. Common Law Official Immunity

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

For executive acts alleged to violate common law rights, the court has adopted a two-step analysis: First, it must be determined whether or not the doctrine of official immunity applies to the public officer's alleged negligent conduct. If it does, the scope of that immunity must be determined. Absolute immunity immunizes an official from suit as well as damages; qualified immunity extends only to damages. Id. at 154, 158 n.17, n.19.

The doctrine of official immunity applies if the officer's actions are within the scope of his or her authority and are discretionary in nature. "Discretionary" in this context has a different meaning than that discussed above in connection with the discretionary function exception to state tort liability. The planning-operational distinction does not come into play. Instead, the court has described a public officer's discretionary acts as those involving a mistake in judgment or discretion, an erroneous interpretation and application of the law, or discretionary-policy decisions. Discretionary acts in this context require personal deliberation, decision, and judgment; while ministerial acts consist of obedience of orders or

the performance of a duty in which the officer is left with no choice of his or her own. Id. at 155.

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

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

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

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

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

- (1) The nature and importance of the function that the officer performed to the administration of government (i.e. the importance to

the public that this function be performed; that it be performed correctly; that it be performed according to the best judgment of the officer unimpaired by extraneous matters);

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

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

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

For example, in Bauman v. State, 768 P.2d 1097 (Alaska 1989), an action by a parent and child against a state trooper arising out of an investigation of an anonymous complaint of sexual abuse, the court found that all of the trooper's actions appeared to be within the scope of his authority and discretionary in nature. In an affidavit, the trooper had portrayed his investigation as objectively reasonable, undertaken in good faith, not malicious, and not corrupt. In the absence of evidence to the contrary, the trooper was entitled to qualified immunity.

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

CONCLUSIONS AND RECOMMENDATIONS

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

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

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

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

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

tion. The Alaska SERC may wish begin this process by identifying those policies which should be promulgated as regulations.

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

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

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

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

Hon. John A. Sandor, Comm'r
Dep't of Env'tl. Conservation
Our file # 663-91-0483

March 31, 1992
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House Bill No. 407 and Senate Bill No. 359 would provide clarity and certainty for the members of the Alaska SERC, the LEPCs, and the HSSTRC by providing immunity from personal liability for any act or omission occurring within the course and scope of the member's official duties under AS 46.13, unless the act or omission constitutes gross negligence or intentional misconduct. Unlike common law immunity, which only extends to discretionary acts, these bills would shield the members from personal liability arising from negligence in performing ministerial acts.

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

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

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

MS:tg