

Hon. John A. Sandor
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Local Emergency Planning
Committees and local
governments

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The Department of Law recently determined that the local emergency planning committees (LEPCs) established by the Alaska State Emergency Response Commission (Alaska SERC) are state agencies for purposes of receiving and expending funds, 1992 Inf. Op. Att'y Gen. (Jan. 23; 663-92-0131), and for purposes of tort liability and immunity, 1992 Inf. Op. Att'y Gen. (Mar. 31; 663-91-0483). Because LEPCs perform important emergency planning and community-right-to-know functions for their local communities, and because local governments are typically the first responders to hazardous substance spills, the Alaska SERC has asked whether LEPCs can be made a required element of local government. Another question is whether local emergency planning districts and LEPCs can take the form of service areas.

BACKGROUND

The Emergency Planning and Community-Right-To-Know Act of 1986, 42 U.S.C.A. •• 11001-11050 (1992) (Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III)), requires the governor of each state to establish a state emergency response commission, which in turn establishes LEPCs for purposes of emergency planning and gathering and disseminating information on hazardous substances.

SARA Title III requires the state emergency response commission to establish local emergency planning districts, and provides, "Where appropriate, the State emergency response commission may designate existing political subdivisions or multijurisdictional planning organizations as such districts." Id., • 11001(b). With respect to LEPCs, SARA Title III states:

Not later than 30 days after designation of emergency planning districts or 10 months after the date of the enactment of this title [enacted Oct. 17, 1986], whichever is earlier, the State emergency response commission shall appoint members of a local emergency planning committee

for each emergency planning district.

Id., • 11001(c). SARA Title III also authorizes the state emergency response commission to revise district boundaries and LEPC appointments. Id., • 11001(d). Moreover, "[i]nterested persons may petition the State emergency response commission to modify the membership of a local emergency planning committee." Id.

The state enabling legislation is found in AS 46.13. With respect to the emergency planning districts, AS 46.13.040(2) requires the Alaska SERC to "designate, and revise as necessary, the boundaries of emergency planning districts, using the boundaries of regions established under AS 46.04.200--46.04.210 [the statewide and regional master oil and hazardous substance discharge prevention and contingency plans] and of political subdivisions where appropriate." AS 46.13.060 further provides, "Boundaries for emergency planning districts are the regions designated by the Department of Environmental Conservation under AS 46.04.210 [the regional master oil and hazardous substance discharge prevention and contingency plans], unless otherwise designated by the commission."

AS 46.13.040(5) requires the Alaska SERC to "establish a local emergency planning committee for each emergency planning district, and appoint, and revise as necessary, the membership of each committee." AS 46.13.070 reiterates, "The commission shall establish and appoint the members of a local emergency planning committee for each emergency planning district."

Thus, both SARA Title III and state law permit the Alaska SERC to designate the boundaries of political subdivisions as the boundaries of local emergency planning districts. The fact that the local emergency planning district boundaries may coincide with municipal and borough boundaries, however, does not make the LEPCs municipal or borough entities.¹

¹ Other states have arrived at the same conclusion. For example, the Kansas State Emergency Response Commission has established each county as a planning district. The Kansas Attorney General's Office determined:

The LEPC is not a county government entity. While the planning districts correspond with county lines, the LEPC functions as a planning unit separate and distinct from the county, as a county. It is the responsibility of the LEPC, not the county, to formulate an emergency plan.

Neither SARA Title III nor AS 46.13 impose LEPC duties on local governments. 1992 Inf. Op. Att'y Gen. at 16 (Mar. 31; 663-91-0483). Instead, the state emergency response commissions must "supervise and coordinate" LEPC activities. 42 U.S.C.A. • 11001(a). Moreover, SARA Title III does not authorize citizen suits against LEPCs or local governments, but rather against state governors and state emergency response commissions. Id., • 11046(a)(1). As contemplated by SARA Title III, emergency planning for hazardous substance spills is part of a statewide, coordinated planning effort. 1992 Inf. Op. Att'y Gen. at 16 (Mar. 31; 663-91-0483). Thus, under SARA Title III, the LEPCs serve statewide planning needs and interests, within local district boundaries.

DISCUSSION

Can LEPCs Be Made Local Entities?

Under the Supremacy Clause of the United States Constitution, federal statutes preempt conflicting state legislation. U.S. Const. art. VI, cl. 2; State v. F/V Baranof, 677 P.2d 1245, 1249 (Alaska 1984), cert. denied, 469 U.S. 823. Therefore, the state may not change the structure of the LEPCs in such a way that would actually conflict with federal law. F/V Baranof, 677 P.2d at 1249.

Under SARA Title III, the Alaska SERC has substantial control over the LEPCs. As discussed above, at a minimum, federal law requires that the Alaska SERC:

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Op. Kan. Att'y Gen. No. 89-56 (May 1, 1989). The New York Attorney General's Office described the role of LEPCs as follows:

LEPCs are unincorporated entities created by and carrying out the directives of the Executive Department under Federal law. LEPCs have no legal affiliation with counties or other local governments. Their boundaries merely coincide with counties outside New York City and in the case of New York City, the LEPC is coterminous with its boundaries. In our view, LEPCs are entities of the State.

Op. N.Y. Att'y Gen. No. 89-F2 (Feb. 15, 1989).

- designate local emergency planning districts
- appoint members to the LEPCs
- revise district boundaries and LEPC appointments
- act upon petitions to modify the membership of an
LEPC
- supervise and coordinate LEPC activities
- review emergency plans prepared by LEPCs and
recommend revisions to ensure coordination with
other LEPC plans.²

SARA Title III requires the governor to appoint the state emergency response commission, and provides that if the governor does not appoint a commission, the governor shall operate as the commission. 42 U.S.C.A. • 11001(a). Thus, the designation of local emergency planning districts and the appointment of LEPCs are executive functions, vested in the executive branch of state government. Apart from the governor, SARA Title III does not authorize other entities or persons to perform the duties of the state emergency response commission or the LEPCs. Further, SARA Title III does not authorize either the state emergency response commission or the LEPCs to delegate responsibility for their functions to others. When a statute is silent on delegation, the general rule is that if the legislature intended a function to be performed only by designated persons

² State law imposes additional requirements with respect to the LEPCs. The Alaska SERC must approve the local emergency response plans prepared by the LEPCs. AS 46.13.040(4); AS 46.13.045. While emergency planning under SARA Title III pertains only to "extremely hazardous substances," under AS 46.13.090(a)(2), local emergency response plans must also include methods and procedures for responding to releases of hazardous substances. In addition, the plans must contain an incident command system. AS 46.13.045(b)-(c); AS 46.13.090(b). Apart from its responsibilities in connection with LEPCs, the Alaska SERC is further authorized to "perform other coordinating, advisory, or planning tasks related to hazardous substance emergency planning and preparedness, community right-to-know reporting, toxic chemical release reporting, or management of hazardous substances." AS 46.13.040(8); see also AS 46.13.040(9).

because of their special qualifications, a subdelegation is invalid. Kaiser v. Sundberg, 734 P.2d 64, 70 (Alaska 1987). See Eagles v. Samuels, 329 U.S. 304, 308-17 (1946); City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346, 351-53 (Alaska 1990). Because SARA Title III requires that the governor appoint the state emergency response commission and appoint to the commission persons with technical expertise in the emergency response field, 42 U.S.C.A. • 11001(a), it follows that Congress intended that only the commission designate local emergency planning districts and appoint LEPCs. Congress has not given the states the discretion to vest the designation of local emergency planning districts or the appointment of LEPC members in governmental entities other than the state emergency response commission or the governor.

Within the above constraints, it may be possible to amend state laws to make the LEPCs an element of local government. There have been cases in other jurisdictions that support the proposition that in matters of general concern, such as police and fire protection, the state may appoint the members of a local board. See 63 Am. Jur. 2d Public Officers and Employees • 99 (1984); see also Sailors v. Bd of Educ., 387 U.S. 105, 108 (1967). Such a procedure, however, may violate the principle of home rule, since under the Alaska Constitution, a city or borough is not an agency of the executive branch of state government. See Wellmix, Inc. v. City of Anchorage, 471 P.2d 408, 410 (Alaska 1970). Further, state appointment of a local board or commission clearly conflicts with AS 29.20.320, which authorizes the borough and municipal assemblies to establish local boards and commissions by ordinance and which authorizes the mayor to appoint their members, subject to confirmation by the assembly.

While it may be possible to amend state law to make the LEPCs a required element of local government, it may not be practicable to do so, because to meet minimum federal requirements, the Alaska SERC must retain substantial control over the LEPCs.

Can LEPCs BE Made Service Areas?

Under the Alaska Constitution, all local government powers are vested in boroughs and cities. Alaska Const. art. X, • 2. Article X, section 3, of the constitution divides the entire state into organized and unorganized boroughs. Under AS 29.03.010, areas of the state not within the boundaries of an organized borough constitute a single unorganized borough.

The constitution allows two types of service areas, service areas within organized boroughs and service areas in the unorganized borough. With respect to organized boroughs, article X, section 5, of the Alaska Constitution states:

Service areas to provide special services within an organized borough may be established, altered, or abolished by the assembly, subject to the provisions of law or charter. A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city. The assembly may authorize the levying of taxes, charges, or assessments within a service area to finance the special services.

With respect to the unorganized borough, article X, section 6, of the Alaska Constitution states:

The legislature shall provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility. It may exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough.

AS 29.03.020 further provides:

Allowing for maximum local participation, the legislature may establish, alter, or abolish service areas within the unorganized borough to provide special services, that may include but are not limited to schools, utilities, land use regulations and fire protection. A new service area may not be established if the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city.

To summarize, under the Alaska Constitution and Title 29, service areas must either be within an organized borough and established by the borough assembly or within the unorganized borough and established by the state legislature. See State v. Alex, 646 P.2d 203, 212 (Alaska 1982). SARA Title III, on the other hand, requires that the Alaska SERC, an executive branch agency, designate the local emergency planning districts and

appoint the LEPCs. Under SARA Title III, neither the borough assemblies nor the state legislature may designate local emergency planning districts or appoint LEPC members. Since the legislature may not designate the local emergency planning districts nor appoint LEPC members, it follows that the legislature may not delegate these functions to local governments. To do so would run afoul of the federal Supremacy Clause, as well as the separation of powers doctrine implicit in the Alaska Constitution, as Congress has directed that the state emergency response commission or the governor, the executive branch, designate the districts and appoint LEPC members. See Bradner v. Hammond, 553 P.2d 1, 5-7 (Alaska 1976). Therefore, while the local emergency planning districts may have the same geographical boundaries as service areas, the districts and the LEPCs cannot take the form of service areas.

CONCLUSION

As can be seen from the above discussion, the Alaska SERC's questions concerning the LEPCs and local governments raise very difficult legal issues concerning the relationship of the federal, state, and local governments. It may be possible to amend state law to make the LEPCs a required element of local government. However, given the explicit requirements of SARA Title III, the Alaska SERC and the state legislature are fairly constrained in their ability to make adjustments in the legal framework that Congress has created for emergency planning and community-right-to-know reporting. It may be more fruitful to explore other means of improving coordination between the LEPCs and local governments.

For example, article X, section 13, of the Alaska Constitution authorizes local governments to enter into agreements for the cooperative or joint administration of any function or power with the state, unless otherwise prohibited by law or charter. AS 29.35.010(13) also authorizes municipalities to enter into cooperative agreements with the state. Any cooperative agreements between the Alaska SERC, the LEPCs, and the local governments would have to be consistent with the legal requirements of SARA Title III and AS 46.13. The use of cooperative agreements has an advantage over statutory change in that each agreement could be individually tailored to meet the needs and interests of the local government and the LEPC involved.

Local governments may also take advantage of AS 29.35.500--29.35.590 and establish a local program for the

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reporting of hazardous chemicals, hazardous materials, and hazardous wastes. An LEPC could participate in such a program by means of a cooperative agreement.

If we can be of further assistance with respect to this matter, please do not hesitate to contact us.

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