STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93025

NO.
STATE OF NEBRASKA
OFFICIAL
APR 2 1993
DEPT. OF JUSTICE

DATE: April 1, 1993

SUBJECT: Authority of the Nebraska State Emergency Response Commission concerning designation of additional facilities under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050.

REQUESTED BY: Major General Stanley M. Heng
Nebraska Adjutant General

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You have requested our opinion as to whether the Nebraska State Emergency Response Commission has the authority to designate additional facilities for regulation under the federal Emergency Planning and Community Right-to-Know Act of 1986, and, if so, what is the appropriate method by which such a designation may be accomplished. As is discussed in detail below, we believe that the State Emergency Response Commission has authority to make such additional designations. However, such designations must be done by the promulgation of Rules or Regulations under the Nebraska Administrative Procedure Act, *Neb. Rev. Stat.* §§ 84-901 to 84-920 (1987, Cum. Supp. 1992).

In 1986, the United States Congress enacted a series of statutes designed to bring about the creation and implementation of emergency plans for responding to the release of hazardous substances into the environment. The Emergency Planning Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (commonly known as SARA Title III), provides for the establishment of State Emergency Response Commissions (SERC's), Local Emergency Planning

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Districts (LEPD's), and Local Emergency Planning Committees (LEPC's). That Act is part of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613, October 17, 1986 (SARA).

Under the federal legislation, the Governor of each state is to appoint a State Emergency Response Commission, consisting of persons having expertise in dealing with emergencies. Each state's SERC, in turn, establishes Local Emergency Planning Districts throughout the state, to be served by a Local Emergency Planning Committee appointed by the SERC. The LEPC's are to identify hazardous materials in use within their district, and to prepare a comprehensive emergency response plan to be implemented in the event of the release of hazardous materials. In addition to appointing the LEPC members, the federal legislation also requires the SERC to review the comprehensive emergency plan for each LEPD, and to coordinate the plans for all the LEPD's to ensure a consistent, efficient response to emergency situations. The SERC also provides other guidance and necessary training to the LEPC's.

Nebraska's SERC was created by Executive Order 92-2, signed by Governor Nelson on March 18, 1992. That Executive Order creates a SERC within the State Civil Defense Agency (SCDA) under authority of ***Neb. Rev. Stat. §*** 81-829.40 (2) (1987) which specifically authorizes the Governor to "issue proclamations and make . . . the necessary orders . . ." to carry out the provisions of the Nebraska Disaster and Civil Defense Act, ***Neb. Rev. Stat. §§*** 81-829.36 to 81-829.74 (1987). The Nebraska SERC is chaired by the Adjutant General (as State Civil Defense Director) and is made up of the Directors of a number of other state agencies including the Department of Health, the Department of Environmental Quality, the Department of Roads, the State Fire Marshall and the Nebraska State Patrol. As established by Executive Order 92-2, the SERC within the SCDA is "charged with overseeing compliance with the requirements of Title III of the Superfund Amendments and Reauthorization Act of 1986. . . ."

Section 302 of SARA Title III requires the owner or operator of a facility where there is an extremely hazardous substance present in excess of a certain threshold planning quantity to notify the SERC of the presence of the substance. This notification triggers the emergency planning duties of the individual LEPC where the facility is located. You have indicated that, in your view, the definition of "facilities" subject to this notification requirement as set out in SARA Title III does not include portable facilities such as portable liquid fertilizer plants. However, there are portable fertilizer manufacturing plants which move and combine large quantities of anhydrous ammonia and superphosphoric acid in rail cars in Nebraska, and the SERC would like to consider designating those portable plants as

"facilities" which are subject to notification requirements. While Section 302 (b) (2) of SARA Title III, 42 U.S.C. § 11002 (b) (2), gives the Governor or the SERC the authority to designate additional facilities which shall be subject to the notification requirements of SARA Title III after public notice and comment, you are concerned that the SERC may not have authority for additional designations under state law. Hence, your opinion request concerning the authority of the SERC to designate additional facilities under state law and the method for doing so.

In our Informal Opinion No. I92-031 dated April 23, 1992, to Richard Semm, Assistant Director of the SCDA, we indicated that, in our view, the SERC had the authority under state law to promulgate rules and guidelines for emergency planning and training of first responders so long as the rules promulgated by the SERC were issued though the SCDA. Our opinion was based upon the premise that the SERC should be considered a part of the SCDA on the basis of Executive Order 92-2. The SCDA, in turn, has broad authority to issue rules and regulations concerning disaster procedures and disaster planning. For example, ***Neb. Rev. Stat. §*** 81-829.41 (1987), dealing with the SCDA, provides, in pertinent part:

> (5) The state disaster and other civil defense plans or any part thereof may be incorporated in rules or regulations of the agency.
>
> (6) The state Civil Defense Agency shall: . . . (c) Promulgate standards and requirements for local and interjurisdictional disaster and civil defense plans; (d) Periodically review local and interjurisdictional disaster and civil defense plans; . . . (f) Establish and operate or assist political subdivisions, their disaster and civil defense agencies, and interjurisdictional disaster and civil defense agencies to establish and operate training programs and programs of public information; . . . (k) Prepare, for issuance by the Governor, proclamations, orders, rules and regulations as are necessary and appropriate in coping with disasters; (l) Cooperate with the federal government and any public or private agency or entity in achieving any purpose of sections 81-829.36 to 81-829.68 [the state Disaster and Civil Defense Act] and in implementing programs for disaster prevention, preparation, response, and recovery; and (m) Do other things necessary, incidental, or appropriate for the implementation of sections 81-829.36 to 81-829.68.

Since the SCDA has broad authority to issue rules and regulations concerning civil defense planning, we concluded that the SERC, as

a part of the SCDA, also has such authority provided that the rules and regulations are issued through the SCDA.

It seems to us that similar reasoning applies to your question regarding the authority of the SERC to designate additional facilities under SARA. Since the SERC can issue rules and regulations through the SCDA, and since the SERC is empowered to oversee state compliance with SARA under Executive Order 92-2, we believe that the SERC could promulgate rules and regulations through the SCDA which would implement Section 302 (b) (1) of SARA Title III and thereby designate additional facilities for the SARA notification requirements. Those additional facilities could include portable fertilizer manufacturing plants.

While it appears that the SERC can designate additional facilities which will be subject to the notification requirements of SARA, we also believe that such a designation process must be accomplished though a rule-making procedure under state law.

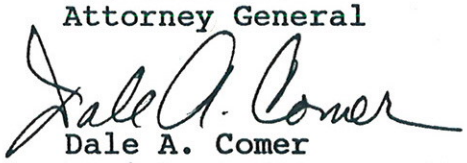
As a part of the SCDA, the SERC is authorized to issue rules and regulations under the procedures set out in the Nebraska Administrative Procedure Act (APA). Under ***Neb. Rev. Stat. §*** 84-901 (1987), a rule or regulation subject to the requirements of the APA is defined as:

> . . . any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure . . .

It seems to us that the designation of additional facilities under SARA fits under the definition of rule or regulation set out in § 84-901. Consequently, we believe that such a designation process must be accomplished through an APA rule-making procedure. Coincidentally, compliance with the APA in such a designation process appears to meet the notice and comment requirements of Section 302 (b) (2) of SARA Title III, 42 U.S.C. §11002 (b) (2).

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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Approved:

DON STENBERG, Attorney General