

OPINION NO. 89-001

Syllabus:

1. Prior to the effective date of Sub. S.B. 367, 117th Gen. A. (1988) (eff. Dec. 14, 1988) (enacting R.C. Chapter 3750), state law implementing the "Emergency Planning and Community Right-to-Know Act of 1986," Pub. L. 99-499, Title III, §§301-320, 100 Stat. 1729-1758 (codified at 42 U.S.C. Chapter 116) consisted of Ohio Governor's Executive Order 87-16 and rules, orders, and resolutions of the State of Ohio Emergency Response Commission then in effect.
2. Under 42 U.S.C. §§11001 through 11050 and state law in effect prior to Sub. S.B. 367, county officials had no duty to participate in the activities of the State of Ohio Emergency Response Commission or local emergency planning districts and committees but were authorized to cooperate with those agencies by the authority of R.C. 307.85.
3. 42 U.S.C. §§11001 through 11050 and state law in effect prior to Sub. S.B. 367 imposed no penalties applicable to county officials for the nonperformance of "emergency planning and response" duties.
4. When the State Emergency Response Commission designated a local emergency planning district and appointed members to its corresponding local emergency planning committee pursuant to 42 U.S.C. §11001 and state law in effect prior to Sub. S.B. 367, the local emergency planning committee for such district was not a county board and the members of the local emergency planning committee were not county officers for purposes of R.C. 309.09 and the prosecuting attorney had no duty to serve as legal adviser to such district or such members.

To: Robert P. DeSanto, Ashland County Prosecuting Attorney, Ashland, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 23, 1989

I have before me your request for my opinion concerning implementation on the county level of the federal "Emergency Planning and Community Right-to-Know Act of 1986" (hereinafter the Act). You have asked that I discuss the duties of county officials and local emergency planning committee members, their immunity from liability and penalties for failure to perform such duties under the Act.¹ Pursuant to your discussion with a member of my staff, I have rephrased your questions as follows:

1. What are the legal duties of county officials pursuant to the Act, Ohio Governor's Executive Order 87-16, and State Emergency Response Commission rules, orders and resolutions?
2. What are the penalties for nonperformance by county officials of the duties pursuant to the Act, Ohio Governor's Executive Order

¹ The Attorney General is not empowered to provide authoritative interpretations of federal law. 1985 Op. Att'y Gen. No. 85-007. See also R.C. 109.12. The Attorney General is authorized, however, to advise county prosecuting attorneys as to the extent of the official duties of county officials. R.C. 109.14. See also 1987 Op. Att'y Gen. No. 87-089; Op. No. 85-007. Here, where there is a question concerning the extent of the duties of county officials to implement a particular program, the Attorney General may render an opinion.

87-16, and State Emergency Response Commission rules, orders and resolutions?

3. For purposes of immunity from liability and the county prosecuting attorney's duty to serve as legal adviser, is a local emergency planning district a county board?
4. For purposes of immunity from liability and the county prosecuting attorney's duty to serve as legal adviser, are members of the local emergency planning committees county officers?

The "Emergency Planning and Community Right-to-Know Act of 1986," Pub. L. 99-499, Title III, §§301-320, 100 Stat. 1729-1758 (codified at 42 U.S.C. Chapter 116), provides for establishment of state emergency response commissions and local emergency planning districts with local emergency planning committees to prepare and implement emergency plans for responding to the release of hazardous substances into the environment. The Act also imposes duties upon owners and operators of facilities where designated hazardous substances are present to inventory them and notify the state emergency response commission and local emergency planning committee of the presence or release of designated hazardous substances.

I will first examine the organizational structure implemented in Ohio to comply with the Act.² Also, in order to determine the involvement of county officials, it is necessary to examine both federal and state law.

State commissions, planning districts and local committees under the Act are established pursuant to 42 U.S.C. §11001 (enacted Oct. 17, 1986), which states in relevant part:

(a) Not later than six months after the date of the enactment of this title, the Governor of each State shall appoint a State emergency response commission. The Governor may designate as the State emergency response commission one or more existing emergency response organizations that are State-sponsored or appointed. The Governor shall, to the extent practicable, appoint persons to the State emergency response commission who have technical expertise in the

² Subsequent to your request for my opinion, the Ohio General Assembly enacted Sub. S.B. 367, 117th Gen. A. (1988) (eff. Dec. 14, 1988). Sub. S.B. 367 enacts R.C. Chapter 3750 which establishes and prescribes the operation of the Emergency Response Commission and local emergency planning committees and districts. Newly enacted R.C. 3750.03(F) designates the local emergency planning committee of an emergency planning district lying wholly within a single county as a county board and expressly provides that it shall "receive the service of...the prosecuting attorney of the county in the same manner as other county boards." This section also provides designated legal advisers for the local emergency planning committees of multicounty, joint and joint interstate districts. In addition, other provisions of Sub. S.B. 367 amend and enact Revised Code sections relevant to "emergency response and planning" matters. Inasmuch as your request concerns the operation of the Commission and local committees and districts as they have been operating under Ohio Governor's Executive Order 87-16 (April 15, 1987) and State of Ohio Emergency Response Commission rules, orders and resolutions prior to the effective date of Sub. S.B. 367, this opinion will address the operation of the Commission and local committees and districts during the period from the promulgation of Executive Order 87-16 to the effective date of Sub. S.B. 367. Sub. S.B. 367 abolished the State Emergency Response Commission created by Executive Order 87-16. All resolutions pertaining to the functions assigned to the Emergency Response Commission created by Sub. S.B. 367 shall continue in force until duly modified or terminated by the Emergency Response Commission.

emergency response field. The State emergency response commission shall appoint local emergency planning committees under subsection (c) and shall supervise and coordinate the activities of such committees....

(b) Not later than nine months after the date of the enactment of this title, the State emergency response commission shall designate emergency planning districts in order to facilitate preparation and implementation of emergency plans. Where appropriate, the State emergency response commission may designate existing political subdivisions or multijurisdictional planning organizations as such districts....

(c) Not later than 30 days after designation of emergency planning districts or 10 months after the date of the enactment of this title, whichever is earlier, the State emergency response commission shall appoint members of a local emergency planning committee for each emergency planning district. Each committee shall include, at a minimum, representatives from each of the following groups or organizations: elected State and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the requirements of this subtitle....

In order to implement the Act in Ohio, Governor Celeste created the State of Ohio Emergency Response Commission (hereinafter the Commission) by Ohio Governor's Executive Order 87-16 (April 15, 1987) (hereinafter Executive Order 87-16). Executive Order 87-16 states, in part:

The Commission shall consist of an indefinite number of members who shall be appointed by and serve at the pleasure of the Governor. Half are to serve for a term of one year and half are to serve for two years; they shall serve without compensation, except that they shall be compensated for the reasonable expenses incurred in the discharge of their duties.

The statutory head or his designated representative of the following State agencies shall be a member of the Commission: Department of Administrative Services; Department of Agriculture; Attorney General's Office; Disaster Services Agency; Environmental Protection Agency; State Fire Marshal's Office[;] Department of Commerce; Hazardous Waste Facility Board; Department of Health; Department of Highway Safety; Industrial Commission; Department of Industrial Relations; Public Utilities Commission; State and Local Government Commission; and Department of Transportation.

The Governor shall appoint the following other members which shall include but not be limited to four members representing industries regulated by Title III of SARA [Superfund Amendments and Reauthorization Act of 1986]; four members from environmental advocacy organizations; seven members from public safety organizations who have technical expertise in the emergency response field; one member from the Ohio House of Representatives and one member from the Ohio Senate. These members shall, to the extent practicable, have technical expertise in the emergency response field.

It is further ordered that the lead organization in the Commission shall be the Ohio Environmental Protection Agency by and through its Director.

It is further ordered that the Commission shall meet as often as necessary and may organize itself in such committees as necessary to implement Title III of SARA in the State of Ohio. At least one meeting of the full Commission shall be held annually. The Commission may establish internal rules for its operation.

It is further ordered that the Commission may conduct whatever activities are necessary to implement Title III of SARA in the State of Ohio including all authority and responsibilities of the Commission as set forth in Title III and so long as such activities are not inconsistent

with Title III of SARA. By way of illustration and not limitation, the Commission is to take the following actions:

1. designate emergency planning districts by July 17, 1987; and
2. appoint local emergency planning committees for each district; and
3. supervise and coordinate the activities of the planning committees; and
4. review emergency plans to be developed by the local committees and the affected facilities; and
5. receive chemical release notification as required by SARA; and
6. establish procedures for handling public information requests for copies of:
 - a) emergency response plans;
 - b) material safety data sheets;
 - c) the list of extremely hazardous substances;
 - d) storage inventory reports; and
 - e) toxic chemical release reports [; and]
7. establish a procedure whereby emergency notifications required by Section 304 of Title III of SARA, 42 U.S.C. Section 11004, shall be provided to the Commission by telephone notification to the Ohio Environmental Protection Agency Office of Emergency Response (800-282-9378) and written follow-up notification shall be submitted to the Ohio Environmental Protection Agency Office of Emergency Response; and
8. determine whether owners or operators of facilities which are subject to the reporting requirements of Subtitle B of Title III of SARA, in order to comply with Section 311(a) of Title III of SARA, 42 U.S.C. Section 11021(a), shall be required to submit lists of hazardous chemicals to the Commission, which lists meet the requirements of Title III of SARA, as there is concern in the lead organization that allowing owners or operators to submit material safety data sheets in lieu of lists of hazardous chemicals may be impractical or undesirable; and
9. establish emergency and hazardous chemical inventory forms consistent with Section 312 of Title III of SARA, 42 U.S.C. Section 11022, and determine whether the Commission shall request Tier II information as described in Section 312 of Title III of SARA, 42 U.S.C. Section 11022; and
10. establish a procedure for handling information submitted to the Commission which is claimed to be a trade secret.

It is further ordered that the Director of the Ohio Environmental Protection Agency is designated as the official of the State of Ohio to whom toxic chemical release forms shall be submitted pursuant to Section 313 of Title III of SARA, 42 U.S.C. Section 11023. The Director of the Ohio Environmental Protection Agency shall have the authority to implement Section 313 of Title III of SARA and may establish procedures by which toxic chemical release forms shall be submitted to the State of Ohio.

Executive Order 87-16 was issued pursuant to R.C. 107.18(A), which authorizes the governor, by executive order, to designate or create an agency or commission to qualify the state to participate in a federal program or activity. R.C. 107.18(A) states, in part:

Except as otherwise provided in the Revised Code, the governor may, by executive order, designate or create such agency, commission, or advisory body, subject to his jurisdiction or otherwise, as a law or regulation of the United States may require to qualify the state, a department or agency thereof, or a unit of local government to participate in a federal program or activity specified in the executive order. The governor may appoint the administrator of such agency or the members of such commission or advisory body and grant to it such rank in state government and such powers as a federal law or regulation may require.

See also R.C. 107.17 (governor by executive order empowered to commit state to participation in federal programs).

Pursuant to 42 U.S.C. §11001 and Executive Order 87-16, the State Emergency Response Commission adopted a formal resolution which concerns the establishment of local emergency planning districts and states in relevant part:

Background

The State of Ohio Emergency Response Commission must designate Local Planning Districts to facilitate preparation and implementation of local emergency plans. Thirty days after designation of emergency planning districts the State of Ohio Emergency Response Commission must appoint members to a local committee for each planning district (Section 301).

Section 303(C)(7) of Title III requires that local plans include provisions for precautionary evacuation and alternative traffic routes.

Recommendation

Due to the above stated facts[,] the State of Ohio Emergency Response Commission moves that each local emergency planning district be no smaller than a one county geographical unit. The Commission further moves that the local planning district may consist of multiple county geographical units if the counties are contiguous, and have indicated the desire to be recognized as a single planning unit by presenting a mutual aid agreement to the Commission. Any such agreements shall be submitted to the Commission Planning Committee by July 6, 1987.

State of Ohio Emergency Response Commission Resolution 87-03 (June 3, 1987). Resolution 87-03 also solicited the cooperation of the boards of county commissioners by seeking their recommendation of individuals for appointment to the local emergency planning committees. The resolution states:

The State of Ohio Emergency Response Commission furthermore recommends that the County Commissioners submit the names of local persons, along with their resumes, whom they are recommending for appointment to their local Emergency Planning Committee, no later than August 1, 1987. Section 301(C) of SARA directs each Local Emergency Planning Committee to include, at a minimum, representatives from[:] elected state and local officials, law enforcement, disaster services, fire, first aid, health, local environmental, hospital, transportation, broadcast and/or print media, community groups, and the operators of facilities subject to Title III. This single package shall be submitted to the chair of the State Commission's Planning Committee at:

Ohio Disaster Services Agency
2825 West Granville Road
Worthington, Ohio 43085.

The Planning Committee will advise the Commission regarding the adequacy of these submittals no later than August 15, 1987.

Subsequent to this resolution, the Board of Ashland County Commissioners adopted a resolution of intent that Ashland County be designated a local emergency planning district. After reviewing the resolutions of the boards of county commissioners of Ashland and other counties, the State of Ohio Emergency Response Commission designated eighty-seven local emergency planning districts, with each district corresponding to the geographic limits of a particular county except one district which corresponds to the combined geographic limits of Greene and Montgomery counties. State of Ohio Emergency Response Commission Resolution 87-05 (July 16, 1987). The local emergency planning committee members for the district corresponding to the geographic limits of Ashland County were appointed by the Commission by State of Ohio Emergency Response Commission Resolution 87-63 (Sept. 19, 1987).

Your first question asks whether county officials had duties under the Act, Executive Order 87-16, or State Emergency Response Commission rules, orders and resolutions. No language in the Act imposes duties on county officials. Instead, the Act makes the Governor responsible for implementing the Act in Ohio. The Governor's primary duty, to appoint a State emergency response commission, was accomplished by Governor Celeste's appointment of the State of Ohio Emergency Response Commission. Executive Order 87-16. No language in Executive Order 87-16 imposed any duties upon county officials. Rather, the Act imposes duties on the Commission, among which are the designation of local emergency planning districts and the appointment of emergency planning committees for such districts. Although the Act permits the designation of existing political subdivisions as emergency planning districts, Executive Order 87-16 did not designate counties as such. The State of Ohio Emergency Response Commission, instead, chose to appoint districts independent of, but geographically coextensive with, county boundaries. The resolutions of the Commission imposed no duties upon county officials. I conclude that county officials have no duties under the Act, and had no duties under Executive Order 87-16 or State Emergency Response Commission rules, orders or resolutions.³

Your second question concerns potential penalties for non-compliance by county officials with the terms of the Act, the Executive Order, and Commission rules, orders and resolutions. Inasmuch as the Act imposes no duties upon county officials, and the Executive Order and Commission rules, orders and resolutions imposed no such duties, the Act, Executive Order and Commission rules, orders and resolutions set forth no penalties for the nonperformance of any duties.⁴

³ Although county officials had no emergency response and planning duties imposed upon them by the Act, Executive Order 87-16, or the State Emergency Response Commission rules, orders or resolutions, county officials could, however, cooperate with the Commission and local emergency planning committees under the authority of R.C. 307.85(A), which states:

The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state.

⁴ Although there are no penalties for the nonperformance of duties, disincentives may apply. For example, 40 C.F.R. pt. 310 provides for reimbursement to counties and other units of local government for costs of temporary emergency measures to prevent or mitigate injury to human health or the environment but requires as a condition precedent for reimbursement that the county or other unit of local government be included in a comprehensive emergency response plan completed by the local emergency planning committee.

You have asked whether the local emergency planning district, under state law then in effect, was a county board for purposes of the county prosecuting attorney's duty to provide legal services. R.C. 309.09 empowers and restricts the prosecuting attorney to serve as legal adviser to enumerated county entities. R.C. 309.09(A) states in relevant part:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

The term "county board" has been restricted to "boards which are essentially a subdivision of a county or a subordinate department of the county." 1984 Op. Att'y Gen. No. 84-099; 1981 Op. Att'y Gen. No. 81-059; 1975 Op. Att'y Gen. No. 75-014; 1961 Op. Att'y Gen. No. 2383, p. 366; 1950 Op. Att'y Gen. No. 1970, p. 446. There is no comprehensive test as to when an entity is "essentially a subdivision of the county," but prior opinions of the Attorney General have given guidance when an entity is not a county board. For example, when an entity's jurisdiction is not required to be coextensive with the territorial limits of the county, the entity is not a county board. Op. No. 81-059; 1950 Op. No. 1970; 1927 Op. Att'y Gen. No. 593, p. 1006. The fact that geographic boundaries of an entity, however, are coextensive with a county is not, in itself, sufficient to justify the conclusion that the entity is a county board. Op. No. 84-099. If an entity is established other than by a county, such as by a governor's executive order or by a state commission's resolution, it is unlikely the entity is a county board. Op. No. 84-099; Op. No. 81-059. A most important consideration is whether the entity is subject to the supervision of the county; if it is not subject to supervision by the county, it is not a county board. Op. No. 84-099; Op. No. 75-014; 1950 Op. No. 1970; 1927 Op. No. 593.

Neither Executive Order 87-16 nor any language in the Revised Code in effect prior to the effective date of Sub. S.B. 367 explicitly or impliedly classified a local emergency planning district as a county board. I conclude, accordingly, that a local emergency planning district, under state law then in effect, was not a county board, but an entity separate from the county. I base my conclusion on the fact that a local emergency planning district did not need to be coextensive with the geographical limits of a county inasmuch as one district was comprised of two counties and all of the districts could have been comprised of more territory than a single county. I also consider as persuasive support for my conclusion the designation of local emergency planning districts and the appointment of the members of the corresponding local emergency planning committees by the State of Ohio Emergency Response Commission rather than by individual county officials. I view the resolution of intent of the Board of Ashland County Commissioners and the board's recommendation of persons to serve on the committee as cooperation by Ashland County under R.C. 307.85, which empowers a board of county commissioners to cooperate with other agencies in establishing and operating any federal program enacted by the Congress of the United States. I am strongly convinced that the local planning districts were not county boards because the duty of supervising the local districts squarely vested in the State of Ohio Emergency Response Commission by Executive Order 87-16 and the Act. Because I have concluded that a local emergency planning district, under state law then in effect, was not a county board, I conclude that the county prosecuting attorney had no duty to serve as legal adviser to the local district.

Your fourth question asks that I determine whether members of local emergency planning committees, under state law then in effect, were "county officers." If they are so designated, the county prosecuting attorney had a duty to serve them as legal adviser pursuant to R.C. 309.09. Since the local emergency planning district was not a county board, it follows that the district's corresponding local emergency planning committee members were not county officers. To be such an officer, one must serve in a position that is a part of county government. See 1962 Op. Att'y Gen. No. 2840, p. 144 (because the position of county director of civil

defense is a part of county government, the director is a county officer). *See also State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (public office defender, in part, by delegation of sovereignty, legislatively defined powers, and independent exercise of judgment). Inasmuch as the local emergency planning district was not a county board or a part of county government, the county was not the source of the committee's delegated authority, and the committee was not subject to county control, I conclude that a member of a local emergency planning committee was not a county official for purposes of R.C. 309.09.⁵

It is therefore my opinion and you are hereby advised that:

1. Prior to the effective date of Sub. S.B. 367, 117th Gen. A. (1988) (eff. Dec. 14, 1988) (enacting R.C. Chapter 3750), state law implementing the "Emergency Planning and Community Right-to-Know Act of 1986," Pub. L. 99-499, Title III, §§301-320, 100 Stat. 1729-1758 (codified at 42 U.S.C. Chapter 116) consisted of Ohio Governor's Executive Order 87-16 and rules, orders, and resolutions of the State of Ohio Emergency Response Commission then in effect.
2. Under 42 U.S.C. §§11001 through 11050 and state law in effect prior to Sub. S.B. 367, county officials had no duty to participate in the activities of the State of Ohio Emergency Response Commission or local emergency planning districts and committees but were authorized to cooperate with those agencies by the authority of R.C. 307.85.
3. 42 U.S.C. §§11001 through 11050 and state law in effect prior to Sub. S.B. 367 imposed no penalties applicable to county officials for the nonperformance of "emergency planning and response" duties.

⁵ The discussion in this opinion focuses on the county role in "emergency planning and response" as established and implemented by 42 U.S.C. §§11001 through 11050, Ohio Governor's Executive Order 87-16 and the rules, orders and resolutions of the State of Ohio Emergency Response Commission. Inasmuch as I have concluded that a local emergency planning district was not a county board and the members of a local emergency planning committee were not county officers, I have confined my discussion to the effect of emergency planning and response matters upon county officials as county officers. I am aware that both 42 U.S.C. §11001 and State of Ohio Emergency Response Commission Resolution 87-03 (June 6, 1987), require local emergency planning committees to "include at a minimum representatives from: elected...local officials...." It is thus probable that a county officer would have served as a member of a local emergency planning committee. Such county officers who served as members of local emergency planning committees were not county officers by virtue of representing the county on the local emergency planning committee since their duties were performed for the local emergency planning committee and not the county. As such they were not entitled to representation by the county prosecuting attorney in their capacity as members of a local emergency planning committee. *See* 1985 Op. Att'y Gen. No. 85-071; 1979 Op. Att'y Gen. No. 79-039.

This opinion does not address what duties and penalties apply to local emergency planning committee members generally, and by inclusion a county officer who serves as a local committee member. This opinion also does not address the liability or immunity of local emergency planning districts and committee members. It is not proper to advise you on these matters as this opinion concerns the operation of local emergency planning districts as they operated under the law in effect prior to the effective date of Sub. S.B. 367, and I am restricted by R.C. 109.14 to advise county prosecuting attorneys only to the extent of the duties of county officers and boards.

4. **When the State Emergency Response Commission designated a local emergency planning district and appointed members to its corresponding local emergency planning committee pursuant to 42 U.S.C. §11001 and state law in effect prior to Sub. S.B. 367, the local emergency planning committee for such district was not a county board and the members of the local emergency planning committee were not county officers for purposes of R.C. 309.09 and the prosecuting attorney had no duty to serve as legal adviser to such district or such members.**