



Seabrook Nuclear Station and the Massachusetts communities living within the Seabrook plume exposure pathway Emergency Planning Zone." (Notice of Prehearing Conference, ASLBP No. 82-471-02-OL). Prior to the conference, three Intervenors joined in a "Motion of the Massachusetts Attorney General, SAPL and NECNP for Adoption of an Agenda." Intervenors there declared:

"The Mass AG intends to file a declaratory judgment in the courts of Massachusetts seeking a determination that the contemplated delegation of authority as described in the SPMC is unlawful. This issue is one of first impression in the Commonwealth, involves an interpretation, inter alia, of provisions of the Massachusetts constitution, and requires knowledge and expertise in state law."

Motion at p. 6-7. Intervenors then followed with several reasons why "[t]his Board should not consider addressing these legal issues for itself...." Motion at p. 7.

The Board, in its Memorandum and Order (Following Prehearing Conference), ASLBP No. 88-558-01-OLR (August 19, 1988), slip op. at 10, denied for the time being "that aspect of the motion which would have us suspend litigation of the legal authority issue pending a state-court judgment." Id. In line with the Board's expectation,<sup>3</sup> this memorandum is

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<sup>3</sup> The Board noted that it expected that "the entire matter may be properly briefed and considered in connection with Applicants' forthcoming summary disposition motion." Memorandum and Order (Following Prehearing Conference) ASLBP No. 88-558-01-OLR (August 19, 1988), slip op. at 10.

directed to Applicants' motion for summary disposition and the forbearance issue raised by Intervenor's motion.

I. THE LICENSING BOARD SHOULD GRANT APPLICANTS' MOTION FOR SUMMARY DISPOSITION ON JOINT INTERVENOR CONTENTIONS 44A AND 44B.

Joint Intervenor Contention 44A states:

"The SPMC contemplates an unlawful delegation of the police powers of the Commonwealth by State and/or local officials to an unincorporated association or organization itself formed and maintained by a division of a bankrupt foreign corporation not licensed to do business in the Commonwealth. Activities envisioned for this entity are ultra vires under the relevant states' corporation laws. As a debtor-in-possession, PSNH's activities outside the ordinary course of business -- such as being the unlawful delegatee of the police powers of a sovereign state -- require prior approval of the bankruptcy court having jurisdiction over the debtor's estate. Without such approval these activities are not permitted under the Bankruptcy Code. As a corporation not licensed to do business in Massachusetts, PSNH and its division NHY are not authorized to engage in the contemplated activities - i.e., act as the delegatee of the police powers of Massachusetts. In sum, the SPMC can not be "generally follow[ed]" by the relevant governments because it contemplates an unlawful delegation of power to an apparent entity behind which operates a corporation not licensed to engage in the contemplated activities in Massachusetts and not authorized to do so by the court which now supervises it. Further, the activities themselves are ultra vires under the laws of New Hampshire and Massachusetts."

Similarly, Joint Intervenor Contention 44B declares:

"To the extent that Mode 2 of the SPMC contemplates the substitution of Applicants for state and local governments in carrying out an emergency response, it violates the emergency planning rule and Massachusetts state law."

NECNP, the Contention's initial sponsor, offers but a single basis for the Contention. It recites, in pertinent part, that:

"To the extent that Mode 2 contemplates the substitution of Applicants for state and local governments in carrying out an emergency response, it violates the emergency planning rule<sup>4</sup> and Massachusetts state law."

Other than this general conclusory statement, the only suggestion as to what state laws NECNP contends the SPMC violate is found in NECNP's reference to Mass AG's former Contention 6. Consequently, as a result of this de facto incorporation, Applicants have turned to the Mass AG bases pleaded as though in support of both contentions. Each of these bases is shown herein to be devoid of a material fact in dispute in respect of either contention and to be legally unfounded. Therefore, summary disposition in Applicants' favor as to all issues in Joint Intervenors' Contentions 44A and B is mandated.

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<sup>4</sup> The only way that the substitution of Applicants for state and local governments may violate the emergency planning rule is if the Board finds that any delegation to the NHY-ORO by the state and local governments is unlawful and that that is a valid rebuttal of the utility plan presumption. Otherwise, non-participation by state and local officials is addressed by the regulations. 10 C.F.R. § 50.47(c)(1).

- A. The CDA contemplates participation by private parties and permits the Governor to delegate the authority vested in him by the Legislature.

In Basis A.1 Mass AG asserts that "[n]either the CDA [Civil Defense Act] nor the Massachusetts RERP provide any basis whatsoever for a delegation of police powers by the Governor or his 'designee' to a foreign private corporation." This assertion is incorrect. Contrary to Mass AG's declaration, the CDA expressly contemplates participation by private parties and permits the Governor to delegate the authority vested in him by the legislature.

The Civil Defense Act, in Section 4, invests in the Governor the "general direction and control of the civil defense agency." 1950 Mass. Acts 639.<sup>5</sup> The Act provides that the Governor "shall be responsible for carrying out the provisions of [the Act] and may assume direct operational control over any or all parts of the civil defense function within the Commonwealth."<sup>6</sup> Id. However, he may also "cooperate with the federal government, and with other states and private agencies in all matters pertaining to the civil

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<sup>5</sup> See copy attached as Exhibit "A".

<sup>6</sup> Section 5 of the CDA invests in the Governor the authority to proclaim a state of emergency. One of the circumstances in which the Governor is authorized to proclaim a state of emergency is "whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the commonwealth." The Governor may exercise considerable power and authority after a state of emergency has been proclaimed.

defense of the commonwealth and the nation." Id. (emphasis added). Furthermore, the legislature authorized the Governor to "delegate any administrative authority vested in him under [the Act]." Id.

- B. The delegation contemplated by the SPMC is permissible under the constitutional, statutory and case law of Massachusetts.

In Basis A.2 Mass AG maintains that "the constitutional, statutory and case law of Massachusetts make clear that not only may private parties not unilaterally exercise such police powers, but those powers are exclusively reserved to the state and its subdivisions and may not be delegated to private parties." In support of this basis, Mass AG cites Opinion of the Justices, 328 Mass 674, 675-76, 105 N.E.2d 565, 566 (1952). Mass AG, however, overstates the decision.

It is, of course, true, as a fundamental principle, that none of the three branches of government "can abandon any powers entrusted to it by the Constitution or transfer those powers to any other person or group of persons." Id. Mass AG, however, fails to recognize, as subsequently pointed out in the Opinion, that even in respect of legislative power the "principle that [that] power cannot be delegated is not, however, applied in all instances with absolute literal inflexibility." Id. As stated in the Opinion, "[o]ne qualification is that where the Legislature by statute lays down a general policy to be pursued it may delegate the

working out of details to some officer or commission, whose acts in pursuance of the general plan, although legislative in character, are valid." Id. Another such instance, but in respect of executive power, is that which is contemplated by the SPMC.<sup>7</sup>

Subsequent case law makes it clear that authority normally exercised by the government may be delegated to private persons. DiLoreto v. Fireman's Fund Insurance Co., 383 Mass. 243, 246, 418 N.E.2d 612, 614 (1981) ("The Legislature may likewise delegate authority to a private person in order that he may fulfill duties which are public in nature . . ."); Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 777, 352 N.E.2d 914, 920 (1976) ("The delegation does not fail in that it was conferred on a 'private person.' . . . a person may be deemed a public official where he is fulfilling duties which are public in nature, 'involving in their performance the exercise of some portion of the sovereign power, whether great or small.'") Even if a person is not fulfilling a duty that is public in nature, authority may be delegated to a private person. DiLoreto at 614-615 ("delegations to private person are

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<sup>7</sup> What is more, as noted in the discussion of Basis A.1, the Legislature has specifically permitted the Governor to delegate the authority vested in him by the CDA.

permissible even when no public duties necessitate such a delegation, so long as proper safeguards are provided").

Moreover, there are numerous instances in which the Legislature has empowered delegation of authority to private persons. See, e.g., ch. 48, § 10 ("The forest warden may appoint deputies to assist him in his duties, and may discharge them; and he or his deputies may, if in their judgment there is danger from a forest fire, employ assistance or require any male person in their town between the ages of eighteen and fifty to aid in its extinguishment or prevention . . ."); ch. 48, § 44A (city or town may "contract with any private fire fighting unit to operate within said city or town [if] said unit has been certified by the department of public safety"); ch. 90B, § 25 ("In the event of a determination by a mayor or board of selectmen, that because of emergency conditions, public ways within a city or town are rendered impassable to conventional motor vehicles, such mayor or board of selectmen, may, without prior notice or public hearing, authorize the direction of the local organization for civil defense or the chief of police in said city or town to grant permits to civil defense volunteers to operate snow vehicles on such ways for such purposes as may be necessary to ensure the health and safety of the public."); ch. 22, § 6 ("The commissioner may, in case of emergency, engage the services of persons who are



experienced skindivers."); ch. 35, § 5 ("Cities by ordinance and towns by by-laws may provide for the removal of snow and ice from sidewalks within such portions of the city or town as they consider expedient by the owner or occupant of land abutting upon such sidewalks."); ch. 31, § 48 ("The following shall be exempt from the civil service law and rules . . . laborers employed in the state department of public works . . . for the removal of snow from and the sanding of the highways and airports of the commonwealth . . . and such temporary employees in such department as required during and following a disaster or period of extreme danger when as authorized by the governor.")

Thus, there is ample precedent for the Legislature to delegate or authorize the delegation of authority to private persons in times of emergency. The delegation contemplated by the SPMC, again, is just one more example. Mass AG's position implies that the statutorily created power to respond to all the emergencies enumerated above would be eviscerated as well. It simply is not, and indeed could not be, the law of Massachusetts that the government cannot empower private parties to assist in responding to emergency situations.

- C. As delegation to private parties is permitted, the issue of de facto delegation is irrelevant.

Basis A.3 asserts that "if the relevant governments were assumed to implement the SPMC, not by express delegation of authority, but by following the directives of NHY-ORO personnel who advised, directed and guided the emergency response, such emergency response puppetry would constitute a de facto delegation of authority to the NHY-ORO."

As delegation to private parties is permitted, Basis A.3's assertion is inapposite.

- D. As delegation to the NHY-ORO is permitted, PSNH's activities are not outside of the ordinary course of business and thus do not require prior approval of the Bankruptcy Court.

In Basis B the Mass G maintains that "[a]s a debtor-in-possession, PSNH's activities outside the ordinary course of business require prior approval of the Bankruptcy Court supervising the debtor's estate. . . . That such activities would be outside the ordinary course if [sic] established, inter alia, by the fact that PSNH and/or NHY would require prior legal authorization to engage in them."

By this Basis, Mass AG appears to argue that, in the event of a radiological emergency, Applicants would not be able to use any of their property to respond to the emergency because to do so would be outside the ordinary course of business and would require leave of the Bankruptcy Court.

Such an argument is absurd. NRC licensing is a requisite of Seabrook Station's operation. Radiological emergency response plans and their implementation are, in turn, an integral part of licensing. Thus, any commitment by New Hampshire Yankee of resources to respond in the Commonwealth of Massachusetts to protect the public cannot possibly be outside of the ordinary course of New Hampshire Yankee's business.

Even if that were so, Intervenor's argument would still be absurd. First, any authorization as could be necessary would be forthcoming. Second, it strains one's credulity that, in case of an actual radiological emergency, PSNH would be required to petition the Bankruptcy Court before using resources to act in response.

E. The NHY-ORO, as an unincorporated association, is not subject to Chapter 181's requirements.

Basis C asserts that PSNH is a foreign corporation doing business in the Commonwealth and thus "is statutorily required to file a certificate or report of condition with the Secretary of State pursuant to M.G.L. c. 181, § 4 identifying those activities in which it is engaged in the Commonwealth." Based on this assertion, Mass AG concludes: "In short, the present activities of PSNH with regard to emergency planning are not presently authorized by law."

As stated in the contention, the SPMC contemplates delegation to an unincorporated association (i.e. NHY-ORO). As an unincorporated association, NHY-ORO is a nonjural person. The NHY-ORO itself has no legal standing. It cannot sue; it cannot act; it cannot enter into contracts. The association, however, is comprised of jural persons -- the members of the NHY-ORO -- who can act. These members are individuals,<sup>8</sup> not a corporation. As individuals, they are not subject to Chapter 181's requirements.

Later in the contention Mass AG states: "As a corporation not licensed to do business in Massachusetts PSNH and its division NHY are not authorized to engage in the contemplated activities, i.e., act as the delegates of the police powers of Massachusetts." It is immaterial whether PSNH or NHY may act as delegates of the police powers of Massachusetts for, as Mass AG acknowledged earlier in his contention, the delegation is to the NHY-ORO, and not to PSNH or NHY. As no powers are contemplated to be delegated to these latter entities, Chapter 181 has no applicability.

F. Even if NHY or PSNH were considered to be police power delegates, the NEPOOL Act would exempt either entity from Chapter 181's requisites.

Even if NHY or PSNH were delegates, as opposed to the

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<sup>8</sup> Many of them Massachusetts residents.

NHY-ORO, the NEPOOL Act<sup>9</sup> in any event would exempt either entity from Chapter 181's requirements.

Section 4 of M.G.L. ch. 164A allows foreign electric utilities to "construct, purchase, operate, maintain, use, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within this commonwealth . . ." without qualifying to do business as a foreign corporation under M.G.L. ch. 181. For the purposes of Section 4, "electric power facilities" are defined as "generating units rated twenty-five megawatts or above, and transmission facilities rated sixty-nine kilovolts or above which have been designated in writing as pool or pool-planned facilities under the New England power-pool agreement." M.G.L. (1986 ed.) ch. 164A, § 1. Seabrook Station has been so designated.

Section 4 clearly permits the type of activities contemplated in Massachusetts by the SPMC. Section 4 is not limited to those parts of the facility that generate and/or transmit power. The express inclusion of the language "or portions thereof" demonstrates that the drafters envisioned more than just the generating and transmission in the abstract would be exempt from qualification. It goes without

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<sup>9</sup> This Act, M.G.L. (1986 ed) ch. 164A, §2, authorizes domestic electric utilities to enter into a New England Power Pool Agreement.

saying that NRC licensing is a requisite of Seabrook Station's operation and radiological emergency response plans and their implementation are, in turn, an integral part of licensing. M.G.L. ch. 181 has no applicability to foreign company participation in a NEPOOL plant.

- G. Even if NHY is not exempt from Chapter 181, failure to comply with that Chapter will not prevent NHY from continuing to conduct its SPMC-related activities within the Commonwealth.

From a practical standpoint, even if NHY were not exempt from Chapter 181, that Chapter is not structured to prevent NHY from continuing to conduct its SPMC-related activities within the Commonwealth for reason of an initial non-compliance.

Any action to enforce Chapter 181 against Seabrook Station requires affirmative action on the part of the Commonwealth. Such action, of course, would not go unchallenged by NHY. Even if NHY were to lose that challenge, NHY could immediately file the certificates and/or reports required by section 4.<sup>10</sup> See E & G Theatre Co. v. Greene, 216 Mass. 171, 103 N.E. 301 (1913) (plaintiff could maintain suit if it complies with law by filing proper papers

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<sup>10</sup> Failure to file an initial certificate or an amended certificate will not affect the validity of any contract involving the foreign corporation. M.G.L. ch. 181, §9.

within 18 days); see also, National Fertilizer Co. v. Fall River Five Cents Savings Bank, 196 Mass 458, 462, 82 N.E. 671, 673 (1907) ("The effect of the statute is, therefore, . . . to stay proceedings until the temporary disability is removed which can be done at any time after, as well as before, resort to the courts".) Mass AG has not shown that any alleged failure to comply with Chapter 181 could or would interfere with the implementation of the SPMC.

In sum, Intervenors have failed to advance any valid legal reason in support of their position that the SPMC contemplates an unlawful delegation of the police powers of the Commonwealth. Not only is such delegation contemplated by the CDA, but Massachusetts case law, including the case cited by Mass AG, has stated clearly that this authority may be delegated to private persons. Moreover, without reaching the question of what, if anything, turns on it, the NHY-ORO, and for that matter, PSNH and NHY, are not subject to Chapter 181's requirements. What's more, even if NHY were not exempt from Chapter 181, that Chapter is not structured to prevent NHY from continuing to conduct its SPMC-related activities within the Commonwealth for reason of an initial non-compliance.

II. THE LICENSING BOARD SHOULD CONSIDER THE ISSUES RAISED IN SURROUNDING JOINT INTERVENOR CONTENTIONS 44A AND 44B AND REJECT THOSE CONTENTIONS

Intervenors, in their "Motion of the Massachusetts Attorney General, SAPL and NECNP for Adoption of an Agenda", offer the following reasons why "[t]his Board should not consider addressing these legal issues for itself . . ."

Motion at p.7:

- a. "This Board has no expertise in these matters."
- b. "This Board has no jurisdiction and thus can not pronounce the law of Massachusetts. But the issue presented by the legal contention concerns the actual real-world ability of the governments to delegate legal authority as a matter of law. Thus, any Board ruling would be held to be in error, if a state court were to decide the issue differently."
- c. "In precisely this situation, a federal court would commit reversible error if it did not abstain from reaching an unsettled issue of state law 'raising constitutional or statutory issues of a public nature.' Wright & Miller, Federal Practice and Procedure § 4246 at 104. Mutatis mutandis, an adjudicatory body of a federal agency should not reach for such issues."
- d. "In federal court review of any final NRC Seabrook determination, the Court of Appeals would likely certify this issue to the courts of the Commonwealth as part of its review of the legal issues before it. Thus, definitive state court determination should be sought upfront."
- e. "This Board has no Article 3 judicial power. To the extent that it reached beyond its limited jurisdiction to decide issues of state law, it may well overstep the constitutional limits of its Congressional jurisdictional grant. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (jurisdiction by non-Article 3 bankruptcy courts over state law claims unconstitutional); Commodity Futures Trading



Commission v. Schor, 106 S. Ct. 3245, 3258 (1986) (agency determination of state law claims not narrowly linked to agency's federal claims' jurisdiction 'may create greater constitutional difficulties')."

As set forth in detail below,<sup>11</sup> none of these reasons provide any basis for this Board to refrain from addressing the legal issues raised in Joint Intervenor Contentions 44A and 44B.<sup>12</sup>

- A. The delegation of legal authority issue does not fall within any abstention doctrine.
  1. Abstention in cases involving unsettled questions of state law.

Intervenors cite Section 4246 of Wright & Miller, Federal Practice and Procedure, for the proposition that "a

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<sup>11</sup> Intervenors' assertion that "[t]his Board has no expertise in these matters" hardly deserves comment. The delegation of authority issue is a question of law. One can only wonder how Intervenors can assert that a Board comprised of judges does not have the expertise to decide such a question.

<sup>12</sup> As a threshold matter, Intervenor's position is logically inconsistent and hence untenable. Given Intervenors' assertion that this Board cannot adjudicate the substance of the contentions, the contentions must be dismissed. Under NRC practice Intervenors may propose contentions alleging that an emergency plan is inadequate as a plan. If a contention alleging some impediment to the implementation of the plan is admitted, it must necessarily be litigable by the Board which by law must dispose of the contention. Correlatively, if the impediment in a given case is something that Intervenors contend the Board cannot resolve, then, by definition, the Board cannot sustain the contention. Consequently, as soon as this is determined by the Board, the contention is rendered moot and must be dismissed.

federal court would commit reversible error if it did not abstain from reaching an unsettled issue of state law 'raising constitutional or statutory issues of a public nature.'" Intervenor's argument is wrongfully premised. Contrary to Intervenor's assertion, Massachusetts law regarding delegation of authority is, in fact, settled. (See summary disposition discussion supra.) When state law is clear abstention becomes meaningless. Wright & Miller, § 4242 at 35-40; Kusper v. Pentikes, 414 U.S. 51, 55 (1973) ("the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain'"); Richard v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970) (abstention inappropriate because a case containing similar facts clearly suggested how courts of Massachusetts would have ruled).

Even if the law were unsettled, Intervenor's reliance on Section 4246 is misplaced. Section 4246, dealing with abstention in private litigation merely to avoid having to decide difficult questions of state law, is inapplicable in this case. Wright & Miller, § 4246 at 104. As (correctly) characterized by Intervenor, the delegation of authority question involves "issues of a public nature."<sup>13</sup> The only

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<sup>13</sup> Moreover, even if this were a situation of the type contemplated by Section 4246, most courts that have confronted the issue have held that the difficulty of determining state law is not in itself a sufficient ground

cases that involve constitutional or statutory issues of a public nature are those that fall within so called "Pullman-type" abstention or "Burford-type" abstention. As seen below, Pullman-type nor Burford-type abstention are appropriate with respect to Joint Intervenor Contentions 44A and 44B.

2. Pullman type abstention.

Under Pullman-type abstention, a federal court 'may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question." Wright & Miller, § 4242 at p. 30; Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984) ("federal courts need not abstain on Pullman grounds when a state statute is not 'fairly subject to an interpretation which will render unnecessary' adjudication of the federal constitutional question").

The delegation of authority issue is not one that would invoke Pullman-type abstention. No state action is here challenged as being contrary to the federal constitution.

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for abstention. Wright & Miller, § 4246 at 113; Colorado River Water Conservation District v. U.S., 424 U.S. 800, 816 (1976) ("the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction").

Resolution of any unsettled questions of state law will not avoid the need for deciding a federal constitutional question. Moreover, state law in this area is settled.

3. Burford-type abstention.

Burford-type abstention is also inappropriate. Burford-type abstention is intended "to avoid needless conflict with the administration by a state of its own affairs." Wright & Miller, § 4244 at p. 81; see also Planned Parenthood League of Mass. v. Bellotti, 608 F. Supp. 800, 809 (D.C. Mass. 1985) ("Burford abstention has come to be described as a doctrine requiring a federal court to abstain 'in order to avoid needless conflicts with the administration by a state of its own affairs'"). However, if federal law has preempted a state's regulatory authority, Burford-type abstention is not warranted. Wright & Miller, § 4244 at 93-94. Moreover, "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." Zablocki v. Redhail, 434 U.S. 374, 379 n. 5 (1978). Were state law to be as portrayed by Intervenor, it conceivably would so interfere with the ability of the utility to implement its evacuation plan, as to be preempted by federal law, cf. Long Island Lighting Co. v. County of Suffolk, New York, 628 F.Supp. 654, 664 (E.D.N.Y. 1986) ("It is manifestly clear from an examination of the legislative history . . . that Congress by no means

intended to allow local governments to frustrate or impede the NRC's ability to evaluate a utility's RERP, either passively, through non-acquiescence, or actively, through a prohibition . . . ."), and Burford-type abstention is not applicable.

Limitations on the doctrine, however, do not rest solely on preemption. Even if the delegation of legal authority issue were not preempted by federal law, Burford-type abstention would not be appropriate because the Board's decision in this case would not needlessly conflict with the administration by a state of its own affairs within the meaning of Burford-type abstention. Unlike Burford v. Sun Oil Co., 319 U.S. 315 (1943), the Board's decision will not interfere with an elaborate state regulatory review system. The Board is merely being asked to make a predictive ruling as to whether Applicants' ability to comply with federal regulations would be barred by settled Massachusetts law. As such, a state court could not do anything that the Board cannot do. See Medical Malpractice Joint Underwriting Association of Rhode Island v. Pfeiffer, 832 F.2d 240, 244 (1st Cir. 1987) (State courts were "not a part of a regulatory process and process[ed] no special powers not possessed by the district court to correct any constitutional problems with the [Insurance] Commissioner's order [denying a rate hearing]").

B. Massachusetts courts have no jurisdiction to decide the delegation of legal authority issue.

Abstention is particularly inappropriate in this case because there is no court in favor of which the Board could abstain.

The New York Court of Appeals, applying New York law in Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 520 N.E.2d 546 (1988), declined to issue what it determined would be an advisory opinion as to whether the utility was without authority under state law to implement the radiological emergency plan and that implementation would be an illegal usurpation of the government's police power. The court reasoned that because the potential for encroachment by the utility "is contingent upon unfinished Federal administrative decisions," id. at 355, the authority issue presented a "nonjusticiable dispute." Id. The court concluded:

"There can be no doubt that the substantive question of whether any Emergency Plan for the Shoreham nuclear power plant is feasible and implementable presents highly important and emotional issues of public policy and safety. As to all aspects of this question, however, it is the NRC, subject to judicial review in the Federal courts, who will speak 'the rule or sentence'; any decision in the present case, while it may provide guidance and indeed be helpful to the NRC, would in the end bind 'no one and settl[e] nothing.' What the parties request, therefore, is a nonbinding advisory opinion for the edification of the NRC. This is not an exercise of the judicial function and is outside the subject matter jurisdiction of this court."

Id. at 357-58 (citations omitted). As was the case with Shoreham, the delegation of legal authority issue with regards to the SPMC presents no live and certain controversy.

If asked to decide the delegation of legal authority issue, Massachusetts courts would be faced with a hypothetical controversy of a type which those courts have repeatedly refused to entertain. Cole v. Chief of Police of Fall River, 312 Mass. 523, 526, 45 N.E.2d 400, 401 (1942), appeal dismissed, Cole v. Violetle, 319 U.S. 581 reh'g denied, 320 U.S. 810 (1943) ("The possibility that the same issue might arise in the future and that it might be advantageous for the parties to have their rights determined in advance is not enough to call for the rendition of a judgment, which the future might show was of little practical value and merely settled a matter that had become no more than a theoretical dispute."); Massachusetts Association of Independent Insurance Agents and Brokers, Inc. v. Commissioner of Insurance, 373 Mass. 290, 293, 367 N.E.2d 796, 799 (1977) ("controversy in the abstract is not sufficient to allow a plaintiff to invoke the declaratory judgment remedy.")

Any opinion by the Massachusetts court would amount to an advisory opinion. Duane v. City of Quincy, 350 Mass. 59, 61, 213 N.E.2d 250, 252 (1966) ("The absence of any factual allegations that there is a live controversy ... leaves the

petition as no more than a request for an opinion on the constitutionality of the statute."); Ashcroft v. Mattis, 431 U.S. 171, 172, 97 S.Ct. 1739, 1740, reh'g denied, 430 U.S. 915, 97 S.Ct. 2990 (1977) (quoting Aetna Life Insurance Co. v. Hartworth, 300 U.S. 227, 242, 57 S.Ct. 461, 465 (1937) ("For a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.").

Massachusetts, unlike New York, permits advisory opinions, but only under certain very limited circumstances:

"Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."

Mass. Const. part 2, ch. 3, art. II. Advisory opinions, however, may only be issued under the circumstances provided in the Massachusetts Constitution. Opinion of the Justices to the Senate, 383 Mass. 895, 914, 424 N.E.2d 1092, 1106 (1981) ("Our duty regarding opinions to a branch of the Legislature is both defined and limited by the Constitution . . ."); Answer of the Justices to the Council, 362 Mass. 914, 916, 291 N.E.2d 598, 600 (1973) ("Not only does the constitution define the extent of the duty of the Justices to furnish opinions, but it also limits their right to express



them.") None of these circumstances arise in the context of the delegation of authority issue.

In order to issue an advisory opinion there must be both an "important question of law" and a "solemn occasion." Answer of the Justices to the House of Representatives, 373 Mass. 898, 901, 367 N.E.2d 793, 795 (1977) ("Irrespective of the impact of a particular question presented, . . . we ordinarily confine the rendering of such opinions only to solemn occasions.")

The delegation of authority question does not rise to the level of a "solemn occasion" both because (1) the Governor is not under a present duty to act on the questions before him, Answer of the Justices to the Governor, 364 Mass. 838, 844, 302 N.E.2d 565, 569 (1973) ("The Justices have often reiterated that they will answer questions only respecting pending matters in order that assistance may be gained in the performance of a present duty."); Answer of the Justices to the Council, 362 Mass. 914, 916, 291 N.E.2d 598, 599 (1973) ("We cannot answer the questions posed because there is no present duty confronting the Council as to the performance of which it is in doubt.") and (2) because the Supreme Judicial Court cannot answer abstract hypothetical questions. Id. at 570 ("A second limitation on our authority to give advisory opinions, closely related to the 'present duty' requirement, is that we cannot answer

abstract questions of law or hypothetical questions."); Opinion of the Justices to the Governor, 373 Mass. 915, 922, 371 N.E.2d 422, 426 (1977) (contingent, future legal question beyond proper function to answer under advisory jurisdiction). As a consequence, the Supreme Judicial Court does not issue advisory opinions with respect to the construction or constitutionality of existing statutes. Opinion of the Justices to the Senate, 397 Mass. 1201, 1206, 493 N.E.2d 859, 862 (1986) ("Questions as to construction or constitutionality of existing statutes do not present a 'solemn occasion.'") Mass AG, however, has only cited existing statutes and case law in support of his contentions that the SPMC contemplates an unlawful delegation of police powers.

Finally, even if the Supreme Judicial Court were to issue an advisory opinion, it would not be binding on this Board or on any court. Loring v. Young, 239 Mass. 349, 361, 132 N.E. 65, 68 (1921) ("It often has been decided that an opinion formed and expressed under such circumstances is liable to incorrectness and must be regarded, not as conclusive and binding, but open to reconsideration and revision . . . ."); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 245 n.1, 69 N.E.2d 115, 126 n.2 (1946) ("But such advisory opinions are given by the justices as

individuals, not by the court. They are not judicial decisions and are not binding upon the court as precedents.")

Thus, any attempt by Mass AG to seek a state court determination of the legal authority issue would amount to an attempt to obtain an impermissible advisory opinion - an opinion that, even if granted, would not be binding on this Board.

C. Certification has no application to the legal authority issue.

Intervenors later suggest that "the Court of Appeals would likely certify this issue to the courts of the Commonwealth as part of its review of the legal issues before it." This argument proves too much. By arguing that the Court of Appeals would certify the delegation of legal authority issue to the courts of the Commonwealth, Intervenors have conceded that the Court of Appeals would have jurisdiction to decide this issue. It necessarily follows that the agency would also be competent to decide the question in the first instance (to the extent necessary to resolve the contention).

Intervenors' prediction as to the likely conduct of the Court of Appeals further demonstrates their confusion with respect to the law of abstention. As discussed above, Burford-type abstention is the only abstention doctrine remotely relevant to the delegation of legal authority issue

but which is nevertheless not applicable for the reasons stated. Moreover, to the extent that Intervenors claim Burford-type abstention, "certification has no application", Wright & Miller, § 4248 at p. 158, because that doctrine contemplates removing a case from federal court entirely rather than have the federal court apply the state court's answer to a question of state law.

- D. The Licensing Board may decide the legal authority issue without overstepping its jurisdiction.

Intervenors assert that "[t]o the extent that [the Board] reached beyond its limited jurisdiction to decide issues of state law, it may well overstep the constitutional limits of its Congressional jurisdictional grant."

Intervenors cite Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1981), and Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), for this proposition.

Intervenors' reliance on Northern Pipeline and Schor is misplaced. Northern Pipeline involved the question of whether the Bankruptcy Court could constitutionally adjudicate state-created private rights - in particular, whether a party had the right to recover contract damages. Northern Pipeline, 458 U.S. at 56. In Schor, the Court examined whether a Congressional delegation to an agency to

decide state law counterclaims was a violation of Article. III. Schor, 478 U.S. at 835-36.

Both Northern Pipeline and Schor go to a different issue than the one that must be decided in this case. The Board is not being asked to decide an independent state law claim. Rather, the Board is being asked to make a predictive ruling as to whether Applicants' ability to comply with federal regulations would be proscribed by Massachusetts law. This determination does not impermissibly impinge on the province of the judiciary. It is simply a valid exercise of the adjudicatory authority granted to the Board by Congress of a Congressionally created substantive federal right. "'To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.'" Thomas v. Union Carbide Agricultural Products, 473 U.S. 568, 590 (1985) (quoting Crowell v. Benson, 285 U.S. 22, 46 (1932)).

Intervenors have failed to state any valid reason why the Licensing Board should not address the issues surrounding Joint Intervenor Contentions 44A and 44B. Neither the abstention doctrine cited by Intervenors, nor any other recognized abstention doctrine, provide any basis for

abstention in this case. Furthermore, as noted, abstention would be meaningless because there is no court in favor of which the Board could abstain. Finally, the cases cited by Intervenor in support of their position that in deciding these issues the Board will overstep the constitutional limits of its congressional jurisdictional grant are not only factually disparate, they do not support Intervenor's position in any case.

Conclusion

For the above stated reasons, no material issues of fact or law exist as to Joint Intervenor Contentions 44A and 44, and Applicants' Motion for summary disposition should be allowed.

Respectfully submitted,

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### TITLE III

#### CIVIL DEFENSE, MILITARY AFFAIRS AND VETERANS

- CHAPTER 31. Civil Defense Act.  
CHAPTER 33. Rights of Inhabitants Inducted or Serving in Military Forces of the United States.  
CHAPTER 35. Public Officers and Employees and Certain Other Persons in the Military or Naval Forces.  
CHAPTER 37. Non profit Corporations to Engage in Providing Homes for Veterans.  
CHAPTER 39. Bonus for Vietnam Veterans.  
CHAPTER 41. Civil Service Examinations for Vietnam Veterans.

#### CHAPTER 31

##### Civil Defense Act

(Acts 1950, Ch. 639, as amended.)

#### SEC.

1. Definitions.
2. Creation of civil defense agency and office of emergency preparedness. Term, salary, powers and duties of director.
- 2A. Construction of fallout shelters. Standards.
3. Creation of defense council. Membership. Duties.
4. Powers and duties of governor, generally.
5. Proclamation of state of emergency. Power to seize or possess personal and real property. Awards to owners of seized property.
6. Cooperation with federal and sister state authorities.
7. Additional powers of governor during state of emergency.
8. Executive orders, general regulations, and written instructions of governor. Violations. Penalties.
- 8A. Inconsistent laws, rules, regulations, etc.
9. [Repealed.]
10. Entrance upon private property to enforce certain laws, rules, regulations, etc.
11. Auxiliary firemen and police.
- 11A. Civil defense claims board. Indemnification of auxiliary forces and volunteers. Survivor benefits. Procedure in filing claims.
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12. Immunity from civil liability for commonwealth, political subdivisions or persons engaged in civil defense activities.
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13. Establishment of local civil defense organizations. Duties. Powers of political subdivisions during disasters.
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- 15A. Indebtedness incurred by political subdivisions for payment of local civil defense organization.
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- 15C. Interconnection of water distribution systems.
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- 16A. Administration of district courts and municipal court of city of Boston during state of emergency. Transfer of matters from Boston juvenile court.
17. Civil defense organizations to be apolitical.
18. Loyalty requirements of persons associated with civil defense organizations. Oath.
19. Severability.
20. Cooperation with governor and civil defense director. Supremacy of governor's orders, rules and regulations.
- 20A. Designated substitutes for commissioners and department heads.
- 20B. Filling certain vacancies by governor without advice and consent of council.
- 20C. Removal of certain officers by governor without advice and consent of council.
21. Expenditure of appropriations by civil defense agency.
22. Inoperativeness of act.

### § 1. Definitions.

In this act, unless the context otherwise requires, the following words shall have the following meanings:—

"Civil defense" shall mean the preparation for and the carrying out of all emergency functions, other than functions for which military forces other than the national guard are primarily responsible, for the purpose of minimizing and repairing injury and damage resulting from disasters caused by attack, sabotage or other hostile action, or

by riot or other civil disturbance, or by fire, flood, earthquake or other natural causes. Said functions shall include specifically, but without limiting the generality of the foregoing, firefighting and police services other than the actual control or suppression of riot or other civil disturbance, medical and health services, rescue, engineering and air-raid warning services, evacuation of persons from stricken areas, emergency welfare services, communications, radiological, chemical and other special weapons of defense, emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services and other functions. (1950, 639, § 1; 1968, 579, § 1.)

"Local organization for civil defense" shall mean an organization created in accordance with the provisions of this act by state or local authority to perform local civil defense functions. (1950, 639, § 1; 1968, 579, § 1.)

### § 2. Creation of Civil Defense Agency and Office of Emergency Preparedness; Term, Salary, Powers and Duties of Director.

There is hereby created within the executive branch of the commonwealth a division of civil defense to be known as the "civil defense agency and office of emergency preparedness" hereinafter called the "civil defense agency", which shall be under the direction of a director of civil defense hereinafter called the "director". The governor shall, with the advice and consent of the council, appoint the director to serve during his pleasure. The director shall devote his full time to his duties under this act, shall not hold any other public office and shall receive, subject to appropriation, such annual salary as the governor and council approve. He shall co-ordinate the activities of all organizations for civil defense within the commonwealth, and shall co-operate and maintain liaison with civil defense agencies of other states and the federal government, shall, subject to the direction and control of the governor, be the executive head of the civil defense agency, and shall have such additional authority, duties and responsibilities authorized by this act as may be prescribed by the governor, and shall be responsible to the governor for carrying out the program for civil defense of the commonwealth. The director may, within the limits of the amount appropriated therefor, appoint such experts, clerks and other assistants as the work of the civil defense agency may require and may remove them, and may make such expenditures as may be necessary in order to execute effectively the purposes of this act. Such employees shall not be subject to



chapter thirty-one of the General Laws. The director and other personnel of the civil defense agency shall be provided with suitable office space, furniture, equipment and supplies in the same manner as provided for personnel of other state departments. (1950, 639, § 2, 1970, 112.)

**Cross References—**

As to director as member of emergency commission relative to the necessities of life, see ALM G.L. c. 23, § 9H.

As to director as member of radiation protection advisory council, see ALM G.L. c. 111, § 4F.

**§ 2A. Construction of Fallout Shelters; Standards.**

The director shall establish standards for the construction of fallout shelters designed to protect the members of a family unit from the effects of enemy attack and shall file the same with the inspector of buildings in each city and town. As used in this section the term "family unit" shall mean a group of persons living together and sharing at least in part their living quarters and accommodations.

A fallout shelter built in accordance with such standards in any location upon any residential property shall be deemed to be an accessory use to such property and, as long as it shall be used exclusively as a fallout shelter, shall not be deemed to violate any provisions of any zoning ordinance or by law. Such a shelter shall not be deemed to violate the provisions of any building code with respect to the materials or method of construction used, but shall be subject to all administrative provisions of any applicable building code, including, without limiting the generality of the foregoing, any provisions relating to application for and issuance of permits, fees, inspection, appeals, penalties and enforcement. The inspector of buildings of the city or town where any such fallout shelter is to be built may waive any provisions of any applicable building code requiring the employment of a licensed builder, provided, he is satisfied that the proposed shelter can be constructed by an unlicensed person without serious danger to himself or others.

Said director shall also establish standards for shelters other than those designed to protect members of a family unit, and inspectors of buildings may grant deviations from the applicable building codes pending the establishment of such standards. (1962, 350.)

**Cross References—**

As to exemptions for air raid or fallout shelters, see ALM G.L. c. 59, § 5.

**§ 3. Creation of Defense Council; Membership; Duties.**

There is hereby created an unpaid civil defense advisory council hereinafter called the "defense council", the members of which shall be appointed by the governor. The defense council shall include such department heads and other officers of the commonwealth as the governor may deem necessary and the director of the civil defense agency. The governor shall appoint the chairman of said defense council to serve during his pleasure. Said defense council shall be in the executive branch of the government and shall serve under the governor and shall be subject to his supervision and control. Said defense council shall advise the governor and the director on matters pertaining to civil defense. (1950, 639, § 3.)

**§ 4. Powers and Duties of Governor, Generally.**

The governor shall have general direction and control of the civil defense agency, and shall be responsible for carrying out the provisions of this act and may assume direct operational control over any or all parts of the civil defense functions within the commonwealth; he may at the request of the director authorize the employment of such technical, clerical, stenographic or other personnel, and may make such expenditures, within the appropriation therefor or from other funds made available to him for the purposes of civil defense or to deal with disaster or threatened disaster should it occur, as may be necessary to carry out the purposes of this act. He may co-operate with the federal government, and with other states and private agencies in all matters pertaining to the civil defense of the commonwealth and the nation, may propose a comprehensive plan and program for the civil defense of the commonwealth, and in accordance with said plan and program may institute training and public information programs and take all other preparatory steps, including the partial or full mobilization of civil defense organizations in advance of actual disaster as he may deem necessary. He may make studies and surveys to ascertain the capabilities of the commonwealth for civil defense and to plan for the most efficient emergency uses thereof, may delegate any administrative authority vested in him under this act, and may appoint, in co-operation with local authorities, metropolitan area directors. (1950, 639, § 4.)

## Cross References—

As to the governor, generally, see ALM G.L. c. 6.

As to modification or revocation of orders by governor, see ALM G.L. c. 40, § 2A.

**§ 5. Proclamation of State of Emergency; Power to Seize or Possess Personal and Real Property; Awards to Owners of Seized Property.**

Because of the existing possibility of the occurrence of disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, in order to insure that the preparations of the commonwealth will be adequate to deal with such disasters, and generally to provide for the common defense and to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth, if and when the congress of the United States shall declare war, or if and when the President of the United States shall by proclamation or otherwise inform the governor that the peace and security of the commonwealth are endangered by belligerent acts of any enemy of the United States or of the commonwealth or by the imminent threat thereof, or upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or from riot or other civil disturbance; or from fire, flood, earthquake or other natural causes; or whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food, the governor may issue a proclamation or proclamations setting forth a state of emergency.

(a) Whenever the governor has proclaimed the existence of such a state of emergency, he may employ every agency and all members of every department and division of the government of the commonwealth to protect the lives and property of its citizens and to enforce the law. Any member of any such department or division so employed shall be entitled to the protection of existing applicable provisions of law relative to any type of service of the commonwealth as well as the protection afforded by this act.

(b) After such proclamation has been made, the governor may, in the event of disaster or shortage making such action necessary for the protection of the public, take possession (1) of any land or building, machinery or equipment; (2) of any horses, vehicles, motor vehicles, aircraft, ships, boats or any other means of conveyance, rolling stock of steam, diesel, electric railroads or of street railways,

(3) of any cattle, poultry and any provisions for man or beast, and any fuel, gasoline or other means of propulsion which may be necessary or convenient for the use of the military or naval forces of the commonwealth or of the United States, or for the better protection or welfare of the commonwealth or its inhabitants as intended under this act. He may use and employ all property of which possession is taken, for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants, and may in particular, when in his opinion the public exigency so requires, lease, sell, or, when conditions so warrant, distribute gratuitously to or among any or all of the inhabitants of the commonwealth anything taken under clause (3) of this paragraph. If real estate is seized under this paragraph a declaration of the property seized containing a full and complete description shall be filed with the register of deeds in and for the county in which the seizure is located, and a copy of said declaration furnished the owner. If personal property is seized under this paragraph the civil defense authorities by whom seized shall maintain a docket containing a permanent record of such personal property, and its condition when seized, and shall furnish a true copy of the docket recording to the owner of the seized property. He shall, with the approval of the council, award reasonable compensation to the owners of the property which he may take under the provisions of this section, and for its use, and for any injury thereto or destruction thereof caused by such use.

(c) Any owner of property of which possession has been taken under paragraph (b), to whom no award has been made, or who is dissatisfied with the amount awarded him by the governor, with the approval of the council, as compensation, may file a petition in the superior court, in the county in which he lives or has a usual place of business, or in the county of Suffolk, to have the amount to which he is entitled by way of damages determined. The petitioner and the commonwealth shall severally have the right to have such damages assessed by a jury, upon making claim, in such a manner as may be provided, within one year after the date when possession of the property was taken under paragraph (b), except that if the owner of the property is in the military service of the United States at the time of the taking, it shall be brought within one year after his discharge from the said military service.

(d) Any owner of property of which possession has been taken under this act, to whom no award has been made, or who is dissatisfied with the amount awarded him as compensation by the governor, with the approval of the council, may have his damages

assessed under chapter seventy-nine of the General Laws, instead of proceeding under the provisions of this act. If any such taking, in itself, constitutes an appropriation of property to the public use, compensation may be recovered therefor under chapter seventy-nine of the General Laws from the body politic, or corporate, appropriating such property. (1950, 639, § 5; 1958, 425, § 1; 1968, 579, § 1)

**Cross References—**

As to power of General Court to regulate food, shelter, etc. in time of emergency, see A.M. Mass. Const. § 149j.

**§ 6. Cooperation with Federal and Sister State Authorities.**

The governor shall have the power and authority to cooperate with the federal authorities and with the governors of other states in matters pertaining to the common defense or to the common welfare, and also so to cooperate with the military and naval forces of the United States and of the other states, and to take any measures which he may deem proper to carry into effect any request of the President of the United States for action looking to the national defense or to the public safety. (1950, 639, § 6.)

**§ 7. Additional Powers of Governor During State of Emergency.**

During the effective period of so much of this act as is contingent upon the declaration of a state of emergency as hereinbefore set forth, the governor, in addition to any other authority vested in him by law, shall have and may exercise any and all authority over persons and property, necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof, and specifically, but without limiting the generality of the foregoing, the governor shall have and may exercise such authority relative to any or all of the following:—

- (a) Health or safety of inmates of all institutions.
- (b) Maintenance, extension or interconnection of services of public utility or public-service companies, including public utility services owned or operated by the commonwealth or any political subdivision thereof.
- (c) Policing, protection or preservation of all property, public or private, by the owner or person in control thereof, or otherwise.

(d) Manufacture, sale, possession, use or ownership of (1) fireworks or explosives, or articles in simulation thereof; (2) means or devices of communication other than those exclusively regulated by federal authorities; (3) articles or objects (including birds and animals) capable of use for the giving of aid or information to the enemy or for the destruction of life or property.

(e) Transportation or travel on Sundays or week-days by aircraft, watercraft, vehicle or otherwise, including the use of registration plates, signs or markers thereon.

(f) Labor, business or work on Sundays or legal holidays.

(g) Assemblages, parades or pedestrian travel, in order to protect the physical safety of persons or property.

(h) Public records and the inspection thereof.

(i) Regulation of the business of insurance and protection of the interests of holders of insurance policies and contracts and of beneficiaries thereunder and of the interest of the public in connection therewith.

(j) Vocational or other educational facilities supported in whole or in part by public funds, in order to extend the benefits or availability thereof.

(k) The suspension of the operation of any statute, rule or regulation which affects the employment of persons within the commonwealth when, and at such times as such suspension becomes necessary in the opinion of the governor to remove any interference, delay or obstruction in connection with the production, processing or transportation of materials which are related to the prosecution of war or which are necessary because of the existence of a state of emergency.

(l) Regulation of the manner and method of purchasing or contracting for supplies, equipment or other property or personal or other services, and of contracting for or carrying out public works, for the commonwealth or any of its agencies or political subdivisions, including therein housing authorities.

(m) Receipt, handling or allocation of money, supplies, equipment or material granted, loaned or allocated by the federal government to the commonwealth or any of its agencies or political subdivisions.

(n) Protection of depositors in banks, and maintenance of the banking structure of the commonwealth.

(o) Variance of the terms and conditions of licenses, permits or certificates of registration issued by the commonwealth or any of its agencies or political subdivisions.

(p) Regulating the sale of articles of food and household articles.

(q) Modification or variation in the classifications established under sections forty five to fifty, inclusive, of chapter thirty of the General Laws and sections forty eight to fifty six, inclusive, of chapter thirty five of the General Laws. (1950, 639, § 7; 1953, 500, § 1.)

**Cross References—**

As to contracts awarded under emergency conditions, see ALM Gl. c. 30, § 39M, 149, § 44A.

As to modification or revocation of curfews by governor, see ALM Gl. c. 40, § 37A.

As to continued operation of insurance companies during national emergencies, see ALM Gl. c. 175, §§ 180M-180Q.

As to power of General Court to regulate food, shelter, etc. in time of emergency, see ALM Mass. Const. §§ 149.

**§ 8. Executive Orders, General Regulations, and Written Instructions of Governor; Violations; Penalties.**

The governor may exercise any power, authority or discretion conferred on him by any provision of this act, either under an actual proclamation of a state of emergency as provided in section five or in reasonable anticipation thereof and preparation therefor, by the issuance or promulgation of executive orders or general regulations, or by instructions to such person or such department or agency of the commonwealth, including the civil defense agency, or of any political subdivision thereof, as he may direct by a writing signed by the governor and filed in the office of the state secretary. Any department, agency or person so directed shall act in conformity with any regulations prescribed by the governor for its or his conduct.

Whoever violates any provision of any such executive order or general regulation issued or promulgated by the governor, for the violation of which no other penalty is provided by law, shall be punished by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both. (1950, 639, § 8; 1968, 579, § 4.)

**§ 8A. Inconsistent Laws, Rules, Regulations, etc.**

Any provision of any general or special law or of any rule, regulation, ordinance or by-law to the extent that such provision is inconsistent with any order or regulation issued or promulgated under this act shall be inoperative while such order or such last-mentioned regulation is in effect; provided that nothing in this section

shall be deemed to affect or prohibit any prosecution for a violation of any such provision before it became inoperative. (1950, 639, § 8A.)

**§ 9. [Repealed, 1962, 743, § 1.]**

**§ 10. Entrance Upon Private Property to Enforce Certain Laws, Rules, Regulations, etc.**

During any blackout or during the period between the air raid warning and the following "all clear" signal, regular, special and reserve members of the police and fire forces of the commonwealth or of its political subdivisions, and members of the state guard and the armed forces of the United States, while in uniform, may enter upon private property for the purpose of enforcing blackout or air raid precaution rules, regulations or orders issued by or under authority of the governor. Such members may at any time enter upon private property in compliance with the written order of the governor, for the sole purpose of enforcing the laws, rules, regulations, by-laws or ordinances specifically set forth by the governor in such orders; provided, that nothing in this section shall be construed or deemed to prohibit any entry upon private property otherwise authorized by law. Any entry made under the foregoing provision shall be reported by the person making such entry forthwith to the director of the local organization for civil defense. (1950, 639, § 10.)

**§ 11. Auxiliary Firemen and Police.**

(a) The mayor and city council in cities and the selectmen in towns, or such other persons or bodies as are authorized by law to appoint firemen or policemen, may appoint, train and equip volunteer, unpaid auxiliary firemen and auxiliary police and may establish and equip such other volunteer, unpaid public protection units as may be approved by said civil defense agency and may appoint and train their members. Coats and other like garments issued hereunder to be worn as outer clothing by auxiliary firemen shall bear on the back the letters C. D. five inches in height and helmets so issued shall be yellow. Every such fireman, unless wearing a coat or other like garment and helmet issued as aforesaid, shall, while on duty as such, wear an arm band bearing the letters C. D. Chapters thirty one, thirty two and one hundred and fifty-two of the General Laws shall not apply to persons appointed hereunder. Coats, shirts and other garments to be worn as outer clothing by auxiliary police officers

shall bear a shoulder patch with the words "Auxiliary Police" in letters not less than one inch in height.

(b) Cities and towns may by ordinance or by law, or by vote of the aldermen, selectmen, or board exercising similar powers, authorize their respective police departments to go to aid another city or town at the request of said city or town in the suppression of riots or other forms of violence therein, and, while in the performance of their duties in extending such aid, the members of such departments shall have the same powers, duties, immunities and privileges as if performing the same within their respective cities or towns. Any such ordinance, by law or vote may authorize the head of the police department to extend such aid subject to such conditions and restrictions as may be prescribed therein. Any city or town aided under and in accordance with this section shall compensate any city or town rendering aid as aforesaid for the whole or any part of any damage to its property sustained in the course of rendering the same and shall reimburse it in whole or in part for any payments lawfully made to any member of its police department or to his widow or other dependents on account of injuries or death suffered by him in the course of rendering aid as aforesaid or of death resulting from such injuries.

(c) The head of the fire or police department of any city, town or district of the commonwealth shall, after the issuing of any proclamation provided for in this act, order such portion of his department, with its normal equipment, as the governor may request, for service in any part of the commonwealth where the governor may deem such service necessary for the protection of life and property. When on such service, police officers and firemen shall have the same powers, duties, immunities and privileges as if they were performing their duties within their respective cities, towns or districts. The commonwealth shall compensate any city, town or district for damage to its property sustained in such service and shall reimburse it for any payments lawfully made by it to any member of its police or fire department or to his widow or other dependents on account of injuries sustained by him in such service or of death resulting from such injuries. Persons appointed to the auxiliary police force in a city or town shall exercise or perform such of the powers or duties of police officers as may be prescribed by the appointing authority including but not limited to replacing and performing the duties of regular personnel who may be actually engaged in the direct control or suppression of riots or other civil disturbance, and no civil defense personnel shall be so utilized in any such direct riot control activities,

provided, that said powers or duties shall not be exercised or performed by them except while they are on active duty and displaying an authorized badge or other insignia after being called to such duty by the head of the police force of such city or town to meet a situation which, in his opinion, cannot be adequately handled by the regular police force and by the reserve police force if any, of such city or town. Auxiliary police in towns, but not in cities, may be authorized by the appointing authorities to exercise the powers conferred by section ten of this act upon members of regular, special or reserve police forces of said towns, except as provided above.

(d) Auxiliary police shall not be sent to another city or town pursuant to the provisions of paragraphs (b) and (c) of this section or any other provisions of law, except upon the order of the head of the police force of the city or town in which such auxiliary police were appointed provided, that auxiliary police shall not be so dispatched to another city or town unless they are authorized by the appointing authority to exercise or perform the full powers or duties of police officers subject to the limitation in paragraph (b) relating to direct riot control activities, except that auxiliary police appointed in a town shall not while performing their duties in a city, exercise the powers conferred by section ten of this act upon members of regular, special or reserve police forces of said town. When on such service, auxiliary police shall have the same powers, duties, immunities and privileges, except as provided above, as if they were performing their duties within their respective cities and towns.

(e) When participating in any training exercise ordered or authorized by the director, policemen and fire fighters shall have the same powers, duties, immunities and privileges as if they were performing their duties within their respective cities, towns or districts. The commonwealth shall compensate any city, town or district for damage to its property sustained in such training, and shall reimburse it for any payments lawfully made by it to any member of its police or fire department or to his widow or other dependents on account of injuries sustained by him in such training or of death resulting from such injuries. (1950, 639, § 11; 1951, 434; 1951, 486; 1952, 684; 1958, 180; 1964 6; 1968, 579, § 3.)

**Cross References.** -

As to appointment of employees of civil defense agency as special police officers, see ALM G.L. c. 147, § 101I.

As to prohibition against employing auxiliary police in connection with labor disputes, see ALM G.L. c. 149, § 23B.

**§ 11A. Civil Defense Claims Board, Indemnification of Auxiliary Forces and Volunteers, Survivor Benefits, Procedure in Filing Claims.**

There shall be in the civil defense agency a civil defense claims board consisting of three members as follows: The chairman of the industrial accident board or such person as shall be designated by him in writing from time to time, the chairman of the commission on administration and finance or such person as shall be designated by him in writing from time to time, and such assistant attorney general as the attorney general shall designate in writing from time to time. The director of civil defense or such person as shall be designated by him in writing from time to time shall be the secretary of the board. The board shall act upon and decide claims filed under this section, and shall have power to adopt and from time to time revise rules and regulations necessary or apt for the expeditious handling and decision of such claims. No hearing shall be held upon any claim unless the board so orders, but nothing herein contained shall prevent the board from ordering and holding a hearing upon any claim, and for such purpose the board shall have power to take evidence, administer oaths, issue subpoenas and compel witnesses to attend and testify and produce books and papers. Any person so subpoenaed who shall refuse to attend or to be sworn or affirm or to answer any question or produce any book or paper pertinent to the matter under consideration by the board shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months or both.

Every person appointed under paragraph (a) of section eleven of this act and every volunteer, unpaid person appointed by the director of civil defense under section two of this act who, while participating in training, or performing duty, in the city or town in which he is appointed or in another city or town in this commonwealth or in another state under or pursuant to any provision of this act or of any mutual aid arrangement or interstate compact made under authority thereof, shall without fault or neglect on his part sustain loss of or damage to his property by reason of such participation in training or performance of duty, shall be indemnified by the commonwealth for such loss or damage; but said indemnification shall not exceed fifty dollars for any one accident. Every such person who, while so participating in training or performing duty, shall by reason thereof without fault or neglect on his part sustain personal injury, shall be indemnified by the commonwealth for the reasonable hospital, medical and surgical expenses incurred by him or in his behalf by reason of such injury, and also for his loss of earning capacity, if

any, but such indemnification for loss of earning capacity shall not exceed for any one week a sum equal to thirty-five dollars plus two dollars and fifty cents for each person wholly dependent on such person within the meaning of section thirty-five A of chapter one hundred and fifty-two of the General Laws. Every such person who, while so participating in training or performing duty, shall by reason thereof without fault or neglect on his part receive any of the injuries specified in section thirty-six of said chapter one hundred and fifty-two shall be indemnified by the commonwealth at the rate and for the period specified in said section thirty-six except that any determination required by said section to be made by the industrial accident board shall be made by the civil defense claims board. If any such person is killed while, and by reason of, so participating in training or performing duty, or if any such person dies from injuries received, or as a natural and proximate result of undergoing a hazard, while, and by reason of, so participating in training or performing duty, the reasonable expense of his burial, not exceeding five hundred dollars, shall be paid by the commonwealth, which shall also pay to his dependents the following annuities: To the widow, so long as she remains unmarried, an annuity not exceeding fifteen hundred dollars a year, increased by not exceeding three hundred and twelve dollars for each child of such person during such time as such child is under the age of eighteen or over said age and physically or mentally incapacitated from earning, and if there is any such child and no widow or the widow later dies, such an annuity as would have been payable to the widow had there been one or had she lived, to or for the benefit of such child, or of such children in equal shares, during the time aforesaid, and, if there is any such child and the widow remains, in lieu of the aforesaid annuity to her, an annuity not exceeding five hundred and twenty dollars to or for the benefit of each such child during the time aforesaid, and, if there is no widow and no such child, an annuity not exceeding one thousand dollars to or for the benefit of the father or mother of the deceased, or to or for the benefit of an unmarried or widowed sister of the deceased with whom he was living at the time of his death, if such father, mother or sister was dependent upon him for support at the time of his death, during such time as such beneficiary is unable to support himself or herself and does not marry.

No indemnification or payment of any kind shall be made by the commonwealth under this section unless a claim therefor in writing, on a form approved by the civil defense claims board, is filed with the secretary thereof within ninety days after the loss of or damage to property or the personal injury or the death, as the case may be, not unless a duplicate copy of such claim is filed within said period with

The director of the local organization for civil defense or, in the case of persons appointed under section two of this act, with the director of civil defense. As soon as reasonably may be after the receipt by such director of such duplicate copy, he shall file with the secretary of the civil defense claims board, on a form approved by such board, as complete a report as may be concerning such claim and his recommendation with respect to the allowance thereof. No decision shall be made by the civil defense claims board upon a claim unless such report and recommendation relative thereto has been filed with its secretary. The decision of the civil defense claims board upon a claim shall constitute the final determination thereof; and there shall be no review thereof or appeal therefrom, but nothing contained herein shall be construed to prevent the board from reconsidering any decision.

The provisions of this section shall not apply to any injury or death, or to any loss, damage or expense, for which any federal law heretofore or hereafter passed shall provide reimbursement, indemnification or compensation.

Any contrary provision of this section notwithstanding, the civil defense claims board is hereby authorized to approve in its sole discretion a claim in accordance with the provisions of this section notwithstanding that the person by or on account of whom said claim shall have been filed was not appointed as required by paragraph (a) of section eleven of this act, provided, that said person, at the time of the occurrence out of which said claim shall have originated, was in good faith actually participating in civil defense training or performing civil defense duty, as an unpaid volunteer, under the supervision or at the direction of a person actually or apparently authorized to direct or supervise such person in such training or duty; and provided, further, that said person, previous to the occurrence out of which such claim shall have originated, shall have enrolled, registered or otherwise previously signified his intention of joining the civil defense organization concerned. A decision of the board approving or denying a claim by or on account of such person shall constitute the final determination thereof and there shall be no review thereof or appeal therefrom, provided, however, that nothing contained herein shall be construed to prevent the board from reconsidering any such decision.

A volunteer, unpaid director of a local organization for civil defense appointed under section thirteen of this act shall be deemed an appointee under paragraph (a) of section eleven of this act for the purposes of this section only, provided, that the duplicate copy of any claim filed under this section by or on account of such local director

shall be filed with the appointing authority designated in said section thirteen, and said appointing authority shall report and recommend to the civil defense claims board concerning such claim. (1951, 547, 1955, 637, §§ 1, 2, 1956, 560, §§ 1, 2.)

**Cross References—**

As to indemnification of civil defense volunteers by municipalities, see A.M. G.L. c. 40, § 50C.

**§ 11B. Employee, Defined.**

The word "employee" as used in clause (1) of section five of chapter forty and in section one hundred A of chapter forty-one of the General Laws, shall include, for the purposes of said sections, a person appointed under the provisions of paragraph (a) of section eleven of this act, while performing his properly assigned training or duties. (1956, 401, § 1.)

**§ 12. Immunity from Civil Liability for Commonwealth, Political Subdivisions or Persons Engaged in Civil Defense Activities.**

On and after a declaration of an emergency neither the commonwealth nor any political subdivision thereof, nor other agencies, nor any person engaged in any civil defense activities while in good faith complying with or attempting to comply with this act or any other rule or regulation promulgated pursuant to the provisions of this act, shall be civilly liable for the death of or any injury to persons or damage to property as result of such activity except that the individual shall be liable for his negligence. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under this act, or under the workmen's compensation law, or under any pension law, or under any other special and general law nor the right of any such person to receive any benefit or compensation under any act of congress.

No city or town shall be liable for any damage sustained to person or property as the result of an authorized blackout. (1950, 639, § 12.)

**§ 12A. Immunity From Civil Liability for Owner of Real Estate or Premises Used to Shelter Persons During Enemy Attack.**

Any person owning or controlling real estate or other premises who voluntarily and without compensation grants to a city or town a

license or privilege, or otherwise permits a city or town, to inspect, designate and use the whole or any part or parts of such real estate or premises for the purpose of sheltering persons during an actual, impending or mock enemy attack shall, together with his successors in interests, if any, not be civilly liable for negligently causing the death of, or injury to, any person, or for loss of, or damage to, the property of such person on or about such real estate or premises under such license, privilege or other permission, and section fifteen of chapter one hundred and eighty-six of the General Laws shall not be deemed to apply to any agreement granting such license or privilege or to such other permission, whether such agreement is executed, or such other permission is given, before or after the effective date of this section. (1951, 460.)

**§ 13. Establishment of Local Civil Defense Organizations; Duties; Powers of Political Subdivisions During Disasters.**

Each political subdivision of the commonwealth is hereby authorized and directed to establish a local organization for civil defense in accordance with the state civil defense plan and program.

Each local organization for civil defense shall have a director, who shall, in the case of a city, be appointed by the mayor, or in a city having the Plan E form of government by the city manager, and in towns shall be appointed by the selectmen, or in towns having a town manager by the manager, and who shall have direct responsibility for the organization, administration and operation of such local organization for civil defense, subject to the direction and control of such appointing authority. Each local organization for civil defense shall perform civil defense functions within the territorial limits of the political subdivision within which it is organized, and, in addition, shall conduct such functions outside of such territorial limits as may be required pursuant to the provisions of section seven of this act.

In carrying out the provisions of this act, each political subdivision in which any disaster, as described in section one, occurs, shall have the power to enter into contracts and incur obligations necessary to combat such disaster, protecting the health and safety of persons and property, and providing emergency assistance to the victims of such disaster. Each political subdivision is authorized to exercise the powers vested under this section in the light of the exigencies of the extreme emergency situation, without regard to time-consuming procedures and formalities prescribed by law, excepting mandatory constitutional requirements, pertaining to the performance of public work, entering into contracts, the incurring of obligations, the

employment of temporary workers, the rental of equipment, the purchase of supplies and materials, the levying of taxes and the appropriation and expenditure of public funds. (1950, 639, § 13.)

**§ 14. Local Civil Defense Organizations to Render Mutual Aid.**

The director of each local organization for civil defense may, in collaboration with other public and private agencies within the commonwealth, develop or cause to be developed mutual aid arrangements for reciprocal civil defense aid and assistance in case of disaster too great to be dealt with unassisted. Such arrangements shall be consistent with the state civil defense plan and program, and in time of emergency it shall be the duty of each local organization for civil defense to render assistance in accordance with the provisions of such mutual aid arrangements. The director of each local organization for civil defense may, subject to the approval of the governor, enter into mutual aid arrangements with civil defense agencies or organizations in other states for reciprocal civil defense aid and assistance in case of disaster too great to be dealt with unassisted. (1950, 639, § 14.)

**§ 15. Appropriations by Political Subdivisions for Local Civil Defense Organizations; Commonwealth and Political Subdivisions May Accept Gifts, Grants, or Loans for Civil Defense.**

Each political subdivision shall have the power to make appropriations in the manner provided by law for making appropriations for the ordinary expenses of such political subdivision, for the payment of expenses of its local organization for civil defense.

Whenever the federal government or any agency or officer thereof, or any person, firm or corporation, shall offer to the commonwealth, or to any political subdivision thereof, services, equipment, supplies, materials or funds by way of gift, grant or loan, for purposes of civil defense, the commonwealth, acting through the governor, or such political subdivision, acting through its governing body, may accept such offer, and upon acceptance the governor or governing body of such political subdivision, may authorize any officer of the commonwealth, or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials or funds on behalf of the commonwealth, or such political subdivision, and subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer. (1950, 639, § 15.)



**§ 15A. Indebtedness Incurred by Political Subdivisions for Payment of Local Civil Defense Organization.**

For the purpose of meeting expenditures authorized under section fifteen, a city, town, district or county may raise such sums as may be necessary by taxation, or by transfer from available funds, or may borrow from time to time and may issue bonds or notes therefor. For the purpose of meeting expenditures authorized under section fifteen, counties may borrow through their county commissioners. Each authorized issue shall constitute a separate loan, and such loans shall be paid in not more than five years from their dates and shall bear on their face the words (city, town, district or county) Civil Defense Loan, Act of 1950. Indebtedness incurred under this act by a city, town or district shall be in excess of the statutory limit, but shall, except as provided herein, be subject to chapter forty-four of the General Laws, exclusive of the limitation contained in the first paragraph of section seven thereof. Indebtedness incurred by a county under this act shall, except as provided herein, be subject to the provisions of chapter thirty-five of the General Laws. No indebtedness shall be incurred under the provisions of this section without the approval of a majority of the members of the emergency finance board established under section one of chapter forty-four of the acts of nineteen hundred and thirty-three, upon such terms and conditions as said board shall determine. The members of the board aforesaid, when acting under this act, shall receive from the commonwealth compensation to the same extent as provided for services under chapter three hundred and sixty-six of the acts of nineteen hundred and thirty-three, as amended, including chapter seventy-four of the acts of nineteen hundred and forty-five, as amended. (1950, 639, § 15A, 1951, 580, § 1.)

**§ 15B. Financial Officers of Political Subdivisions to File Annual Reports of Expenditures.**

The city auditor, town accountant, or, if there is no such officer, the town treasurer, district treasurer and county treasurer, of every city, town, district and county making expenditures under authority of section fifteen or section fifteen A of this act shall file annually with the director of accounts of the department of corporations and taxation of the commonwealth a report of liabilities incurred and expenditures made under authority of sections fifteen and fifteen A in such form and detail as said director of accounts may require. (1950, 639, § 15B, 1951, 580, § 2, 1953, 532, 1955, 25.)

**§ 15C. Interconnection of Water Distribution Systems.**

Any city or town, water district, water supply district, fire and water district, fire district or water company may contract with any other such city, town, district or water company for the interconnection of their water distribution systems and for providing and using any necessary pumping equipment for the supplying of water for domestic, fire and other purposes. The supplying of water for domestic purposes for extended periods shall be subject to the provisions of section forty of chapter forty of the General Laws. Such interconnections made with the works of the metropolitan district commission or any municipality, district or water company supplied herefrom shall be subject to the provisions of chapter ninety-two of the General Laws. (1951, 531.)

**§ 16. Utilization of State and Local Departments, Agencies, Officers, and Personnel.**

In carrying out the provisions of this act, the governor and the executive officers, or governing bodies of the political subdivisions of the commonwealth, are directed to utilize the services, equipment, supplies and facilities of existing departments, offices and agencies of the commonwealth, and of the political subdivisions thereof, to the maximum extent practicable, and the officers and personnel of all such departments, offices and agencies of the commonwealth, and of the political subdivisions thereof, to the maximum extent practicable, and the officers and personnel of all such departments, offices and agencies are directed to co-operate with and extend such services and facilities to the governor and to the civil defense organizations of the commonwealth upon request.

The governor may assign to a state agency any activity concerned with disaster preparedness and relief of a nature related to the existing powers and duties of such agency, and it shall thereupon become the duty of such agency to undertake and carry out such activity on behalf of the commonwealth. (1950, 639, § 16.)

**Cross References—**

As to duties of health department during emergencies, see A.M.C.A. c. 111, § 5A.

**§ 16A. Administration of District Courts and Municipal Court of City of Boston During State of Emergency, Transfer of Matters From Boston Juvenile Court.**

During a state of emergency, the administrative justice of the district courts may direct that a district court shall be held at any place or places, including other district courthouses, outside the district of which said court has jurisdiction, and at such times, including Sundays, as he may direct, and said administrative justice

may direct justices, clerks, probation officers and any other personnel of other district courts to act as such in a district court other than their own; and with the concurrence of the administrative justice of the municipal court of the city of Boston, the administrative justice of the district courts may direct any district court to hold sessions in the said municipal courthouse, and may employ such justices, clerks, probation officers or other personnel of said municipal court as the administrative justice of the said municipal court may designate; and the administrative justice of the municipal court of the city of Boston may direct that said court shall be held at any place or places outside the district over which said court has jurisdiction, and at such times, including Sundays, as he may direct; and with the concurrence of the administrative justice of the district courts, the administrative justice of the municipal court of the city of Boston may direct that the municipal court hold sessions in any district courthouse, and may employ such justices, clerks, probation officers or other personnel of any district court as the administrative justice of the district court may designate; and with the concurrence of the administrative justice of the superior court, the administrative justice of the district courts or the administrative justice of the municipal court of the city of Boston may order the holding of sessions of any district court or said municipal court in any premises of the superior court that the administrative justice of the superior court may designate; and with the concurrence of the justice of the Boston juvenile court and the administrative justice of the district courts, jurisdiction over any matters pending in said juvenile court may be transferred to another court as defined in section fifty-two of chapter one hundred and nineteen of the General Laws, and jurisdiction of any matter so transferred shall remain therein after the termination of the emergency unless the administrative justice of the district courts and the justice of the Boston juvenile court concur that said matter ought to be transferred back to the Boston juvenile court. In the event of the absence from the commonwealth, illness or other disability of the justice of the Boston juvenile court, the administrative justice of the district courts may act as aforesaid without his concurrence; and in the event of any such disability of any of said administrative justices to act as aforesaid, any other justice previously designated by any of said administrative justices may act in his stead, or if no such designation has been made, or if a justice so designated is similarly disabled, or in any other instance where the chief justice of the supreme judicial court shall deem it necessary, the chief justice of the supreme judicial court may act in his stead or designate any other justice of any court so to act. (1968, 579, § 5; 1978, 478, § 16, approved July 18, 1978, by § 343, effective July 1, 1978.)

**Cross References—**

As to authorization of General Court to provide for continuity of government in periods of emergency, see ALM Mass. Const. [§ 22].

As to territorial jurisdiction and place of holding District Courts, see ALM G.L. c. 218, § 1.

As to clerks of District Courts, see ALM G.L. c. 218, § 8.

As to temporary clerks of District Courts, see ALM G.L. c. 218, § 9.

As to assistant clerks of District Courts, see ALM G.L. c. 218, § 10.

As to hours when District Court open for transaction of business, see ALM G.L. c. 218, § 15.

As to District Courts always open, see ALM G.L. c. 218, § 38.

As to sittings of District Courts, see ALM G.L. c. 218, § 38.

As to who may hold court, see ALM G.L. c. 218, § 40.

As to territorial jurisdiction of Boston Juvenile Court, see ALM G.L. c. 218, § 57.

**§ 17. Civil Defense Organizations to be Apolitical.**

No organization for civil defense established under the authority of this act shall participate in any form of political activity, nor shall it be employed directly or indirectly for political purposes. (1950, 639, § 17.)

**§ 18. Loyalty Requirements of Persons Associated With Civil Defense Organizations; Oath.**

No person shall be employed or associated in any capacity in any civil defense organization established under this act who advocates, or has advocated, a change by force or violence in the constitutional form of the government of the United States, or in this commonwealth, or the overthrow of any government in the United States by force or violence, or who has been convicted of, or is under indictment or information charging any subversive act against the United States. Each person who is appointed to serve in an organization for civil defense shall, before entering upon his duties, take an oath, in writing, before a person authorized to administer oaths in this commonwealth, which oath shall be substantially as follows:—

"I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the constitution of the United States and the constitution of the Commonwealth of Massachusetts against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties on which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am

is a member of any political party or organization that advocates, the overthrow of the government of the United States or of this commonwealth by force or violence; and that during such time as I am a member of the (name of civil defense organization), I will not advocate nor become a member of any political party or organization that advocates the overthrow of the government of the United States or of this commonwealth by force or violence." (1950, 639, § 18.)

**Cross References—**

As to loyalty oaths taken by state employees, see A.L.M. G. L. c. 26A, §§ 7A, 15.

**§ 19. Severability.**

If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable. (1950, 639, § 19.)

**§ 20. Cooperation With Governor and Civil Defense Director, Supremacy of Governor's Orders, Rules and Regulations.**

It shall be the duty of the members of, and of each and every officer, agent and employee of every political subdivision of this commonwealth and of each member of all other governmental bodies, agencies and authorities of any nature whatsoever fully to cooperate with the governor and the director of civil defense in all matters affecting civil defense. The governor is authorized to make, amend and rescind orders, rules and regulations pertaining to civil defense, and it shall be unlawful for any municipality or other subdivision or any other governmental agency of this commonwealth to adopt any rule or regulation or to enforce any such rule or regulation that may be at variance with any such order, rule or regulation established by the governor. Each such organization shall have available for inspection at its office all orders, rules and regulations made by the governor, or under his authority. In the event of a dispute on the question of whether or not any such rule or regulation is at variance with an order, rule or regulation established by the governor under this act, the determination of the governor shall control. (1950, 639, § 20.)

**§ 20A. Designated Substitutes for Commissioners and Department Heads.**

The commissioner or head of each executive or administrative

**§ 20C**

department of the commonwealth, including the state secretary, the attorney general, the treasurer and receiver general, and the auditor, and the director or head of each division in each such department, shall designate, by name or position, five persons in his respective department or division who shall exercise, successively, his duties in the event of his absence or disability. Each such designation shall be subject to approval by the governor and council and shall be in effect until revoked by the officer who made such designation. Persons designated under this section to perform the duties of a department or division head in his absence or disability shall perform such duties only in succession to persons so authorized under any other provision of general or special law. (1962, 767.)

**Cross References—**

As to election and tenure of secretary, treasurer, auditor and attorney general, see A.L.M. Mass. Const. § 19.

As to authorization of General Court to provide for continuity of government in periods of emergency, see A.L.M. Mass. Const. § 227.

**§ 20B. Filling Certain Vacancies by Governor Without Advice and Consent of Council.**

Any vacancy in any office which, by reason of the provisions of any statute, is to be filled by the governor, with the advice and consent of the council, may, in the event of a vacancy therein resulting from enemy attack and in the event that enemy attack or the effect thereof prevents a quorum of the council from assembling, be filled by the governor without the advice and consent of the council. Any appointment made under the authority of this section shall be temporary pending appointment in the usual manner, with the advice and consent of the council, when circumstances shall permit. (1962, 767.)

**Cross References—**

As to election and tenure of secretary, treasurer, auditor and attorney general, see A.L.M. Mass. Const. § 19.

As to authorization of General Court to provide for continuity of government in periods of emergency, see A.L.M. Mass. Const. § 227.

**§ 20C. Removal of Certain Officers by Governor Without Advice and Consent of Council.**

Any officer who, by reason of the provisions of any statute, may be removed by the governor, with the advice and consent of the council, may, in the event that enemy attack or the effects thereof

prevents a quorum of the council from assembling, he removed by the governor without such advice and consent, provided that the removal is for grounds that would be grounds for removal with the advice and consent of the council. Any removal made under the authority of this section shall be temporary, pending removal in the usual manner, with the advice and consent of the council, when circumstances shall permit. Pending such removal with the advice and consent of the council, the governor may fill any vacancy resulting from a removal effected under the authority of this section, by appointment thereto without the advice and consent of the council. (1962, 767.)

**Cross References—**

As to authorization of General Court to provide for continuity of government in periods of emergency, see ALM Mass. Const. § 227.

As to removal of state officers appointed by governor, see ALM G.L. c. 30, § 9.

**§ 21. Expenditure of Appropriations by Civil Defense Agency.**

For the purpose of carrying out the provisions of this act, the civil defense agency may expend such sums as may hereafter be appropriated therefor. (1950, 639, § 21.)

**§ 22. Inoperativeness of Act.**

This act or any part hereof shall become inoperative by the adoption of a joint resolution to that effect by the house and senate acting concurrently. (1950, 639, § 22, 1952, 269, 1953, 491.)

CHAPTER 33

**Rights of Inhabitants Inducted or Serving in Military Forces of the United States**

(Acts 1970, Ch. 174)

**SEC.**

1. Commonwealth inhabitants not to be required to serve outside United States in event of undeclared war not an emergency or outside scope of presidential powers.
2. Attorney general to bring actions on behalf of commonwealth inhabitants.

**§ 1. Commonwealth Inhabitants not to be Required to Serve Outside United States in Event of Undeclared War not an Emergency or Outside Scope of Presidential Powers.**

No inhabitant of the commonwealth inducted or serving in the military forces of the United States shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities not an emergency and not otherwise authorized in the powers granted to the President of the United States in Article 2, Section 2, of the Constitution of the United States designating the President as the Commander-in-Chief, unless such hostilities were initially authorized or subsequently ratified by a congressional declaration of war according to the constitutionally established procedures in Article I, Section 8, of the Constitution of the United States. (1970, 174, § 1.)

**§ 2. Attorney General to Bring Actions on Behalf of Commonwealth Inhabitants.**

The attorney general shall, in the name and on behalf of the commonwealth and on behalf of any inhabitants thereof who are required to serve in the armed forces of the United States in violation of section one of this act, bring an appropriate action in the Supreme Court of the United States as the court having original jurisdiction thereof under clause two of section 2 of Article III of the Constitution of the United States to defend and enforce the rights of such inhabitants and of the commonwealth under section one; but if it shall be finally determined that such action is not one of which the

TITLE III  
CIVIL DEFENSE, MILITARY AFFAIRS AND  
VETERANS

CHAPTER 31  
Civil Defense Act

(Acts 1950, Ch. 639, as amended.)

**§ 2. Creation of Civil Defense Agency and Office of Emergency Preparedness; Term, Salary, Powers and Duties of Director.**

There is hereby created within the executive branch of the commonwealth a division of civil defense to be known as the "civil defense agency and office of emergency preparedness" hereinafter called the "civil defense agency", which shall be under the direction of a director of civil defense hereinafter called the "director". The governor shall, with the advice and consent of the council, appoint the director to serve during his pleasure. The director shall devote his full time to his duties under this act, shall not hold any other public office and the position of director shall be classified in accordance with section forty-five of chapter thirty of the General Laws and the salary shall be determined in accordance with section forty-six C of said chapter thirty. He shall co-ordinate the activities of all organizations for civil defense within the commonwealth, and shall co-operate and maintain liaison with civil defense agencies of other states and the federal government, shall, subject to the direction and control of the governor, be the executive head of the civil defense agency, and shall have such additional authority, duties and responsibilities authorized by this act as may be prescribed by the governor, and shall be responsible to the governor for carrying out the program for civil defense of the commonwealth. The director may, within the limits of the amount appropriated therefor, appoint such experts, clerks and other assistants as the work of the civil defense agency may require and may remove them, and may make such expenditures as may be necessary in order to execute effectively the purposes of this act. Such employees shall not be subject to chapter thirty-one of the General Laws. The director and other personnel of the civil defense agency shall be provided with suitable office space, furniture, equipment and supplies in the same manner as provided for personnel of other state departments. (Amended by 1981, 699, § 83, approved, with emergency preamble, December 24, 1981; by § 97, effective June 28, 1981.)

**Editorial Note—**

The 1981 amendment deleted the third sentence, providing that the director receive such annual salary as the governor and council approve, and substituted a sentence providing that said position be classified in accordance with § 45 chapter 30 of the General Laws, and the salary be determined in accordance with § 46C of chapter 30 of the General Laws.

**§ 2B. Designation of Nuclear Power Plant Areas.**

The director shall designate certain areas of the commonwealth as "nuclear power plant areas". For purposes of this section, said areas shall consist of all communities located within a ten mile radius of a nuclear power plant, whether or not said power plant is located within the commonwealth.

The director shall annually publish and release to local officials of each political subdivision within areas preparedness and response plans which will permit the residents of said areas to evacuate or take other protective actions in the event of a nuclear accident. Copies of such plans shall be made available to the public upon request for a fee which is not to exceed the cost of reproduction.

The director shall also annually publish and release through local officials to the residents of the said areas emergency public information. Such information shall include warning and alerting provision, evacuation routes, reception areas, and other recommended actions for each area.

The director shall propose procedures for annual review by state and local officials of the preparedness and response plans with regard for, but not limited to, such factors as changes in traffic patterns, population densities, and new construction of schools, hospitals, industrial facilities, and the like. Opportunity for full public participation in such review including a public hearing, shall be provided pursuant to section two of chapter thirty A. (Added by 1979, 796, § 24, approved, with emergency preamble Nov. 16, 1979, by § 35, effective Jan. 1, 1980.)

**§ 5. Proclamation of State of Emergency; Power to Seize or Possess Personal and Real Property; Awards to Owners of Seized Property.**

[The introductory paragraph is amended to read as follows:]

Because of the existing possibility of the occurrence of disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, in order to insure that the preparations of the commonwealth will be adequate to deal with such disasters, and generally to provide for the common defense and to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth, if and when the congress of the United States shall declare war, or if and when the President of the United States shall by proclamation or otherwise inform the governor that the peace and security of the commonwealth are endangered by belligerent acts of any enemy of the United States or of the commonwealth or by the imminent threat thereof, or upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action, or from riot or other civil disturbance, or from fire, flood, earthquake or other natural causes, or whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food, or whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the commonwealth, the governor may issue a proclamation or proclamations setting forth a state

of emergency. (Amended by 1979, 796, § 26, approved, with emergency preamble Nov. 16, 1979; by § 35, effective Jan. 1, 1980.)

[No change in balance of section.]

**Editorial Note—**

The 1979 amendment, near the end of the first paragraph, added language relative to proclamation of nuclear emergency.

CHAPTER 35

Public Officers and Employees and certain Other Persons in  
the Military or Naval Forces

(Acts 1941, Ch. 708, as amended.)

§ 6. Reinstatement to Non-civil Service Positions; Certificates of  
Registered Physicians; Definitions.

**ALR Annotations—**

When does sale or reorganization exempt business from re-employment requirements of military veterans' re-employment laws (38 USCS §§ 2021 et seq.) 63 ALR Fed 132.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. The police powers of the Commonwealth of Massachusetts may be lawfully delegated by State and/or local officials to PSNH, NHY and/or the NHY-ORO.
2. The NHY-ORO is the delegatee of the police powers of the Commonwealth of Massachusetts.
3. The activities envisioned for PSHA, NHY and/or the NHY-ORO are not ultra vires under the Commonwealth of Massachusetts corporation laws.
4. The activities contemplated by the SPMC for PSNH, NHY and/or the NHY-ORO are not outside of the ordinary course of business and do not, in any case, require prior approval of the Bankruptcy Court.
5. PSNH, NHY and/or the NHY-ORO do not have to qualify to do business in the Commonwealth of Massachusetts.

'88 OCT 11 P4:57

CERTIFICATE OF SERVICE

I, Jay Bradford Smith, one of the attorneys for the Applicants herein, hereby certify that on October 7, 1988, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

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(\* = Ordinary U.S. First Class Mail)