



# The Commonwealth of Massachusetts

## AUDITOR OF THE COMMONWEALTH

### DIVISION OF LOCAL MANDATES

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AUDITOR

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February 25, 2004

Barry S. McKay, Fire Chief  
City of Gloucester  
Fire Department  
8 School Street  
Gloucester, Massachusetts 01930-3529

RE: Department of Environmental Protection (DEP) Annual Compliance Assurance Fee,  
G. L. c. 21E, s. 3B and 310 CMR 40.00

Dear Chief McKay:

This letter is in response to your request regarding the Local Mandate Law, G. L. c. 29, s. 27C, and the above-captioned DEP compliance fee. Specifically, you asked for a determination as to whether the Local Mandate Law applies to the DEP annual compliance fee of \$2,600, invoiced on May 5, 2002. G. L. c. 21E, s. 3B authorizes DEP to levy such fees to offset costs for inspection and enforcement activities related to oil and hazardous material release and disposal sites. You explain that this fee relates to a 1988 release of gasoline at the Gloucester Fire Headquarters. Although it may appear that this would be the type of state-mandated cost that would invoke the Local Mandate Law, in light of court interpretations, it is the opinion of DLM that G. L. c. 29, s. 27C does not apply in this instance. This is primarily because this cost is imposed generally across the public and private sectors, and not directed particularly at cities and towns. The following discussion explains this conclusion.

In relevant part, the Local Mandate Law provides that any post-1980 state law or regulation that imposes additional costs upon any city or town shall be subject to local acceptance, unless the Commonwealth assumes the additional compliance costs. Note that a community may not unilaterally choose not to comply. Rather, any city or town aggrieved by such a law or regulation may petition superior court to seek an exemption from compliance.

In one such case, the state Supreme Judicial Court ruled that the Local Mandate Law did not apply to costly regulations governing sanitary landfills. This was because these were "generally applicable environmental regulations" that applied to public and private landfill owners, and resulted in costs only to municipalities that chose to engage in the activity. *Town of Norfolk v. Department of Environmental Quality Engineering*, 407 Mass. 233, 241 (1990). As the DEP compliance and assurance fees at issue here apply to public and private owners of fuel storage tanks, it is our opinion that the *Norfolk* rule would place these costs beyond the protection of the Local Mandate Law.

Chief Barry S. McKay  
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Additionally, G. L. c. 21E, s. 3B was approved with a provision that it applies "notwithstanding any general or special law to the contrary." This language effectively suspends the Local Mandate Law, and any other contrary laws, with respect to G. L. 21E, s. 3B.

I regret that this opinion does not aid your efforts to deal with budget constraints. Nonetheless, we must apply the Local Mandate Law consistently to each issue, as interpreted by the courts. Please let me know if there are factors we may not have considered that would change this result. I apologize for the delay in this response, and thank you for your patience.

By the way, permit me to introduce myself as Auditor DeNucci's recent appointment to the position of Director of the Division of Local Mandates. I have been with the Division for a number of years as Legal Counsel, and hope to provide able service to you and your fellow municipal officials in this new capacity.

Sincerely,

A handwritten signature in cursive script, reading "Emily D. Cousens".

Emily D. Cousens, Esq., Director  
Division of Local Mandates

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