
Cross-Border Assistance in Emergencies: The New England/Eastern Canadian Model

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I. INTRODUCTION

There is a saying in the Emergency Management community that “all disasters are local.” This is demonstrably true; the first response to any disaster, large or small, must be by local authorities: firefighters, police, emergency medical services, public health authorities, etc. Depending upon the type and scale of the emergency, state-level resources such as hazardous materials teams may be called in, and assistance may be needed from outside the local area or from outside the state. In large events, federal monetary and material help may be needed.

Emergencies requiring more than a local response may be of many different types: weather events, such as snowstorms, floods, and hurricanes; large forest or urban fires; disasters at sea; chemical or nuclear releases or accidents; or events stemming from terrorism or bioterrorism.

On a regional level, the six New England states (Maine, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island) have a history of assisting one another in times of need. A number of regional

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mutual aid compacts have existed for many years.¹ Prior to September 11, 2001, many states recognized the occasional need for outside assistance, and joined the interstate Emergency Management Assistance Compact (EMAC).² EMAC was created in the wake of Hurricane Andrew, which devastated parts of Florida. Then-Governor Lawton Chiles contacted governors of other states in the South to explore the benefits of an interstate mutual aid compact, which resulted in the creation of the Southern Regional Emergency Management Assistance Compact.³ This compact opened its membership to other states in 1995, and Congress ratified it into law as a national model in 1996.⁴ EMAC ranks as the first interstate compact approved by Congress since the Civil Defense Act of 1950.⁵ Today, forty-eight of the fifty states are members of EMAC – all except California and Hawaii.⁶ The territories of Puerto Rico and the U.S. Virgin Islands are also members. Since EMAC is adopted by each member state as state law,⁷ assistance sent through the compact is a legally binding arrangement.⁸

EMAC has been activated successfully on a number of occasions. During Hurricane Floyd in 1999, fourteen states lent more than five-hundred workers to North Carolina alone.⁹ EMAC was activated again during Hurricane Isabel in 2003, when affected jurisdictions (North

1. See, e.g., New England Compact on Radiological Health Protection, Chapter 801 of the Acts of 1967 (Mass.); “Interstate Procedures Guideline [for emergency medical services],” interpretation prepared by the New England Council for EMS, and 105 CMR 170.255(C); Act Granting the Consent and Approval of Congress to an Interstate Forest Fire Protection Compact,” June 25, 1949. (approving the Northeastern Forest Fire Protection Compact, which includes New York). See also Act of May 13, 1952 (extending the Interstate Forest Fire Protection Compact to any province of Canada contiguous to any party state).

2. Richard J. Dieffenbach, *Help is Just a State Away*, State Government News, Council of State Governments, December 1998 at 27 available at http://www.emacweb.org/EMAC/library/documents/Help_Is_A_State_Away.pdf (last visited Oct. 24, 2004).

3. *Id.*

4. Sydney J. Freedberg Jr., *No Disaster This Compact Can't Handle*, National Journal, April 6, 2002 at 1001 available at http://www.emacweb.org/EMAC/library/documents/National_Journal_Article_2002.pdf.

5. See Dieffenbach, *supra* note 2, at 30.

6. *Member States*, Emergency Management Assistance Compact, at http://www.emacweb.org/EMAC/About_EMAC/Member_States.cfm (last visited Oct. 24, 2004).

7. See, e.g., Interstate Emergency Management Assistance Act, 2000 Mass. Acts 339 [hereinafter EMAC].

8. Dieffenbach, *supra* note 2.

9. Freedberg, *supra* note 4.

Carolina, Virginia, Maryland, Delaware, and the District of Columbia) made twenty-six requests for assistance through the compact.¹⁰ Hurricane Isabel was the first time that any of the New England states provided assistance under EMAC. Massachusetts, Rhode Island and Vermont responded, sending personnel and needed materials.¹¹ Recently, the Florida hurricanes in the summer of 2004 led to the largest mobilization of mutual aid in U.S. history. Again, several New England states sent assistance.¹²

Building upon the EMAC model, the six New England states and five Eastern Canadian provinces (New Brunswick, Nova Scotia, Quebec, Prince Edward Island, and Newfoundland & Labrador) have entered into an International Emergency Management Assistance Memorandum of Understanding (known as "IEMAC" or "the Compact").¹³ IEMAC was successfully implemented in February, 2004 during a snow storm in Nova Scotia known as "White Juan," so named because it started as a tropical storm and turned to snow when it hit Nova Scotia. Earlier, Hurricane Juan had done a great deal of damage in the province. Both Maine and New Brunswick provided snow plows in response to a request under the Compact.¹⁴ IEMAC was successfully implemented again in August, 2004. Vermont requested 2000 blankets from Quebec in connection with a large outdoor concert, to prevent hypothermia which was a risk due to rain and cool weather. The blankets were obtained from the Red Cross in Quebec

10. John Tommaney, Response and Recovery Branch Chief of the Massachusetts Emergency Management Agency. Presentation at a meeting of the International Emergency Management Group (Oct. 22, 2003).

11. *Id.*

12. Christopher Herrick, Chief of the Vermont HAZMAT Response Team. Presentation at a meeting of the International Emergency Management Group (Oct. 27, 2004).

13. International Emergency Management Assistance Memorandum of Understanding, July 18, 2000, *available at* http://www.scics.gc.ca/cinfo00/85007918_e.html [hereinafter IEMAC]. On July 18, 2000 at Halifax, Nova Scotia, during the 25th Annual Conference of the New England Governors and Eastern Canadian Premiers, all of the New England Governors and Eastern Canadian Premiers either signed IEMAC or a letter of intent to sign it as soon as the authorizing language was passed by their respective legislative bodies. At that meeting, all of the Governors and Premiers committed their jurisdictions to proceeding immediately to prepare the plans necessary to implement the compact and directed their Emergency Management Directors to proceed without waiting for legislation. As of the date of this writing, only Rhode Island and Connecticut are still awaiting legislation.

14. A legal issue also arose from this activation of the Compact and was resolved successfully. When a plow from New Brunswick damaged a private automobile, the plow was treated for liability purposes as equipment belonging to Nova Scotia. *See* IEMAC, *supra* note 13, at Article VI. *See also infra* note 28 and accompanying text.

and delivered to the concert site on the same day the request was made.¹⁵

The purpose of this article is to analyze the provisions of IEMAC and issues that arise in its implementation, with the hope of assisting people in other regions of the country working towards adopting mutual aid agreements with other regions of Canada or Mexico.¹⁶ Part II of this article will describe the Compact's provisions. Part III will examine some of the legal and logistical issues that arise in its implementation and will discuss ongoing efforts to address them.

II. OVERVIEW OF THE INTERNATIONAL COMPACT

The International Compact (hereinafter referred to as "IEMAC") establishes as its governing body those party jurisdiction officials assigned emergency management responsibilities in their jurisdictions (typically the directors of the various emergency management agencies). This body is known as the International Emergency Management Group (IEMG).¹⁷ It meets each year in the spring and fall, and it has established several "working groups" to research and resolve issues that arise under IEMAC, both legal and logistical.

In its drafting, IEMAC was modeled heavily on EMAC, and in many cases its substantive language is verbatim or nearly so. Since it is an international compact, the introductory language notes compliance with the "Agreement between the Government of the United States and the Government of Canada on Cooperation in Comprehensive Emergency Planning and Management," which was renewed on December 2, 1998.¹⁸

Article I of IEMAC sets forth its purpose in clear terms:

The purpose of this compact is to provide for the possibility of mutual assistance among the jurisdictions entering into this compact in managing any emergency or disaster when the affected jurisdiction or jurisdictions ask for assistance, whether arising from natural disaster, technological hazard, man-made disaster or civil emergency aspects of

15. Bernard Dubois, Director of Civil Security Operations, Quebec Emergency Management Organization. Presentation at a meeting of the International Emergency Management Group (Oct. 27, 2004).

16. A similar compact among the states of Alaska, Idaho, Oregon, and Washington, the Province of British Columbia, and the Yukon Territory is awaiting a signing ceremony.

17. IEMAC *supra* note 13, at Article III.

18. Agreement on Co-operation in Comprehensive Civil Emergency Planning and Management, Apr. 28, 1986, U.S.-Can., T.S. 1998/36. Annex A of this Agreement creates a Consultative Group on Comprehensive Civil Emergency Planning and Management. Among other things, Annex A directs the consultative group to "encourage and facilitate, where appropriate, planning and development of mutual cooperation for comprehensive civil emergency management by provinces, states and municipalities[.]" *Id.* at Annex A, § 2(c).

resources shortages.¹⁹

Article II, “General Implementation,” expresses the background premises that underlie the compact:

Each party jurisdiction entering into this compact recognizes that many emergencies may exceed the capabilities of a party jurisdiction and that intergovernmental cooperation is essential in such circumstances. . . . few, if any, individual jurisdictions have all the resources they need in all types of emergencies or the capability of delivering resources to areas where emergencies exist.²⁰

Article II also delegates various responsibilities to the chief emergency management officials in each jurisdiction:

On behalf of the party jurisdictions participating in the compact, the legally designated official who is assigned responsibility for emergency management is responsible for formulation of the appropriate inter-jurisdictional mutual aid plans and procedures necessary to implement this compact, and for recommendations to the jurisdiction concerned with respect to the amendment of any statutes, regulations or ordinances required for that purpose.²¹

Article III specifies particular responsibilities of the jurisdictions. Among other things, each party jurisdiction must complete the following: review its emergency plans and develop a plan that will allow for inter-jurisdictional cooperation; develop inter-jurisdictional procedures; protect and ensure delivery of services and resources, both human and material, to the extent authorized by law; inventory and agree upon procedures for the inter-jurisdictional loan and delivery of human and material resources; and provide, to the extent authorized by law, for temporary suspension of any statutes or ordinances, over which the province or state has jurisdiction,

19. IEMAC, *supra* note 13, at Article I. The parallel EMAC provision states:

The purpose of this compact is to provide for mutual assistance between the states entering into this compact in managing any emergency disaster that is duly declared by the governor of the affected state, whether arising from natural disaster, technological hazard, manmade disaster, civil emergency aspects of resources shortages, community disorders, insurgency or enemy attack. EMAC, *supra* note 7, at Article I.

It is interesting to note that while EMAC requires a disaster or emergency *declaration* by a state’s governor to activate its mutual assistance responsibilities, IEMAC can be activated simply by a request for assistance.

20. IEMAC, *supra* note 13, at Article II. *See also* EMAC, *supra* note 7, at Article II (stating similar language).

21. IEMAC, *supra* note 13, at Article II.

that impede the implementation of the above-described responsibilities.²²

Each of these requirements presents challenges. For example, although the requirement to inventory resources sounds straightforward, an issue of terminology arises. Pieces of equipment may have different names in the U.S. and Canada, and personnel, such as advanced practice nurses and emergency medical technicians (EMTs), may be referred to by different terms. IEMG has completed its first round of work on this “resource typing” project. Article III also sets forth a process for a jurisdiction to request assistance. The requesting state or province must describe the emergency service function for which assistance is needed, list the amount and type of assistance needed and an estimated time that it will be needed, and specify a place and time for staging of the assisting party’s response.²³ Article III also requires frequent consultation among officials of the party jurisdictions, the group known as IEMG.²⁴

Article IV acknowledges that the jurisdiction rendering aid to another jurisdiction may withhold or recall resources to the extent necessary to provide reasonable protection for that jurisdiction.²⁵ In addition, with respect to the legal authority of personnel from one jurisdiction operating in another, Article IV provides:

Each party jurisdiction shall afford to the personnel of the emergency forces of any party jurisdiction, while operating within its jurisdictional limits under the terms and conditions of this compact and under the operational control of an officer of the requesting party, the same powers, duties, rights, privileges and immunities as are afforded similar or like forces of the jurisdiction in which they are performing emergency services. Emergency forces continue under the command and control of their regular leaders, but the organizational units come under the operational control of the emergency services authorities of the jurisdiction receiving assistance. These conditions may be activated, as needed . . . and continue as long as . . . the emergency or disaster remains in effect or loaned resources remain in the receiving jurisdiction or jurisdictions, whichever is longer. The receiving jurisdiction is responsible for informing the assisting jurisdictions of the specific moment when services will no longer be required.²⁶

Article V is a key provision as it allows for reciprocity of licensing for

22. IEMAC, *supra* note 13, at Article III. *See* EMAC, *supra* note 7, at Article III (stating similar language); *See also infra* Section III.D.

23. IEMAC, *supra* note 13, at Article III, 2.

24. IEMAC, *supra* note 13, at Article III, 3.

25. IEMAC, *supra* note 13, at Article IV. *See also* EMAC, *supra* note 7, at Article IV (stating a similar provision).

26. IEMAC, *supra* note 13, at Article IV.

responders who cross a jurisdictional line under IEMAC:

Whenever a person holds a license, certificate or other permit issued by any jurisdiction party to the compact evidencing the meeting of qualifications for professional, mechanical or other skills, and when such assistance is requested by the receiving party jurisdiction, such person is deemed to be licensed, certified or permitted by the jurisdiction requesting assistance to render aid involving such skill to meet an emergency or disaster, subject to such limitations and conditions as the requesting jurisdiction prescribes by executive order or otherwise.²⁷

Note that this broad language covers all types of responders: healthcare personnel, engineers, electricians, certified technicians of all types, etc. Article VI immunizes responders from tort liability for negligence, stating:

Any person or entity of a party jurisdiction rendering aid in another jurisdiction pursuant to this compact are [sic] considered agents of the requesting jurisdiction for tort liability and immunity purposes. Any person or entity rendering aid in another jurisdiction pursuant to this compact are [sic] not liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article does not include willful misconduct, gross negligence or recklessness.²⁸

IEMAC and EMAC both allow for supplementary agreements among the jurisdictions. “Supplementary agreements may include, but are not limited to, provisions for evacuation and reception of injured and other persons and the exchange of medical, fire, public utility, reconnaissance, welfare, transportation and communications personnel, equipment and supplies.”²⁹

Both compacts also provide that workers’ compensation and death benefits travel with the person who crosses a border under a compact:

Each party jurisdiction shall provide, in accordance with its own laws, for the payment of workers’ compensation and death benefits to injured members of the emergency forces of that jurisdiction and to representatives of deceased members of those forces if the members sustain injuries or are killed while rendering aid pursuant to this compact, in the same manner and on the same terms as if the injury or

27. *Id.* at IEMAC Article V. *See also* EMAC, *supra* note 7, at Article V (stating an almost identical provision).

28. IEMAC, *supra* note 13, at Article VI. *See also* EMAC, *supra* note 7, at Article VI (providing identical immunity for “officers or employees of a party state”). Issues of interpretation of this provision in IEMAC will be discussed *infra* at Section III.C.

29. IEMAC, *supra* note 13, at Article VII. *See also* EMAC, *supra* note 7, at Article VI.

death were sustained within their own jurisdiction.³⁰

The remaining substantive Articles of IEMAC deal with evacuation (responsibility for support and repatriation of civilian evacuees)³¹ and implementation (when it becomes effective and procedures for withdrawal).³²

III. CHALLENGES IN IMPLEMENTING IEMAC

A. Crossing the Border

The first crucial question in planning for implementation of IEMAC is whether people and materials will be able to easily cross the international border after assistance has been requested during a disaster. To answer this question, it is helpful to divide disasters into two basic types: "routine" and others.

"Routine" disasters involve circumstances such as weather events, accidental releases or spills, fires, etc., during which normal border crossing procedures would apply. With some pre-planning on the part of IEMG members, it should be possible to provide to customs officials, on both sides of the border, rosters of people and inventories of equipment that may need to cross the border in a disaster. These resources can then be "pre-cleared" so that time spent at customs during the disaster can be minimized.³³ IEMG's working groups are undertaking this task.

A more challenging problem would arise after a terrorist event or suspected terrorist event, or any time during a period of heightened alert when the border is limited or closed. Ironically, a large disaster could precipitate border closure during the time when international assistance is needed the most. More work is needed to ensure the smooth passage of IEMG assets across the border in these circumstances.³⁴

B. Credentialing and Privileging

The concepts of credentialing and privileging can be confusing as they are sometimes used interchangeably. For the purposes of this article, "credentialing" refers to the process of answering the question whether a

30. IEMAC, *supra* note 13, at Article VIII (discussing Workers' Compensation and Death Benefits. *See also* EMAC, *supra* note 7, at Article VIII (discussing Compensation similarly).

31. IEMAC, *supra* note 13, at Article X. *See also* EMAC, *supra* note 7, at Article X.

32. IEMAC, *supra* note 13, at Article XI. *See also* EMAC, *supra* note 7, at Article XI.

33. Discussion at IEMG meeting, Charlottetown, Prince Edward Island (June 2004).

34. *Id.*

person has the appropriate education, training – including licensure, certification, etc. – and/or experience (the “credentials”) to perform specific tasks. “Privileging” refers to the extensive background-checking process that hospitals must engage in before granting “hospital privileges” to a physician and allowing her to treat patients there.

1. Credentialing

As discussed above, IEMAC Article V provides for reciprocity of licensure or certification for individuals responding under IEMAC.³⁵ This mutual recognition of credentials may be limited or conditioned by the governor or premier of the state or province receiving assistance, by an executive order or otherwise.³⁶ It may be anticipated that professional and other types of credentials issued by one of the parties will generally be accepted by all parties to IEMAC, so the jurisdictions will not have to be concerned with credentialing problems in the heat of a disaster.

In the U.S., the federal Health Resources and Services Administration (HRSA) is at work on a nationwide (and state-based) Emergency System for Advance Registration of Volunteer Healthcare Personnel, known as “ESAR-VHP”.³⁷ The purpose of ESAR-VHP is to assist medical professionals in volunteering for emergencies and disasters by providing verifiable, up-to-date information regarding the volunteers’ identity, licensing, credentialing, and accreditation to hospitals or other medical facilities. HRSA is working with several advisory groups on this project. It plans to issue guidelines to states in January 2005, which will help to ensure that the information in the systems can be shared across state lines

One New England state already has an advance registration process for volunteer healthcare professionals. Connecticut has developed an Emergency Credentialing Program, in which hospitals solicit their current staff to allow placement of their names in a database of participating practitioners.³⁸ When an emergency occurs, a hospital that needs extra staff can use the database to obtain volunteer doctors, nurses, or other health professionals. Each hospital participating in the Connecticut program is responsible for appropriately screening all volunteer practitioners that it includes in the database and must verify, in advance, the credentials of each such practitioner. When a state of emergency is declared by the Chief Executive Officer of a participating hospital, that hospital must also ensure malpractice coverage for the volunteers it

35. *See supra* note 27 and accompanying text.

36. IEMAC, *supra* note 13, at Article V.

37. Emergency System for Advance Registration of Volunteer Healthcare Personnel (ESAR-VHP) Focus Group Meeting (May 2004).

38. Statewide Emergency Credentialing Program, “Program and Policy” (CT 2004).

enlists.³⁹ In contrast, a state of emergency declared by the Governor will activate the state's Medical Reserve Corps, and liability and workers compensation coverage will be provided to the volunteers through the Public Health Emergency Response Authority.⁴⁰

All thirty-two acute care hospitals in Connecticut are involved in the program. Currently, over 1,500 physicians and mid-level practitioners are signed up in the database of participating practitioners, and the program expanded to include other health-related disciplines as of September 1, 2004.

2. Privileging

Hospital privileging raises different questions.⁴¹ Typically, state regulations or hospitals' medical staff bylaws require hospitals to undertake a specific privileging process (often called "credentialing") for physicians, as a condition of hospital licensure.⁴² This process is time-consuming and poses a formidable barrier to the rapid movement of physicians between hospitals during a disaster. While some states allow for emergency appointments of physicians,⁴³ the process is not always as clear as it could be. A helpful model to streamline the privileging process during emergencies is the "Disaster Privileging Standard" created by the U.S. Joint Commission on Accreditation of Healthcare Organizations (JCAHO).⁴⁴ The standard allows a hospital to grant "disaster privileges" during times when it has activated its Emergency Management Plan and the hospital is unable to handle its immediate patient needs.⁴⁵ Briefly, the

39. *Id.*

40. *Id.*

41. It should be noted that the privileging issue can arise whatever the scope of the disaster; it applies to physicians who move between hospitals *intrastate* as well as those who move interstate or across an international border.

42. For example, in Massachusetts, regulations of the Board of Registration in Medicine require all health care facilities to undertake this process before they may grant practice privileges to any licensed physician. *See* 243 CMR 3.05. These regulations require the hospital, among other things, to review information provided by the licensee concerning criminal convictions and malpractice suits pending or closed; to obtain from previous employers an assessment of the licensee's clinical skills and any information relevant to the licensee's character or competence to practice medicine; and to analyze and document the licensee's professional performance and judgment, mental and physical status, and compliance with continuing education requirements.

43. For example, Maine's regulations allow for a process of emergency appointment. *See* CODE ME. R. § IX.H.1.(b)(2)(c) (2004).

44. Many, but not all, U.S. hospitals are accredited by JCAHO. *See* JCAHO, *infra* note 45.

45. *Crosswalk of 2003 Medical Staff Standards for Hospitals to 2004 Medical Staff Standards for Hospitals*, Joint Commission on Accreditation of Healthcare Organizations, at

standard allows, but does not require, the chief executive officer of the hospital to grant short-term “disaster privileges” to a physician who presents one of four types of identification, or who is personally known by a current hospital or medical staff member. There must be a mechanism in place to ensure that the verification process of the credentials and privileges of individuals who receive disaster privileges begins as soon as the immediate situation is under control.⁴⁶

States may need to amend their regulations to allow hospitals to follow a procedure such as the one described in the JCAHO standard when disaster strikes.⁴⁷ The Connecticut program described above addresses this issue by requiring the hospital in need of volunteers during an emergency to follow its own internal medical staff policies for issuing disaster privileges in accordance with the JCAHO, or equivalent, standards before volunteers are permitted to work.⁴⁸ In other words, the state program does not replace hospital policies concerning emergency preparedness and disaster privileging, but serves as an adjunct to them. The program provides sample language that hospitals may choose to insert into their Medical Staff Bylaws, which would allow the hospital’s Chief of Staff to grant disaster privileges to volunteer practitioners whose names are in the statewide database.⁴⁹

C. Liability

As noted above, Article VI of IEMAC immunizes cross-border responders from liability for negligence.⁵⁰ However, the language of Article VI raises several questions of interpretation. First, any “person or entity of a party jurisdiction” who renders aid in another party jurisdiction pursuant to IEMAC is considered an “agent of the requesting jurisdiction for tort liability and immunity purposes.”⁵¹ Who falls within the definition of “person or entity of a party jurisdiction”? Must it be a government

http://www.jcaho.org/accredited+organizations/hospitals/standards/new+standards/ms_xwalk_hap.pdf [hereinafter JCAHO].

46. *Id.*

47. Effective August 1, 2004, Maine amended its hospital licensing regulations to allow hospitals’ bylaws, regulations, etc. to provide for the granting of emergency practice privileges. The amendments describe a process similar to the JCAHO standard. *See* CODE ME. R. § IX.E.6.a (2004).

48. Statewide Emergency Credentialing Program, “Program and Policy” (CT 2004).

49. *Id.* at Attachment 3.

50. *See supra* note 28 and accompanying text. Note that cross-border responders may also be protected by various states’ Good Samaritan laws and, in the U.S., by the federal Volunteer Protection Act of 1997. 42 U.S.C. § 14501 *et seq.* An analysis of these laws is beyond the scope of this article.

51. IEMAC, *supra* note 13, at Article VI.

employee, or do people and organizations from the private sector qualify? A similar question arises under EMAC, where parallel language uses the term “officers or employees of a party state.”

Since large-scale disasters may require resources beyond those that can be provided by governments, it seems reasonable to assume that the drafters of both EMAC and IEMAC intended private sector resources to fall within the compacts’ protections, once these resources are properly designated by the appropriate government officials. This begs the question of what constitutes a “proper designation.” To date, this issue has not been resolved by IEMG, although work is proceeding on creating a standard “official designation” template that could be completed and faxed to the appropriate officials in the receiving jurisdiction when a disaster occurs.

The second issue involves the language stating that the responder is “considered an agent of the requesting jurisdiction.” This provision is designed to place the responder on the same footing as a governmental employee of the requesting state or province, and thus to bring the responder under the protection of that jurisdiction’s Tort Claims Act.⁵² Normally, in the United States, it is the responsibility of individual state Attorneys General to investigate tort claims brought against state employees, and to litigate or settle these cases when appropriate. In the context of IEMAC (or EMAC), when a person from another state or province is sued for an act committed while under the authority of the relevant compact, will the relevant Attorney General view it as his or her duty to investigate the case and defend the person?⁵³ In the absence of

52. All New England states have Tort Claims Acts. The Canadian provinces have similar legal mechanisms. *See, e.g.*, Tort Claims Act, MASS. GEN. LAWS ch 258 (2004); Nova Scotia Proceedings Against the Crown Act, R.S.N.S. 1989, c. 360, § 5.

53. Several of the New England states have legislation that provides at least partial answers to this question. New Hampshire and Rhode Island have very similar statutes declaring all “functions . . . relating to ‘emergency management’ [New Hampshire] ‘disaster response’ [Rhode Island] are hereby declared to be governmental functions. . . .” N.H. REV. STAT. ANN. § 21-P:41 (2004); R.I. GEN. LAWS § 30-15-15 (2004). In both these states, an “emergency management [EM]” or “disaster response [DR]” worker is not liable for negligence with respect to personal injury or property damage as a result of EM or DR activity. *Id.* An “EM [or DR] worker” is defined broadly to include any person, paid or unpaid, from that state or out of state, public or private, who performs EM or DR services pursuant to a request of the state or a political subdivision. *Id.* The declaration of emergency response activities as “governmental functions” appears to bring out-of-state disaster responders under the protection of the Tort Claims Acts in these states, and at least suggests that such responders would stand in the same position as state employees with respect to defense by the Attorney General.

Vermont has a more specific statute that provides:

In any civil action against a state employee for alleged damage, injury, loss or

state legislation imposing such a duty, is the language of the compact designating such a person an “agent” of the requesting jurisdiction enough to create a duty? The answers are not entirely clear, despite the apparent intent of the language.⁵⁴

Finally, another troublesome question arises concerning the provision in Article VI of IEMAC stating that good faith does not include “willful misconduct, gross negligence or recklessness.” If the Tort Claims Act in the state where the harm occurs *does* cover such conduct, is the out-of-state responder protected for that conduct as an agent of that jurisdiction? Case law in Massachusetts has extended the reach of its Tort Claims Act to willful, wanton, or reckless conduct.⁵⁵ The final resolution of this issue will have to await a court decision.

D. Waiver of Laws

As mentioned above, Article III of IEMAC requires that each party jurisdiction must provide, to the extent possible, for temporary suspension of any of its statutes or ordinances that impede the implementation of IEMAC’s responsibilities.⁵⁶ Regardless of the amount of advance planning, it is likely that if and when a major disaster strikes, the governor or premier of an IEMG jurisdiction will need to waive particular laws. The authority for the head of state to waive laws usually exists, and is often found in civil defense statutes.⁵⁷

deprivation of rights arising from an act or omission to act in the performance of the employee’s official duties it shall be the obligation of the state to defend the action on behalf of the employee and to provide legal representation for that purpose at state expense. . . .” (emphasis added). VT. STAT. ANN. tit. 3, § 1101 (2004).

For the purposes of this statute, “state employee” includes “any person who volunteers for a state agency by providing services at the request of that agency and under the direction and control of that agency, but who does not receive hourly or salary compensation. . . .” VT. STAT. ANN. tit. 3 § 1101(b)(4) (2004). A person providing services pursuant to a request under IEMAC or EMAC should fit into the category of one who provides services at the request of and under the direction and control of the state agency.

54. Depending upon the tortious behavior alleged, the defense of the out-of-state responder could take several forms. If the act constitutes simple negligence, a motion to dismiss would be in order because IEMAC and EMAC immunize responders against claims of simple negligence. If the complaint alleges that the act was grossly negligent but an investigation supports simple negligence, the merits of the case might have to be litigated. Tort Claims Acts generally do not cover intentional torts, nor do IEMAC or EMAC. *See, e.g.,* Massachusetts Tort Claims Act, MASS. GEN. LAWS ch. 258, § 10(c) (2004); IEMAC, *supra* note 13; EMAC, *supra* note 7, at Article VI.

55. *Forbush v. City of Lynn*, 35 Mass. App. Ct. 696 (1994).

56. IEMAC, *supra* note 13, at Article III.

57. *See, e.g.,* MASS. GEN. LAWS ch. 33 App., §§13-5, 13-7 (2004).

In the United States, there are two good starting points for compiling a list of the types of laws that may need to be waived. First, the American Bar Association's section on State and Local Government Law prepared a useful "Draft Checklist for State and Local Government Attorneys to Prepare for Possible Disasters."⁵⁸ Second, in connection with the TOPOFF 2 exercise in Illinois in 2003, the TOPOFF 2 Legal Team⁵⁹ created the TOPOFF 2 Legal Handbook. While the handbook is somewhat specific to Illinois law, it contains very helpful Simulated Executive Orders waiving certain statutes and regulations. These provide examples of the kinds of laws that may pose barriers in a disaster, and with appropriate modifications they can serve as templates for other states and provinces.

Nevertheless, each state and province would be well advised to undertake a thorough review of its laws and to create a comprehensive list of which ones may need to be waived during a disaster. The legal working group of IEMG has created generic lists of types of laws that may require waiver for each state and province belonging to IEMAC, which can serve as a starting point.

IV. CONCLUSION

The implementation of IEMAC is still a work in progress. Although legal and logistical conundrums await resolution, it is clear that the responsible people in the New England states and Eastern Canadian provinces are dedicated to finding answers. As noted above, it is the author's hope that the progress being made in implementing IEMAC can assist government officials in other regions of the country in the emergency management, public health, and related fields to work together effectively across state and international borders.

58. Ernest B. Abbott, *Draft Checklist for State and Local Government Attorneys to Prepare for Possible Disasters*, A.B.A. ST. & LOC. GOV'T SEC. (Nov. 2002). The Checklist is available at www.abanet.org/statelocal/disaster.pdf.

59. The TOPOFF 2 Legal Team was chaired by Anne M. Murphy, Chief Counsel, Illinois Department of Public Health. A copy of the Handbook may be obtained by contacting Ms. Murphy's office care of the Illinois Department of Public Health, 160 N. LaSalle Street, Suite S-200, Chicago, Illinois, 60601.