COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA, & NORTHERN ISLANDS

COMMONWEALTH REGISTER
VOLUME 26 NUMBER 02

FEBRUARY 23, 2004

COMMONWEALTH REGISTER

VOLUME 26
NUMBER 02
FEBRUARY 23, 2004

TABLE OF CONTENTS

COMMONWEALTH REGISTER

VOLUME 26
NUMBER 02
FEBRUARY 23, 2004

TABLE OF CONTENTS

COMMONWEALTH REGISTER

VOLUME 26
NUMBER 02
FEBRUARY 23, 2004

TABLE OF CONTENTS

LEGAL OPINIONS:

COMMONWEALTH REGISTER

VOLUME 26
NUMBER 02
FEBRUARY 23, 2004

TABLE OF CONTENTS

COMMONWEALTH REGISTER

VOLUME 26
NUMBER 02
FEBRUARY 23, 2004

TABLE OF CONTENTS

FEB 1 0 2004

DECLARATION OF EMERGENCY

Volcanic Eruption on Anatahan

I, JUAN N. BABAUTA, by the authority vested in me as Governor pursuant to Article III, Section 10 of the Commonwealth Constitution and 3 CMC §5121, and in accordance with the recommendations of the Emergency Management Office, Commonwealth of the Northern Mariana Islands and US Geological Survey (attached hereto and incorporated herein by this reference) hereby declare another 30-day extension of the May 13, 2003 Declaration of Emergency for the island of Anatahan and the declaration that the island of Anatahan as unsafe for human habitation and further do hereby restrict all travel to said island with the exception of scientific expeditions. Therefore, the provisions of the May 13, 2003 Declaration of Emergency remain in effect maintaining the off-limits zone from 30 nautical miles to 10 nautical miles.

This Declaration shall become effective upon signature by the Governor and shall remain in effect for thirty (30) days unless the Governor shall, prior to the end of the 30-day period, notify the Presiding Officers of the Legislature that the state of emergency has been extended for a like term. The Governor shall give reason for extending the emergency.

JUAN N. BABAUTA
Governor

Cc: Lt. Governor
Senate President
House Speaker
Mayor of the Northern Islands
Director of Emergency Management
Commissioner of Public Safety
Attorney General
Secretary of Finance
Special Assistant of Management and Budget
Acting Special Assistant for Programs and Legislative Review

Emergency Management Office
OFFICE OF THE GOVERNOR
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta, Governor
Diego T. Benavente, Lt. Governor

Rudolfo M. Pua, Director
Mark S. Pangelinan Dep., Director

MEMORANDUM

TO : Governor

FEB 07 2004

FROM : Director

SUBJECT : Declaration of Emergency

The EMO seismic staff and USGS, once again with close consultation has informed me that Anatahan volcano has increase in seismic activities and continues to emit steam and releases sulfiric gaseous vapors. In addition, after more than five (5) months of very low level activity, long period earthquakes (LP's) began to occur at Anatahan on February 1, 2004. The events are increasing slowly in size, now reaching about magnitude M 2, and are becoming more frequent, up to several events per hour. These events likely result from magma degassing and/or moving beneath the recently active crater frequently recorded by the seismograph at Emergency Management Office.

Therefore, we are once again respectfully soliciting your assistance in extending the **Declaration of Emergency** for the Island of Anatahan for another thirty (30) days and to maintain the **off limits zone from 30 nautical miles to 10 nautical miles** around Anatahan until further notice. Under these conditions restriction of entry to the said island should continue until a thorough scientific study is done and that the findings suggest otherwise. The current **Declaration of Emergency** will expire on February 10, 2004.

Should you have any question or concern, please call our office at 322-9528/9529.

RUDOLFO M. PUA

FAXED 2/7

Xc: Lt. Governor
SAA
Mayor, NI

Read Mary 2/09/04

Northern Mariana Islands Volcanic Activity

Activity Update

The first historical eruption of Anatahan Volcano began suddenly on the evening of May 10. An eruption column as high as 10 km resulted in a far-reaching eruption cloud to the west. No one was directly threatened by the initial activity, because residents had long before evacuated the small volcanic island (9 km long and 3 km wide). Thus far, the eruption has consisted of a nearly continuous small eruption column (less than 5 km) punctuated by stronger explosive activity. In early June, a small lava flow erupted in the volcano's east crater, but was mostly destroyed by subsequent explosive activity.

| Eruption Overview | Washington VAAC Volcano Ash Advisories |

Anatahan Volcano Update

Anatahan Volcano Update

Submitted Friday, February 6 at 1000 local Anatahan time

After more than 5 months of very low level activity, long-period earthquakes (LP's) began to occur at Anatahan on February 1. The events are increasing slowly in size, now reaching about magnitude M 2, and are becoming more frequent, up to several events per hour. These events likely result from magma degassing and/or moving beneath the recently active crater.

The Emergency Management Office, Office of the Governor, CNMI, has placed Anatahan Island off-limits until further notice and concludes that, although the volcano is not currently dangerous to aircraft, aircraft should exercise due caution in the vicinity of Anatahan.

Contact persons:

Juan Takai Camacho, Geophysical Seismic Technician, EMO Saipan; tel: (670) 322-9528, fax: (670) 322-7743, email: juantcamacho@hotmail.com Ramon Chong, Geophysical Instrument Specialist, EMO Saipan; tel: (670) 322-9528, fax: (670) 322-7743, email: rcchongemo@hotmail.com Frank Trusdell, Geologist, USGS; tel: (808) 967-8812, fax: (808) 967 8890,email: trusdell@usgs.gov

CIVIL SERVICE COMMISSION

NOTICE OF EMERGENCY REGULATION
IMPLEMENTATION OF FINANCIAL AUSTERITY MEASURES
UNIFORMED CORRECTIONAL SERIES

Statutory Authority:	1 CMC §8117 and Personnel Service System Rules and Regulations Part XII.A
Short Statement of Goals and Objectives:	Partial suspension of austerity measures
Brief summary of the Rule:	The reinstatement of Personnel Service System Rules and Regulations Part IV.B5, B6, B7, B8, B12 & B15 in respect to employees the "Uniformed Correction Series", consisting of employees within the Division of Corrections, Department of Public Safety, in classified positions ranging from Corrections Cadet through Assistant Chief of Corrections
For Further Information Contact:	Norbert S. Sablan, Executive Director Civil Service Commission 1211 Capitol Hill Capitol Hill Road Saipan, CNMI Phone 322-4363 Fax 322-3327
Citation of Related and Affected Statutes & Regulations:	Personnel Service System Rules and Regulations Part IV.B5, B6, B7, B8, B12 & B15.
Need for Emergency Adoption:	Yes. Compliance by the CNMI with the Consent Decree entered in the United States District Court

Date: February 23, 2004

Submitted by:

Francisco DLG Camacho, Chairman
Civil Service Commission

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
CIVIL SERVICE COMMISSION

NOTICE OF EMERGENCY REGULATION
AND NOTICE OF INTENT TO ADOPT

PARTIAL SUSPENSION OF FINANCIAL AUSTERITY MEASURES
UNIFORMED CORRECTIONAL SERIES

On January 23, 2004, the Governor issued a letter advising the Civil Service Commission that there is a need to suspend financial austerity measures in respect to employees in the "Uniformed Correction Series", consisting of employees within the Division of Corrections, Department of Public Safety, in classified positions ranging from Corrections Cadet through Assistant Chief of Corrections.

REASONS FOR EMERGENCY. The Civil Service Commission finds that the adoption of the regulation upon fewer than thirty days notice is necessary. The CNMI Government entered into a Consent Decree in the United States District Court. This agreement remains in effect and governs the operations at five facilities: Division of Corrections prison, juvinal facility, Immigration Detention Facility, Rota Detention Facility and Tinian Detention Facility. The Consent Degree requires certain standards including staffing at a level reasonably sufficient to provide for the safety and security of Division of Correction inmates. The present vacancies in twelve supervisory positions within the Division of Corrections creates significant risk that Division of Corrections and the CNMI may be found to be in non-compliance with the Consent Decree.

NOTICE OF EMERGENCY REGULATION. Under the authority of 1 CMC §8117, and Personnel Service System Rules and Regulations, Part XII.A the Civil Service Commission hereby notifies the general public that the provisions of the Personnel Service System Rules and Regulations Part IV.B5, B6, B7, B8, B12 & B15 are reinstated in respect to employees in the "Uniformed Correction Series", consisting of employees within the Division of Corrections, Department of Public Safety, in classified positions ranging from Corrections Cadet through Assistant Chief of Corrections.. The reinstatement of Personnel Service System Rules and Regulations Part IV.B5, B6, B7, B8, B12 & B15 will not entitle employees to retroactive salary adjustments for salary increases suspended by prior austerity measures.

INTENT TO ADOPT. It is the intent of the Civil Servcie Commission to adopt the emergency regulation, partially lifting austerity measures, as permanent, pursuant to 1 CMC §9104(a)(1) & (2). Accordingly, interested persons may submit written comments on these emergency regulations to Executive Director, Civil Service Commission, P.O. Box 5150 CHRB, 1211Capitol Hill Road. Saipan, MP 96950. Facsimile: (670) 322-3327

Date: February 23, 2004 Submitted by: _____
Francisco DLG Camacho
Chairman

Date: February 23, 2004 Approved By: DIEGO T. BENAVENTE, Acting
~~Juan N. Babauta~~
Governor

Date: 2-23-04 Filed and Recorder by: _____
Bernadita B. Dela Cruz
Commonwealth Registrar

Pursuant to 1 CMC §2153, as amended by PL10-50, the following rules and regulations have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General's Office.

Dated: 2/23/04 By _____
Pamela S. Brown
(Acting) Attorney General
pursuant to delegation of authority

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
CIVIL SERVICE COMMISSION

EMERGENCY REGULATION

PARTIAL SUSPENSION OF FINANCIAL AUSTERITY MEASURES UNIFORMED CORRECTIONAL SERIES

The provisions of the Personnel Service System Rules and Regulations that require increases in employees' salaries due to permanent or temporary promotions, acting or detail assignments, reallocation or reclassification of positions, and step increases based on attendance at workshops or other training programs, Personnel Service System Rules and Regulations Part IV.B5, B6, B7, B8, B12 & B15, are hereby reinstated as they existed prior to November 14, 2001 in respect to employees in the "Uniformed Correction Series", consisting of employees within the Division of Corrections, Department of Public Safety, in classified positions ranging from Corrections Cadet through Assistant Chief of Corrections. Expiration of the suspension will not entitle employees to retroactive salary adjustments for salary increases suspended by the November 14, 2001 Rule suspending Personnel Service System Rules and Regulations Part IV.B5, B6, B7, B8, B12 & B15.

PUBLIC NOTICE

DEPARTMENT OF FINANCE

Emergency Re-peal and Re-actment of Sections 3-104 and 3-108 and to amend Section 5-101 of the CNMI Procurement Regulations

Citation of Statutory Authority:	Pursuant to Article X, Section 8 of the Commonwealth Constitution and 1 CMC §2553(j) and 1 CMC §2557
Short Statement of Goals and Objectives:	To provide expedited procurement of goods and services with funds under the U.S. Department of Homeland Security through the Office of Domestic Preparedness grants/initiatives with specific guidelines on acquisition of equipment and services under Unites States Congressional appropriation to expend allocated funds within a certain period of time as well as procurement of equipment under the concept of "Equipment Inter-Operability" within jurisdiction and potential mutual aid assistance to nearby jurisdictions.
Brief Summary of The Rule:	Expedited and sole source procurement procedures are amended to include procurement of goods and services funded by the Federal government for homeland security needs.
For Further Information Contact:	Director, Procurement and Supply Division, Department of Finance at (670) 664-1500.
Citation of Related and/or Affected Statutes, Regulations and Orders:	CNMI Procurement Regulations Sections 3-104, 3-108 and 5-101.

Submitted by:

Cathryn C. Villagomez
Department of Finance

1/30/04
Date

NOTISIAN PUPBLIKU

DIPÅTTAMENTON I FINANCE

AMENDASIÓN INSIGIDAS PARA I REGULASIÓN I PROKURAMENTE SEKSIONA 3-104,3-108, YAN 5-101

Sitasión i Aturidåt i Lai: Sigun para i Atikulu X, Sek. 8 ginen i Commonwealth Constitution i 1 CMC Sek. 2553 (j) yan 1 CMC Sek. 2557.

Kada'da' Na Sinangan Put i Goals yan Objectives Siha: Para u probeniyi hinalula yan uniku na kontråta para prokuramente gi bandan fektos yan ginastan setbisiu ni ma fondu ginen i U.S. Dept. Homeland Security kontra i Ofisinan i Domestic Preparedness grants / initiatives yan spesifiku na maneha gi bandan konkistan trástes yan setbisiu siha gi papa apropositun i Kongresun Estådos Unidos ni para i ginastan i kuota gi halom i tiempo parehu ha yan i prokuramentèn fektos siha papa i hinasun i "Equipment Inter-Operability" halom i aturidåt yan parehu ha na asistimento para i aturidåt gi uriya siha.

Kada'da' Na Sinangan Put i Areklamento: Hinalula yan uniku na kontråta para i prokuramente gi bandan fektos yan ginastan setbisiu ginen i Gobietnamenton Federåt para Homeland Security yan nisisidåt National Defense.

Para Mås Infotmasión Agan: Bob Florian, Dibision i Prokuramente yan Probensión, Dipåttamenton i Finance, 670-664-1514

Sitasión i Man Achuli yan / pat i Man Inafekta Na Lai Siha, Regulasión yan Otden Siha: Commonwealth I Sankattan Siha Na Islas Mariånas Regualsión Prokuramente Seksiona 3-104, 3-108, yan 5-101.

Cathryn C. Villagomez
Dipattamenton i Finance

1/30/04
Fecha

NOTICE OF EMERGENCY REGULATIONS AND NOTICE OF INTENT
TO ADOPT AMENDMENT TO PROCUREMENT REGULATIONS,
SECTION 3 – 104, 3-108 AND SECTION 5– 101

Emergency: The Acting Secretary of Finance for the Commonwealth of the Northern Mariana Islands finds that pursuant to Title 1 CMC, Division 9, Chapter 1, and specifically under 1 CMC § 9104 (b), the public interest requires the adoption, on an emergency basis, of amendments to the Procurement Regulations, Section 3 – 104 and Section 3 – 108. These Procurement Regulations were enacted as published in the Commonwealth Register Vol. 12, No. 10 on October 15, 1990, amended as published in Commonwealth Register Vol. 22, No. 08 on August 18, 2000, and as published in the Commonwealth Registry Vol. 23, No. 05, on May 24, 2001.

The Acting Secretary of Finance further finds that the public interest mandates the adoption of these amendments to the Procurement Regulations upon fewer than thirty (30) days notice, and that these amendments shall become effective immediately after filing with the Registrar of Corporations, subject to the approval of the Acting Attorney General and the concurrence of the Governor and shall remain effective for a period of 120 days, unless sooner adopted as permanent regulations.

Reasons for the Emergency: The Commonwealth of the Northern Mariana Islands is a recipient of funds under the U.S. Department of Homeland Security through the Office of Domestic Preparedness grants/initiatives with specific guidelines on acquisition of equipment and services under Unites States Congressional appropriation to expend allocated funds within a certain period of time as well as procurement of equipment under the concept of "Equipment Inter-Operability" within jurisdiction and potential mutual aid assistance to nearby jurisdictions.

The Acting Secretary of Finance finds that the existing Procurement Regulations will not allow the Commonwealth of the Northern Mariana Islands within the specified time period to procure the equipment and services as mandated by the United States Congress to procure, equip and train emergency response personnel in chemical, biological, radiological, nuclear exposure. The intended purpose of the funding allocated to the Commonwealth under the Federal Homeland Security Initiative/Office of Domestic Preparedness grants is vital to the welfare and safety of the people and those employees tasked to perform such tasks of responding and protecting the people as well as themselves during a terrorist attack. The acquisition of equipment and services must be initiated immediately due to time constraints and the need to equip and train emergency responders as well as the potential of loosing funds allocated for the Commonwealth for inability to initiate procurement due to existing Procurement Policies.

Contents: The adoption of these amendments to the Procurement Regulations will allow the Commonwealth of the Northern Mariana Islands to procure equipment, supplies and services as specified under the U.S. Office of Domestic Preparedness grants/funding those needed to equip and train the Commonwealth's first responders.

Notice of Intent to Permanently Adopt: It is the intention of the Acting Secretary of Finance to adopt this emergency amendment as permanent amendments to the CNMI Procurement Regulations with such adoption pursuant to 1 CMC §§ 9104 (a) (1) and (2). Therefore, publication in the Commonwealth Register of these amendments, this Notice, and an opportunity for public comment pursuant to the requirements of the CNMI Administrative Procedure Act are hereby provided. Comments on these amendments to the CNMI Procurement Regulations may be submitted in writing to the Department of Finance, Director of Procurement and Supply, Lower Base, Saipan, MP 96950 or by fax (670) 664-1500, not later than thirty days from the date of this publication.

Dated this 30th day of January, 2004

CATHRYN C. VILLAGOMEZ
Acting Secretary
Department of Finance

Received by: 1/30/04
THOMAS TEBUTEB Date
Special Assistant for Administration

Concurred by: 2/2/04
JUAN N. BABAUTA Date
Governor

Pursuant to 1 CMC §2153, the rules and regulations attached have been received and approved as to form and legal sufficiency by the CNMI Attorney General's Office.

Dated this _____ day of January, 2004

PAMELA BROWN
Attorney General

Filed and Recorded by: 2.2.04
Registrar of Corporations Date

Emergency Re-peal and Re-actment of Sections 3-106 and 3-108 and to amend Section 5-101 of the CNMI Procurement Regulations

Sections 3-106 and 3-108 are hereby repealed and re-enacted to read as follows:

"**Section 3-106** Sole Source Procurement

1. A contract may be awarded for a supply, service or construction without competition when:

   a the Director determines in writing that there is only one source for the required supply, service or construction; or

   b for the purpose of procuring equipment and services identified as interoperable for the use of enhancing and protecting the Commonwealth Homeland Security from suppliers determined capable to deliver such equipment and services for the purpose specified and/or for purposes relating to the needs of agencies designated as Homeland providers; or

   c to obtain professional services for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth; or

   d to obtain professional services for the purpose of facilitating the establishment of a unit authorized in a federal defense appropriations act; or

   e solely for the purpose of obtaining expert witnesses for litigation; or

   f for legal services; or

   g for policy consultants of the Governor, Lt. Governor, and presiding officers of the Legislature.

2. For any sole source procurement pursuant to Subsection 1(a), a written justification for sole source procurement shall be prepared by the official with expenditure authority and shall contain the specific unique capabilities required; the specific unique capabilities of the contractor; the efforts made to obtain competition; and the specific considerations given to alternative sources and specific reasons why alternative sources were not selected.

3. For any sole source procurement pursuant to Subsections 1(b)(c) or (d), the official with expenditure authority shall provide a written copy of the applicable federal grant or act under which the services are authorized or required."

"**Section 3-108** Expedited Purchasing in Special Circumstances

1. When special circumstances require the expedited procurement of goods or services including professional services for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth, the official with expenditure authority may request that the Director approve expedited procurement without the solicitation of bids for proposals.

2. The factor to be considered by the Director in approving or disapproving this request shall be:

   a. The urgency of the government's need for the good or services especially if procuring vehicles and equipment specifically designed for chemical, biological, nuclear exposure and bomb detection and critically needed emergency medical supplies as described by the Office of Domestic Preparedness.

   b. The comparative costs of procuring the goods or service from a sole source or through the competitive process;

   c. The availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and

   d. Any other factors establishing the expedited procurement is in the best interest of the Commonwealth Government.

3. Upon the Director's written determination that the factors in (2) above justify an expedited purchase, he shall process the necessary document(s) and assist the official with the expenditure authority in procuring the required goods or services in the most efficient manner.

4. If the Director determines that the request for the expedited procurement did not meet the criteria in (2) above, he shall promptly notify the official with the expenditure authority of his disapproval in writing.

5. The expedited procurement shall be as competitive as possible under the circumstances.

6. The total amount of goods or service that may be approved under this section shall not exceed $25,000 except when such goods or services are procured for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth including procuring vehicles and equipment specifically designed for chemical, biological, nuclear exposure and bomb detection and critically needed emergency medical supplies as described by the Office of Domestic Preparedness."

Section 5-101 is hereby amended to read as follows:

Section 5-101. Contract Clauses.

1. *Price.* In executing contracts, agencies shall set the maximum amount that can be charged under the contract and disallow open-ended contracts, *i.e.* contracts which do not specify the maximum contract price. Whatever contract type is selected, agencies shall limit contracts to a fixed price or a ceiling price, and the contractor shall not exceed the price set unless a change order is approved (See Section 5-103, Change Order). Provided, however, in the case of contracts for legal or lobbying services obtained pursuant to a contingency fee agreement, the agency shall put a fixed price on any costs to be born by the agency out of the general fund, including but not limited to any price to be charged by the contractor in lieu of a percentage of an award obtained as a result of the contractor's services

2. *Payment Terms.* Payments shall be made only upon submission of evidence of work performed and adherence to contract terms and specifications. Generally, a one-time payment shall be made after the official with expenditure authority has certified completion of work or delivery of goods or services. Other types of payments are as follows:

    a. *Advance payments.* Advance payments shall be authorized only in certain circumstances as provided in (i), in (ii) or in (iii) below:

        (i) The contractor fails to qualify as a responsible contractor due solely to the absence of financial capability, and it is justified under Section 3-106 that the contractor is the only available source, subject to the following conditions:

            (1) General Requirements – the contractor pledges adequate security, and the official with expenditure authority determines, based on written findings, that the advance payment is in the public interest.

            (2) The standards for advance payment determination are: (a) the advance payments will not exceed the contractor's

interim cash needs based on an analysis of the cash flow required for contract performance, consideration of the reimbursement or other payment cycles, and employment of the contractor's own working capital; (b) the advance payments are necessary to supplement other funds or credit available for the contract; (c) the recipient is otherwise qualified as a responsible contract in all area other than financial capability; and (d) paying the contractor in advance will result in specific advantages to the Government.

(3) Advance payments shall be limited to not more than 25 percent of the contract price or an amount equivalent to a 60 day working capital requirement, whichever is lower.

(ii) The official with expenditure authority demonstrates in writing that the common business practice of a particular industry requires buyers to pay on an advance payment basis. Such advance payment shall be limited to not more than 50 percent of the contract price. Pertinent documents supporting such a business practice shall be attached to the written justification.

(iii) The official with expenditure authority demonstrates in writing that the advance payment is made pursuant to procurement of goods and services as provided in Sections 3-104 1b, 1c, or 1d, or 3-108 2.a.

PUBLIC NOTICE OF EMERGENCY REGULATIONS AND NOTICE OF INTENT TO ADOPT RULES AND REGULATIONS AMENDING THE MECHANISM FOR THE REALLOCATION OF NONRESIDENT WORKERS IN THE GARMENT INDUSTRY

EMERGENCY: The Commonwealth of the Northern Mariana Islands, Office of the Attorney General (AGO) and Department of Labor (DOL) find that under 1 CMC § 9104(b), the public interest requires the passage of regulations to modify the individual employer allocations of nonresident workers within the Garment Industry. These regulations are promulgated pursuant to the authority given the Secretary of Labor under P.L. 12-11. Regulations were promulgated and published in the Commonwealth Register Vol. 25, No. 9, page 21418 (Oct. 15, 2003). Notice of Intention to permanently adopt the regulations was delivered to the Commonwealth Registrar on January 19, 2003. After receiving comments from the affected industry concerning when a replacement position becomes available following the transfer of a nonresident worker to a different employer, the regulation was amended to clarify this issue, as well as to allow for expedited processing of applications from within or without the Commonwealth. AGO and DOL further find that the public interest mandates adoption of these regulations upon fewer than thirty (30) days notice, and that these regulations shall become effective immediately after filing with the Registrar of Corporations, subject to the approval of the Attorney General and the concurrence of the Governor, and shall remain effective for 120 days.

REASONS FOR EMERGENCY: AGO and DOL have determined that transfers within the garment industry have created difficulty for some employers in maintaining adequate staffing to keep current with orders and to be able to assure purchasers that orders will be timely filled. The current regulations do not specifically address the allocation of replaceable employee positions following the transfer of a nonresident worker from one employer to another. This has caused uncertainty in the employment market that directly affects the manufacturers' operations. In addition, some employers desire expedited processing of applications for off-island hires as well as for on-island hires.

INTENT TO ADOPT: It is the intent of AGO and DOL to adopt these emergency regulations amending the mechanism for the reallocation of nonresident workers in the garment industry, pursuant to 1CMC § 9104(a)(1) and (2). Accordingly, interested persons may submit written comments on these emergency recommendations to Dr. Joaquin A. Tenorio, Secretary of Labor, Afetnas Square, 2nd Floor, San Antonio, Saipan, MP 96950 or Clyde Lemons, Jr., Deputy Attorney General, Office of the Attorney General, Second Floor, Juan A. Sablan Memorial Bldg, Capitol Hill, Saipan MP 96950.

Submitted by:

PAMELA BROWN
Attorney General

2/9/04
Date

DR. JOAQUIN A. TENORIO .
Secretary of Labor

2/09/04
Date

Concurred by:

JUAN N. BABAUTA
Governor

02/09/04
Date

Received by:

THOMAS A. TEBUTEB
Special Assistant for Administration

2/9/04
Date

Filed and Recorded by:

BERNADITA B. DE LA CRUZ
Commonwealth Registrar

2/10/04
Date

Pursuant to 1CMC §2153, as amended by Public Law 10-50, the emergency rules and regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General's Office.

Dated this 9th day of February 2004.

PAMELA BROWN
Attorney General

PUBLIC NOTICE

EMERGENCY ADOPTION OF RULES AND REGULATIONS AMENDING THE MECHANISM FOR THE REALLOCATION OF NONRESIDENT WORKERS IN THE GARMENT INDUSTRY

This amendment is promulgated in accordance with the Administrative Procedure Act, 1 CMC § 9101, et seq. The Office of the Attorney General is adopting rules and regulations establishing a mechanism for the reallocation of nonresident workers in the garment industry.

Citation of Statutory Authority: The Office of Attorney General is authorized to promulgate regulations for entry and deportation of aliens in the Commonwealth of the Northern Marianas pursuant to Executive Order 03-01 and 3 CMC § 4312(d). The Department of Labor is authorized to promulgate regulations under P.L. 11-76 as amended by P.L. 12-11 for establishing a mechanism for the reallocation of Garment workers among manufacturers

Short Statement of Goals and Objectives: The emergency regulations amend the mechanism for the reallocation of worker positions among garment manufacturers to clarify the distribution of replacement positions and to allow for expedited processing of applications for on- and off-island hiring.

Brief Summary of the Proposed Regulations: These emergency regulations are promulgated to:

(1) Clarify that when an employee transfers from one garment company to another, the company gaining the employee must have an open position before hiring, and the employer losing the employee retains a position that can be filled from within or without the Commonwealth.

(2) Clarify that employers must first attempt to fill positions with resident workers, followed by nonresident workers who are presently in the Commonwealth before wiring from abroad sill be allowed.

(3) Clarify that the $150.00 expedited processing fee applies to hiring from within or without the Commonwealth.

For Further Information Contact: Kevin A. Lynch, Assistant Attorney General, Office of the Attorney General, telephone (670) 236-0910 or facsimile (670) 236-0992.

Citation of Related and/or Affected Statutes, Rules and Regulations, and Orders: The emergency regulations amend the regulations governing allocation of nonresident worker positions within the garment industry published in the Commonwealth Register Vol. 25, No. 9, page 21418 (Oct. 15, 2003).

Dated this 9th day of February, 2004.

Submitted by:

PAMELA BROWN
Attorney General

DR. ~~JOA~~QUIN A. TENORIO
Secretary of Labor

PROPOSED EMERGENCY REGULATIONS AMENDING THE MECHANISM FOR THE REALLOCATION OF GARMENT WORKER POSITIONS

The Commonwealth of the Northern Mariana Islands, Office of the Attorney General (AGO) and Department of Labor (DOL) have determined that employee transfers within the garment industry have created difficulty for some employers in maintaining adequate staffing to keep current with orders and to be able to assure purchasers that orders will be timely filled. The current regulations do not specifically address the allocation of replaceable employee positions following the transfer of a nonresident worker from one employer to another. This has caused uncertainty in the employment market that directly affects the manufacturers' operations. In addition, some employers desire expedited processing of applications for off-island hires as well as for on-island hires.

The following regulations are adopted to implement the authority of the Secretary of Labor to "establish a mechanism for the reallocation of non-resident workers among employers based on need." PL 12-11 (4 CMC § 5708).

1. Once an employer in the garment industry has reconciled its records of the number of nonresident workers in its employ with those of the Department of Labor, the employer may begin hiring additional workers pursuant to these regulations.

2. An employer may hire workers who do not have a permanent employer and who presently reside within the Commonwealth unrestricted by the allocations specified in the Moratorium on Nonresident Alien Worker Hiring, Schedule A of 3 CMC §4601 *et seq.*

a. Employers within the garment industry may acquire these workers subject to the following conditions:

I. The worker must be an individual who has a valid CNMI Labor permit or labor status and must be presently within the Commonwealth; or

II. The worker must possess a Memorandum or Administrative Order from the Department allowing them to seek permanent employment;

III. The worker is eligible for employment by any qualifying employer in any job category for which they are qualified regardless of the specific job category indicated on their Entry Permit or LIIDS data;

IV. Payment of the fee for the application for a Labor Identification Certificate and Immigration entry permit as established by the Department, plus a nonrefundable, nontransferable fee of $50.00 to offset the cost of increased administration. Fees previously paid to the Department with the expectation of securing a worker from outside the CNMI may be transferred to an application made for an on-island worker pursuant to these regulations, or may be refunded

by the Department if the off-island worker cannot be employed as a result of the operation of these regulations;

V. Approval by the Department of an employer's agreement and employment contract for each worker hired pursuant to these regulations;

VI. Advertising for the position is waived provided the worker will become employed within the same job classification except for trimmers, packers, security guards, maintenance workers, and office workers.

VII. An employer who desires expedited processing of the documents required to employ a nonresident worker from within the Commonwealth or from outside the Commonwealth pursuant to these regulations may receive expedited processing by paying an additional nonrefundable fee of $150.00. "Expedited processing" means that after submission of all required documents by the employer, and the Department finding that all documents have been submitted and the application is otherwise complete, the Department shall prepare the labor permit within a period not to exceed fourteen (14) days. However, the Director of Labor may, after giving notice to the prospective employer prior to payment of any expedited processing fee, inform the employer of a different time period if the demand for expedited processing exceeds the ability of the Section to guarantee processing of the permits within the 14 day period.

b. Workers employed under a reallocation shall be considered to be "New" employees for purposes of the application and processing, and not an officially transferred employee for replacement purposes.

3. Replacement employees may be hired in conformity with existing laws, PL 11-6 as amended by PL 11-76 §5, provided however that no replacement will be granted that would cause the total number of nonresident workers in the garment industry to exceed 15,727 as established in PL 11-76 §6(a). After September 12, 2003 any employer showing available positions after completion of the fiduciary audit may replace those workers with off-island hires.

4. Consensual, expiration, or Administrative Order transfers within the Garment Industry:

a. Nonresident workers may be transferred from one permanent employer to another within the garment industry subject to these conditions: The transfer of a worker from one company to another may be accomplished if the receiving company has an available replacement position. Once the transferring worker fills the position, another worker may not be hired by the receiving company to fill the same position. The transferring company is considered to have an available, replaceable position upon the granting of the transfer by Administrative Order or the Conditional Grant of Transfer issued by the Department. The receiving company is deemed to have filled the position upon the granting of the transfer by Administrative Order or the Conditional Grant of Transfer issued by the Department

b. As required by the Nonresident Workers Act and the Moratorium on the Hiring of Nonresident Workers, the employer must first attempt to fill any available position with a

resident worker who is qualified and available for the position. If such a resident worker is not available, the transferring company must attempt to hire a qualified nonresident worker who is presently within the Commonwealth. If such a nonresident worker is not available, the company may hire a nonresident worker from outside the Commonwealth.

c. For purposes of these regulations, a "permanent employer" is an employer with whom the employee has a regular employment contract, where there is an employer's agreement on file with the Department guaranteeing employment that is not temporary in nature (more than 90 days), and the employer is the employer of record within the Department of Labor.

5. Workers not to be assessed fees or costs:
A nonresident worker may not be assessed any fee or cost of any kind by any person relating to a reallocation or transfer to the receiving employer. The attempt to collect or the collection of a fee or other consideration from a nonresident worker constitutes a violation of the Nonresident Workers Act and may subject the violator to the penalties therein. An employer may offer an incentive to an employee to accept employment if such incentive is included in the employer's agreement and the approved employment contract.

6. Reporting of numbers of employees:
On June 1 and December 1 of each year each employer shall report to the Department of Labor the number of nonresident workers employed. Failure to submit the required report shall result in a sanction of one thousand dollars ($1000.00) for each seven (7) days the report is late. Failure to submit the report within fourteen (14) days may result in a suspension of the processing of any of the employer's labor-related documents by the Department plus the sanction until the report is filed with the Department.

7. Biannual review of nonresident garment worker count:
Upon receipt of the reports required by Section 5 above which were submitted on June 1, 2004 and every six (6) months thereafter, the Secretary of Labor and the Attorney General shall review the placement of nonresident workers in the garment industry to determine whether to reinstate an nonresident worker allocation system similar to that previously adopted in Schedule A of the Moratorium on Nonresident Alien Worker Hiring, 3 CMC §4601 *et seq*.

8. The Division of Immigration, the Department of Labor and the LIIDS Section of the Office of the Governor shall monitor the number of workers in the garment industry no less than once every fourteen days to ensure that the total number of nonresident workers in the industry does not exceed 15,727. This monitoring may be accomplished in any manner that will give an accurate total of the number of workers.

NOTISIAN PUPBLIKU PUT IMIDIAMENTE NA REGULASION SIHA YAN NOTISIA PUT INTENSION PARA U MA'ADOPTA I AREKLAMENTO YAN REGULASION SIHA NI MA'AMEMENDA I SISTEMA PARA I KUOTAN I TI MAN RESIDENTE SIHA NA HOTNALERU GI INDUSTRIAN GARMENT

IMIDIAMENTE : I Commonwealth I Sankattan Siha Na Islas Marianas, Ofisinan i Abugådo Henerât (AGO) yan i Dipåttamenton i Hotnaleru (DOL) ma'sodda na papa i Lai 1 CMC Sek. 9104 (b0, i enteres pupbliku a nisisita i pinasan i regulasion siha para u tulaika i kuotan empleao siha ni ti man residente na hotnaleru siha gi Industrian Garment. Este na regulasion siha man ma'establesi sigun i aturidât ni ma'nå'i' i Sekritarion i Hotnaleru papa i Lai Pupbliku 12-11. I regulasion siha man ma'establesi yan pupblisa gi Rehistran i Commonwealth Baluma 25, Numiru 9, pahina 21418 (Oktubre kinse, dos mit tres na sakkan). Notisia put intension para u ma'adopta petmanente i regulasion siha ma'entrega para i Rehistran i Commonwealth gi Ineru dies i nuebe, dos mit tres na sakkan (Jan. 19, 2004). Despues anai ma'risisibi i opinion siha ginen i man ma'afekta na industria ni tineteka anai guaha kuentåyen pusision ni muteru tinatitiye' i transferin i ti man residente na hotnaleru para ottro na emplehu, i regulasion ma'amenda para u klåru este na asunto, parehu ha para u ma'sedi para i apuraon ma'choguen i aplikasion siha ginen hålom pat hiyong i Commonwealth. I Ofisinan i Abugådo Henerât pat i Dipåttamenton i Hotnaleru mås ma'sodda na i enteres i pupbliku a amenda i inadoptasion este na regulasion siha gi menos di trenta (30 dihas na notisia, ya put este na regulasion siha debi di u fan efektibu imidiamente despues i ma'polu gi Rehistran i Koporasion, suhetu para i ma'aprueba ginen i Abugådo Henerât yan i konfotmen i Gobietno, ya debi di u efektitibu para siento bente (120) dihas.

RASON PARA IMIDIAMENTE : I Ofisinan i Abugådo Henerât yan i Dipåttamenton i Hotnaleru ma ditetmina na i transferi siha gi hålom i industrian Garment gumuaha kriadun kubukao para palu na empleao siha ni ma'susteteni i sufisiente na empleao para u ma'konsigi i prisente na oda siha (orders) yan para u asigura i finåhån siha na oda siempre u ma'kumple i oran niha. I prisente na regulasion siha ti a spesifika i kuotan i man ma'kuentåye' na pusision empleao tinatitiye' i transferin i ti man residente na hotnaleru ginen un empleahu para ottro. Este put rason na tisiguramente i metkaon empleao na punto a afekta i operasion fakteria siha. It mås, palu na empleao ma'diseha i apuraon i machoguen i aplikasion siha para u fan ma'empleha ni manaigue gi tano' parehu ha yan u fan ma'empleha ni mangaige gi tano'.

INTENSION PARA U MA ADOPTA : I intension i Ofisinan i Abugådo Henerât yan i Dipåttanmenton i Hotnaleru para u adopta este imidiamente na regulasion siha ni ma'amemenda i sistema para i kuotan i ti man residente na hotnaleru siha gi Industrian Garment, sigun i Lai 1 CMC Sek. 9104 (a) (1) yan (2). Kinensisiste, i man enteresao na petsona siña munahalom tinige' opinion put este na imidiamente na rekomendasion siha para as Dr. Joaquin A. Tenorio, Sekritarion i Hotnaleru, gi Afetna Square, San Antonio, giya Saipan MP 96950 pat as Clyde Lemons, Jr. i Segundon i

Abugådo Henerål, Ofisinan i Abugådo Henerål, gi segundo na bibienda, gi Juan A. Sablan Memorial Bldg. giya Capitol Hill, Saipan MP 96950.

Ninahålom as: _____ _____
Pamela Brown — Fecha
Abugådo Henerål

_____ 2/20/04
Dr. Joaquin A. Tenorio — Fecha
Sekritarion i Hotnaleru

Kinofotme as: _____ 2/20/04
Juan N. Babauta — Fecha
Gobietno

Ma Risibi as: _____ 2-20-04
Thomas A. Tebuteb — Fecha
Espesiål Na Ayudånte Para i Atministrasion

Pinelo' yan Rinikot as: _____ 2-19-04
Bernadita B. Dela Cruz — Fecha
Rehistran i Commonwealth

Sigun i Lai 1 CMC Sek. 2153, ni inamenda ginen i Lai Pupbliku 10-50, i imidiamente na areklamento yan regulasion siha ni man che'che'ton este na momento man ma'ribisa yan aprueba put para u fotma yan sufisiente lugåt ginen i Ofisinan i Abugådo Henerål gi CNMI.

Ma fecha este mina _____ na diha gi Febreru, dos mit kuattro na sakkan.

_____
Pamela Brown
Abugådo Henerat

Trinansladan : Charlene S. Cruz
Transladoran Chamorro, CCLPC

ARONGOL TOULAP REEL GHITIPWOTCHOL ALLÉGH KKAAL ME ARONGOL REEL IGHA RE MANGI EBWE FILLÓÓY ALLÉGH KKAAL ME ALLÉGH KKA EBWE LLIWELI MWÓGHÚTÚL REALLOCATION REER SCHÓÓL ANGAANGAL KKA ARAMASAL LÚGHÚL IKKA RE ANGAANG LLÓL GARMENT INDUSTRY

GHITIPWOTCH: Commonwealth téél falúw kka falúwasch, Bwulasiyool Sów Bwúngúl Allégh (AGO) me Depattamentool Labor (DOL) e schungi bwe faal 1CMC tálil 9104 (b), bwe llól tipeer toulap bwe rebwe yááya ngáli mwóghútúl allégh kkaal reel ebwe lliweli employer allocation reer schóól angaang kka aramasal lúghúl mellól Garment industry. Allégh kkaal ikka ebwe akkatééwow sángi bwángil Samwoolul Labor P.L. 12-11. Allégh kkaal ye e akkatééwow me arongowow mellól Commonwealth Register Vol. 25, No, 9, peigh 21418 (Sarobwel 15, 2003). Mángemángil arong yeel igha ebwe schééschéél fillong allégh kkaal ye e akkafangalong Commonweath Register ótol Schoow 19, 2003. Mwiril yaar bwughil aghiyágh mereel industry kka e fitighogho bwelle ssiwelil position ebwe yoor mwirilóól akkafangal school angaang kka aramasal lúghúl ngáli tafal employer, allegh yeel e lliwel igha ebwe affata aweewe yeel, me bwe ghutchuw mwóghutul tittingor kkaal mellól me ngare saabw llól Commonwealth . AGO me DOL re bwal schungi bwe llól tipeer toulap bwe rebwe fillooy allegh kkaal ye essobw luulo eliigh (30) raalil yaal arong, me allégh kkaal ebwe schééschéél allégheló mwiril yaal isisilong llól Registrar of Corporation kkapasal igha ebwe alúghúlúghúló mereel Sów Bwúngúl Allégh me bwal Sów Lemelem, nge ebwe fis ótol ebwughuw ruweigh (120) rállil .

BWULUL GHITIPWOTCH: AGO me DOL re aghiyaghi bwe fransfers mellól Garment industry e ayoorata fitighoogho reel akkascheey schóól angaang igha rebwe aisis ghatch school angaang reel iseisil schóól afalafal ighila me ebwe mmwelil alúghúlúgh reel schóól purchase ye yaal tittingór ebwe akkate fisch. Allégh kka ighila nge ese ghi bwáári allocation reel replaceble employee positions mwiril yaal transfer school angaang kka school lughul mereel eschay employer ngali eschay. Ebwal ghal yoor aghiliwel reel schóól angaang (employment market) ye e aweiresi manufacturers' operations Bwal eew, amweyut employers nge re mángi bwe rebwe ghutchuw mwóghútúl tittingór (application) reel off-island me bwal on-island hire, (umwumwul lughul faleey me wóól faleey).

MÁNGEMÁNGIL IGHA EBWE FILLÓÓY: Aghiyaghil AGO me DOI igha ebwe fillóóy alléghúl ghitipwotchol yeel ye ebwe ssiweli mwóghútúl reallocation reel schóól angaang kka aramasal lúghúl mellól Garment industry, sángi allégh ye 1CMC tálil 9104 (a) (1) me (2) wellóól, aramas ye eyoor mángemángil reel alléghúl ghitipwotch yeel nge ebwe ischilong reel Dr. Joaquin A. Tenorio , Samwoolul Labor, Ghafeetia square, aruwowal pwo, San Antonio, Séipel, MP 96950 me ngáre Clyde Lemons, Jr., Aruscheyil Sów Bwúngúl Allégh, Bwulasiyool Sów Bwúngúl Allégh, Aruwowal pwo, Juan A. Sablan Memorial Bldg, Capitol Hill, Seipél MP 96950.

Isáliiyallong: _____ _____
PAMELA BROWN Rál
Sów Bwúngúl Allégh Lapalap

_____ 2/20/04
DR. JOAQUIN A. TENORIO Rál
Samwoolul Labor

Alughulugh sángi: _____ 2/20/04
JUAN N. BABAUTA Rál
Sów Lemelem

Mwir sángi: _____ 2-20-04
THOMAS A. TEBUTEB Rál
Sów Alillisil Sów Lemelem

Aisis sángi: _____ 2.19.04
BERNADITA B. DELA CRUZ Rál
Commonwealth Registrar

Sángi allégh ye 1CMC tálil 2153, ye aa lliwel mereel Alléghúl Toulap 10-50, allégh kka e appasch nge raa takkal amweri fischiiy me alúghúlúghúw mereel CNMI Bwulasiyool Sów Bwúngúl Allégh Lapalap.

Ráálil ye _____llól Febuary 2004.

_____
PAMELA BROWN
Sów Bwúngúl Allégh Lapalap

Commonwealth of the Northern Mariana Islands
Coastal Resources Management
P.O. Box 10007, 2nd Floor, Morgen Building
San Jose Saipan, MP 96950

COASTAL RESOURCES MANAGEMENT

Tels.: (670) 6648300/14
Fax : (670) 664-8315

MEMORANDUM

DATE: **18 February 2004**

TO: **Commonwealth Registrar**

FROM: **Director**

SUBJECT: **COASTAL RESOURCES MANAGEMENT (CRM) REGULATION AMENDMENTS**

Hafa Adai:

On 22 January 2004, the Commonwealth Register published CRM's Notice of Proposed Amendments to the CRM Rules & Regulations, reference Volume 26 Number 01. However the proposed amendments were inadvertently left out of the January publication. Thus, CRMO is kindly requesting to republish the Public Notice along with the proposed amendments in the February Commonwealth Register publication. Attached are the documents to be republished for public review and comments.

Should you have any questions or comments, please do not hesitate to contact Ms. Becky Lizama, CRM Permit Manager, at 664-8305 or via fax at 664-8315.

JOAQUIN D. SALAS

JDS/bcl.

Attachments.

Commonwealth of the Northern Mariana Islands
Coastal Resources Management
P.O. Box 10007, 2nd Floor, Morgen Building
San Jose Saipan, MP 96950

COASTAL RESOURCES MANAGEMENT

Tels.: (670) 8300/14
Fax: (670) 664-8315

PUBLIC NOTICE

NOTICE OF PROPOSED AMENDMENTS TO THE COASTAL RESOURCES MANAGEMENT RULES AND REGULATIONS

AUTHORITY

The Coastal Resources Management Office hereby notifies the public of proposed amendments to the Coastal Resources Management Rules and Regulations. The CNMI Coastal Resources Management Agency Officials (CRMA) indicated herein are authorized under 2 CMC § 1531(d) to regularly review adopted regulations and adopt new regulations as necessary in accordance with the Administrative Procedures Act [1 CMC § 9101 et. seq.].

PUBLIC COMMENT

In accordance with 1 CMC § 9104(a), the public has the opportunity to comment on the proposed amendments. Interested persons may obtain copies of the proposed amendments from the CRM Office on the 2nd Floor of the Morgen Building, San Jose, Saipan. Written comments regarding the proposed amendments are to be submitted within thirty (30) days of publication of this notice in the Commonwealth Register and should be directed to the Director, Coastal Resources Management Office, P.O. Box 10007, Saipan, MP 96950. Comments may also be submitted via fax, 664-8315.

CONTENTS

These amendments correct typographical and grammatical errors, revise the format, eliminate duplicate definitions, alphabetize definitions, add and revise definitions, rephrase the fee category and remove the example, revise the requirement for a final construction plan, add an exemption for contacting adjacent landowners, add a provision requiring unanimous agreement from CRM agency officials on permit issuance, allow additional uses of wetland and mangrove APCs, allow transfer of interest in a permit when an interest in the land is transferred, require notice of the proposed amount of fines, cite the Administrative Procedure Act, and add language regarding civil fines and restore language that was inadvertently left out in the last amendment of these regulations. Modifications of the regulations are consistent with the coastal resources management policies in 2 CMC § 1511. Except for simple formatting changes (alphabetizing, renumbering, etc.), deletions are indicated with strikeout and additions are shown with bold and italics.

Issued By CRM Agency Officials:

Lorraine A. Babauta
Executive Director
Commonwealth Utilities Corporation

Date: 12/4/03

Fermin M. Atalig
Secretary
Department of Commerce

Date: 12/16/03

Thomas B. Pangelinan
Secretary
Department of Lands & Natural Resources

Date: 12/16/03

Juan S. Reyes
Secretary
Department of Public Works

Date: 12/16/03

John I. Castro, Jr.
Director
Division of Environmental Quality

Date: DEC 17 2003

Epiphanio Cabrera, Jr.
Historic Preservation Officer

Date: 12-16-03

Concurred by:

Joaquin D. Salas
CRMO Director

Date: 12/18/03

Attorney General Review:

Pursuant to 1 CMC § 2153, as amended by P.L. 10-50, the regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the office of the Attorney General.

Pam Brown
Attorney General

Date: 12/31/03

Filed By:

Bernadita B. Dela Cruz
Commonwealth Register

Date: 12.31.03

Received at the Governor's Office by:

Thomas A. Tebuteb
Special Assistant for Administration

Date: 1-8-04

PROPOSED AMENDMENTS TO THE COASTAL RESOURCES MANAGEMENT RULES AND REGULATIONS

Authority	The CNMI Coastal Resources Management Agency Officials propose amendments to the Coastal resources Management Rules and Regulations pursuant to the Coastal Resources Management Act, 2 CMC § 1531(d).
Statement of Goals and Objectives	The amendments are intended to improve readability, correct typographical and grammatical errors, to add and modify definitions, and to restore language that was left out in the last amendment of these regulations. Modifications of the regulations are consistent with the coastal resources management policies in 2 CMC § 1511.
Brief Summary of Proposed Amendments	Correct typographical and grammatical errors, revise the format, eliminate duplicate definitions, alphabetize definitions, add and revise definitions, rephrase the fee category and remove the example, revise the requirement for a final construction plan, add an exemption for contacting adjacent landowners, add a provision requiring unanimous agreement from CRM agency officials on permit issuance, allow additional uses of wetland and mangrove APCs, allow transfer of interest in a permit when an interest in the land is transferred, require notice of the proposed amount of fines, cite the Administrative Procedure Act, and add language regarding civil fines.
Contact For Further Information	Becky Lizama, CRMO Permit Manager, phone: 664-8300, fax: 664-8315
Related and Affected Statutes, Regulations, and Orders	CNMI Coastal Resources Management Act (2 CMC § 1501 et seq.), Coastal Resources Management Rules and Regulations

NOTISIAN PUPBLIKU
NOTISIA PUT I MAN MA PROPONI NA AMENDASION SIHA PARA I AREKLAMENTO YAN REGULASION SIHA GI COASTAL RESOURCE MANAGEMENT

ATURIDAT

I Ofisinan I Coastal Resource Management ma notisia I Pupbliku put I Man Ma Proponi Na Amendasion Siha Para I Areklamento Yan Regulasion Siha gi Coastal Resource Management. I Ofisiales I Ahensian I Coastal Resource Management gi CNMI ma indika na man ma aturisa gi papa I Lai 2 CMC Sek. 1531 (d) para u ma ribisa regulatmente I man ma adopta na regulasion siha ya u ma adopta nuebu na regulasion siha an nisisariu u tattiye' I Akton I Areklamenton I Atministrasion [1CMC Sek. 9101 et.seq.].

SINANGAN PUPBLIKU

U kinensiste yan I 1 CMC Sek. 9104 (a), I pupbliku guaha opotunidat para u gai opinion gi man ma proponi na amendasion siha. I man enteresao na petsona siha sina u ma chule' I kopian I man ma proponi na amendasion ginen I Ofisinan I Coastal Resource Management gi mina dos na bibienda gi Morgan Building, giya San Jose, Saipan. I tinige' opinion siha put asunton I man ma proponi na amendasion siha u fan ma submiti gi halom trenta (30) dihas an ma pupblisa este na notisia gi Rehistran I Commonwealth ya debi di u ma dirihi guatto I Direktot gi Ofisinan I Coastal Resource Management gi P.O. Box 10007, Saipan, M.P. 96950. Sina lokkue u ma submiti I opinion siha gi fax numiru 664-8315.

SINAGUAN

Este na amendasion para u kurihi I man ma taip yan I gramatika siha ni man lache', para u ma ribisa I fotmasion, laknos I difinision siha ni man ma sangan dos biahe, I difinision u ma alphabetize, u ma omentayi yan ribisa I difinision siha, rephrase I katigorian apas yan na suha I example, ribisa I ginagagao para I final construction plan, omentayi I probension ni manisisita gi konfitmasion ginen I Ofisiales gi Ahensian I Coastal Resource Management put inentregan petmisu siha, sinedin I ma usana I susonyan yan I mangrove APC siha, sineden I trinansferan I interes gi petmisu an I interes I tano' ma transfera, manisisita I notisia put I man ma proponi na tutat I pena siha, ma sita I Akton I Areklamenton I Atministradot, u ma omentayi I lengguahe put asunton I penan sibet siha yan u ma atmayi I lengguahe ni ti ma na fan danna gi mapus na amendasion put este na regulasion siha sa put deskuido. Tinilaikan I regulasion siha man konsiste yan I areklamenton I Coastal Resource

Management gi 2 CMC Sek. 1511. Fuera di para I tinilaikan I ti man mappot na fotmasion (man ma afabetiku, talun ma numiru, etc.), man ma indika siha I linaknos an ma strikeout yanggen ma omentayi pues man ma fan la'attelong I palabra siha (bold) yan ma tulaika I style I tinige'(italics).

Linaknos I Ofisiales siha gi Ahensian I Coastal Resource Management:

Lorraine A. Babauta
Direktot Eksekatibu
Commonwealth Utilities Corporation

12/5/03
Fecha

Fermin M. Atalig
Sekritario
Dipattamenton I Commerce

Fecha

Thomas B. Pangelinan
Sekritario
Dipattamenton I Lands and Natural

12/16/03
Fecha

Juan S. Reyes
Sekritario
Dipattamenton I Public Works

Fecha

Juan I. Castro, Jr.
Direktot
Dibision I Environmental Qualities

DEC 17 2003
Fecha

Epiphanio Cabrera, Jr.
Historic Preservation Officer

12-16-03
Fecha

Kinonfotme as:

Date: 12/18/03
Fecha

Joaquin D. Salas
Direktot
Ofisinan I Coastal Resource Management

Ribisan I Abugado Henerat:

Sigun I 1 CMC Sek. 2153, ni ma amenda ginen I Lai Pupbliku 10-50, I regulasion Siha ni man checheton man ma ribisa yan aprueba put para u fotma yan ligat sufisiente ginen I Ofisian I abugado Henerat.

Date: _____
Fecha

Pam Brown
Abugado Henerat

Pine'lo as:

Date: 12-31-03
Fecha

Bernadita B. Dela Cruz
Rehistran I Commonwealth

Ma risibi gi Ofisinan I Gobietno as:

Date: 1/8/04
Fecha

Thomas A. Tebuteb
Espesiat Na Ayudante Para I Atministrasion

Man Ma Proponi Na Amendasion Siha Para I Areklamento Yan Regulasion Siha Gi Coastal Resource Management

Aturidat	I Ofisiales I Ahensian I Coastal Resource Management Ma Proponi I Amendasion Siha Para I Arekalmento Yan Regulasion Siha gi Coastal Resource Management sigun I Akton I Coastal Resource Management, 2 CMC Sek. 1531 (d).
Mensahe Put I Goals yan Objectives	I Amendasion siha Man Ma intensiona para u na maolek I tinaitai, u ma na dinanche I tinaip yan I gramatika siha ni man lache', para u ma omentayi yan tulaika I difinision siha, ya u ma atmayi I lengguahe ni ti ma na fandanna gi mapus na amendasion put este na regualsion siha. Tinialaikan I regulasion siha man konsiste yan I areklamenton I Coastal Resource Management gi 2 CMC Sek. 1511.
Kada'da' Na Mensahe Put I Man Ma Proponi Na Amendasion Siha	Kurihi I man ma taip yan I gramatika siha ni man lache', para u ma ribisa I fotmasion, laknos I difinision siha ni man ma sangan dos biahe, I difinision u ma alphabetize, omentayi yan ribisa I difinision, rephrase I katigorian apas yan na suha I example, u ma ribisa I ginagagao para I Final Construction Plan, u ma omentayi I pribilehu para I inagang I duenun I propiadat siha gi bisinu, omentayi I probension ni ma nisisita gi konfitmmasion ginen I Ofisiales gi Ahensian I Coastal Resource Management pat I inentregan I petmisu siha, sineden I ma usana I susonyan yan I mangrove APC siha, sineden I trinansferan I interes I tano' ni man ma transfera, ma nisisita I notisia put I man ma proponi na tutat I pena siha, ma sita I Akton I Areklamenton I Atministradot, ya u ma omentayi I lengguahe put I asunton I penan I sibet siha.
Para Mas Infotmasion Agang	Becky Lizama, Manehanten I Petmisu siha gi Ofisinan I Coastal Resource Management, tilifon numiru 664-8300, fax

	gi 664-8315
Man Achule' yan Inafekta Na Lai Siha, Regulasion Siha, yan Otden Siha	Akton I Coastal Resource management gi CNMI (2 CMC Sek. 1501 et.seq.), Areklamento yan Regulasion Siha gi Coastal Resource Management

ARONGORONGOL TOULAP

ARONGOL TOULAP REEL LLIWEL KKAAL NGÁLI ALLÉGHÚL COASTAL RESOURCE MANAGEMENT

BWÁNGIL

Bwulasiyool Coastal Resource Management ekke arongaar toulap reel pomwol lliwel kkaal ngáli alléghúl Coastal Resource Management. CNMI Coastal Resource Manegement assamwolul Agency (CRMA) re schuungi bwe faal bwángil 2 CMC tálil 5131 (d) bwe rebwe amweri fischiy ffillóól allégh kkaal me fillóóy allégh kka e welepakk ngáli Administrative Procedure Act (1CMC tálil 9101 et seq.).

AGHIYÁGHIIR TOULAP

Sángi allégh ye 1CMC talil 9104 (a) nge emmwel bwe toulap rebwe aghiyághiiy pomwol lliwel kkaal. Emmwel bwe aramas rebwe bweibwogh tilighiyal pomwol lliwel kkaal mereel Bwulasiyool CRM aruwowal bibenda Morgan Building, Oleai, Seipél. Aghiyágh reel pomwol lliwel kaal nge rebwe ischilong ótol eliigh (30) raalil yaal arongowow mellól Commonwealth Register me ebwe akkafangeló reel Samwolul Coastal Resource Manegement, P. O. Box 10007, Seipél MP 96950. Ayégh nge emmwel ebwe akkafang sangi via fax, 664-8315.

ÒUTOL

Lliwel kkaal nge ebwe awelaaló typographical me grammatical kka ese wel, liweli format, akkaschewow aweewe (definitions) kka e duplicate, alphabetize aweewe kkaal, isisilong me liweli weewe kka, ischi seféli tapelal óbwós (fee) me atoowowu tapelal aweewe (example), siweli lemelemil pomwol construction ye aa bwungúló, aschuwulong exemption reel arong ngáliir aramas kka e ppasch (adjecent) falaweer, aschuwulong alúghúlúgh ye ebwe schuppagh aghiyágh sángi assamwoolul agency ye CRM, reel isisiwowul lisensia, saleti ngáli akkaaw yááyál meschor (wetland) me mangrove APC's, sáleti ngáli ebwe transfer interees mellól lisensiya, ngáre interees mellol falúw aa transfer, ayoora pomwol llapal mwutta sángi Alléghúl Administrative Procedure me aschuwulong tapelal kkepas ye ghil ngáli mwuttaal civil me isisilong tapelal kkepas kka ese toolong sángi lliwelil allégh kkaal.Ssiwelil allégh kkaal nge e fil ngáli alléghúl coastal resources management mellól 2CMC tálil 1511. Ese bwal toolong mwóghútúl simple formating (alphabetizing, renumbering, etc), akkaschewow nge e bwáári igha e strikeout me isisilong nge e bwáári igha e bold me italics.

Isaliiyalewow assamwoluur CRM Agency:

Lorraine A. Babauta
Samwool
Commonwealth Utilies Corporation

12/5/03
Rál

Fermin M. Atalig
Samwool
Bwulasiyool Commerce

Rál

Thomas B. Pangelinan
Samwool Land & Natural Resources

12/16/03
Rál

Juan S. Reyes
Samwool
Bwulasiypol Public Works

12/11/03
Rál

Juan I. Castro Jr.
Assamwool
Division of Environmental Quality

12.17.03
Rál

Epiphanio Cabrera, Jr.
Historic Preservation Officer

12/16/03
Rál

Alughulugh sangi::

Date: 12/18/03

Joaquin D. Salas
Samwoolul CRMO

Ral

Mwir sangi Sow Bwungul Allegh:

Sangi allegh ye 1CMC talil 2153, ye aa lliwel mereel Alleghul Toulap 10-50, allegh kka e appasch nge raa takkal amweri me alleghelo mereel Bwulasiyool Sow Bwungul Allegh.

Date:

Pam Brown
Sow Bwungul Allegh

Ral

Aisis sangi:

Date: 12.31.03

Bernadita B. Dela Cruz
Commonwealth Register

Ral

Mwir sangi Bwulasiyool Sow Lemelem:

Date: 1/8/04

Thomas A. Tebuteb
Sow alillisil Sow Lemelem

Ral

ARAMAS YE UBWE FAINGI

Becky Lizama, CRMO Samwolul lisensia, tilifoon: 664-8300, fax : 664-8315

AKKATEEL AKKAAW ALLEGH

CNMI Coastal Resources Management Act (2 CMC talil 1501 et seq.) alleghul Coastal Resources Management

Awelaalo typographical me grammatical kka ese wel, liweli format, akkaschewow aweewe (definition) kka e duplicate, alphabetize-li awewee, aschuwulong me liweli awewee, ischi sefali tapelal obwos (fee) me atoowowu tapelal awewee (example), siweli lemelemil pomwol construction ye aa final, aschuwulong exemption reel arong ngaliir aramas kka e ppasch (adjacent) faluweer, aschuwulong alughulugh ye ebwe schuppagh aghiyagh sangi assamwoolul agency ye CRM, reel isisiwowul lisensia, saleti ngali akkaaw yaayal meschor (wetland) me mangrove APC's, ngare interees mellol faluw aa transfer, ayoora pomwol llapal mwutta sangi Alleghul Administrative Procedure, me aschuwulong tapelal kkepas ye ghi ngali mwuttal civil.

Translated by : Manny N. Kaniki
CCLPC Language Policy Commission

TITLE 15
COASTAL RESOURCES MANAGEMENT

CHAPTER 10 – COASTAL RESOURCES MANAGEMENT RULES AND REGULATIONS

Index

PART 001 – GENERAL PROVISIONS

§ 15-10-001 SHORT TITLE

This CHAPTER shall be cited as the "Coastal Resources Rules and Regulations"

§ 15-10-005 AUTHORITY

Pursuant to the authority of CNMI Public Law 3-47, §§ 8(d) and 9(c) [2 CMC §§ 1531(d) and 1532 (c)], and 1 CMC § 9115, the following rules and regulations are hereby established. They shall apply to all areas designated by CNMI P.L. 3-47, § 7 [1 CMC § 1513], as subject to the jurisdiction of the ***Coastal Resources Management*** (CRM) Program.

§ 15-10-010 PURPOSE

This chapter governs practice and procedure within the federally-approved CRM Program and sets standards for the CRM Program in implementing its responsibilities, as approved by the Office of Coastal Resources Management, U.S. Department of Commerce. Provisions of this ***CHAPTER*** are not intended to negate or otherwise limit the authority of any agency of the Commonwealth government with respect to coastal resources, provided that actions by agencies shall be consistent with provisions contained herein. This ***CHAPTER*** shall be consistent with the Federal Coastal Zone Management Act (CZMA) and applicable rules and regulations.

§ 15-10-015 CONSTRUCTION

This CHAPTER shall be construed to secure the just and efficient administration of the CRM Program and the just and efficient determination of the CRM permit process. In any conflict between a general rule or provision and a particular rule or provision, the particular shall control over the general.

§ 15-10-020 DEFINITIONS.

(a) ***"Adjacent Property" means real property that has at least one boundary point in common with the lot or site on which a proposed project will be located, or is separated from such lot or site only by a physical barrier such as a road or a stream.***

(b) ***"Adjacent Property Owner" means a person, business, corporation, or entity who currently holds valid ownership or lease of an adjacent property.***

(c) "**Adverse Impacts**" means but is not limited to:

(1) ~~the~~ alteration of chemical/ or physical properties of coastal or marine waters that would prevent the existence of the natural biological habitats and communities;

(2) ~~the~~ accumulation of toxins, carcinogens, or pathogens which could potentially threaten the health ***or*** safety of humans or aquatic organisms;

(3) ~~the~~ disruption of ecological balance in coastal and marine waters that support natural biological communities;

(4) ~~the~~ addition of man made substances foreign to the coastal or marine environment for which organisms have had no opportunity for adaptation and whose impacts are largely known;

(5) ~~the~~ disruption or burial of bottom communities; ***or***

(6) ~~the~~ interference with traditional fishing activities.

(d) "**Affected Person**" means a public official, adjacent land owner or ~~a~~ member of the general public who can demonstrate to the Administrator the actual or potential bias or conflict of interest of a CRM agency official and can demonstrate that she/he participated in the CRMO hearing process

either by submitting written comments or making oral statements during any hearing held on the project and that these comments were not adequately addressed by the final permit decision.

(e) **"Aggrieved Person"** means any applicant or person who has been adversely affected by the decision of the coastal resources management agencies officials and can demonstrate that she/he participated in the CRMO hearing process either by submitting written comments or making oral statements during any hearing held on the project and that these comments were not adequately addressed by the final permit decision.

(f) **"APC"**

(1) "APC" means an area of particular concern consisting of a delineated geographic area included within coastal resources which ***are*** subject to special management within the standards established in ***§ 15-10-310.***

(2) APCs addressed in this CHAPTER includ***e*** lagoon and reef, wetland and mangrove, shoreline, and port and industrial, all of which are separately defined herein.

(3) APCs shall also include new APCs as may be designated hereinafter.

(g) **"Aquaculture or Mariculture Facility"** means a facility, either land or water based, for the culture or commercial production of aquatic plants or animals, for research or food production, sales, or distribution.

(h) **"Beach"** means an accumulation of unconsolidated deposits along the shore with their seaward boundary being at the low tide or reef flat platform level and extending in a landward direction to the strand vegetation ***or*** first change in physiographic relief to topographic shoreline.

(i) ***"BMP" means best management practices***; a measure, facility, activity, practice, structural or non-structural device, or combination of practices that are determined to be the most effective and practicable (including technological, economic, and institutional considerations) means of controlling point and nonpoint pollutants at levels compatible with environmental quality goals to achieve stormwater management control objectives.

(j) **"Coastal Land"** means all lands and the resources thereon, therein, and thereunder located within the territorial jurisdiction of the CRM Program, as specified by section 7 of PL 3-47 [2 CMC § 1513].

(k) **"Coastal Resources"** means all coastal lands and waters and the resources therein located within the territorial jurisdiction of the CRM Program, as specified by section 7 of PL 3-47 [2 CMC § 1513].

(l) ***"Coastal Resources Management Program Boundaries" means the edge of the area subject to CRM Program territorial jurisdiction, as specified in Section 7 of P.L. 3-47 [2 CMC § 1513].***

(m) **"Coastal Waters"** all waters and the submerged lands under the marine resources subject to the territorial jurisdiction boundaries of the coastal resources management program as specified in Section 7 of P.L. 3-47 [2 CMC § 1513].

(n) **"Conclusion of Law"** means statements of the propositions of law that the decision maker arrives at after, and as a result of, finding certain facts in a case.

(o) **"CRM"** means Coastal Resources Management.

(p) **"CRM Administrator"** means the ***CRM Director***, appointed by the CNMI Governor to administer the CRM Program, pursuant the CNMI P.L. 3-47, § 2 [1 CMC § 2081 (a)].

(q) **"CRM Agency Officials"** ~~means the designated representative of *CRM* Agencies; such agencies include the Department of Lands and Natural Resources, the Department of Commerce, the Department of Public Works, the Division of Environmental Quality, Historic Preservation Office,~~

~~in the Department of Community and Cultural Affairs, and the Commonwealth Utilities Corporation, hereafter CUC.~~ ***as defined in 2CMC § 1501, et seq.***

(r) **"CRM Appeals Board"** ~~means the *CRM* Appeals Board, consisting of three members appointed by the CNMI Governor, pursuant to CNMI P.L. 3-47 § 10 [2 CMC § 1541].~~ ***as defined in 2CMC § 1501, et seq.***

(s) **"CRM Coastal Advisory Council"** ~~means the Council established by CNMI P.L. 3-47, § 5 [1 CMC § 1521], comprised of the mayors of Rota, Tinian, Saipan, and Northern Islands, the Special Assistant for Carolinian Affairs, Chairman of the Marianas Public Land Corporation, the Executive Director of the Commonwealth Ports Authority, the Executive Director of Marianas Visitors Bureau, the President of the Chamber of Commerce, and the Historic Preservation Officer. In addition, the Council includes one member of the public representing fisheries, one member of the public representing the construction industry, one member of the public representing a subsistence lifestyle, and one staff member each from the Commonwealth Legislature House and Senate Committees on Resources and Development.~~ ***as defined in 2CMC § 1501, et seq.***

(t) **"CRM Office"** ~~means the CRM Office, within the Office of the CNMI Governor, headed by the CRM Administrator, pursuant to CNMI P.L. 3-47, § 2 [1 CMC § 2081].~~ ***as defined in 2CMC § 1501, et seq.***

(u) **"CRM Permit"** means a permit that is issued by CRM Agency Officials for a proposed project that is subject to CRM Program jurisdiction

(v) **"CRM Program"** means the Coastal ***Resources*** Management Program established by CNMI P.L. 3-47 [2 CMC §§ 1501, et seq.]. ~~, including the CRM Office, the CRM Administrator, the CRM Agency Officials, the CRM Appeals Board, and the CRM Coastal Advisory Council, all of which are charged with implementing coastal resources management in the Commonwealth of the Northern Mariana Islands.~~

(w) **"Degradation"** means a diminution or reduction of strength, efficacy, value or magnitude.

(x) **"Development"** means:

(1) the placement or erection of any solid material or structure;
(2) discharge or disposal of any dredge materials or of any gaseous, liquid, solid, or thermal waste;
(3) the grading, removing, dredging, mining, or extraction of any materials;
(4) a change in the density or intensity of use of land including, but not limited to, subdivision of land and any other division of land including lot parceling;
(5) a change in the intensity of use of water, the ecology related thereto, or the access thereto;
(6) a construction or reconstruction, demolition, or alteration of any structure, including any facility of any private or public utility; ***or***
(7) the removal of significant vegetation.

(y) **"Direct and Significant Impact"** means the impact which is causally related to or derives as a consequence of a proposed project, use, development, activity or structure which contributes to a material change or alteration in the natural or social characteristics of any coastal resources.

(z) **"Endangered or Threatened Wildlife"** means species of plants or animals which are:

(1) determined to be of such limited numbers as to be in immediate danger of extinction or reduction to a critically low population level in and around the Commonwealth of the Northern Mariana Islands if subjected to continued taking or reduction, or alteration of habitat; or
(2) so designated by the U.S. Department of Interior's Fish and Wildlife Service on the latest list of "Endangered and Threatened Wildlife and Plants."

(aa) **"Federally Excluded Lands"** means those federally owned lands excluded from the territorial jurisdiction of the CRM program as specified by Section 7 of P.L. 3-47 [2 CMC § 1513].

(bb) **"Findings of Fact"** means determination of fact by way of reasonable interpretation of evidence.

(cc) ***"Fluid" means any material or substance which flows or moves, whether in a semisolid, liquid, sludge, gas, or any other form or state.***

(dd) **"Hazardous Material"** means a material or combination of materials which may:

(1) cause or contribute to an increase in mortality or an increase in serious illness; ***or***

(2) pose a potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed.

(ee) **"Impact"** is any modification in an element of the environment, including modification as to quality, quantity, aesthetics, or human or natural use thereof.

(ff) **"Infrastructure"** means those structures, support systems and appurtenances necessary to provide the public with such utilities as are required for economic development, including but not limited to systems providing water, sewerage, transportation and energy.

(gg) **"Infrastructure Corridors"** means a strip, ***or strips of land***, not including highways, forming passageways which carry infrastructure.

(hh) **"Lagoon and Reef APC"** means that geographic area of particular concern consisting of a partially enclosed body of water formed by sand spits, baymouth bars, barrier beaches or coral reefs, of the Northern Mariana Islands chain.

(ii) **"Littoral Drift"** means the movement of sedimentary material within the near-shore zone under the influence of tides, waves and currents.

(jj) **"Major Siting"** means any proposed project which has the potential to directly and significantly impact coastal resources, as provided for in § 15-10-501 of this chapter. The phrase includes, but is not limited to the following:

(1) energy related facilities, wastewater treatment facility pipelines, transportation facilities, surface water control project, harbor structures;

(2) sanitary landfills, disposal of dredged materials, mining activities, quarries, basalt extraction, incinerator projects;

(3) dredging and filling in marine or fresh waters, point source discharge of water or air pollutants, shoreline modification, ocean dumping, artificial reef construction;

(4) proposed projects with potential for significant adverse effects on submerged lands, groundwater recharge areas, cultural areas, historic or archeological sites and properties, designated conservation and pristine areas, or uninhabited islands, sparsely populated islands, mangroves, reefs, wetlands, beaches and lakes, areas of scientific interest, recreational areas, limestone, volcanic and cocos forest, and endangered or threatened species or marine mammal habitats;

(5) major recreational developments and major urban or government developments;

(6) construction and major repair of highways and infrastructure development;

(7) aquaculture or mariculture facilities, and silvaculture or timbering operations;

(8) any project with the potential for affecting coastal resources which requires a federal license, permit or other authorization from any regulatory agency of the U.S. Government;

(9) any project, or proposed project, that may cause underground injection of hazardous wastes, of fluids used for extraction of minerals, oil and energy, and of certain other fluids with potential to contaminate ground water. Any such project, or proposed project, shall be primarily governed by the CNMI Underground Injection Control Regulations and

supplemented by this CHAPTER ;

(10) any other proposed project which by consensus of the CRM Agency Officials, has the potential for causing a direct and significant impact on coastal resources including any project having a peak demand of 500 kilowatts per day and/or 3,500 gallons of water per day as established by CUC demand rates for particular types of projects; ***or***

(11) proposed projects that modify areas that are particularly susceptible to erosion and sediment loss; areas that provide important water quality benefits and/or are necessary to maintain riparian and aquatic biota and/or necessary to maintain the natural integrity of water bodies and natural drainage systems.

(kk) **"Management Measures"** are economically achievable measures to control the addition of pollutants to surface and ground waters, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives.

(ll) **"Marine Resources"** means those resources found in or near the coastal waters of the Commonwealth such as fish, dissolved minerals, aquatic biota and other resources.

(mm)**"Minor development"** means:

(1) normal maintenance and repair activities for existing structures or developments which cause only minimal adverse environmental impact;

(2) normal maintenance and repair of: existing rights of way; underground utility lines including water, sewer, power, and telephone; minor appurtenant structures to such; pad mounted transformers and sewer pump stations, provided that normal maintenance and repair shall not include the extension or expansion of existing lines, structures or right of way;

(3) temporary, not to exceed six (6) months, ***picnic shelter*** (pala-pala) construction for fundraising, carnival or cultural activities;

(4) construction of pala-palas, picnic tables and/or barbecue pits;

(5) construction of non-concrete volleyball or tennis courts;

(6) temporary photographic activities (such as advertising sets) which are demonstrated by the applicant to have an insignificant impact on coastal resources;

(7) public landscaping and beautification projects;

(8) memorial and monument projects covering ten (10) square meters or less;

(9) security fencing which does not impede public access;

(10) placement of swimming, navigation or temporary or small boat mooring buoy;

(11) single family residential construction or expansion including sewer connections within the Shoreline APC;

(12) archeological and related scientific research approved by the Historical Preservation Office (HPO), evaluated on a case-by-case basis, and found by CRMO to cause no significant adverse environmental impacts;

(13) agricultural activities;

(14) debris incineration;

(15) repair of existing drainage channels and storm drains;

(16) strip clearing for survey sighting activities, except in Wetland APC;

(17) construction of bus stop shelters;

(18) construction of an accessory building incident to an existing acceptable activity in the port and industrial APC; ***or***

(19) temporary storage of hazardous or nuisance materials including but not limited to construction chemicals, used oil, automotive fluids, batteries, paints, solvents, unregistered or unlicensed vehicles, accumulation of trash, garbage, or other refuse.

(nn) **"Minor Permits"** are those permits specified in ***§ 15-10-110(d)*** of this ***CHAPTER***.

(oo) "**Nonpoint Source**" means any source of water pollution that does not meet the legal definition of "point source" as defined in section 502(14) of the Federal Clean Water Act.

(pp) ***"NPS" means nonpoint source pollution or*** contamination that comes from many diffuse sources rather than from a specific point, such as an outfall pipe, including pollutants contained in runoff and groundwater that do not meet the legal definition of "point source" in section 502(14) of the Federal Clean Water Act.

(qq) "**Party**" means a person, legal or natural, or any department of government, organization or other entity that is a CRM Permit applicant or a successor in interest.

(rr) "**Permit Holder**" means a person or entity that holds the beneficial interest in a CRM permit and may be either a CRM permit applicant, a successor in interest if the project site has been sold, leased, or otherwise transferred, or a real party in interest if the benefit of the CRM permit is for one other than the applicant or a successor in interest.

(ss) "**Person**" means the government of the United States of America or any agency or department thereof; or the Government of the Commonwealth or any agency or department of any municipality thereof; any sovereign state or nation; a public or private institution; a public or private corporation, association, partnership, or joint venture, or lessee or other occupant of property, or individual, acting singly or as a group.

(tt) "**Point Source**" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. (Federal Clean Water Act, section 502(14), 33 U.S.C. § 1362(14)).

(uu) "**Port and Industrial APC**" means the land and water areas of particular concern surrounding the commercial ports of the Northern Mariana Islands chain which consists of projects, industrial uses and all related activities.

(vv) "**Project**" means any structure, use, development, or other activity subject to CRM Program territorial jurisdiction as specified by section 7 of P.L. 3-47 [2 CMC § 1513].

(ww) "**Resources**" means natural advantages and products including, but not limited to, marine biota, vegetation, minerals and scenic, aesthetic, cultural and historic resources subject to the territorial jurisdiction of the CRM Program.

(xx) "**Riparian**" means pertaining to the banks and other adjacent, terrestrial (as opposed to aquatic) environs of freshwater bodies, watercourses, and surface-emergent aquifers (e.g., springs, seeps), whose imported waters provide soil moisture significantly in excess of that otherwise available through local precipitation.

(yy) "**Shoreline APC**" means the geographic area of particular concern consisting of the area between the mean high water mark or the edge of a shoreline cliff and one hundred fifty (150) feet inland on the islands of the Northern Mariana Islands chain.

(zz) "**Underground Injection**" means a "well injection"

(aaa) "**Under Penalty of Perjury**" means any statement, oral or written, certified as true and correct under penalty of perjury, pursuant to CNMI P.L. 3-48, and which precludes the necessity of a notarized affidavit for written statements, as in the following example: I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed on (date), at _____, CNMI. ---------- (Signature).

(bbb) "**Water-dependent Use**" means a ***use that needs a*** waterfront location ~~that is necessary~~ for its physical function, such as seaports and other similar facilities.

(ccc) "**Water-oriented Use**" means ***a use that faces or overlooks*** ~~facing or overlooking~~ the shoreline or water, but ***does*** not require a location on the shoreline or waterfront. ***S***uch uses include, but are not limited to restaurants, hotels and residential developments.

(ddd) "**Water-related Use**" means ***a use that requires*** ~~requiring~~ water itself as a resource, but does not require a waterfront location***; including*** most industries requiring cooling water, or industries that receive raw material via navigable waters for manufacture or processing. Such uses must have adequate setbacks, as required by the CRM office.

(eee) "**Watershed**" means all land and water within the confines of a drainage divide.

(fff) "**Well**" means a bored, drilled or driven shaft, or a dug hole whose depth is greater than the largest surface dimension.

(ggg) "**Well Injection**" means the subsurface emplacement of "fluids" through a bored, drilled, or driven "well", or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

(hhh) "**Wetland and Mangrove APC**" means any geographic area of particular concern which includes areas inundated by surface or ground water with a frequency sufficient to support a prevalence of plant or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands include swamps, marshes, mangroves, lakes, natural ponds, surface springs, streams, estuaries and similar areas in the Northern Mariana Islands chain.

PART 100 - CRM PERMIT REQUIREMENT

§ 15-10-101 WHEN CRM ACTION REQUIRED

Prior to the commencement of a proposed project wholly or partially within an APC, or which constitutes a Major Siting under ***§ 15-10-501*** herein, or which has a direct and significant impact on an APC, the party responsible for initiating the proposed project shall obtain a CRM Permit.

§ 15-10-105 MULTIPLE APC PERMIT

If a proposed project is to be located in more than ***one*** APC, CRM permit standards and policies for each applicable APC shall be evaluated in a single CRM permit decision.

§ 15-10-110 EXCEPTIONS TO CRM PERMIT REQUIREMENTS

(a) **Excluded Federal Land.** Notwithstanding the language of ***§ 15-10-101*** and ***§ 15-10-105***, a CRM Permit shall not be required for proposed projects on federally excluded lands provided that all activities on federally-excluded lands which have a direct and significant impact on areas subject to CRM program, as specified in Section 7 of P.L. 3-47 [2 CMC § 1513], shall be consistent with these rules and regulations and applicable Federal and Commonwealth laws.

(b) **Emergency Services or Repairs.** During or immediately after an environmentally destructive event such as typhoon, storm, earthquake, shipwreck, ***or*** oil or other hazardous substances spill, the CRM Administrator may issue a temporary permit for emergency repair and cleanup subject to the following conditions:

(1) the temporary permit shall be valid for up to six (6) months or until a regular CRM permit is processed whichever is less in time;

(2) any repair permitted under this section shall be limited in scope to replacement of pre-existing structures;

(3) a person granted a temporary permit shall file a CRM permit application within twenty (20) days of the issuance of the temporary permit; ***and***

(4) the CRM Administrator must find that the proposed repair or cleanup is necessary to prevent further immediate damage or injury to structures, vessels, the environment or the public welfare.

(c) **Exceptions from Coastal Permit Requirements.**

(1) A Coastal permit may not be required for the following types of projects except as set forth in subsections (2) and (3) of this subsection (c). Any relief from the coastal permit requirements does not remove a project proponent's responsibility to comply with CRM program goals and policies, nor does it exempt a project from any other commonwealth regulatory authority.

(i) A proposed project situated completely outside of any APC and which does not require a minor or major siting permit;

(ii) agricultural activities on lands which have been historically used for such activities;

(iii) cutting of trees and branches by hand tools, not driven by power or gas;

(iv) hunting, fishing and trapping;

(v) the preservation of scenic, historic and scientific areas including wildlife preserves which do not require any development; ***or***

(vi) construction of small scale non-intensive projects such as single family dwellings, duplexes, out-buildings and small neighborhood businesses outside of an APC.

(2) If any proposed project or expansion of a previous project that was exempted by sub-section (c)(1) may have a direct and significant impact on coastal resources, as determined by the CRM Administrator then the project proponent or owner shall be required to apply for a CRM permit.

(3) Should it be found that a particular proposed project exempted by subsection (c)(1) above may have a direct and significant impact on coastal resources, the CRM office or its designee may conduct such investigation(s) as may be appropriate to ascertain the facts and may require the person(s) applying for such proposed project(s) to provide all of the necessary information regarding the project in order that a determination may be made as to whether the proposed project requires a coastal permit.

(d) **Permit for Minor Developments Under Expedited Procedures.**

(1) Applications for permits for minor development shall be expeditiously processed so as to enable their promptest feasible disposition.

(2) Applications for permits for minor developments on Saipan will be received at the CRM Office and the CRM Administrator will review and make a determination on the application based on P.L. 3-47 [2 CMC §§ 1501, et seq.] and this ***CHAPTER***.

(3) Applications for permits for minor developments on Tinian and Rota will be made to the Tinian and Rota Coastal Coordinators, respectively, who will review and make a determination on the application based on P.L. 3-47 [2 CMC §§ 1501, et seq.], and this chapter.

(4) Failure ~~of the CRM Program Administrator~~ to approve or deny an application for a minor permit within ten working days from receipt of application shall be treated as approval of the application, provided that the CRM Program Administrator may extend the deadline by not more than an additional ten days where necessary.

(5) CRM minor permit applications will involve a full evaluation of individual and cumulative

impacts and include an application review, site inspection and the issuance of a standard permit (with appropriate conditions). The conditions to be attached to the minor permit will be based on a case-by-case evaluation of each particular project.

PART 200 - CRM PERMIT PROCESS

§ 15-10-201 INTRODUCTION

All persons proposing to conduct any activities affecting or which may affect the coastal resources of the Commonwealth must apply for a CRM permit. A pre-application conference shall be conducted with applicant by a CRM staff person at a designated time. At the request of the applicant, a pre-application conference also may be held with CRM agency officials. The pre-application conference shall be held to discuss the proposed activity to provide the applicant with information pertaining to the CRM program goals, policies and requirements and to answer questions the applicant may have regarding the CRM program and its requirements. The following permit process shall govern all coastal permit applications except as provided in ***§ 15-10-110(d).***

§ 15-10-205 APPLICATION

CRM permit application forms shall be maintained at ***the*** CRM Office on Saipan. Copies of the application form shall also be maintained at CRM branch Offices on Rota and Tinian. CRM permit applicants shall complete and file an application for each proposed minor permit, proposed project within an APC, or those constituting a major siting as defined in ***§ 15-10-020(jj)*** herein. The following conditions shall apply to all CRM permit applications:

(a) **Copies.** The applicant shall file an original CRM Permit application with exhibits and attachments and eight (8) copies thereof.

(b) **Filing Location.** CRM Permit applications shall be filed at the CRM office in Saipan, though filing may be at the CRM Branch Office on Rota or Tinian, if the proposed project is to be on either of those islands.

(c) **Certification.** CRM Permit applications shall be certified by the applicant that the information supplied in the application and its exhibits and attachments are true. The certification shall be by affidavit or declaration under the penalty of perjury.

(d) **Attachments:**

(1) CRM Permit applications shall, to the extent necessary, contain attachments and necessary supporting materials including statements, drawings, maps, etc., which are relevant to the CRM Permit application.

(2) Except for minor permit applications, CRM shall require the applicant to submit evidence establishing that the project will not have significant adverse impact on the coastal environment or its resources. Adverse impacts are defined in ***§ 15-10-020(c).***

(e) **Management Measures.** CRM Permit applications shall include a description and design of proposed management measures which will avoid, reduce and/or minimize nonpoint source pollution contributed by the proposed project.

(f) **Fees.** CRM Permit Applications shall be accompanied by a non-refundable CRM permit application fee in accordance with the following fee schedule, by check made payable to CNMI Treasurer.

(1) No fee for government projects.
(2) $25.00 fee for emergency permits.
(3) $100.00 fee for minor permits.

(4) $500.00 initial fee and $400.00 renewal fee for jet ski operating permits.
(5) All other fees for projects shall be based upon appraisal of construction costs for structures affixed to the ground.

FEE AMOUNT	COST OF PROJECT
$100	less than or equal to $50,000
$200	***value between*** ~~less than or equal to~~ $50,001 and $100,000
$750	***value between*** ~~less than or equal to~~ $100,001 and $500,000
$1,500	***value between*** ~~Less than or equal to~~ $500,001 and $1,000,000
$1,500	***plus an additional amount equal to the fee for the cost increment exceeding $1,000,000.***

~~If the cost of the project exceeds one million dollars, the fee shall be $1,500 plus an additional amount equal to the fee for the cost increment exceeding $1,000,000. For example, a project that costs $1,350,000 would be assessed a fee of $2,250 (a $1,500 fee for the first $1,000,000 and a $750 fee for the $350,000 cost increment exceeding $1,000,000). A project that costs $2,000,001 would be assessed a fee of $3,100 ($1,500 for the first $1,000,000, $1,500 for the second $1,000,000 and $100 for the $1.00 increment over $2 million). The maximum total fee for any project shall be $300,000.~~

(g) **Performance Bond Requirements**. A performance bond or equivalent surety may be required by the CRM program if failure to comply with terms of the application or permit will result in environmental damage. In the event that the project cannot be completed as permitted, the applicant shall forfeit the bond or surety equivalent or portion thereof needed to mitigate any damage caused by such failure of performance. Any monies obtained from the bond or surety may be used to complete the site preparation and infrastructure requirements, restore the natural appearance and biological character of the project site and its impacts on adjacent properties or correct any adverse impacts to the environment.

(h) **Information**. CRM permit applications shall include the following for review by the CRM Office:
(1) Applicant's name.
(2) Applicant's representative (if any).
(3) Owner of any real property at the project site.
(4) Lessee of any real property at the project site.
(5) Project name.
(6) Owner of the project if different from applicant.
(7) The following construction plans:
  (i) master site plan including; architectural features in conceptual form, major infrastructure and major amenities (in schematic or single line form);
  (ii) typical floor plans in conceptual format for all structures and major infrastructure;
  (iii) view corridor plan;

(iv) site coverage plan- (displaying lot density including buildings, infrastructure, amenities, parking area, road networking and open space;

(v) ***proposed road improvements; and***

(vi) existing conditions map.

(8) The following erosion control and drainage plans:

(i) slope and elevation map;

(ii) watershed and drainage map;

(iii) preliminary drainage and erosion control map; and

(iv) preliminary stormwater nonpoint source management plan.

(9) A map showing the distance of all proposed structures from mean high water and wetlands, as shown on APC maps, if applicable.

(10) Estimated costs for all improvements to be affixed to the property.

(11) Copies of CNMI and Federal permits or permit applications including business license, submerged lands lease, and other necessary permits.

(12) Names of adjacent property owners and copies of letters sent to them notifying them of the proposed project.

(i) ***Application may request an exemption of this requirement where notification of every adjacent property owner would not be practical or would create an undue burden. This exemption is intended to be limited to projects such as infrastructure corridors, where the path of the corridor or project may be adjacent to a large number of properties. If the exemption is granted by CRM Agency Officials, the applicant must complete an alternative notification. The applicant would be required to publish public notice of the proposed project in a newspaper of general circulation in the CNMI at least four (4) times prior to the public hearing on the proposed project. The public notice shall include the permit number, name of project, name of applicant, map of the proposed project area as approved by CRMO, date, time and place of the public hearing, CRMO's contact numbers, and description of the proposed project. The applicant shall obtain approval of the public notice from CRMO prior to publishing. The applicant is responsible for all public notice fees and printing.***

(ii) ***For purpose of this subsection, and subsection (g)(13), adjacent property is defined in § 15-10-020(a).***

(13) Adjacent property description.

(14) Estimates of daily peak demand for utilities including water and electricity and projected usage of utilities and other infrastructure.

(15) Map of the vicinity.

(16) Topographic survey map with ten (10) foot contour.

(17) Elevation plans of the project including a side profile of the project.

(18) Title documents to all real property and submerged lands including leases ***or lease applications*** from appropriate parties.

(19) Affidavit or declaration made under penalty of perjury that the application is a statement of truth by the principal or authorized agent.

(20) In addition, environmental assessments for all CRM major sitings shall include:

(i) project summary, justification and size;

(ii) description of existing environment of site including vegetation, wildlife, land uses, and historic and cultural resources, soil, geology, topography, weather, air quality;

(iii) description of socio-economic characteristics of the project including income and employment, education, infrastructures, law enforcement, fire protection, hospital, and medical facilities;

(iv) discussion of alternatives to the proposed project size/design and how the preferred alternative was selected;

(v) description of the direct, indirect and cumulative environmental and socio-economic effects, both positive and negative, which may result from the project, i.e., air and water quality, noise and dust levels, sedimentation and erosion, plant and wildlife habitat and populations, infrastructure capacity (short and long term);

(vi) description of how impacts have been avoided or minimized and how any unavoidable impacts will be mitigated; and

(vii) evaluation of alternative management measures to control nonpoint source pollution and a description of management measures selected for incorporation in the proposed project.

(21) The following plans shall be required of all applicants ***as a condition of*** ~~contingent~~ the issuance of a CRM major siting permit. The time frames for the submission of the plans shall be specified within their respective conditions of the CRM permit. Additional types, numbers and/or quality of plans may also be required prior to permit issuance or as a condition of the permit at the discretion of the CRM Administrator or the CRM agency officials.

(i) Copies of the ***final*** construction plans ***and specifications must be signed and sealed by a CNMI licensed architect and engineer in their respective discipline.*** ~~including 100% CNMI certified architect and engineering designs and floor plans~~. Final plans for excavation, earthmoving and stormwater control.

(ii) Final master site plan.

(22) All dimensions shall be stated in English units (i.e., inches and feet).

(i) **Certification of Completion of Application**. Within thirty (30) days of the date on which an application for a CRM Permit is received by the CRM office, the CRM Administrator shall review the application and certify its completion to the applicant or notify the applicant of any defects or omitted necessary information. The time commencing review of an application specified in ***§ 15-10-215*** shall begin on the date an application is certified complete.

§ 15-10-210 NOTICE OF APPLICATION

The CRM office shall cause notice of each application for CRM permit to be published in a newspaper of general circulation within the Commonwealth within fifteen (15) days of receipt of the application. The notice shall state the nature, scope, and location of the proposed project, invite comments by the public, provide information on requesting a public hearing and provide information on the procedure for appealing any permit decision.

§ 15-10-215 REVIEW OF APPLICATION

The CRM Administrator and the CRM agency officials shall have sixty (60) days following certification of completion of application to grant or deny a CRM Permit except a permit for a minor development. For purposes of Section 9(a) of the Coastal Resources Management Act of 1983 (P.L. 3-47) [2 CMC § 1532(a)], the term "receipt of any request for review" shall mean "CRM certification of completion of a

permit application." Except for a permit for a minor development, the CRM Office shall review the application, publish notice of its contents, schedule a CRM permit hearing if mandatory or requested pursuant to § 15-10-220, or by the public and transmit the application to the CRM agency officials for review. The CRM Office shall provide technical findings on the impacts of proposed project to assist CRM agency officials in reaching a unanimous decision on CRM permit applications and shall ensure compliance of CRM permit decisions with this ***CHAPTER*** and CNMI P.L. 3-47 [2 CMC § 1532(d)]. Where an unanimous decision cannot be reached, the matter shall be submitted to the Governor for his determination pursuant to Section 9(d) of P.L. 3-47 [2 CMC § 1532(d)].

§ 15-10-220 CRM PERMIT HEARING

When a hearing on a permit application is required or requested pursuant to this section the CRM Administrator shall schedule the hearing, inform the party or parties involved of the hearing date and publish notices of the hearing two times in a newspaper of general circulation in the Commonwealth at least fourteen (14) days prior to the hearing.

(a) **When Permit Hearing Appropriate**. The CRM Administrator shall schedule a CRM permit hearing if:

(1) the proposed project is determined to be a major siting by the CRM agency officials;

(2) the proposed project does not constitute a major siting, but falls within one of the coastal ***APCs*** and the applicant, CRM agency official, or people pursuant to subsection (a)(4) below, submit a written request for a public hearing;

(3) if a CRM agency official requires a hearing on a proposed project; or

(4) a petition signed by at least five (5) people requesting a public hearing is received by the CRM Office within fourteen (14) days of the date the application is published in the newspaper as required in ***§ 15-10-210***.

(b) **Review Period**. The sixty (60) day period of review or, in the case of a minor permit, the ten (10) days period of review, shall begin on the day the application is certified to be complete by the CRM Office.

(c) **Presiding Officer**. The CRM Administrator or his designee shall preside at CRM permit hearings. The presiding officer shall control the taking of testimony and evidence. Evidence offered in a hearing need not conform with any prescribed rules of evidence; further, the presiding officer may allow and limit evidence and testimony in any manner he reasonably determines to be just and efficient.

(d) **Public Invited**. CRM permit hearings shall be open to the public.

(e) **Location**. Public meetings may be held at any location within the Commonwealth. Public hearings pursuant to permit applications shall be conducted on the island where the proposed project is located. Appellate hearings shall be held on the same island as the permit hearings, or if no CRM permit hearing was held, on the island where the proposed project is located. All other public hearings shall be conducted on Saipan.

(f) **Parties**. Any party to a hearing on a CRM permit application may appear on his/her own behalf. Parties may appear through an authorized representative of a partnership, corporation, trust or association. An authorized employee or officer of a government department or agency may represent the department or agency in any hearings.

(g) **Record**. The CRM Office shall provide for an audio recording or a stenographic record of CRM permit hearings. Transcription of the record shall not be required unless requested by a CRM permit applicant or the CRM Administrator, and except for the latter any party requesting transcription shall pay the cost incurred in the preparation of the transcript. Public access to the contents of the record and CRM records retention responsibilities are discussed in ***PART 1200***.

§ 15-10-225 FILING OF DOCUMENTS

Documents filed in support of, or in opposition to, CRM permit applications shall conform to the following standards.

(a) **Form and Size.** Pleading and briefs shall be bound by staple in the upper left hand corner and shall be typewritten upon white paper eight-and-a-half by eleven inches (8 1/2 X 11") in size. Tables, maps, charts, exhibits or appendices, if larger, shall be folded to that size where practicable. Text shall appear on one side of the paper and shall be double-spaced, except that footnotes and quotations in excess of a few lines may be single-spaced.

(b) **Title and Number**. Petitions, pleadings, briefs, and other documents shall show the title and number of the proceeding and the name and address of the party or its attorney.

(c) **Signatures**. The original of each application, petition, amendment or other legal document shall be signed in ink by the party or its counsel. If the party is a corporation or a partnership, the document may be signed by a corporate officer or partner. Motions, petitions, notices, pleading, and briefs may be signed by an attorney. Certifications as to truth and correctness of information in the document shall be by affidavit or declaration under penalty of perjury by the person charged with making the statements contained herein.

(d) **Copies**. Unless otherwise required, there shall be filed with the CRM Office an original and five (5) copies of each document.

§ 15-10-230 DECISION ON CRM APPLICATION

The CRM agency officials shall review the CRM permit application, hearing transcripts, if any, CRMO technical findings, supporting documentation and relevant laws, rules and regulations, and issue a unanimous written decision to grant, deny, or grant with conditions, a CRM permit in accordance with the policies of CNMI P.L. No. 3-47 [2 CMC § 1501, et seq.] and applicable rules and regulations. In reviewing a CRM Permit application, the following procedures shall apply:

(a) **Voluntary Disqualification**. CRM agency officials participating in decisions regarding CRM Permits shall do so in an impartial manner. They shall not contribute to decisions on CRM Permits where there exists an appearance of bias, or where actual bias may prevent them from exercising independent judgment. Should a CRM agency official determine, after considering the subject matter of a CRM permit application, that bias, or the appearance of bias, might appear to prevent him from exercising independent judgment, he shall excuse himself from that decision and appoint an alternate with comparable qualifications to act in his stead.

(b) **Disqualification by challenge**. If a CRM agency official refuses to disqualify himself under subsection (a), an applicant or affected person may petition the CRM Administrator at any time prior to the issuance of a permit decision for disqualification of a CRM agency official because of bias or the appearance of bias. A petition for disqualification shall be accompanied by a declaration under the penalty of perjury containing facts supporting the assertion of bias. The CRM Administrator shall review the petition and determine whether the facts give rise to a significant inference of bias, and if so, he shall inform the challenged CRM ***agency official that he/she is disqualified. If a CRM agency official is disqualified*** the CRM Administrator shall appoint a qualified alternate from the same department, to act in the disqualified CRM official's stead. Alternatives are also subject to disqualification by challenge of a party or affected person.

(c) **Unanimous Decision Required**. Decisions regarding issuance or denial of CRM permits by the CRM agency officials shall be by unanimous vote. Disagreements among the CRM agency officials shall be mediated by the CRM Administrator, and he shall assist in the preparation of a joint decision in order to achieve unanimous consent. Further, the CRM Administrator shall certify that

each CRM permit decision complies with CNMI P.L. 3-47 [2 CMC § 1501, et seq.] and applicable rules and regulations.

(d) **Deadlock Resolution by Governor.** In the event that the unanimity required by subsection (c) is not obtained, and/or the CRM Administrator is unable to certify that a unanimous decision of CRM agency officials complies with CNMI P.L. 3-47 [2 CMC § 1501, et seq.] and/or applicable rules and regulations, the CRM Administrator shall forward the CRM permit application to the Governor for resolution of the deadlock.

(1) Referral. Determination that a deadlock exists regarding a decision over a CRM permit application shall be made by the CRM Administrator within the sixty (60) day period of review by CRM agency officials specified by § 15-10-215. A deadlocked CRM permit application shall be referred to the Governor for resolution within ten (10) days following this determination.

(2) Supporting Documentation. In addition to the deadlocked CRM permit application, the CRM Administrator shall forward all supporting documentation, including additional briefs, if any, filed by the applicant, and statements of support or opposition by CRM agency officials. If a deadlock results solely from the CRM Administrator's denial of certification of compliance with CRM laws, then he shall supply a statement of his objections. If a deadlock results from dispute among CRM agency officials, then statements reflecting the divergent views on the CRM permit application shall be obtained from the CRM agency officials and forwarded with CRM permit application to the Governor for his review.

(3) Decision. After receipt of the deadlocked CRM permit application and accompanying documents, briefs and statements referred to above, the Governor shall have thirty (30) days to render his decision. He may grant, deny or conditionally grant a CRM permit, but he must issue written findings of facts and conclusions of law for his decision.

(4) Review. The decision of the Governor in a deadlock resolution under this section shall be conclusive for purposes of permit issuance or denial. Parties objecting to the Governor's decision may, if they seek review of the Governor's decision, appeal directly to the Appeals Board.

(e) **Written Findings and Conclusions.** Decisions rendered by the CRM agency officials on granting, denying or conditionally granting CRM permits shall be accompanied by written findings of fact and conclusions of law. The CRM Office shall assist the agency officials in preparing a consensus draft of finding of fact and conclusions of law for signature by CRM agency officials and the CRM Administrator.

(f) **Issuance of CRM Permit.** ***If the CRM agency officials unanimously agree on the issuance or conditioned issuance of a CRM permit and the CRM Administrator certifies that the CRM permit complies with CNMI P.L. 3-47 [2 CMC §1501, et seq.] and applicable rules and regulations, the CRM permit shall be issued. In the case of a deadlocked CRM permit application, if the Governor finds that it is proper to grant or conditionally grant a CRM permit, then the CRM Office shall prepare a written CRM permit stating the terms and conditions of issuance and obtain the signatures of the following on the CRM permit:***

(1) The CRM agency officials; and
(2) The CRM Administrator.

(g) **"He Who Decides Must Hear".** In those cases where a public hearing is held on a CRM permit application, the CRM agency officials shall review and consider the matters discussed or presented at the hearing. To this end, CRM agency officials shall, whenever practicable, attend CRM permit hearings, and if unable to attend a hearing, they shall listen to the audio recording of the hearing, or obtain and read a stenographic transcript prior to rendering any decision on the affected CRM permit application.

(h) **Notice.** Within ten (10) days of the issuance of a CRM permit decision, CRM shall publish notice of such issuance in a newspaper of general circulation in the Commonwealth.

§ 15-10-235 APPEAL OF CRM PERMIT DECISION

Any aggrieved person as defined in *§ 15-10-020(e)* may appeal the decision of CRM agency officials or in the case of a minor development, the CRM Administrator's decision to grant, deny or condition a new CRM permit to the CRM Appeals Board by filing a notice of the appeal with the CRM Office within thirty (30) days of the issuance of the CRM permit decision. The CRM Administrator shall then schedule an appellate hearing before the CRM Appeals Board.

(a) **Disqualification; Voluntary or by Challenge.** In the same manner and for the same reasons specified for CRM agency officials in *§ 15-10-230*, the three members of the CRM Appeals Board shall render decisions on CRM permit applications in an impartial manner. They shall voluntarily disqualify themselves for bias or the appearance of bias, and they are subject to disqualification by challenge in the manner prescribed for CRM agency officials in *§ 15-10-230*.

(b) **Quorum, Vote.** At least two (2) members of the CRM Appeals Board shall constitute a quorum and must be present to act upon review of a CRM agency official decision and the vote of at least two (2) members is necessary for Board action on the appeal.

(c) **Briefs, Statements.** Any aggrieved person who requests an appeal before the CRM Appeals Board shall file with the CRM Office within fifteen (15) days following its request for appeal, a written statement of objections to the CRM permit decision. In addition, any existing party may within ten (10) days of receipt of appellant's statement, submit to the CRM Office a statement or brief providing arguments in support of or in opposition to, the permit decision. Statements filed under this subsection shall be filed in accordance with the format and standards listed in *§ 15-10-225*.

(d) **Notice of Appeal, Contents.** Any notice of appeal filed with the CRM Office shall contain the following:

(1) the nature of the petitioner's interest in the CRM permit;
(2) the effect of the CRM permit on the petitioner's interest; and
(3) the extent that the petitioner's interest is not represented by CRM, the applicant or other aggrieved persons.

(e) **Service of Papers.** All parties to an appeal shall serve all other parties with any papers that are required to be filed at the CRM Office and such service shall occur on the same day as filing at the CRM Office.

(f) **Papers Considered by CRM Appeals Board.** For the purpose of reviewing the CRM permit application decision, the CRM Appeals Board shall receive and review the following:

(1) findings of facts and conclusions of law adopted by the CRM agency officials;
(2) CRM permit application;
(3) CRM permit, if issued;
(4) record of the CRM permit hearing, if any;
(5) statements filed with the CRM Office in support of, or in opposition to, the appeal; and
(6) any other documents, correspondence or testimony considered in the permit decision-making process.

(g) **Oral Argument.** Upon written request to the CRM Office by the appellant or other party to the appeal, oral argument shall be permitted. The scope of oral argument shall be limited to the written statements in support of, or in opposition to, the appeal. Oral argument shall be scheduled by the CRM Administrator before the full membership of the CRM Appeals Board. Oral argument shall be heard after the submission of written statements by the appellant and opponents, if any, and within twenty-five (25) days after the issuance of the CRM permit by CRM agency officials.

(h) **Scope of Appeal.** In reviewing the CRM permit decision of CRM agency officials, the CRM Appeals Board shall reverse the decision below, and remand if necessary when:

(1) it is clearly erroneous in light of CRM rules and regulations and the policies established in CNMI P.L. 3-47 [2 CMC § 1501, et. seq.];
(2) it is in violation of applicable federal or CNMI constitutional or statutory provisions;
(3) it is arbitrary or capricious; or
(4) it was not issued in accordance with required procedures.

(i) **Written Decision.** After reviewing the record and considering the arguments, the CRM Appeals Board shall render a written decision detailing the reasons in support of its determination. The decision of the Board shall be the final administrative decision, subject to judicial review. In drafting its decision, the Appeals Board may utilize the resources of the CRM Office.

(j) **Automatic Affirmance**. If no decision is rendered by the CRM Appeals Board within thirty (30) days of the date of the hearing, the CRM Administrator shall issued notice of summary affirmance of the CRM permit decision. The party or parties aggrieved by the CRM permit decision, as defined at ***§ 15-10-020(e)***, may then appeal to the Commonwealth Superior Court, pursuant to ***§ 15-10-240***.

§ 15-10-240 COMMONWEALTH SUPERIOR COURT

Any person aggrieved by a final decision of the CRM Appeals Board may seek judicial review in accordance with ***2 CMC § 1501, et. seq***. In the event that the CRM Appeals Board does not have a quorum within sixty (60) days, the decision of the CRM agency officials, CNMI Governor, or the CRM Administrator shall be considered summarily affirmed and the aggrieved party may seek judicial review from the Commonwealth Superior Court in accordance with ***2 CMC 1501, et. seq.***

PART 300 – STANDARDS FOR CRM PERMIT ISSUANCE

§ 15-10-301 GENERAL STANDARDS FOR ALL CRM PERMITS

In the course of reviewing all CRM permits for proposed projects located wholly, partially or intermittently within an area of particular concern (APC), or which have a direct and significant impact on an APC or which are designated as a major siting, the CRM agency officials and the CRM Administrator shall require the applicant to demonstrate by a fair preponderance of evidence that the project will not have a significant adverse impact on the coastal environment or its resources. The CRM program agency officials and Administrator shall also base their decision on technical findings and the policy set out in section 3 of Public Law 3-47 [2 CMC § 1511]. Adverse impacts may include but are not limited to those defined in ***§ 15-10-020(c)***.

§ 15-10-305 GENERAL CRITERIA FOR ALL CRM PERMITS

The CRM agency officials and the CRM Administrator shall consider the following when evaluating all CRM Permit applications:

(a) **Cumulative Impact**. The CRM Administrator and CRM agency officials shall determine the impact of existing uses and activities on coastal resources and determine whether the added impact of the proposed project seeking a CRM permit will result, when added to the existing use, in a significant degradation of the coastal resources. Consideration shall include potential coastal nonpoint source pollution, watershed setting, and receiving waters of the watershed in which a project is situated.

(b) **Compatibility**. The CRM Administrator and CRM agency officials shall determine, to the extent practicable, whether the proposed project is compatible with existing adjacent uses and is not

contrary to designated land and water uses being followed or approved by the Commonwealth government, its departments or agencies.

(c) **Alternatives**. The CRM Administrator and CRM agency officials shall determine whether or not a reasonable alternative site exists for the proposed project.

(d) **Conservation**. The CRM Administrator and CRM agency officials shall determine, to the extent practicable, the extent of the impact of the proposed project, including construction, operation, maintenance and intermittent activities on its watershed and receiving waters, marine, freshwater, wetland, and terrestrial habitat, and preserve, to the extent practicable, the physical and chemical characteristics of the site necessary to support water quality and living resources.

(e) **Compliance with Local and Federal Laws**. The CRM Administrator and CRM agency officials shall require compliance with Federal and CNMI laws, including, but not limited to, air and water quality standards, land use, Federal and CNMI constitutional standards, and applicable permit processes necessary for completion of the proposed project.

(f) **Right to a Clean and Healthful Environment**. Projects shall be undertaken and completed so as to maintain and, where appropriate, enhance and protect the Commonwealth's inherent natural beauty and natural resources, so as to ensure the protection of the people's constitutional right to a clean and healthful environment.

(g) **Effect on Existing Public Services**. Activities and uses which would place excessive pressure on existing facilities and services to the detriment of the Commonwealth's interests, plans and policies, shall be discouraged.

(h) **Adequate Access**. The CRM Administrator and CRM agency officials shall determine whether the proposed project would provide adequate public access to and along the shoreline.

(i) **Setbacks**. The CRM Administrator and CRM agency officials shall determine whether the proposed project provides adequate space between the project and identified hazardous lands including floodplains, erosion-prone areas, storm wave inundation areas, air installation crash and sound zones and major fault lines unless it can be demonstrated such development does not pose unreasonable risks to the health, safety, and welfare of the people of the Commonwealth, and complies with applicable laws.

(j) **Management measures for control of nonpoint source pollution**. The CRM Administrator and CRM agency officials shall determine if the selected management measures are adequate for the control of nonpoint source pollution resulting from project construction, operations and maintenance, including intermittent activities such as repairs, routine maintenance, resurfacing, road or bridge repair, cleaning, and grading, landscape maintenance, chemical mixing, and other nonpoint sources.

§ 15-10-310 SPECIFIC CRITERIA, AREAS OF PARTICULAR CONCERN.

Prior to the issuance of any CRM permit for a proposed project within an APC, the CRM agency officials and the CRM Administrator shall evaluate the proposed project in terms of its compatibility with the standards and relative priorities listed below, and the general standards provided above in ***§ 15-10-305***. If more than one project requiring a CRM permit is proposed for a particular location, the project determined by the CRM regulatory officials to be the most compatible with the general and specific standards provided herein shall be given priority over the less compatible project.

(a) **Lagoon and Reef APC; Management Standards**. Any project proposed for location within the lagoon and reef APC shall be evaluated to determine its compatibility with the following standards:

(1) subsistence usage of coastal areas and resources shall be ensured;

(2) living marine resources, particularly fishery resources, shall be managed so as to maintain optimum sustainable yields;
(3) significant adverse impacts to reefs and corals shall be prevented;
(4) lagoon and reef areas shall be managed so as to maintain or enhance subsistence, commercial and sport fisheries;
(5) lagoon and reef areas shall be managed so as to assure the maintenance of natural water flows, natural circulation patterns, natural nutrient and oxygen levels and to avoid the discharge of toxic wastes, sewage, petroleum products, siltation and destruction of productive habitat;
(6) areas and objects of historic and cultural significance shall be preserved and maintained; and
(7) under water preservation areas shall be designated.

(b) **Lagoon and Reef APC; Use Priorities.**

(1) General Lagoon and Reef APCs. Activities listed within a use priority category are neither priority-ranked nor exhaustive. Use priorities categories for the lagoon and reef APCs of the Northern Mariana Islands are as follows:

(i) **HIGHEST:**

(A) projects promoting conservation of open space, high water quality, historic and cultural resources;

(B) projects promoting or enhancing public recreation and access;

(C) water-dependent projects which are compatible with adjacent uses;

(D) sport and small-scale taking of edible marine resources within sustainable levels;

(E) activities related to the prevention of beach erosion; ***or***

(F) projects preserving fish and wildlife habitat.

(ii) **MODERATE:**

(A) commercial taking of edible marine resources within sustainable levels;

(B) aquaculture projects which do not adversely affect the productivity of coastal waters or natural beach processes; ***or***

(C) piers and docks which are constructed with floating materials or which, by design, do not impede or alter natural shoreline processes and littoral drift.

(iii) **LOWEST:**

(A) point sources discharge of drainage water which will not result in significant permanent degradation in the water quality of the lagoon; ***or***

(B) dredge and fill activity for the purpose of constructing piers, launching facilities, infrastructure, and boat harbors, if designed to prevent or mitigate adverse environmental impacts.

(iv) **UNACCEPTABLE:**

(A) discharge of untreated sewage, petroleum products or other hazardous materials;

(B) taking of sand and aggregate materials not associated with permitted activities and uses;

(C) destruction of coralline reef matter not associated with permitted activities and uses;

(D) dumping of trash, litter, garbage or other refuse into the lagoon, or at a place on shore where entry into the lagoon is inevitable; ***or***

(E) dredge and fill activities not associated with permitted construction of piers, launching facilities, infrastructure, and boat harbors.

(2) Lagoon and Reef APC; Managaha. Use Priority Categories for Managaha Island (Saipan), in addition to those listed for general Lagoon and Reef APCs, shall be as follows:

(i) **HIGHEST**. Maintenance of the island as an uninhabited place used only for cultural and passive recreational purposes.

(ii) **MODERATE**. Improvements for the purposes of sanitation and navigation.

(iii) **LOWEST**. Commercial activity situated on the island related to cultural and passive recreational pursuits.

(iv) **UNACCEPTABLE**. Development, uses or activities which preclude or deter or are unrelated to the use of the island by residents of the Commonwealth for cultural or passive recreational purposes.

(3) Lagoon and Reef APC; Anjota Island. Use Priority Categories for Anjota Island (Rota) shall be as follows:

(i) **HIGHEST**. Maintenance of that part of the island outside the port and industrial APC as a wildlife sanctuary and for passive recreation.

(ii) **UNACCEPTABLE**. Expansion of the port and industrial Section of Anjota Island which would encroach upon or have significant adverse impact upon the maintenance of a wildlife preserve or upon recreational uses of the island.

(4) Lagoon and Reef APC; Coral Reefs. The use Priority Categories for the Coral Reefs of Saipan, Tinian, and Rota shall be as follows:

(i) **HIGHEST**:

(A) maintenance of highest levels of primary productivity; ***or***

(B) creation of underwater preserves in pristine areas.

(ii) **MODERATE**. Dredging of moderately productive corals and reefs associated with permitted uses and activities.

(iii) **LOWEST**. Taking corals for cultural use (i.e., production of lime).

(iv) **UNACCEPTABLE**:

(A) destruction of reefs and corals not associated with permitted projects; ***or***

(B) taking corals for other than scientific study.

(c) **Wetland and Mangrove APC; Management Standards**. Any project proposed for location within the wetland and mangrove APC shall be evaluated to determine its compatibility with the following standards:

(1) significant adverse impact on natural drainage patterns, the destruction of important habitat

and the discharge of toxic substances shall be prohibited; adequate water flow, nutrients and oxygen levels shall be ensured;

(2) the natural ecological and hydrological processes and mangrove areas shall be preserved;

(3) critical wetland habitat shall be maintained and, where possible, enhanced so as to increase the potential for survival of rare and endangered flora and fauna;

(4) public landholding in and adjacent to the wetland and mangrove APC shall be maintained and, to the extent possible, increased, for the purpose of access and/or hazard mitigation, through land trades with the Marianas Public Land Corporation, land purchasers, creation of easement or through taking by eminent domain; and

(5) wetland resources shall be utilized for appropriate agriculture, recreation, education, public open space and other compatible uses which would not degrade productivity.

(d) **Wetland and Mangrove APC; Use priorities.** Activities listed within a use priority category are neither priority ranked nor exhaustive. Use priority categories for the wetland and mangrove APC are as follows:

(1) **HIGHEST**:

(i) preservation and enhancement of wetland and mangrove areas; ***or***

(ii) preservation of wildlife, primary productivity, conservation areas and historical properties in both wetland and mangrove areas.

(2) **MODERATE**:

(i) non-intensive agriculture benefited by inundation, low density grazing;

(ii) infrastructure corridors designed to avoid significant adverse impacts to natural hydrological processes and values as wildlife habitat; ***or***

(iii) non-commercial recreation including light duty, elevated, non-permanent structures such as footbridges, observation decks and similar non- enclosed recreational and access structures.

(3) **LOWEST**. Residential development designed to avoid adverse environmental impacts and which is not susceptible to damage by flooding.

(4) **UNACCEPTABLE**:

(i) land fill and dumping not associated with flood control and infrastructure corridors or other allowable activities and uses; ***or***

(ii) land clearing, grading or removal of natural vegetation not associated with allowable activities, which would result in extensive sedimentation of wetland, mangrove areas and coastal waters.

(e) **Shoreline APC; Management Standards**

(1) Any project proposed for location within the shoreline APC shall be evaluated to determine its compatibility with the following standards:

(i) the impact of onshore activities upon wildlife, marine or aesthetic resources shall be minimized;

(ii) the effects of shoreline development on natural beach processes shall be minimized;

(iii) the taking of sand, gravel, or other aggregates and minerals from the beach and near shore areas shall not be allowed;

(iv) removal of hazardous debris from beaches and coastal areas shall be strongly encouraged;

(v) where possible public landholdings along the shore shall be maintained and increased, for the purpose of access and hazard mitigation, through land trades with Marianas Public Land Corporation (MPLC), land purchases, creation of easements, and where no practicable alternative exists, through the constitutional authority of eminent domain; ***and***

(vi) marina and small boat harbor projects shall be evaluated for consistency with the following performance standards and goals:

(A) effective runoff control shall be implemented which includes the use of pollution prevention activities and the proper design of hull maintenance areas;

(B) shoreline stabilization shall be implemented where erosion is a nonpoint source pollution problem;

(C) effective fuel station design shall be implemented to prevent spills and leaks and allow for efficient and effective cleanup of spills;

(D) effective sewage management facilities shall be installed where needed to reduce the release of sewage to surface waters. Facilities shall be design to allow for efficient and effective maintenance and signage shall be posted to facilitate the public's use of the facility;

(E) effective fish waste management shall be implanted through restrictions, public education, and/or facilities for proper disposal of fish waste;

(F) petroleum control shall be implemented to reduce the amount of fuel and oil from boat bilges and fuel tank air vents and other vessel activities from entering marina and surface waters;

(G) boat cleaning operations shall minimize, to the extent practicable, the release of harmful cleaners and solvents as well as paint from in-water hull cleaning;

(H) public education management, outreach, and training shall promote marina activities that minimize environmental impact; and

(I) boating activities within marina areas shall conform with Department of Public Safety Boating Safety Regulations.

(2) In addition to deciding whether the proposed project is consistent with the above standards, CRM agency officials shall consider the following in their review of coastal permit applications:

(i) whether the proposed project is water-dependent or water-oriented in nature;

(ii) whether the proposed project is to facilitate or enhance coastal recreational, subsistence, or cultural opportunities (i.e., docking, utt, fishing, swimming, picnicking, navigation devices);

(iii) whether the existing land use, including the existence of roadways, has irreversibly committed the area to uses compatible with the proposed project, particularly water oriented uses, and provided that the proposed project does not create adverse cumulative impacts;

(iv) whether the proposed project is a single-family dwelling in an existing residential area and would occur on private property owned by the same owner as of the effective date of the program, of which all or a significant portion is located in the shoreline APC, or

no reasonable alternative is open to the property owner to trade land, relocate or sell to the government;

(v) whether the proposed project would be safely located on a rocky shoreline and would cause significant adverse impacts to wildlife, marine or scenic resources;

(vi) whether the proposed project is designated to prevent or mitigate shoreline erosion; ***and***

(vii) whether the proposed project would be more appropriately located in the port and industrial APC.

(f) **Shoreline APC; Use Priorities.** Activities listed within a use priority category are neither priority ranked nor exhaustive. Use priority categories for the shoreline APCs of the entire Northern Mariana Islands chain are as follows:

(1) **HIGHEST**:

(i) public recreational uses of beach area, including the creation of public shoreline parks and construction of structures enhancing access and use, such as barbecue grills, picnic table, docks, shelters or boardwalks;

(ii) compatible water-dependent development which cannot be reasonably accommodated in other locations;

(iii) traditional cultural and historic practices;

(iv) preservation of fish and wildlife habitat;

(v) preservation of natural open areas of high scenic beauty and scientific value; ***or***

(vi) activities related to the prevention of beach erosion through non-structural means.

(2) **MODERATE**:

(i) single-family dwelling in existing residential areas;

(ii) agriculture/aquaculture, which requires or is enhanced by conditions inherent in this APC; ***or***

(iii) improvements to or expansion of existing water-oriented structures which are compatible with designated land uses and do not otherwise conflict with or obstruct public recreational use of coastal areas or other water-dependent or water-related uses.

(3) **LOWEST**:

(i) projects, which result in growth or improvements to existing commercial, non-recreational public, or multi-unit residential uses; ***or***

(ii) water related and new water-oriented development compatible with designated land uses, which cannot be accommodated in other locations and which neither conflicts with recreational uses nor restricts access to or along the shoreline.

(4) **UNACCEPTABLE**:

(i) new commercial structures, industrial structures, or non-recreational public structures which are not water dependent, water-oriented or water-related;

(ii) disposal of litter and refuse; ***or***

(iii) the taking of sand for other than cultural usage, and mining of gravel and extraction of minerals, oil and gas, or other extractive uses.

(g) **Port and Industrial APC; Management Standards.** Any Project proposed for location within the port and industrial APC shall be evaluated to determine its compatibility with the following standards:

(1) projects shall be undertaken and completed so as to maintain and, where appropriate, enhance and protect the Commonwealth's inherent natural beauty and natural resources and so as to ensure the protection of the people's constitutional right to a clean and healthful environment;
(2) in the siting of port and industrial development, its suitability in terms of meeting the long-term economic and social expectations of the Commonwealth;
(3) recognize the limited availability of the port and industrial resources in making allocation decisions;
(4) ensure that development is done with respect for the Commonwealth's inherent natural beauty and the people's constitutionally protected right to a clean and healthful environment;
(5) develop improvements to infrastructure in the port and industrial APC;
(6) prohibit projects, which would result in significant adverse impacts, including cumulative impacts on coastal resources outside the port and industrial APC;
(7) conserve shoreline locations for water-dependent projects;
(8) consider and assist in resolution of possible conflicts by identifying and planning for the potential exercise of military retention area options affecting port resources;
(9) locate, to the maximum extent practicable, petroleum base coastal energy facilities within the port and industrial APC;
(10) consider development proposals from the perspective of federal port related opportunities and constraints which are applicable to the Commonwealth; ***and***
(11) the amount of shoreline frontage utilized by any project, regardless of the extent to which the project may be water-dependent, shall be minimized to the greatest extent practicable.

(h) **Port and Industrial APC; Use Priorities.** Activities listed within a use priority category are neither priority ranked nor exhaustive. Use priority categories for the port and industrial APCs in the entire Northern Mariana Islands chain are as follows:

(1) **HIGHEST:**

(i) water-dependent port and industrial activities and uses located on the APC shoreline;

(ii) industrial uses that are not water-dependent, but would cause adverse impacts if situated outside the port and industrial APC and would not be sited directly on the port and industrial APC shoreline, and would not preclude the opportunity for water-dependent activities and uses; ***or***

(iii) industries and services that support water-dependent industry and labor, which are not located on the port and industrial APC shoreline and do not interfere with water-dependent uses.

(2) **MODERATE:**

(i) recreational boating facilities; ***or***

(ii) clearing, grading or blasting which does not have long-term adverse effects on environmental quality, drainage patterns or adjacent APCs, so long as the activity is related to the permitted project.

(3) **LOWEST:**

(i) indefinite storage or stockpiling of hazardous materials;

(ii) indefinite storage of goods, not awaiting water-borne transport, in a shorefront location; ***or***

(iii) uses or activities which are acceptable in other APCs and which do not enhance or are not reasonably necessary to support permissible uses, activities and priorities in the port and industrial APC.

(4) **UNACCEPTABLE:**

(i) non-port and industrial related activities and uses which, if permitted, would result in conversion to other uses at the expense of port and industrial related growth, or would induce port and industrial related growth into other APCs or areas; ***or***

(ii) uses and activities which would have an adverse impact on other APCs, the American Memorial Park, Anjota Preserve, historic properties and other significant coastal resources.

(i) **Coastal Hazard APC; Management Standards**

(1) Areas identified as a coastal flood hazard zones (V & VE) in the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps (FIRM's) shall be considered a coastal hazards APC and any project proposed for location within the coastal hazards APC shall be evaluated to determine its compatibility with the following standards:

(i) if the project will have a detrimental impact on existing landforms or coastal processes that provide natural resistance from the forces of coastal hazards such as beaches, wetlands and cliff lines, impacts to these coastal resources shall be avoided to the maximum extent possible;

(ii) if the project is located in a geologically unstable zone such as cliff lines, severe slopes, coastal headlands or outcroppings, appropriate mitigation to prevent threat to human life, safety and the environment must be applied;

(iii) if the project design, form or use tend to make the structure (or auxiliary structures) more vulnerable to the effects of coastal hazards such as high winds, wave energy, flooding and storm surge, the plans must be certified by a CNMI licensed structural engineer to ensure potential impacts and threats to human life and safety are minimized;

(iv) if the project is located within an area which has historically been known to flood or be at a high risk to storm wave inundation or erosion, all design plans must be approved by the DPW Building Control Officer for compliance with the Uniform Building Code (UBC); ***and***

(v) if construction of the project may endanger human life or safety due to its design or siting, it shall not allowed.

(2) In addition to deciding whether the proposed project is consistent with the above standards, the CRM agency officials and the CRM Administrator shall consider the following in their review of coastal applications:

(i) whether the project is shoreline dependent;

(ii) whether the project is located in an area where potentially hazardous construction or unsafe structures already exist;

(iii) whether the project is receiving funding by any entity of the federal or local government for its design or construction;

(iv) whether the project will enhance or facilitate recreational or cultural opportunities;

(v) whether access to or from the shoreline is enhanced or the level of safety to or along the shoreline is increased;

(vi) whether the project is designed to prevent or mitigate for shoreline erosion; **and**

(vii) whether the project meets the requirements of the (UBC) for structures in flood or storm hazard zones.

(j) **Coastal Hazard APC; Use Priorities.** Activities listed within a use priority category are neither priority ranked nor exhaustive. Use priority categories for the coastal hazard APCs of the entire Northern Marianas Island chain are as follows:

(1) **HIGHEST**:

(i) projects which preserve, or enhance the natural defense of the shoreline against storm wave attack and flooding;

(ii) public recreational uses of beach area, including the creation of public shoreline parks and the preservation of open space along the shoreline;

(iii) traditional cultural and historic practices;

(iv) preservation of fish and wildlife habitat; ***or***

(v) preservation of natural open areas of high scenic beauty and/or scientific value.

(2) **MODERATE**:

(i) projects which promote access to and from remote shoreline areas; ***or***

(ii) improvement to, or expansion of, existing water oriented-structures, which are located in low risk hazard areas, are compatible with designated land uses and do not pose a risk to the health and safety of the public.

(3) **LOWEST**:

(i) projects which result in the start, growth or improvement of commercial, public, or multi-unit/single residential uses in areas identified or known to be in high hazard zones;

(ii) transportation facilities, public infrastructure or shoreline dependent projects which cannot be reasonably accommodated in other areas; ***or***

(iii) projects which require the installation or placement of shore protection structures.

(4) **UNACCEPTABLE**:

(i) projects which degrade or modify natural shoreline protective features such as beaches, cliffs or rocky shorelines;

(ii) projects which require hard shore protection to facilitate or accommodate structural entities of the developments unless these developments are associated with boating or marine based facilities; ***or***

(iii) projects which interfere or disrupt the natural shoreline processes such as littoral transport or coastal dynamics.

§ 15-10-315 HEIGHT, DENSITY, SETBACK, COVERAGE AND PARKING GUIDELINES

(a) **Application.** The following building design and site utilization guidelines will be applied to all projects requiring a CRM permit unless CRM agency officials in writing and with concurrence by CRMO Administrator grant an exception. An exception may only by granted when the applicant

can demonstrate that there will be no significant impacts on scenic, historical, coastal, biological, and water resources. However, no exception may be granted for shoreline setbacks unless otherwise provided for in subsection (b). In order to be consistent with the 1990 CNMI Building Code (P.L. 6-45) [2 CMC § 7101, et seq.] building heights will be measured according to the definition section of the Uniform Building Code ***CHAPTER*** 4 § 408 (Grade and Section), 409 (Height of Building).

(b) **Shoreline Setbacks.**

(1) Scope of Regulations. The Shoreline setback regulations herein prescribed apply to all coasts of the Commonwealth except for the port and industrial ***APCs*** where no shoreline setback regulations shall apply. Shoreline setbacks shall be measured inland from the mean high water level. For purposes of these regulations the front of any lot shall be that side parallel to the coastline and/or ocean.

(2) Shoreline Setbacks:

(i) **Shoreline Setback A, from 0-35 feet.** Beach and shoreline reservation zone for use as public access and recreation. Generally, structures are prohibited.

(ii) **Shoreline Setback B, from 35-75 feet.** No vertical construction, which will obstruct the visual openness and continuity of the shoreline area, is permitted. Open space, rest and recreation areas, swimming pools, terraces, landscaping and related outdoor improvements are allowed. Parking areas are not permitted.

(iii) **Shoreline Setback C, from 75-100 feet.** Single-story structures, covered porches, trellises and similar improvements not to exceed 12-feet in height measured from the natural grade line. Parking is permitted if otherwise allowed by law.

(iv) **Shoreline Setback D, from 100-feet or more.** Building height based on ***§ 15-10-315 (c)*** ~~Property Setback/Height Regulations~~. If the building is higher than 2 stories, 100 feet from the shoreline shall be considered the property line. ~~for applying the Setback/Height Regulations.~~

(3) Setbacks for Small Shoreline lots. For any lot where thirty percent (30%) or more of the land area of the lot is affected by the mandatory shoreline setback above, such shoreline setback regulations are modified as follows:

(i) **Shoreline Setback A-1, from 0-20 feet.** Beach recreation zone for use as public access and recreation.

(ii) **Shoreline Setback B-1, from 20-60 feet.** Shall be open space with no vertical construction or parking permitted.

(iii) **Shoreline Setback C-1, from 60-100 feet.** Single and two-story structures only, with the total height not to exceed 20 feet.

(iv) **Shoreline Setback D-1, from 100 feet or more.** Building height based on § 15-10-310 (c) ~~proposed Property Setback/Height Regulations.~~

(c) **Height and Side Yard Setback**

(1) High Rise Development. All high rise developments defined as structures more than six (6) stories or more than sixty (60) feet above grade are encouraged to locate in areas of existing high rise development. High rise construction is only permissible subject to the following conditions:

(i) High rise structures proposed seaward of any coastal road must be set back one foot from the front and back property lines for each one foot in the overall height of the building;

(ii) In order to create view corridors, the applicant for high-rise development will be required to draw one datum line perpendicular to the shoreline or beach. All high rise structures shall be orientated so that the longest lateral dimension is parallel to the datum line;

(iii) The project design shall incorporate substantial landscaping and tree planting to reduce/screen the visual bulk and mass of buildings as seen from public places such as roads, parks, and other public areas; ***and***

(iv) The applicant shall prepare a view corridor plan which shall include an inventory of existing views, impacts on existing views and proposed mitigation measures to protect scenic views.

(2) Multi-unit Residential. Multi-unit residential buildings must be set back one foot from the front and back of property lines for each one foot in the overall height of the building. All multi-unit residential buildings must be set back at least 10 feet from the side property lines.

(3) Commercial. Commercial buildings must be set back one foot from the front and back property lines for each one-foot in the overall height of the building. All commercial buildings must be set back at least 10 feet from the side property lines. The CRMO Administrator may allow a smaller side set back upon a determination that the adjacent property is being or is substantially likely to be used for commercial or industrial purposes.

(4) Hotel & Resort. Hotel and Resort buildings must be setback one foot from the front and back property lines for each one foot in the overall height of the building.

(5) Industrial. Industrial buildings shall set back a minimum of 20 feet from all property lines. The CRMO Administrator may allow less than a 20-foot setback upon a determination that the adjacent property is being or is substantially likely to be used for industrial purposes.

(d) **Lot Coverage Density and Parking Guidelines**. Lot coverage for structures means the "footprint" of buildings on the site and does not consider the floor area of upper floors or the overall density of the development. Where the first floor is elevated above the ground level, its lot coverage ratio shall be based on the proposed use for the area below the structures. The lot coverage ratio for open space is considered to include plazas, terraces, decks, and other outdoor areas which are not covered or walled, landscaped areas, recreation and open space, improved or unimproved natural areas, covered stormwater disposal areas, and pedestrian walkways, The continuity, conservation, and maintenance of open space must be provided for; any later modification must be first approved.

(1) One and Two Family Residential:

(i) Maximum lot coverage by buildings is 40% for lots on which not all dwellings are connected to a public sewer and 60% for lots on which all dwellings are connected to a public sewer.

(ii) In developments consisting of more than four lots, the developer and/or subdivider must provide common use open space at a ratio of one acre of common use open space per every five acres of private lots. Up to 50% of the required common open space may be open space useable by the community included in public schools or similar public facilities.

(2) Multi Unit Residential. Maximum lot coverage by buildings is 60%. A minimum of 1.25 parking spaces must be provided for each dwelling unit.

(3) Commercial. Maximum lot coverage by structures is 75%. A minimum of one parking space must be provided for each 200 feet of commercial space; one parking space for each 150 square feet office space; and one parking space for every four restaurant seats.

(4) Hotel & Resort:

(i) **For buildings exceeding 35 feet in height.** Maximum lot coverage by structures is 20%. Maximum lot coverage by parking, roads, and service entries is 35%. Minimum lot coverage for open space is 45%;

(ii) **For buildings less than 35 feet in height.** Maximum lot coverage by structures is 35%. Maximum lot coverage by parking, roads and service entries is 35%. Minimum log coverage for open space is 30%; and

(iii) A minimum of 1 parking space for each 5 guest units must be provided.

(5) Industrial. An adequate number of parking spaces for employees and customers must be provided.

PART 400 - STANDARDS FOR APC CREATION AND MODIFICATION

§ 15-10-401 AUTHORITY

The CRM Agency Officials or the CRM Administrator may seek designation of any area within the Commonwealth as an APC or propose a change in any APC boundary. Further, the CRM Administrator may review requests from private parties for designation or modification of ***APCs***.

§ 15-10-405 PROCEDURE

Requests for new or modified APCs shall include detailed documentation supporting the APC designation or boundary change. The documentation shall be based on criteria set forth in ***§ 15-10-410*** below, but may include other information pertinent to the area nominated or proposed boundary change. Within thirty (30) days of a nomination or proposed boundary change, the CRM Administrator shall circulate it to the CRM agency officials and the CRM Coastal Advisory Council. The CRM Administrator shall, within that same period, publish notice of the nomination or proposed boundary change, describing the area involved, in a newspaper of general circulation within the Commonwealth. The CRM Office shall be available to receive public comment for a period of forty-five (45) days from the date such notice is published. Within the forty-five (45) day comment period, the CRM agency officials and the CRM Coastal Advisory Council shall submit to the CRM Office comments and recommendations, and a public hearing shall be conducted by the CRM Office. Within thirty (30) days after the closure of the comment period, the CRM Coastal Advisory Council shall, after adequate consideration of the comments received, issue a recommendation on the nomination to the CRM agency officials who shall make the final decision regarding the proposed creation or modification.

§ 15-10-410 CRITERIA FOR CREATION AND MODIFICATION

In reviewing a request for designation or modification of an APC, the CRM Administrator and the CRM agency officials shall consider whether the areas require special management because the areas are:

(a) areas of unique, scarce, fragile, or vulnerable natural habitat; have a unique or fragile physical configuration (e.g. Saipan Lagoon); are of historical significance, cultural value or scenic importance (including resources on or determined to be eligible for the National or CNMI Register of Historic Places);

(b) areas of high natural productivity or essential habitat for living resources, including fish, wildlife and endangered species and the various trophic levels in the food web critical to their well-being;

(c) areas of substantial recreational value or potential;

(d) areas where developments and facilities are dependent either upon the utilization of, or access to coastal waters or of geographic significance for industrial or commercial development or for dredge spoil disposal;

(e) areas of urban concentration where shoreline utilization and water uses are highly competitive;

(f) areas which, if development were permitted, might be subject to significant hazard due to storms, slides, floods, erosion, settlement or salt water intrusion;

(g) areas needed to protect, maintain, or replenish coastal lands or resources, including coastal flood plains, aquifers and their recharge areas, estuaries, sand dunes, coral and other reefs, beaches, and offshore sand deposits; ***or***

(h) areas needed for the preservation or restoration of coastal resources due to the value of those resources for conservation, recreational, ecological, or aesthetic purposes.

§ 15-10-415 NEW APC STANDARDS AND USE PRIORITIES

Upon a determination to designate a new APC, the CRM Administrator shall draft management standards and use priorities. Designation of the area as an APC and publication of the new Standards and Use Priorities shall be effected by publication of the designated APC and Standards and Use Priorities in the Commonwealth Register pursuant to 1 CMC § 9101, et seq.

PART 500 – STANDARDS FOR DETERMINING OF A MAJOR SITING

§ 15-10-501 DETERMINATION OF MAJOR SITING

(a) The determination of whether a proposed project, inside or outside a coastal APC, constitutes a major siting shall be issued by the CRM Office based on a documented consensus of CRM program agencies stating the rationale therefore. The phrase includes but is not limited to the following:

(1) energy related facilities, waste-water treatment facilities, pipelines, transportation facilities, surface water control projects, harbor structures;

(2) sanitary landfills, disposal of dredged materials, mining activities, quarries, basalt extraction, incinerator projects;

(3) dredging and filling in marine or fresh waters, point source discharge of water or air pollutants, shoreline modification, ocean dumping, artificial reef construction;

(4) proposed projects with potential for significant adverse effects on submerged lands, groundwater recharge areas, cultural areas, historic or archaeological sites and properties, designated conservation and pristine areas, or uninhabited islands, sparsely populated islands, mangroves, reefs, wetlands, beaches and lakes, areas of significant interest, recreational areas, limestone, volcanic and cocos forest, and endangered or threatened species or marine mammal habitats;

(5) major recreational developments and major urban or government developments;

(6) construction and major repair of highways and infrastructure development;

(7) aquaculture or mariculture facilities, and silvaculture or timbering operations;

(8) any project with the potential of affecting coastal resources which requires a federal license, permit or other authorization from any regulatory agency of the U.S. Government;

(9) any project, or proposed project, that may cause underground injection of hazardous wastes, of fluids used for extraction of minerals, oil and energy, and of certain other fluids with potential to contaminate ground water. Any such project, or proposed project, shall be primarily governed by the CNMI Underground Injection Control Regulations and supplemented by these Regulations;

(10) any other proposed project which by consensus of the CRM agency officials, has the potential

for causing a direct and significant impact on coastal resources including any project having a peak demand of 500 kilowatts per day and/or 3,500 gallons of water per day as established by CUC demand rates for particular types of projects; **or**

(11) proposed projects that modify areas that are particularly susceptible to erosion and sediment loss; areas that provide important water quality benefits and/or are necessary to maintain riparian and aquatic biota and/or necessary to maintain the natural integrity of water bodies and natural drainage systems.

(b) All major sitings shall be in conformity with the policy enumerated in section 3 of P.L. 3-47 [2 CMC § 1511].

§ 15-10-505 SPECIFIC CRITERIA FOR MAJOR SITINGS

The CRM agency officials and the CRM Administrator shall evaluate a proposed project found to constitute a major siting based on the specific criteria listed below, as well as the general criteria for all CRM permits listed in ***§ 15-10-301.***

(a) **Project Site Development**. The proposed project site development shall be planned and managed so as to ensure compatibility with existing and projected uses of the site and surrounding area.

(b) **Minimum Site Preparation**. Proposed projects shall, to the extent practicable, be located at sites with pre-existing infrastructure, or which require a minimum of site preparation (e.g. excavation, filling, and removal of vegetation, utility connection).

(c) **Adverse Impact on Fish and Wildlife**. The proposed project shall not adversely impact fragile fish and wildlife habitats, or other environmentally sensitive areas.

(d) **Cumulative Environmental Impact**. The proposed project site shall be selected in order to minimize adverse primary, secondary, or cumulative environmental impacts.

(e) **Future Development Options**. The proposed project site shall not unreasonably restrict the range of future development options in the adjacent areas.

(f) **Mitigation of Adverse Impact**. Wherever practicable, adverse impact of the proposed project on the environment shall be mitigated. Mitigation shall include the incorporation of management measures for control of nonpoint source pollution.

(g) **Cultural-historic and Scenic Values**. Consider siting alternatives that promote the Commonwealth's goals with respect to cultural-historic and scenic values.

(h) **Watershed Conservation**. In regard to site development (including roads, highways, and bridges), avoid development, to the extent practicable, of areas that are particularly susceptible to erosion and sediment loss; preserve areas that provide important water quality benefits and/or are necessary to maintain riparian and aquatic biota and/or protect to the extent practicable the natural integrity of water bodies and natural drainage systems.

PART 600 - CRM PERMIT CONDITIONS

§ 15-10-601 USE OF CONDITIONS IN CRM PERMITS

CRM agency officials may delineate the scope of an approved activity, or otherwise limit CRM permits, by issuing conditions to CRM permits. The conditions shall be set out individually in writing, shall be accompanied by a specific reason for each condition and shall be issued contemporaneously with the CRM permit. In permitted projects of ongoing nature, the requirement for satisfaction of or compliance with CRM permit conditions shall continue for the duration of the permitted activity. Violation of a CRM

permit condition at any time shall be cause for the CRM Administrator to take enforcement action pursuant to PARTS 800 and 900.

§ 15-10-605 PURPOSE AND SCOPE

The purpose of issuing CRM permits subject to specific conditions is to ensure that a permitted project complies with ***PART 300*** - STANDARDS FOR CRM PERMIT ISSUANCE, and ***with*** CRM program policies. Any lawful requirement consistent with the standards and policies referred to above may be the basis of a CRM permit condition.

§ 15-10-610 MANDATORY CONDITIONS

All CRM Permits shall contain at least the following conditions:

(a) **Inspection.** The CRM Administrator or his designee shall have the right to make reasonable inspections of the out-of-doors portions of a permitted project site at any reasonable time in order to assess compliance with the CRM permit and its conditions.

(b) **Timing and Duration.**

(1) Permitted physical development of the project site subject to a CRM permit shall begin within the time frame specified for project commencement on the permit. The maximum time allowed for project commencement shall be one (1) year. The project shall be completed within the time frame specified on the permit for project completion. The maximum time allowed for project completion shall be three (3) years unless it can be demonstrated the scope of the project requires additional time for construction purposes (only). Upon project completion, the permittee shall deliver a completion certificate to the CRM Office. If the project is not completed within the time frame specified in the permit, the permit will be reviewed by the CRM Administrator who will do one of the following:

(i) extend or amend the permit; or

(ii) terminate the permit.

(2) If the CRM Administrator grants an extension of the permit, a fee equaling fifty percent (50%) of the original permit fee shall be assessed. The CRM Administrator shall have the discretion to waive this fee if the project has been substantially completed. Substantial completion means, the project is over seventy-five percent (75%) structurally complete as certified by a CNMI licensed architect or engineer.

(3) All conditions attached to the permit shall be of perpetual validity unless action is taken to amend, suspend, revoke, or otherwise modify the CRM permit.

(c) **Duty to Inform.** The CRM permit holder, whether it be the applicant or a successor in interest, shall be required to notify the CRM Administrator in writing if he/she has knowledge that any information in the CRM permit application was untrue at the time of its submission or if he/she has knowledge of any unforeseen adverse environmental impacts of the permitted project. A CRM permit holder shall further have the duty to inform any successor in interest of the permit granted and the conditions attached thereto, if any; and the successor in interest shall, within five (5) days thereafter, advise the CRM Office of his/her interest in writing.

(d) **Compliance with other Law.** The CRM permit is valid only if the permitted project is otherwise lawful and in compliance with other necessary governmental permits.

(e) The following conditions will be included in every permit involving construction of any kind:

(1) The permittee shall be responsible for preventing discharge of construction site chemicals through the proper use of best management practices as described in the document "Construction Site Chemical and Material Control Handbook" for the following activities: material delivery and storage; material use, spill prevention and control; hazardous waste

management; concrete waste management; vehicle and equipment cleaning, maintenance and fueling; and

(2) Where appropriate, the project shall preserve, enhance, or establish buffers along surface water bodies and their tributaries.

PART 700 - CRM PERMIT AMENDMENT

§ 15-10-701 CRM PERMIT AMENDMENT

An amended CRM permit shall be required of all projects before they are significantly altered or substantially expanded. Such an amendment shall require submittal of a revised CRM permit application to the CRM Office. Alterations and expansions requiring amended CRM permits include, but are not limited to, project changes which exceed $5,000.00 of the monetary value of the permitted project as described in the original CRM permit application. Where a substantially new project is proposed, a new and different permit must be obtained.

§ 15-10-705 TRANSFER OF INTEREST

If a property interest in the project is transferred, the CRM Office shall issue a new permit in the name of the successors in interest within 30 days of receiving notice of the transfer. A permit issued under this section shall be identical in respect to terms and condition to the permit issued to the predecessor in interest.

PART 800 – ENFORCEMENT OF CRM PERMITS

§ 15-10-801 PURPOSE

The provisions of this ***PART*** are intended to establish procedures whereby the CRM Administrator may enforce the terms and conditions of CRM permits. Final actions of the CRM Administrator based upon this section are final agency action reviewable directly by the Commonwealth Superior Court pursuant to the Administrative Procedure Act, 1 CMC § 9101, et seq.

§ 15-10-805 GROUNDS FOR ACTION

The CRM Administrator shall take action to enforce compliance with CRM program policies and CRM permit conditions in any of the following cases:

(a) **Misstatement.** The CRM permit applicant, a party or any participant in a hearing on the CRM permit application made a material misstatement that directly and significantly affected the CRM permit decision.

(b) **Permit Violation.** The CRM permit applicant or its successor in interest, has violated a material term or condition of the CRM permit.

(c) **Supervening Illegality.** The permitted project, as constructed or operated, has become unlawful by subsequent case law, statute, regulation, or other illegality.

(d) **New Environmental Impact.** The permitted project has a newly discovered adverse environmental impact.

§ 15-10-810 WARNING

The CRM Administrator, upon a determination that a permitted project violates one or more provisions of *§ 15-10-805*, may issue a notice of intent to undertake CRM permit enforcement proceedings unless the CRM permit holder accomplishes corrective measures. This warning procedure shall not affect nor limit the CRM Administrator's duties, powers, and responsibilities under *§ 15-10-815*.

§ 15-10-815 PERMIT ENFORCEMENT NOTICE

If after thirty (30) days of the date the CRM Administrator issued a notice of intent under *§ 15-10-810*, the CRM permit holder has failed to take corrective action, or continues to be in violation of its CRM permit in the case of an ongoing violation, the CRM Administrator shall issue a written permit enforcement notice to the CRM permit holder.

(a) **Content of Notice.** A Permit enforcement notice shall include a statement of facts or conduct constituting the violation and shall indicate the intended action to be taken by the CRM Administrator. ***If the CRM administrator intends to impose a fine for the violation(s), the permit enforcement notice shall state the proposed amount of the fine.*** A permit enforcement notice shall provide for permit enforcement hearings, if requested, and inform the CRM permit holder of his or her responsibilities and rights under this part. The notice shall inform the permit holder that unless he requests a permit enforcement hearing within 30 days, the proposed sanction will be imposed.

(b) **Service.** A permit enforcement notice shall be delivered by the CRM Office staff in person to the CRM permit holder, or served by certified U.S mail addressed to the CRM permit holder, or his designated agent. Proof of service shall be made by affidavit.

(c) **Response to Notice.** If CRM permit holder believes the statement of facts or conduct constituting violation in the permit enforcement notice is inaccurate, and desires a permit enforcement hearing, he/she shall respond in writing to the CRM Administrator within thirty (30) days of service of the permit enforcement notice. This response shall include a written statement indicating the CRM permit holder's arguments.

§ 15-10-820 EMERGENCY SUSPENSION

If the CRM Administrator determines that a CRM permit holder has willfully violated a provision of *§ 15-10-805* or the public health, safety, or welfare imperatively requires immediate action, the CRM Administrator may order emergency summary suspension of a CRM permit pending proceedings for revocation or other action, notwithstanding, any notice requirement under *§ 15-10-815*. If a permit enforcement hearing is requested, the proceeding shall be promptly instituted and determined pursuant to *§ 15-10-825*.

§ 15-10-825 PERMIT ENFORCEMENT HEARING

Upon receipt of a request for permit enforcement hearing, the CRM Administrator shall schedule a hearing within fifteen (15) days. The CRM Administrator or his designee shall preside at CRM enforcement hearings, shall control the taking of testimony and evidence and shall cause to be made an audio recording or stenographic record of CRM enforcement hearings. Evidence presented at such hearings need not conform with any prescribed rules of evidence but may be limited by the CRM Administrator in any manner she/he reasonably determines to be just and efficient and promote the ends of justice. Permit enforcement hearings shall conform to the provisions ***of the Administrative Procedure Act, 1 CMC § 9108, et seq.*** The CRM Administrator shall issue a decision within ten (10) days of the close of the enforcement hearing and all orders shall be in writing and accompanied by written findings of fact and conclusions of law. The standard of proof for such hearing shall be by the preponderance of the evidence.

§ 15-10-830 REMEDIES

Upon a determination by the CRM Administrator and/or CRM agency officials that a violation did occur, the CRM Administrator may order any or all of the following remedies:

(a) **Revocation.** The CRM permit may be revoked in its entirety.

(b) **Suspension.** The CRM permit may be temporarily suspended for a given period, or until the occurrence of a given event or satisfaction of a specific condition.

(c) **Corrective Measures.** Measures may be ordered of the CRM permit holder so that the project conforms to the CRM permit terms and conditions.

(d) **Civil Fines.** ***The CRM Administrator may impose a civil fine in an amount not to exceed $10,000 per day for each day the violation of the CRM permit occurred pursuant to 2 CMC § 1543(a). For purposes of computing a fine, any day that the CRM Administrator finds that a violation of the CRM permit occurred may be counted. The CRM Administrator shall, in his discretion, set fines in an amount calculated to compel compliance with CRM permit conditions, applicable law, and any order issued by the Administrator, taking into consideration the value of the existing and potential damage to the environment caused by the violation, efforts at compliance, and/or any other factors that the Administrator finds relevant to the calculation.***

PART 900 - ENFORCEMENT OF CRM STANDARDS AND POLICIES

§ 15-10-901 PURPOSE

The provisions of this ***PART*** are intended to establish procedures whereby the CRM Administrator and/or CRM agency officials may enforce penalties against persons conducting activities or participating in projects within the jurisdiction of the CRM program without a required CRM permit. The actions of the CRM Administrator and/or CRM agency officials based upon this ***PART*** are agency action reviewable by the Commonwealth Superior Court.

§ 15-10-905 INVESTIGATION

(a) The CRM Administrator shall have the authority to investigate suspected violations of CNMI P.L. 3-47 [2 CMC §§ 1501, et seq.] or this ***CHAPTER***. If practicable, the CRM Administrator shall first request the person or persons having knowledge or custody of the information to voluntarily produce or allow access to it. If voluntary production of or access to the information is not forthcoming, the CRM Administrator may implement the following measures to compel disclosure.

(b) **Authority to Search.**

(1) Consent from Permit Application. The CRM Administrator or his designee may enter, at any reasonable time, the site of a proposed project for which there exists a signed CRM permit application on file with the CRM Office.

(2) Permit Authorization. The CRM Administrator or his designee may enter, at any reasonable time, the site of a project for which there has been granted a CRM permit.

(3) Search Warrant. The CRM Administrator may, if necessary, apply to the Commonwealth Superior Court for a search warrant allowing entry onto a project site on land or water subject to CRM program jurisdiction, pursuant to applicable law of administrative searches, regardless of the existence of a pending CRM permit application or a currently valid CRM permit.

§ 15-10-910 CONDITIONS WARRANTING INVESTIGATION

The CRM Administrator may act pursuant to this section upon a reasonable determination that a violation of CNMI P.L. 3-47 [2 CMC §§ 1501, et seq.] or this ***CHAPTER***, or CRM administrative orders issued under this ***CHAPTER*** has occurred. Such violations include, but are not limited to, projects undertaken without a required CRM permit and activities that do not conform to CRM permit terms and conditions under ***PART 800***.

§ 15-10-915 WARNING

Upon a determination that a violation of law subject to CRM program jurisdiction has occurred, the CRM Administrator may issue a cease and desist order to the person(s) responsible for the violation and state notice of intent to undertaken legal proceedings unless corrective measures are undertaken. The letter shall state the corrective measures necessary and shall provide for a period in which compliance shall be effected.

§ 15-10-920 ENFORCEMENT

Upon a determination that a person other than a CRM permit holder is in violation of CNMI P.L. 3-47 [2 CMC §§ 15-10-920], or applicable rules and regulations or administrative orders issued thereunder, the CRM Administrator shall promptly issue an enforcement notice to the offending party. The enforcement notice shall be delivered personally to the offending party or, if such service is not reasonably possible, it may be sent by certified mail to his residence or place of business.

(a) **Content of Enforcement Notice.**

(1) Completed Violation. If acts constituting a violation are complete and the violation is not of an ongoing nature, the enforcement notice shall include a statement of the facts and conduct constituting the violation, the amount of an imposed fine, if any, a warning not to repeat the unlawful activity and a statement that a hearing on the findings of violation or size of the fine is available if the CRM Administrator is so requested, in writing, within seven (7) days of service of the enforcement notice.

(2) Continuing Violation. If acts constituting a violation are of an ongoing nature or likely to be repeated, the enforcement notice shall include a statement of facts and conduct constituting the violation, a statement of an imposed, continuing fine, if any, an order to cease and desist the activity giving rise to a violations, a warning that additional fines may be imposed for failure to cease and desist the prohibited activity and a statement that an enforcement hearing on the finding of violation or size of the fine is available if the CRM Administrator is so requested, in writing, within seven (7) days of service of the enforcement notice.

(b) **Response to Notice.** If the party to whom enforcement notice is sent objects to the finding of violation, or seeks an enforcement hearing on the fine, he shall submit a written response to the enforcement notice within seven (7) days of service of the enforcement notice. Failure to provide written response or to demand an enforcement hearing within the prescribed period shall be deemed a waiver of defense and the right to an enforcement hearing and the fine, as set in the enforcement notice, shall upon expiration of the seven (7) days period, become immediately due and payable to the CNMI Treasurer. All fines shall be paid by check made payable to the Treasurer of the CNMI. A copy of the payment receipt shall be provided to the CRM Office by the violator.

§ 15-10-925 DETERMINATION OF FINES AND PENALTIES

The CRM Administrator shall, in his sound discretion; set fines in an amount calculated to compel compliance with applicable law and administrative orders and shall consider the value of the existing and potential value of the damage to the environment proximately caused by the violation described in ***PART 800*** and ***PART 900***. In no event, however, shall any fine imposed exceed the ceiling imposed by 2 CMC § 1543. In addition the CRM Administrator may order the offending party to cease and desist from the

activity that is in violation, take mitigation measures to cure the violation or seek any other remedy available at law or in equity.

§ 15-10-930 ENFORCEMENT HEARING

If a written response to an enforcement notice is filed with the CRM Office requesting an enforcement hearing it shall be conducted by CRM Administrator pursuant to § 15-10-825. The decision of the CRM Administrator shall be final as within the CRM program. Appeal from an enforcement decision shall be to the Commonwealth Superior Court within thirty (30) days following service of the CRM Administrator's written enforcement decision on the offending party.

§ 15-10-935 ENFORCEMENT BY COMMONWEALTH *SUPERIOR* COURT

Fines and cease and desist orders issued by the CRM Administrator for purposes of enforcement constitute official agency orders and must be complied with, by persons determined in violation of CRM program policies or CRM permit conditions. In the event fines are imposed or cease and desist order issued, and compliance with either is refused, the CRM Administrator may file in Commonwealth ***Superior*** Court seeking court enforcement.

§ 15-10-940 ENFORCEMENT BY CRIMINAL PROSECUTIONS

If the CRM Administrator has reason to believe that a person in violation of CRM program policies or CRM permit conditions or administrative orders issued thereunder has committed criminal offense within the definition provided in 2 CMC 1543 (b), (d), he shall promptly submit a report of the violation to the Attorney General.

§ 15-10-945 ADMINISTRATIVE ORDER

For purposes of ***PART 800*** and ***900*** administrative orders shall be any orders issued by the CRM Administrator for enforcement of CRM policies and regulations pursuant to 2 CMC § 1453(a).

PART 1000 - PUBLIC INFORMATION AND EDUCATION

§ 15-10-1001 PUBLIC INFORMATION AND EDUCATION

The CRM Office shall make information and educational materials available to the public and CRM agency officials. The CRM Office, under the direction of the CRM Administrator, shall assist a CRM permit applicant, CRM agency officials, the Governor and the CRM Appeals Board, by explaining the policies and procedures of the CRM Permit process.

(a) **Vernacular.** When requested and reasonably necessary, the CRM Office shall provide translation of official business into the appropriate vernacular.

(b) **Media.** The CRM Office shall, to the extent practicable, develop and maintain a continuing program of public information and education. Information regarding coastal resources management and conservation shall be disseminated through newspapers, television, radio, posters, and brochures supplied by the CRM Office.

(c) **Public Hearings.** Any hearing or meeting held for purposes of the CRM permit or enforcement process, or the Coastal Advisory Council, shall be open to the public.

(d) **APC Maps.** The CRM Office shall maintain a current series of island maps clearly showing the areas of particular concern.

PART 1100 – CRM COASTAL ADVISORY COUNCIL

§ 15-10-1101 CREATION

Pursuant to CNMI P.L. 3-47 § 6 [2 CMC § 1521-22], a CRM Coastal Advisory Council (CAC) shall be established, consisting of those members listed in ***§ 15-10-020(s).***

§ 15-10-1105 ADOPT INTERNAL PROCEDURES

The CAC shall adopt internal procedures, which shall govern its meetings.

§ 15-10-1110 ADVISE CRM

The CAC shall advise the CRM Office and the CRM Administrator on any proposed change in the CRM program or the CRM permit process or any proposed rules and regulations considered useful for implementing the CRM program.

§ 15-10-1115 CONDUCT MEETINGS

The CAC shall conduct meetings from time to time in public sessions, in order to receive information from the public on the impact or advisability of programs and policies in the CRM program. Meetings shall be scheduled by the Council or as requested by CRM Administrator, as he deems necessary for purposes of obtaining input and advice, and shall be scheduled at lease twice each calendar year.

PART 1200 - CRM PUBLIC RECORDS

§ 15-10-1201 RETENTION

The CRM Office shall retain and preserve the following documents for a minimum of five (5) years following their receipt or acquisition, unless the CRM office determines that they shall be retained for a longer period of time. After five (5) years, all pertinent materials shall be safely stored.

(a) **CRM Permit Application Materials**. All applications, permits, variances pleadings, motions, affidavits, charts, petitions, statements, briefs or other documentation submitted in support of or opposition to applications for CRM permits or variances, or prepared by the CRM Office in the course of the CRM permit process, shall be retained and preserved.

(b) **CRM Hearing Records**. Stenographic or tape recordings of all CRM permit or enforcement hearings and written minutes of CAC meetings shall be retained and preserved.

(c) **Coastal Resources Materials**. All studies, guides, plans, policy statements, charts, special reports, educational materials, or other information obtained or prepared by the CRM Office in order provide public information and education shall be retained and preserved.

(d) **Best Management Practices**. CRM shall provide access to reference documents including, "Guidance Specifying Management Measures for Sources Of Nonpoint Pollution In Coastal Waters" published under the authority of section 6217(G) of the Coastal Zone ***Management*** Act reauthorization amendments of 1990, United States Environmental Protection Agency Office of Water, Washington, DC, and relevant BMP documents published by ***Office of Ocean and Coastal Resources Management, Environmental Protection Agency, Natural Resources Conservation Service*** and other local and Federal agencies.

§ 15-10-1205 PUBLIC ACCESS TO CRM RECORDS

All CRM program records shall be available for inspection for a period of five (5) years by any person during established business hours at the CRM Office in Saipan except as otherwise provided by law.

(a) **Minutes and Transcripts.** Minutes of CAC meetings and transcripts or tapes of CRM permit or enforcement hearings shall be made available upon request to the public within thirty (30) days after the meeting or hearing involved, except where the disclosure would be inconsistent with law, or where the public distribution of minutes of meeting held in executive session would defeat the lawful purpose of the executive meeting. All CRM permit or enforcement hearings must be open to the public, and all transcripts of the hearing shall be made available upon request; provided, however, that those persons requesting transcription shall pay the costs of transcription at the time of the request.

(b) **Copies of Documents.** Copies of CRM public records shall be made available to any member of the public requesting them provided that reasonable fees or costs incurred in reproducing the records shall be paid by check into the CNMI Treasury by the requesting party.

(c) **Denial of Inspection.** Any person aggrieved by a denial of access to CRM program records, or transcription or copying thereof may apply to the Commonwealth Superior Court for an order directing inspection or copies or extracts of CRM program public records. The court shall grant the order after hearing upon finding that the denial was not for just and proper cause.

PART 1300 - CRM ACCESS TO RECORDS

§ 15-10-1301 ADMINISTRATOR ACCESS

The Administrator, on behalf of himself, the CRM Office, the CRM agency officials, the Governor, the CRM Appeals Board, and the CRM Coastal Advisory Council, shall have access to such records necessary for conducting official CRM business, except as provided by law.

§ 15-10-1305 CNMI GOVERNMENT RECORDS

The CRM Administrator shall have access to relevant CNMI governmental records for the purpose of obtaining information for official CRM business. This access may include government reports, reviews, policy statements and any other data not protected as confidential by law. The CRM Administrator shall keep his requests reasonable in scope and accompany his requests for information with payment for copying or gathering of specific information.

§ 15-10-1310 PRIVATE RECORDS

The CRM Administrator may request from interested parties only such records and documents deemed necessary for the CRM permit process.

PART 1400 - COMPUTATION OF TIME

§ 15-10-1401 COMPUTATION OF TIME

In computing any period of time under this ***CHAPTER***, the time begins with the day following the act, event or default, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday, in which event, the period runs until the end of the next work day. When the prescribed period of time is ten (10) days or less, Saturdays, Sundays, or holidays within the designated period shall be excluded from the computation.

PART 1500 – FEDERAL CONSISTENCY

§ 15-10-1501 GENERAL LAW

Federal activities and development projects which directly affect the coastal zone must be conducted or supported in a manner which is, to the maximum extent practicable, consistent with the CRM program. Federally licensed or permitted activities and the provisions for federal financial assistance for activities affecting land or water uses of the coastal zone must be consistent with the CRM program. Furthermore, any federal agency proposing to undertake any development project in the coastal zone shall insure that the project is, to the maximum extent practicable, consistent with the CRM program. The implementation of these federal consistency provisions will be carried out in accordance with section 307 of the CZMA and federal regulations at 15 C.F.R., Part 930.

§ 15-10-1505 STANDARD FOR DETERMINING CONSISTENCY

The CRMO shall apply the following enforceable standards in making consistency determinations:

(a) the goals and policies set forth in CNMI Public Law 3-47 [2 CMC §§ 1501, et seq.];

(b) the standards and priorities set forth in this ***CHAPTER***;

(c) federal air and water quality standards and regulations, to the extent applicable to the Commonwealth of the Northern Mariana Islands; and

(d) air and water quality standards and regulations of the CNMI, including, but not limited to, the CNMI Underground Injection Control Regulations and the CNMI Drinking Water Regulations; and

(e) any additional policies, regulations, standards priorities and plans that are enforceable and incorporated into any amendment of the CRM program in the future.

§ 15-10-1510 FEDERAL ACTIVITIES AND DEVELOPMENT PROJECTS

(a) A federal development project includes any federal activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization or disposal of land or water resources.

(b) "Federal activities" include those federal agency actions, which are either development projects or licenses, permits, or assistance actions as described herein below. Examples include federal agency activities requiring a federal permit and federal assistance to entities other than the local government. Although federal lands in the CNMI are excluded from the CRM program jurisdiction pursuant to Section 7 of P.L. 3-47 [2 CMC § 1513], federal activities occurring on federal lands which result in spillover impacts which directly affect the Commonwealth's coastal zone must be consistent, to the maximum extent practicable, with the CRM program.

(c) In the event that a federal agency plans to undertake a federal activity, including a development project, which is likely to directly affect the coastal zone, the federal agency must notify the CRMO of the proposal at least ninety (90) days before any final decision on the federal action, unless both the federal agency and CRMO agrees to an alternative notification schedule. Such notification must include a brief statement indicating how the proposed project will be undertaken in a manner consistent, to the maximum extent practicable, with the CRM program. The federal agency's consistency determination must be based upon an evaluation of the relevant provisions of the CRM program. consistency determinations must include:

(1) a detailed description of the proposed project;
(2) the project's associated facilities;
(3) the combined cumulative coastal effect of the project; and
(4) data and information sufficient to support the Federal agency's conclusion.

(d) If CRMO does not issue a written response within forty-five (45) days from the receipt of the federal agency notification, the federal agency may presume CRMO's agreement that the activity is consistent with the CRM program. Requests for an extension of time may be made for a period of not more that fifteen (15) days, unless the federal agency agrees to longer or additional extension requests. CRMO agreement shall not be presumed if CRMO requests an extension of time within the forty-five (45) days review period.

(e) CRMO's concurrence with or objection to a federal agency's consistency determination must be set forth in writing with reasons and information supporting the agreement or disagreement and sent to the federal agency. In case of disagreement, CRMO will attempt to resolve its differences with the federal agency's consistency determination within the ninety (90) days notification period.

(f) In the event that the CRMO and the federal agency are unable to come to an agreement on the manner in which a federal activity or development project may be conducted or supported in a manner consistent, to the maximum extent practicable, with the CRM ***program***, the CRMO or Federal Agency may request mediation of the disagreement pursuant to the procedures set forth in Section 307 of the Federal Coastal Zone Management Act of 1972 (P.L. 92-583, as amended) and 15 CFR 930, subpart-H.

§ 15-10-1515 FEDERAL LICENSES AND PERMITS

(a) Federal licenses and permits include any authorization, certification, approval or other form of permission which any federal agency is empowered to issue to an applicant.

(b) An applicant includes any individual or organization, except a federal agency, which, following management program approval, files an application for a federal license or permit to conduct an activity affecting the coastal zone.

(c) An applicant for a federal license or permit for an activity affecting the coastal zone must file, along with the application, a certification that the activity will be conducted in a manner consistent with the CRM program. A copy of the application and certification, along with the necessary data and information, should also be sent to the CRMO. The federal agency shall not issue the license or permit unless CRMO concurs in the consistency certification or its concurrence is presumed because CRMO has failed to respond in six (6) months. The applicant's consistency certification statement, which will then be reviewed along with the application by the CRMO, must be accompanied by sufficient information to support the applicant's consistency determination.

(d) **Federal Agency Licenses and Permits**

(1) The federal agency licenses and permits that the CRM Office will review for consistency with the CRM program are those listed in the Procedures Guide for Achieving Federal Consistency with the CNMI CRM program (available from CRMO), incorporated and made a part hereof. If, in the future, it is found that the issuance of other types of federal permits and licenses cause direct and significant impact on coastal land and water resources, the said listing will be expanded as necessary.

(2) CRMO shall be responsible for providing the above list to the relevant federal agencies who in turn shall make the information available to applicants.

(e) If any project which requires a federal license or permit also requires a coastal permit, applications for both should be filed simultaneously. A certification of consistency with the CRM program shall be filed with both applications. The issuance or denial of a CRM permit will indicate consistency or the lack of consistency with the CRM program and the CRMO shall notify the federal agency of the CRM permitting decision for its use in its federal permitting decision.

(f) **Certification of Consistency:**

(1) A certification of consistency shall include the following clause "The proposed activity complies with the CNMI CRM program and will be conducted in a manner consistent with such program."

(2) Supporting information must be attached to the certification. This information will include a detailed description of the proposal, a brief assessment of the probable coastal zone effects and a brief set of findings indicating that the proposed activity, its associated facilities and their effects, are all consistent with the provisions of the CRM program, including the application standards listed in ***§ 15-10-1505*** above.

(g) Interested parties may assist the applicant in providing information to the CRMO. In addition, the CRMO will, upon the request of the applicant, provide assistance to the applicant in developing the assessment and findings required.

(h) CRMO review begins at the time the office receives both the applicant's consistency certification and the supporting information and determines that the information is complete. Timely public notice of the proposed activity will be made by CRMO. The public notice will include a summary of the proposal, an announcement that information submitted by the applicant is available for public inspection and a statement that public comments are invited.

(i) **Certification of Consistency Decisions**

(1) At the earliest practicable time and within six (6) months after the date of receipt, the CRMO will notify the issuing federal agency of its concurrence or objection. If CRMO has not issued a decision within three (3) months after the date of receipt, it must notify the applicant and the federal agency of the status of the matter and the basis for further delay, if any.

(2) In the event that CRMO objects to the applicant's consistency determination, the Office must set out its objection, in writing, with reasons and supporting information and alternative measures if they exist, which, if adopted, would permit the activity to be conducted in a manner consistent with the CRM program. A CRMO objection will include a statement informing the applicant of a right to appeal to the Secretary of Commerce as provided in Section 307 of the Federal Coastal Zone Management Act, as amended.

§ 15-10-1520 FEDERAL ASSISTANCE

(a) "Federal assistance" means assistance provided under a federal grant program to an applicant agency through grant or contractual agreements, loans, subsidies, guarantees, insurance or other forms of financial aid for activities which affect the coastal zone.

(b) An applicant refers to any unit of the CNMI Government, which, following CRM program consistency concurrence, submits an application for federal assistance.

(c) The CRMO shall be notified of any application submitted to the Planning and Budget Affairs Office for any federal assistance program listed in the Catalog of Federal Domestic Assistance in addition to applications to the Office of Ocean and Coastal Resource Zone Management for Coastal Energy Impact Program grants.

(d) Application for federal assistance for activities affecting coastal lands must go through the clearinghouse notification and review process to ensure that the CRMO has an opportunity to review the proposed action for consistency with the CRM ***program***. Such applications must include a certification of consistency which meets the information requirements set out in this ***CHAPTER***.

(e) If a coastal permit is required for a project utilizing federal assistance, then the coastal permit and the federal assistance application shall be filed simultaneously.

(f) In the event that CRMO finds that the proposed federal assistance is not consistent with the CRM ***program***, the application shall not be approved unless CRMO's objection is resolved through ***informal*** discussions among the federal program agencies, the applicant and the CRMO or the objection is set aside on appeal to the Secretary of Commerce pursuant to Section 307 of the Federal Coastal Zone Management Act. CRMO's objection must be set forth in writing with reasons, supporting information and alternative measures. The Planning and Budget Affairs Office must then notify the applicant agency and the federal agency of CRMO's objection and must inform the applicant agency of its right to appeal to the Secretary of Commerce. If CRMO does not object to an application proposal during the clearinghouse process, the federal agency may grant the federal assistance.

PART 1600 – MISCELLANEOUS PROVISIONS

§ 15-10-1601 SEVERABILITY PROVISION

If any provision of this ***CHAPTER*** or the application of any provision of this ***CHAPTER*** to any person or any other instrumentality or circumstances shall be held invalid by a court of competent jurisdiction the remainder of this ***CHAPTER*** and the application of the affected provision to other persons, instrumentalities and circumstances, shall not be affected thereby.

§ 15-10-1605 SAVINGS

The repeal of the CRM Rules and Regulations which notice of adoption was published in Commonwealth Register 7, Number 7 at 3883, does not release or extinguish any penalty, forfeiture or liability incurred or right accrued or accruing under such law. The regulation shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, or forfeiture.

CHAPTER 20 – JET SKI RULES AND REGULATIONS

Index

PART 001 – GENERAL PROVISIONS

[Reserved]

PART 100 – JET SKI OPERATIONS

§15-20-101 APPLICATION

All jet skis are subject to this PART and all other applicable PARTS of these regulations and the Boating Safety Act of 1982 as amended from time to time.

§ 15-20-105 EXCLUSION AREAS

No jet ski may be landed, launched or operated within the following areas:

(a) **North Lagoon.** All of the water extending from the mean high water line seaward to the outer shelf of the barrier reef north of a line beginning at the tip of Punta Flores and extending due north.

(b) **South Lagoon.** All of the water extending from the mean high water line seaward to the outer shelf of the barrier reef south of a line beginning at a point on the shoreline thirty (30) feet south of Sugar Dock and extending due west.

(c) **Micro Beach.** An area extending two hundred (200) yards seaward from the mean low water line from the northern end of the Saipan Beach Hotel tennis courts north to the tip of Point Muchot.

(d) **Hafa Adai Beach.** An area extending two hundred yards seaward from the mean low water line from the drainage channel north of the Carolinian Utt to the southern edge of the Hafa Adai Hotel.

(e) **Grand/Diamond.** An area extending two hundred (200) yards seaward from the mean low water line form the southern edge of the Saipan Grand Hotel north to the northern edge of the Diamond Hotel.

(f) **Tachungnya/Kammer.** An area extending seventy-five (75) yards seaward from the mean low water line from the southern edge of Tachungnya Beach to the northern edge of Kammer Beach adjacent to the Tinian harbor dock.

(g) **Marina/Harbor/Shipping Channel.** An area extending from the mean low water line seaward at the Tinian Marian including the entire area within the Tinian harbor breakwater and the Tinian shipping channel.

(h) **Managaha.** An area surrounding Managaha Island bounded by lines running at latitude 15° 14' 0" N; latitude 15° 14' 45" N; longitude 145° 41' 30" E; longitude 145° 42' 50" E.

(i) **Lake Susupe.** The entire area of Lake Susupe.

PART 200 – JET SKI RENTAL OPERATIONS

§ 15-20-201 DEFINITIONS

(a) **"Jet ski rental operation"** means the rental of a jet ski to others on a regular basis for the purpose of operating the jet ski.

§ 15-20-205 LAUNCHING AND LANDING

Jet ski rental operations shall only stage their operation and allow the launching and landing of their jet skis at the following locations:

(a) The Chalan Kanoa – Susupe Regional Park;

(b) The southern end of Civic Center Beach;

(c) The public beach at the Samoan Housing in Garapan north of the Hafa Adai Hotel;

(d) The public beach adjacent to Martin's Bar and Grill;

(e) The South Sea Plane Ramp;

(f) Off Taga Beach as designated by the Coastal Resources Management Office with jet-skis to be launched form a floating dock; ***and***

(g) The public beach adjacent to the Carolinian Utt in Garapan.

§ 15-20-210 OPERATION

Jet ski rental operations shall only allow their patrons to operate jet skis on marked courses in the areas of the lagoon adjacent to the launching and landing areas set forth in § 15-20-205 as specified in the operator's coastal permit issued by the coastal resources management program. The jet ski rental operators shall be responsible for installing and maintaining all buoys and other lagoon markings required for their operations by permit or law.

§ 15-20-215 HOURS OF OPERATION

Jet ski rental operation shall only operate between eight o'clock a.m. and six o'clock p.m.

§ 15-20-220 INSURANCE

All jet ski rental operators must carry liability insurance in such amount as required by the Coastal Resources Management Office.

§ 15-20-225 CRM PERMIT

No person may conduct a jet ski rental operation without a coastal permit issued by the coastal resources management program which may include requirements in addition to this chapter. The CRM Administrator may determine the number of permits and number of jet skis which will be allowed to operate at each area specified in § 15-20-205 of this chapter and how to best allocate such permits between existing and future operators.

PART 300 – WATER SKI OPERATIONS

§ 15-20-301 WATER SKI OPERATIONS

No one may water ski in the Managaha exclusion area described in ***§ 15-20-105(h).***

PART 400 – MISCELLANEOUS

§ 15-20-401 SEVERABILITY

Should any section, paragraph, sentence, clause, phrase or application of the chapter be declared unconstitutional or invalid for any reason by competent authority, the remainder or any other application of this chapter shall not be ***affected*** in any way thereby.

§ 15-20-405 ENFORCEMENT

This chapter shall be enforceable by the Coastal Resources Management Office and Department of Public Safety, Division of Boating Safety.

Commonwealth of the Northern Mariana Islands
Department of Public Works
Juan S. Reyes, Secretary
Caller Box 10007, Gualo Rai, Saipan, MP 96950
(2nd Floor Joeten Commercial Building)
tel: 670. 235.9714 fax: 670.235.6346

PUBLIC NOTICE OF PROPOSED REGULATIONS
WHICH ARE AMENDMENTS TO THE REGULATIONS OF
THE DEPARTMENT OF PUBLIC WORKS

INTENDED ACTION TO ADOPT THESE PROPOSED REGULATIONS: The Commonwealth of the Northern Mariana Islands, Department of Public Works, intends to adopt as permanent regulations the attached Proposed Regulations, pursuant to the procedures of the Administrative Procedure Act,1 CMC § 9104(a). The Department intends to adopt them as permanent after March 1, 2004, and hereby gives at least 30 days' notice of its intent. (*Id.*) The Regulations would become effective 10 days after adoption. (1 CMC § 9105(b))

AUTHORITY: The Department is required by the Legislature to adopt rules and regulations regarding those matters over which the Department has jurisdiction (1 CMC sec. 2403, Public Law 1-8, tit. 1, ch. 15, § 4), and over matters regarding the cutting and trenching of roads (2 CMC §§ 4131-36 (PL 5-41). *See* Executive Order 94-3 (effective August 23, 1994, reorganizing the Executive branch).)

THE TERMS AND SUBSTANCE: The Regulations provide clear legal authority for the Department or its designee to remove obstructions and encroachments to, and to restrict the uses of, public streets, highways, drains, and other public rights-of-way. They also provide procedures for determinations and orders, penalties, permits, complaints, and appeals relating to obstructions, encroachments and restrictions of use.

These Regulations shall be amendments to the Department of Public Works Regulations. These amendments add to the Regulations of the Department of Public Works, Section 5 (Divisions) Subsection D (Roads and Facilities Division) the attached new **Paragraph 6 (Regulations for Public Rights-of-Way and Related Facilities).**

THE SUBJECTS AND ISSUES INVOLVED: There are independent, but related, reasons for the promulgation of these regulations.

1. The Regulations provide procedures for the Department to clear obstructions and encroachments on the public right-of-way as it undertakes important public works to eliminate health risks and begins the important revitalization of the Garapan District. As a result of recent investigation into encroachments in the Garapan District, the

Commonwealth has determined that part of the reason for the continual appearance of unsafe bacteria in the Saipan Lagoon is illegal hookups of waste pipes to the District's surface drainage. The public swims in the Lagoon. The Commonwealth, through the Garapan Revitalization Project, seeks to eliminate these and other polluting and potential disease-causing connections to the surface drainage by installing buried drainage pipes in place of the surface drainage. The Project will require excavation, installation and other civil engineering and construction work in the public-rights-of-way. In order to protect the public's safety, the excavations and other works will need to be segregated from pedestrian and vehicular travel, by fences, foot bridges and other obstructions to the public right-of-way. The Project is to begin construction on or about January 12, 2004.

The Garapan construction works also address a concerted public effort to strengthen the Commonwealth's economy and protect the economy against the projected loss of garment industry revenues in the next two years, the Commonwealth has undertaken the multi-year, multi-million-dollar Garapan Revitalization Project. The Garapan Project's aim is to enhance the tourist economy by rectifying the substantial deficits in infrastructure, health and safety which the District presents, responding to documented tourist industry claims that the shabby, non-family-oriented nature of the Garapan District detracts from CNMI's ability to attract substantial tourism revenue.

The first phase of the project is to rebuild Third Street into "the Promenade", replacing road and sidewalk surfaces, and the drainage system, adding lighting, street furniture, plantings and other amenities and security measures. In order to meet a key deadline for its use, the June 10, 2004, 60th anniversary commemoration event for the Battle of Saipan and Tinian, and the thousands of tourists expected for it, the many-months construction period is scheduled to begin in mid-January 2004, during the dry season.

The Garapan Project will also improve Hotel Street/Coral Tree Avenue in Garapan, as well as correct drainage problems along the street.

The Proposed Regulations provide important legal tools to undertake these public works, including clear legal authority to remove obstructions and encroachments to the public works and to close streets as required on a temporary basis.

2. The Regulations also provide procedures for the Department to clear obstructions and encroachments on the public rights-of-way throughout the Commonwealth, particularly during the dry construction season. For instance, with the advent of the Commonwealth's dry season, beginning in November-December, the Department has the opportunity to begin, and to timely and cost-effectively complete, numerous road improvement projects. This work must be completed annually by the rainy season, which begins in July-August. This work includes, but is not limited to, the Garapan Revitalization Project.

Other obstructions which the Department may need to clear may be of a more

temporary nature; but they may critically interfere with traffic safety, requiring immediate correction. Such obstructions include holes, ditches, flowing water, animal carcasses and other materials.

3. The Regulations also provide a unified permitting procedure for the use of special district rights-of-way, like the Garapan Promenade, and the public rights-of-way. The procedure includes applications, fees, criteria for decision-making, penalties, and appeals. The intent is to make such areas attractive, tourist- and family-friendly venues that allow for special uses. In some cases, as with the Promenade, this will involve restricting vehicular traffic for substantial portions of each day. Portions of the Promenade will become available for such restrictions as the Project's construction moves from its starting point, at Beach Road, to its end point on Coral Tree Avenue, during the period January 12 - June 10, 2004. Individuals and organizations seeking to use such special districts for gatherings, public communication, and other special purposes will be required to use the permit system. The Regulations provide for the Governor to declare such districts.

4. Clearance work and permitting may require coordination with other instrumentalities of the CNMI, including the Department of Public Safety. In some cases the Department may need to make agreements with other CNMI instrumentalities to directly address obstructions and encroachments and the granting and verification of permits. These could include departments, agencies, commonwealth corporations or the Mayors' offices.

CONCURRENT ADOPTION OF EMERGENCY REGULATIONS FOR 120 DAYS: The Department has followed the procedures of 1 CMC § 9104(b) to adopt these Proposed Regulations on an emergency basis for 120 days. Please see the separate notice.

DIRECTIONS FOR FILING AND PUBLICATION: These Proposed Regulations shall be published in the Commonwealth Register in the section on proposed and newly adopted regulations (1 CMC § 9102(a)(1)) and posted in convenient places in the civic center and in local government offices in each senatorial district, both in English and in the principal vernacular. (1 CMC § 9104(a)(1))

By the accompanying Notice of Emergency Regulations the Secretary has instructed the Department of Public Works to take appropriate measures to make these Proposed Regulations known to the persons who may be affected by them (1 CMC 9105(b)(2) (emergency regs)).

TO PROVIDE COMMENTS: Send or deliver your comments to Secretary Juan S. Reyes, *Attn: New DPW Regs*, Box 10007, Saipan MP 96950 **or** fax 670.235.6346 **or** email to director.tsd@dpwtechserv.com with the subject line "New DPW regs". Comments are due by March 1, 2004. Please submit your data, views or arguments. (1 CMC § 9104(a)(2))

Submitted by: _____ 1/12/04
JUAN S. REYES — Date
Secretary of Public Works

Concurred by: _____ 01/12/04
JUAN N. BABAUTA — Date
Governor

Filed and
Recorded by: _____ 1-13-04
BERNADITA B. DE LA CRUZ — Date
Commonwealth Register

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the proposed regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General and shall be published (1 CMC § 2153(f) (publication of rules and regulations)).

Dated the 12th day of January, 2004.

_____
PAMELA S. BROWN,
Attorney General

0 DPW NOPR 6 Obstr.wpd

NOTISIAN PUPBLIKU PUT I MAN MAPROPONE NA REGULASION SIHA NI MAN MA'AMENDA PARA I REGULASION SIHA GI DIPÅTTAMENTON I PUBLIC WORKS

MA'INTENSIONA NA AKSION PARA U MA'ADOPTA ESTE MAN MAPROPONE NA REGULASION SIHA: I Commonwealth I Sankattan Siha Na Islas Marianas, I Dipåttamenton I Public Works, ma'intensiona para u ma'adopta petmanente na regulasion siha ni man checheton na Regulasion siha ni man Mapropone sigun para I areklamento siha ginen I Akton Areklamenton Atministradot, 1 CMC Sek. 9104 (a). I Dipåttamento a intensiona para u adopta petmanente despues di Matso uno, dos mit kuattro, ya este na momento man nå'nå'i' menos di trenta (30) dihas na notisia put I intension. (Id) I Regulasion siha siempre mu efektibu dies (10) dihas despues di ma adopta. (1 CMC Sek. 9105 (b))

ATURIDÅT: I Dipåttamento ma nisisita ginen I Lehislatura para u adopta Areklamento yan regulasion siha ni tineteka eyu siha na asunto put I Dipåttamento ni gai aturidåt (1 CMC Sek. 2403, Lai Pupbliku 1-8, titilu 1, kapitulu 15, Sek. 4), yan put asunto ni tineteka I initut yan guinadok chålan siha (2 CMC Sek. 4313 – 36 (Lai Pupbliku 5-41)). Attan I Otden Eksekatibu 94-3 (efektibu Agosto bente tres, mit nuebe siento nobientai kuattro, talun ma'otganisa I Dipattamenton Eksekatibu (executive Branch))).

I MENSÅHE YAN SUSTANSIA: I regulasion siha a probeniyi klåru na aturidåt ligåt para I Dipåttamento pat I madesigna para u mana suha I apstrakto yan estotbo para, yan para u pribi (restrict) I inisan I, chålan pupbliku siha, highways, drains, yan palu na direchon hinanao pupbliku (public right of way). Ha probeniyi lokkue areklamento siha para I ditetminasion siha yan otden siha, pena siha, petmisu siha, kineha siha, yan apela siha ni tineteka I apstrakto, estotbo, yan pribi siha gi inisa.Este na regulasion siha siempre man ma amenda para I Regulasion siha gi Dipåttamenton I Public Works. Este na amendasion siha para u omentåye' I Regulasion siha gi Dipåttamenton I Public Works, Seksiona 5 (Dibision) Subsection D (chålan siha yan fasilidåt Dibision) I man checheton na nuebu Parafu 6 (Regulasion siha para I direchon hinanao pupbliku yan fasilidåt ni man tineteka).

I ASUNTO YAN PUNTO SIHA NI TINETEKA: Man indipendente, lao manachule', na rason siha para I establesen este na regulasion siha.

1. I Regulasion siha a probeniyi areklamento para I Dipåttamento para u na suha i apstrakto yan estotbo siha gi direchon hinanaon pupbliku ni a tutuhon I impotante siha na public works para u na suha I ariesgan (risks) hinemlo' ya tutuhon I impotanten rimedian I Distriton Garapan. Put I risutan I imbestigasion halacha hålom I estotbo siha gi Distriton Garapan, I Commonwealth a ditetmina na pått e' gi rason para I kinentinuan I inannok I bacteria siha ni ti man såfu gi lagunan Saipan na ti ligåt siha I pinegan I waste pipes para I drainage I Distrito siha. I pupbliku man ñañangó' gi laguna. I Commonwealth, ginen I Garapan Revitalization Project, a aliligao para u na suha este yan palu siha na inaplacha yan pusipble kuneksion I muna guaguaha minalångo' (disease) para I drainage ni 'annok ginen I pineggan tinatmen drainage pipes kuentåye' I

drainage ni 'annok. I project a nisisita guinaddok, pinegga yan palu na engineering sibet yan cho'chu' construction gi direcho na hinanaon pupbliku. An para to protehi I sinafun pupbliku, I guinaddok yan palu na cho'chu' siempre manisisita u seperao yan I hinanaon manmamomokat yan kinarereta, ni kollat, tolain addeng siha yan palu na apstrakto siha para I direchon hinanaon pupbliku. I project para u tutuhon u ma chogue gi pat siña Ineru dosse (12) dos mit kuattro (2004).

I Garapan Construction macho'cho'chu' lokkue para u adingane' I inanimun kontratan pupbliku para u na la'metgot I Ekonomian Commonwealth ya u protehi I ekonomia kontra I minalingo' na reditu siha ginen I industrian bestidura gi mamaila na dos sakkan, I Commonwealth maneha I Garapan Revitalization Project. I Garapan Project apunta para u insima I ekonomian turista ginen I rektifikika I mineggain minalingo gi infrastructure gi hinemlo' yan sinafu ni I distrito a prisenta, mao'oppe I madokumento na klema siha ginen I industrian turista na I chinatpagu, ti sågan familia I distriton Garapan ti a kombibida ginen I abilidåt para u kombida I salåpe' turista.

I fine'nina na pasun I project I para u mahåtsa dinuebu I Tetseru na chålan para "I pukate'", kuentåye' I chålan yan I sågan pukåte' siha, yan I sisteman drainage, omentåye' I kåndet siha, kosas chålan siha, tinanum siha yan palu kombenensia yan brasehan asiguridåt. An para ta gåna I uttimon I ha'ånen I para u ma usa, I Junio diha dies, dos mit kuattro na sakkan (June 10, 2004), I sisienta na kumpliaños silebrasion para I Minimun Saipan yan Tinian, yan I mit siha na turista maekspekta, I mineggain mesis siha na tiempon construction mapunto para u tutuhon gi entalo' I mes Ineru dos mit kuattro na sakkan (2004), duranten I tiempon angglo'.

I project Garapan siempre a adilånta I chålan hotel/Coral Tree Avenue gi Garapan, parehu ha para u kurihi I prubleman drainage siha gi chalan.

I man mapropone na regulasion siha a probeniyi impotante na ligåt ramenta para u na pusible este na public works, a enklusu I manasuhan aturidåt ligåt para u ma na suha abstakto yan estotbo siha para I public works ya para u huchom I chalan an manisisita temporario na manera.

2. I regulasion siha lokkue probeniyi areklamento siha para I Dipåttamento para u ma suha I apstrakto yan estotbo siha gi direchon hinanaon pupbliku gi enteru I Commonwealth, patikulåtmente durånten I construction an tiempon ånngglo'. Pot I hemplo', ni I atbento ginen I tiempon ånngglo' gi Commonwealth ma tutuhon gi Nobembre para Disembre, I Dipåttamento guaha apotunidåtña para u tutuhon, yan para u kompli I tiempoña yan I åpas efektibu, kantidåha na inadulåntan I project chalan. Este na cho'chu' debi di u komplidu kada sakkan ginen I tiempon uchan, ni ma tutuhon gi Julio esta Agosto. Este na cho'chu' enklusu, lao ti ma midi para, I Project Revitalization Garapan.

Palu na abstrakto siha ni I Dipåttamento siña manisisita u mana suha siña mås di tempurario na tinanum pat gå'gå' naturåt (plants or animal nature); lao siña a entaluye' kritikåt ni I sinåfun hinanaon transpotasion kareta, ni manisisita imidiamente na kinirihe'.

I apstrakto siha enklusu maddok siha, kannat siha, machudan hånom, måtai gå'gå', yan palu siha na matiriåt.

3. I regulasion siha lokkue probeniyi dinañña areklamenton petmisun para I mausan I espesiåt na distriton direcho na hinanaon pupbliku siha, taiguehe' Pukaten Garapan, yan I direcho na hinanao siha. I areklamento a enklusu aplikasion, åpas, criteria para mamatinas disision, pena siha, yan apela siha. I intension put para u mana atanun I lugåt para u fangunbida turista yan lugåt ga'chong familia siha ni para u fan masedi u mausa espesiåt. Gi palu na kaosa siha, ni I pukåti, este siempre a enklusu I ti sineden hinanaon kareta para impotånte na påtten I diha. Påtte gi diha siempre mutero para I pribi siha mientras I construction I project manusuha ginen I punto anai ma tutuhon siha, gi Beach Road, para I uttimon I punto gi Coral Tree Avenue, duråanten I tiempon Ineru dosse esta Junio dies, dos mit kuattro na sakkan. Indibiduåt siha yan otganisasion siha ni man aliligao para u ma usa espesiåt na distrito para inetnon siha, kamunikasion pupbliku, yan palu ottro na espesiåt na rason siempre manisisita para u mausa I sisteman petmisu. I regulasion siha a probeniyi para I Gobietno para u deklåra I distrito siha.

4.Sineden cho'chu' yan mapetmisu siña manisisita otganisasion ni palu na instrumentalities I CNMI, a enkluklusu I Dipåttamenton I Sinafun Pupbliku. Gi palu na kaosa siha I Dipåttamento siña a nisisita para u famatinas kontråta yan palu na instrumentalities I CNMI para u dirihe' I prubleman apstrakto yan estotbo siha yan I ninå'e' yan I inaprueban petmisu siha. Este siña a enklusu dipåttamento siha, ahensia siha, otganisasion Commonwealth siha pat I Ofisinan I Mayot siha.

KONFOTMEN I MAN MA'ADOPTA IMIDIAMENTE NA REGULASION SIHA PARA SIENTO BENTE DIHAS: I Dipåttamento a Tatiye' I areklamento siha put 1 CMC Sek. 9104 (b) para u ma'adopta este Man Mapropone Na Regulasion Siha gi Imidiamente na manera para siento bente (120) dihas. Put fabot attan I seperao na Notisia.

DIREKSION SIHA PARA I PINE'LO YAN PUPBLIKASION: Este man mapropone na regulasion siha debi di u mapupblisa gi Rehistran I Commonwealth gi Seksiona I mapropone yan nuebu anai ma'adopta na regulasion siha (1 CMC Sek, 9102 (a)(1) yan u fan mapolu para infotmasion pupbliku gi man kombinensia na lugåt gi Civic Center yan gi lukat Ofisinan Gobietnamento siha gi kada distriton Senadot gi todu dos Engles yan Prinsipat lengguåhen Natibu siha. (1 CMC Sek. 9104 (a)(1))Ginen I tinatitiyen Notisia put Imidiamente Na Regulasion Siha I Sekritario a tagu I Dipåttamenton I Public Works para u chule' imidiamente na aksion para u ma'infotma I petsona siha ni inafekta siha ni este man mapropone na regulasion siha (1 CMC 9105 (b)(2)(imidiamente na regulasion siha)).

PARA U PROBENIYI OPINION SIHA: Hanague pat chule' guatto I opinion siha para I Sekritario as Juan S. Reyes, Atension I New DPW Regs, Box 10007, Saipan MP 96950 pat fax 670-235-6346 pat email para director.tsd@dpwtechsev.com ni I subject line "New DPW Regs". I opinion siha man uttimo gi Matso' diha uno dos mit kuattro na sakkan

(March 1, 2004). Put fabot na'halom I infotmasion interes pat kinontra. (1 CMC Sek. 9104 (a)(2)).

Ninahålom: _____ 2/20/04
Juan S. Reyes — Fecha
Sekritårion I Public Works

Kinonfotmen: _____ 2/23/04
DIEGO T. BENAVENTE — Fecha
~~Juan N. Babauta~~
Acting Gobietno

Pine'lo yan
Rinikot as: _____ 2.18.04
Bernadita B. Dela Cruz — Fecha
Rehistran I Commonwealth

Sigun I 1 CMC Sek. 2153 (e)(I Abugado Henerat aprueba I regulasion siha put para u ma'establesi put para u fotma) yan 1 CMC Sek. 9104 (a)(3) (a na guaha I Abugådo Henerål I inaprueba) I man mapropone na regulasion siha ni man checheton este na momento man maribisa yan aprueba put para u fotma yan ligåt sufisiente ginen I Abugådo Henerål I CNMI ya debi di u ma pupblisa (1 CMC Sek. 2153 (f)(pupblikasion I areklamento yan regulasion siha)).

Ma fecha este mina dosse na diha gi Ineru, dos mit kuattro na sakkan.

Pamela S. Brown
Abugådo Henerål

Trinansladan: Charlene S. Cruz
Transladoran Chamorro

COMMONWEALTH FALÚW KKA FALÚWASCH EFÁNG MARIANAS
DEPATTAMENTOOL PUBLIC WORKS
Juan S. Reyes Samwool
caller Box 10007, Amairaw Seipél, MP 96950
(aruwowal pwó Joeten Commercial Building)
til: 670. 235.9714 fax: 670. 235.6346

ARONGORONGOL TOULAP REEL POMWOL ALLÉGH KKA EBWE LLIWEL NGÁLI ALLÉGHÚL DEPATTAMENTOOL PUBLIC WORKS

AGHIYÁGHIL IGHA EBWE FILLÓÓY POMWOL ALLÉGH KKAAL: Commonwealth Falúw Kka Falúwasch Marianas, Depattamentool Public Works, e memángi ebwe schééschéél fillóóy allégh kkaal kka e appasch pomwol allégh kkaal, sángi mwóghútúl alléghul Administrative Procedure Act, 1CMC tálil 9104 (a). Depattamento yeel e mángi ebwe schééschéél fillóóy mwiril Maailap 1, 2004, me e mángi ebwe ngalley ótol eliigh (30) ráálil yaal arongowow aghiyágh yeel. (Id.) Allégh kkaal ebwe alléghelo llól seigh (10) rállil mwiril fillóól. (1CMC tálil 9105(b))

BWÁNGIL: Depattamento nge ebwe yááyá sángi Sów Allégh reel fillóól allégh me mwóghútúl Depattamento ye eyoor bwángil (1CMC tálil. 2403, Alléghúl Toulap 1-8, tit. 1, ch. 15, tálil 4), me mwóghútúl melemel me kkelil yaal (2 CMC talil 4131-36 (PL 5-41). Amweri akkuleeyal Sow Lemelem 94-3 (schééschéél August 23, 1994, mwóghutul Executive branch).)

KAPASAL ME ÓUTOL: Allégh kkaal e bwáári bwángil allégh ngáli Depattamento me sów akkúle reel ebwe mwóghut ágháli atippal yaal me ghilighilil yaal, me amweri fischiiy ngáre yááyá reel, yaaliir toulap, yaal, yáálil schaal, me bwo nngow, mwutta, lisensia, aweewe, me isisilong llól imwal aweewe bwelle, atippal yaal, ghilighilil yaal me yaal ye ese mmwel rebwe yááli.

Allégh kkaal ebwe lliwel ngáli Alléghúl Depattamentool Public Works. Lliwel kkaal ebwe schu ngáli Alléghúl Public Works, Tálil 5 (Divisions) táttálil D (Yaal me Facilities Division) Paraghraph oloow (6) ye e ffé (Alléghúl Public Rights-of-way me fasilidóód kka e ghil fengál).

KAPASAL ME AWEEWE KKA EYOOR IGHILA: eyoor milikka e leemweiló, bwelle e ghil fengál, bwulúl igha ebwe akkatewow allégh kkaal.

1. Allégh kkaal e ayoora mwóghutul Depattamento reel ebwe ffat mwóghútúl yaal me yaal kka ghililghil wóól right of way igha e atippa Pubic works ebwe ammwataaló semwaayil iliigh me ebwe bwulúw mwóghutul Garapan District. Bwelle affat kka e toowow reel yaal kka e ghilighil mellól Garapan District, Commonwealth aa apelúghúlúghúló bwe sóbwol kapas igha ebwe sóbweey toowowul maal nngów (unsafe bacteria) mellól satil seipél nge ese fil (illegal) féérúl waste pipe ngáli Districts Surface Drainage. Aramas re túúttú llól woosch kkaal. Commonwealth, sángi Garapan Revitalization Project, ekke ammweri igha ebwe atotoowow milikkaal me akkááw bwasuula me semwaay kka emmwel ebwe ghulaaghisch bwelle drainage kka e ffeer weiláng nge rebwe feeru bwe ebwe lo faal falúw bwe liwelil drainage kka weiláng. Schééschéél project yeel nge ebwe kkel, akkayúúl me akkááw civil engineering me angaangal construction mellól public-right-of-way. Bwelle ebwe affalliy alléghúl Toulap, kkel yeel me akkááw angaang nge ebwe ghilighil sángi yaalil

aramas me yáálil ghareeta , sibwe ira ghollal, fóót bridges me akkááw atip ngáli right-of-way. Project yeel nge ebwe bweletá wóól me ngare ótol Schoow (JANUARY) 12, 2004.

Angaangal construction mellól Garapan ekke tittingor aghiyaghiir toulap reel ebwe aghatchú economia me ammwelil economia sángi salaapial Garment industry llól ruweigh ráágh, Commonwealth aa appelúghúlúghúló reel multi-year, multi-million-dollar Garapan Revitalization Project. Project ye Garapan nge ekke mángi ebwe aghutchúwúló economial tourist bwelle igha schééschéél deficit infrastructure, lófisch me allégh ye District ebwe bwáári, sángi docomento nge leliyal tourist industry nge aa ghi tufey, iimw kka Garapan District nge rebwe atoowowu mellól bwángil CNMI igha ebwe atotoolong salaapial tourist.

Mmwal phase reel project nge ebwe akkayú safal Third street llól " leliyal uur me fáárágh " ye ebwe liweli yaal me sidewalk surfaces, me drainage system, isisilong dengkki, street furniture, fóót me akkááw leliyeer toulap me ngáre leliyal ammesseigh me ammwel ghatch. Reel ebwe tabweey otol yaayal, June 10, 2004, awoleighil (60th) ammwol reel aingiingil Seipél me Tchúlúyól, me ebwe yoor sangaras tourist kka re aghiyaghi, Llól maram kkaal nge aa allégheló ótol rebwe bwulúw wóól January 2004, ótol dry season.

Project ye Garapan ebwal aghatchú Hotel Street/Coral Tree Avenue mellól Garapan, mebwal aghatchuweló drainage kka ngáschel yaal.

Pomwol allégh kkaal nge rebwe ayoora legal tools kka e welepakk igha public works ebwe mwóghut aghali, ebwal toolong clear legal authority igha ebwe mwóghut ágháli pilipilil yaal me ghilighilil yaal kkaal ngali public works me ebwe tittiló yaal sángi tittingor ye e tempororiyo.

2. Allégh kkaal ebwal ayoora mwóghut ngáli Depattamento igha ebwe aghutchuwuló yaal kka e pilisagh me ghilighilil yaal wóól yaalil public right-of-way mellól Commonwealth, schééschéél ótol angaang llól dry season. Sibwe ira, ótol dry season mellól Commonwealth, ye ebwe bwel wóól November-December, emm wel bwe Depattamento ebwe bwel, me ebwe fil me takkeló, akkááw yaal. An gaang yeel nge ebwe takkeló llól ráágh ótol uschow, ye e ghal bweleta llól July-August. Angaang yeel ebwal atoolongow, nge esebwal aighúghúló reel, ghatchul project ye Garapan.

Akkááw weires ye Bwulasiyo emmwel ebwe maleti nge emmwel ebwe tem pororiyo, nge ebwal mmwel ebwe ghi weires reel aweweel fraffic ye ebwe yaaya sángi affat. Reel piliságh ebwal toolong kkeel, liibw, bwuul schaal, máál maal, akkááw peirágh

3. Allégh kkaal ebwal ayoora mwóghutul unified permitting reel yááyál special district right-of-way, ewey leliyel uur me Garapan, me public rights-of-way. Mwóghut yeel ebwal atoolongow tittingór (application) , méél, kkapasal igha rebwe aweweey, mwutta, me tingór alillis. Aghiyágh nge rebwe féérú bwe ebwe attractive, schóól tooto faley-me family-friendly venues ye emmwel rebwe yááli. Sibwe ira, leliyeer aramas le uur, milleel ebwal akkayuuwuló mwóghutul ghareeta reel substantial por tion llól eral. Llapal ighila leliyeer aramas le uur ngare mwóghut ye rebwe restrict-l

igha project constructions e mwóghut sángi ighila ebwe bwel iye, me beach road, sangi meschel Coral Tree Avenue, ótol January 12-June10, 2004. amweyut me mwiisch kka rekke ghut igha rebwe yáálí special district reel aschuschu, leliyal tittillap,

4. Affatal angaang me atotoolong nge emmwel ebwe yááyá ngáli mwóghútúl akkááw instrumentalities mellól CNMI , ebwal toolong Depattametool Public Safety. Faal akkááw, emmwel bwe Depattamento ebwe féér alúghúlúgh ngáli akkááw CNMI instrumentalities igha ebwe affatta obstrutions me encroachments me ngálleey, affattal lisensia. Milleel nge emmwel ebwal toolong Depattamento, agencies, commonwealth corporations me ngáre bwulasiyool Mayors'.

Alúghúlúghúl fillóól reel alléghúl ghitipwotch llól ebwughuw ruweigh (120) ráálil: De pattamento ekke tabweey mwóghútúl 1CMC tálil 9104 (b) igha ebwe fillóóy pomwol allégh kkaal reel mwóghutul ghitipwotch ótol ebwughuw ruweigh (120) ráál. amweri schéél ammataf kka akkááw.

Afalafalal aisis me akkatééwow: Pomwol Allégh kkaal ebwe akkatééwow mellól Commonealth Register mellól tálil pomwol kkaal me fillóól allégh kka e ffé (1CMC tálil 9102 (a) (1) me ebwe appaschetá igha ebwe ghatch iye mellól civic center mebwal llól Bwuasiyool local government kkaal mellól senatorial district, ii me ruwoow reel Englisch me ii me ruwoow reel kkapasas Remeraalis me Refaluwasch. 9 1CMC talil 9104 (a) (4))

Sángi bweibwoghol ammataf reel Alléghúl ghitipwotch, samwool e afala Depatta mentol Public Works bwe ebwe ghutchuw yaal féérú Pomwol Allégh kkaal igha emmwel ebwe aweiresiir schagh (1CMC 9105 (b) (2) (alléghúl ghitipwotch)).

Atotoolongol aghiyágh: afangaalo me ngáre bwughiiló yóómw aghiyágh reel Sam woolul Juan S. Reyes, Att: Alléghúl DPW ye e ffe, Box 10007, Seipél MP 96950 me ngáre fax ngáli 670.2356346 me email ngali director.tsd@dpwtechserv.com igha rebwe tabweey line ye " Alleghul DPW ye e ffe ". Aghiyagh nge atotoolong ótol March 1, 2004. Utu ghal soong isisilong yóómw data, ghuleyómw me ngáre aingiing. (1 CMC tálil 9104 (a) (2))

Isáliiyalong: _____ 2/20/04
JUAN REYES
Samwoolul Public Works
Ráal

Alúghúlúgh sángi: DIEGO T. BENAVENTE, Acting _____ 2/29/04
JUAN N. BABAUTA
Sow Lemelem
Ráal

Aisis sángi: _____ 2.19.04
BERNADITA B. DELA CRUZ
Commonwealth Register
Ráal

Sángi 1CMC tálil 2153 (e) (AG alléghuuyal allégh kkaal igha ebwe akkatéélló bwe ebwe alúghúlúghúló) me 1CMC tálil 9104 (a) (3) (bwughi yaal AG alúghúlúgh) reel pomwol allégh kka eppasch ye raa takkal amweri me affataló mereel CNMI Sow Bwungul Allegh me ebwe akkateelong (1 CMC talil 2153 (f) (arongowowul allégh kkaal)).

Ráálil ye _____llól January, 2004.

_____
PAMELA S. BROWN,
Sów Bwúngúl Allégh Lapalap

PUBLIC NOTICE
PROPOSED AMENDMENT OF THE RULES AND REGULATIONS GOVERNING THE P.L. 10-58 AS AMENDED BY P.L. 11-34 FOR POSTSECONDARY EDUCATION

The Scholarship Advisory Counsel Board for the Commonwealth of the Northern Mariana Islands Scholarship Office hereby notifies the general public of its intention to amend the P.L. 10-58 as amended by P.L. 11-34 "Post Secondary Teacher Education Program" Rules and Regulations that were promulgated in July 2001 and adopted in September 2001. P.L. 10-58 as amended by Public Law 11-34 and Executive Order 94-3, Sec. 211, authorizes the proposed amendment of the "Post Secondary Teacher Education Program" Rules and Regulations.

All interested persons may examine, and copies may be obtained of, the proposed amendment of the "Post Secondary Teacher Education Program" Rules and Regulations and submit written comments to the Chairperson, Scholarship Advisory Counsel Board, Caller Box 10007, Saipan, MP 96950, or by facsimile to 664-4759 or email to **cnmieap@cnmischolarship.com** within thirty (30) calendar days following the date of the publication of this Notice in the Commonwealth Register.

Dated this 6th day of February 2004, at Saipan, Northern Mariana Islands.

SCHOLARSHIP ADVISORY COUNSEL BOARD

By: _____
ROMAN BENAVENTE
Scholarship Advisory Counsel Board, Chairperson

Pursuant to 1 CMC § 2153, as amended by P.L. 10-50, the rules and regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the Office of the Attorney General.

Dated this 9th day of February 2004.

NAME:
Attorney General

By: _____
Attorney General

Received By: _____
THOMAS TEBUTEB
Special Assistant for Administration

Date: 2/9/04

Filed By: _____
Registrar of Corporation

Date: 02-11-04

Notisian Pupbliku

Man Ma Proponi i Amendasión Put i Areklamento yan Regulasión siha ni a Gobiebietna i Lai Pupbliku 10-58 ni ma amenda ginen i Lai Pupbliku 11-34 para i Edukasion Postsecondary

I kuetpon i Akonsehon man atbisu gi Scholarship para i ofisinan i Scholarship gi Commonwealth I Sankattan Siha na Islas Marianas este na momento a notitisia i publiku henerât 10-58 ni ma amenda ginen i Areklamento yan Regulasión i 'post secondary Teacher Education Program' ni man ma establesi gi Julio 2001. I Lai Publiku ni ma amenda ginen i Lai Publiku 11-34 yan i Otden Eksekatibu 94-3, Sek. 211, a aturirisa i man ma proponi na amendasión put i Areklamento yan Regulasión i "post Secondary Teacher Education Program".

Todu i , man enteresao na petsona siha siña ma eksamina, yan u fan mañule kopia siha put i man ma proponi na amendasión put i Areklamento yan Regulasión "Post Secondary Teacher Education Program" ya uma submiti opinion tinige para i kabiseyu, kuetpon i Akonsehon man Atbisu gi Scholarship Caller Box 10007, Saipan, MP 96950 pat ginen i facsimile para 664-4759 pat email para cnmicap@ cnmischolarship, gi hâlom trenta (30) dihas gi kalendârio tinititiyi i fecha ginen i publikasión este na Notisia gi Rehistran Commonwealth.

Ma fecha este 6th na diha gi Febreru 2004, giya Saipan, Sankattan Siha Na Islas Marianas.

KUETPON MAN ATBISU GI SCHOLARSHIP

Ginen as: _____
Ramon Benavente
Kabiseyon i Kuetpon Konsehon Man Atbisu gi Scholarship

Sigun i Lai Sek. 2153, ni inimenda ginen i Lai Publiku 10-50, i areklamento yan Regulasión siha ni man checheton man ma ribisa yan aprueba put para u fotma yan ligât sufisiente ginen i Ofisinan i Abugâdo Henerât.

Ma fecha este _____na diha gi Febreru 2004

Na'an
Abugado Henerat

Ginen:_____
Abugado Henerat

Ma Risibi as:

THOMAS TEBUTEB
Espesiat Na Ayudante
Para i Atministrasion

Fecha: 2/9/04

Pine'lo as:

Rehistran i Koporasion

Fecha: 2-11-04

Trinansladan: Charlene S. Cruz
Transladoran Chamorro, CCLPC

ARONGORONGOL TOULAP
REEL POMWOL LLIWEL NGÁLI ALLÉGH KKA E LEMELEM, ALLEGHÚL TOULAP 10-58 YE AA LLWEL MEREEL ALLÉGHÚL TOULAP 11-34 REEL POSTSECONDARY EDUCATION

Scholarship Advisory Counsel Mwiischil Commonwealth Falúwasch Marianas Bwulasiyool Scholarschip ekke arongaar Toulap igha e mángi ebwe fillóóy Alléghúl Toulap 10-58 ye aa lliwel mereel Alléghúl Toulap ye 11-34 " Progroomal Post Secondary Teacher Education " allegh kka e akkatééwow wóól wuun 2001 me fillóól llól Maan 2001. Alléghúl Toulap 10-58 ye aa lliwel mereel 11-34 me akkulééyal Sów Lemelem 94-3 , Tálil, 211 ye e mweiti ngáli Pomwol lliwel yeel ngáli " Progróómal Post Secondary Teacher Education " Allégh kkaal.

Schóókka re tipeli nge emmwel rebwe amweri fischiiy, me emmwel rebwe bweibwogh kkopial reel, pomwol lliwel yeel ngáli " Progróómal Post Secondary Teacher Education " Allégh kkaal me ischilong aghiyágh reel Chairperson, Scholarship Advisory Counel Board, Caller Box 10007, Seipel MP 96950, me ngáre facsimile ngáli 664-4759 me email ngáli cnmi@cnmischolarship.com llól eliigh (30) ráálil mwirilóól raalil yaal akkate ammataf yeel mellól Commonwealth Register.

Ráálil ye 6th llól Mááischigh 2004, wóól Seipél, Falúwasch Marianas.

SCHOLARSCHIP ADVISORY COUNSEL BOARD

Sángi : _____

ROMAN BENAVENTE
Scholarship Advisory Counsel Board, Chairperson

Sángi 1 CMC tálil 2153, ye e liweli Alléghúl Toulap 10-50, allégh kka e appasch nge raa takkal amweri fischiiy me alúghúlúgh mereel Bwulasiyool Sów Bwúngúl Allégh.

Ráálil ye _____llól Maaischigh 2004.

lit:
Sów Bwúngúl Allégh Lapalap

Sangi:_____
Sow Bwungul Allegh

Mwir sángi:_____
THOMAS TEBUTEB
Sów Alllilisil Sów Lemelem

Rál: 2/9/04

Aisis sángi:_____
Registrar of Corporation

Rál: 02.11.04

PROPOSED AMENDMENT OF THE RULES AND REGULATIONS GOVERNING THE P.L. 10-58 AS AMENDED BY P.L. 11-34
"Post Secondary Teacher Education Program"

Citation of Statutory Authority:	The Scholarship Office proposes to amend Rules and Regulations pursuant to Executive Order, 94-3, Sec. 211 and P.L. 10-58 as amended by P.L. 11-34.
Short Statement of Goals and Objectives:	The proposed amendment of the P.L. 10-58 as amended by P.L. 11-34 Post Secondary Teacher Education Program Rules and Regulations provides a guideline and criteria to applicants pursuing postsecondary education scholarship funds.
Brief Summary of the Proposed Regulations:	The purpose for amending the Rules and Regulations governing the P.L. 10-58 as amended by P.L. 11-34 is to correct the programs expiration dates, definition of a fulltime status and to notify all recipients of such scholarship of the changes.
Citation of Related and/or Affected Statutes, Regulations, and Orders:	P.L. 7-32 now codified at 3 CMC Section 1341; P.L. 8-18 The Post Secondary Education Act of 1982 and Executive Order 94-3, Sec. 211.
For Further Information Contact:	Meliza S. Guajardo, Scholarship Administrator, telephone number 664-4750 or facsimile number 664-4759

Submitted by: Roman Benavente, SAB-Chairperson — 2/6/04 Date

RULES AND REGULATIONS GOVERNING THE PUBLIC LAW 10-58 AS AMENDED BY PUBLIC LAW 11-34

PURPOSE

The Rules and Regulations are to implement Public Law 10-58, as amended by Public Law 11-34, a law to establish a Post Secondary Teacher Education Program (PSTEP).

1. DEFINITIONS FOR IMPLEMENTING PUBLIC LAW 10-58 AS AMENDED BY PUBLIC LAW 11-34

1.1 CUMULATIVE GRADE POINT AVERAGE (GPA): The Grade Point Average for all terms combined.

1.2 FULLTIME STATUS: ~~Twelve (12) credits per semester/term/quarter.~~ **A recipients fulltime status is defined by the institution that he or she is attending.** Courses that are repeated are not counted towards maintaining a fulltime status.

1.3 PROBATION: A condition placed on a student who fails to comply with the statutory requirement or any of the Rules and Regulation promulgated by the Scholarship Office.

1.4 TERMINATION: Discontinued from the program.

2. APPLICATION PROCEDURE

2.1 Applications must be received or postmarked on or before July 1st for fall semester/quarter or December 15th for winter/spring quarter/semester for which the scholarship is to award.

NOTE: If the deadline falls on a weekend or a holiday, deadline will be the next working day.

2.2 The required documents to be submitted with the Application include but are not limited to: A) an official sealed transcript from the institution B) a letter of acceptance from an accredited college or university; C) A Certification letter from the institution stating the institutions Education Program Accreditation status and accrediting agency, D) Certification letter stating acceptance into an Accredited Teacher Training Program and student class status and E) proof of compliance with statutory requirements as demonstrated by, but not limited to, documents such as a US passport, parent's tax forms, or other similar documents deemed acceptable or appropriate by the Scholarship Office.

2.3 Once accepted, recipients must continue to submit the appropriate information and documentation necessary to maintain their scholarship as required by the Scholarship Office.

3. ELIGIBILITY

In addition to meeting all statutory requirements an applicant must meet the following criteria to be eligible:

3.1 A scholarship awarded to undergraduate students enrolled in an accredited teacher-training program will commence at the beginning of the students' junior year in college/university.

3.2 For the purpose of these Rules and Regulations, students are defined as PSTEP recipients who either meet the criteria of Sections 3 paragraph 3.1 above, have obtained their undergraduate, baccalaureate degree and their teacher education certificate or similar teaching credentials and immediately after completion of their baccalaureate program pursue a Masters Degree in Education. A PSTEP scholarship award will be granted to one seeking an advanced degree in Education only for a period, which is provided by law.

3.3 The recipient must sign and have notarized a Memorandum of Agreement approved by the Scholarship Advisory Board for each academic year in order to receive scholarship benefits. This Memorandum of Agreement shall set forth the terms and conditions pursuant to which scholarship benefits will be awarded to the recipient. Each Memorandum of Agreement must be notarized and returned to the Scholarship Office before the recipient will receive any scholarship benefits.

4. DURATION OF ELIGIBILITY

4.1 Unless otherwise provided by law, applicants are allowed to benefit from the PSTEP program for a period of up to four (4) years. The Scholarship Administrator will determine when the applicant will be eligible based on Sections 3 of the Rules and Regulations. Students graduating from the program should be qualified to be classroom teachers. Thus, the 4-year scholarship period allowed by law may also include teacher certification programs and/or other internship necessary to acquire the highest standard of credential and certification to be professional teacher.

5. PERSONS ELIGIBLE

5.1 Initial eligibility for the PSTEP program shall be as provided by law.

5.2 Persons on educational or government administrative leave with or without pay are eligible to receive benefits under this program.

6. MINIMUM SCHOLASTIC ACHIEVEMENT

6.1 Undergraduate Recipients who initially qualify under this program must, as provided by law, remain and continue as a full time student without interruption or break during the 4-year period in order to continue

benefiting from the program. A transfer or change of college or university may be allowed provided that the transfer is completed without interruption of a session or semester.

7. AMOUNT AND DISTRIBUTION OF AWARDS

7.1 Changes in the annual appropriation level funding this program and/or the number of participants in the program will determine the level of awards to each participant in the PSTEP. All awards will be consistent with the provisions of applicable CNMI Law. Recipients will be advised of the changes in award levels necessitated by either an increase or decrease in funding and/or an increase or decrease in the number of participants in the PSTEP.

8. PROBATION AND TERMINATION

8.1 The recipient must maintain a fulltime status and have a cumulative GPA of 2.5 on a 4.0 scale to continue in the PSTEP program. If the recipient fails to maintain the required cumulative GPA of 2.5 on a 4.0 scale or if the number of credits hours drop below that of a full-time student, fails to comply with the statutory requirement and all terms and condition of the Memorandum of Agreement the student will be placed on probation for one following enrollment period.

8.2 Scholarship benefits will be awarded during probationary period. However, in order to continue in the scholarship program the student must make-up the credits lacking while also maintaining the full-time (12 credits) status and by the end of the probationary enrollment period must meet the minimum cumulative GPA and be in compliance with the statutory requirement and the Memorandum of Agreement.

If the student does not meet the required cumulative GPA or does not complete the credits lacking with the full-time status or is not in compliance with the statutory requirement and the Memorandum of Agreement during the probationary enrollment period, the scholarship benefit will be terminated immediately, and the recipient will not be allowed any further participation in the PSTEP.

9. REPAYMENT

9.1 All recipients of such scholarship are required to return to the CNMI no later than three (3) months after completion of their degree program.

9.2 Recipient, who fails to complete his/her educational degree program, will be required to repay the amount of scholarship awarded. The amount may either be repaid in full or in installments as determined by the Scholarship Office and the Board.

9.3 Legal proceedings will be taken to recover the total amount of scholarships awarded in order to enforce the requirements provided in §9.1 and 9.2 above. The recipient shall also pay all legal expenses and fees incurred by the government in the effort to recover scholarship awards.

9.4 No penalty shall be imposed on a recipient who obtain their baccalaureate degree and decides to enter a post-graduate Teacher Training Program. The repayment or cancellation of such scholarship will be deferred until the student obtains of their postgraduate degree whether or not the student is receiving PSTEP scholarship funds. However, should the student cease his/her post-graduate program, he/she must return to the CNMI within three (3) months to commence work. Failure to return will result in the student being required to repay all scholarship awards previously received.

10. FRAUDULENT INFORMATION

10.1 All documents received by the Scholarship Office are subject to verification from the Institution and sources from which it came. The applicant and his or her family or authorized representative are individually responsible for the integrity of these documents. Recipients and the authorized representative who submit documents that are false or tampered with in any way will result in the recipients' immediate and permanent removal from any the Scholarship program administered by the Scholarship Office. Documents include but not limited to application, supporting documents, grade reports, transcript, etc.

11. APPEALS

11.1 A recipient who is denied PSTEP funds has the right to appeal to the Scholarship Advisory Board. .

11.2 Recipient may appeal a decision by the Scholarship Administrator. The appeal must be in writing addressed to the Chairperson of the Scholarship Advisory Board.

11.3 The appeal must be postmarked or hand-delivered no later than twenty-one (21) calendar days after notification of the decision by the Scholarship Administrator. If notification is via mail it shall be given via a certified mail, return receipt requested.

11.4 The appeal to the Scholarship Advisory Board shall be heard and decided pursuant to applicable CNMI law, including, but not limited to, the CNMI Administrative Procedure Act, 1 CMC Section 9101 et. seg.

11.5 All decisions by Scholarship Advisory Board on appeals are final regarding the administrative review process.

12. EFFECTIVE AND EXPIRATION DATES

Public Law 10-58 was signed into law May 15, 1997. The implementation of the program commenced on August 1997, (Fall Semester 1997). As provided by Section 4 of Public Law 11-34, the Program will expire six years **and three months from** ~~it became effective on~~ September 4, 1998. Therefore, unless this program is renewed or extended by the legislature, scholarship funds **for those** enrolled in the PSTEP ~~for those~~ may not be available on or after ~~September 4, 2004~~ **December 4, 2004**. Funding for the PSTEP is part of the scholarship budget appropriated by the Legislature on an annual basis. The PSTEP program will continue only if subsequently funded by the CNMI Legislature after ~~September 4, 2004~~ **December 4, 2004**.

Department of Commerce

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
Caller Box 10007 CK., Saipan, MP 96950
Tel. (670) 664-3000/1 • Fax: (670) 664-3067

NOTICE OF CERTIFICATION AND ADOPTION OF PROPOSED PAWNBROKER BUSINESS LICENSE REGULATIONS PURSUANT TO 1 CMC §§ 2454, 9104, 4 CMC § 5651 BY THE DEPARTMENT OF COMMERCE

I, Fermin M. Atalig, Secretary of the Department of Commerce which promulgated as a Notice of Intent to Adopt Pawnbroker Business License Regulations published in the Commonwealth Register, vol. 26, no. 1, at 21623-21629 (January 22, 2004), by signature below hereby certify that as published such Proposed Regulations are true and correct copies of the Proposed Pawnbroker Business Regulations previously proposed by the Department of Commerce which, after the expiration of appropriate time for comment, have been adopted with no changes.

By signature below, I hereby certify that the Proposed Pawnbroker Business License Regulations are the true, correct and complete Proposed Pawnbroker Business License Regulations proposed by the Department of Commerce. I further request and direct that this Notice and Certification of Adoption be published in the Commonwealth Register.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on this 10th day of February, 2004, at Saipan, Commonwealth of the Northern Mariana Islands.

Fermin M. Atalig
Secretary of Commerce

Filed by:

Bernadita B. DelaCruz
Commonwealth Register

2.11.04
Date

Time

Received by:

Thomas A. Tebuteb
SAA

2-18-04
Date

Time

Department of Commerce

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
Caller Box 10007 CK., Saipan, MP 96950
Tel. (670) 664-3000/1 • Fax: (670) 664-3067

NOTICE OF CERTIFICATION AND ADOPTION OF AMENDMENT TO THE BUREAU OF TAXICAB REGULATIONS PURSUANT TO 1 CMC §§ 2454, 9104 BY THE DEPARTMENT OF COMMERCE

I, Fermin M. Atalig, Secretary of the Department of Commerce which promulgated as a Notice of Intent to Adopt an Amendment to the Bureau of Taxicab Regulations published in the Commonwealth Register, vol. 26, no. 1, at 21630-21637 (January 22, 2004), by signature below hereby certify that as published such Amendment is a true and correct copy of the Amendment to the Bureau of Taxicab Regulations previously proposed by the Department of Commerce which, after the expiration of appropriate time for comment, have been adopted with no changes.

By signature below, I hereby certify that the proposed amendment to the Bureau of Taxicab Regulations is the true, correct and complete Amendment to the Bureau of Taxicab Regulations adopted by the Department of Commerce. I further request and direct that this Notice and Certification of Adoption be published in the Commonwealth Register.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on this 10th day of February, 2004, at Saipan, Commonwealth of the Northern Mariana Islands.

Fermin M. Atalig
Secretary of Commerce

Filed by:

Bernadita B. DelaCruz
Commonwealth Register

2-11-04
Date

Time

Received by:

Thomas A. Tebuteb
SAA

2-18-04
Date

Time

Department of Commerce

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
Caller Box 10007 CK., Saipan, MP 96950
Tel. (670) 664-3000/1 • Fax: (670) 664-3067

NOTICE OF CERTIFICATION AND ADOPTION OF AMENDMENT TO THE WEIGHTS AND MEASURES REGULATIONS PURSUANT TO 1 CMC §§ 2454, 9104, 4 CMC § 5429 BY THE DEPARTMENT OF COMMERCE

I, Fermin M. Atalig, Secretary of the Department of Commerce which promulgated as a Notice of Intent to Adopt an Amendment to the Weights and Measures Regulations published in the Commonwealth Register, vol. 26, no. 1, at 21638-21642 (January 22, 2004), by signature below hereby certify that as published such Amendment is a true and correct copy of the Amendment to the Weights and Measures Regulations previously proposed by the Department of Commerce which, after the expiration of appropriate time for comment, have been adopted with no changes.

By signature below, I hereby certify that the proposed amendment to the Weights and Measures Regulations is the true, correct and complete Amendment to the Weights and Measures Regulations proposed by the Department of Commerce. I further request and direct that this Notice and Certification of Adoption be published in the Commonwealth Register.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on this 10th day of February, 2004, at Saipan, Commonwealth of the Northern Mariana Islands.

Fermin M. Atalig
Secretary of Commerce

Filed by:

Bernadita B. DelaCruz
Commonwealth Register

2.11.04
Date

Time

Received by:

Thomas A. Tebuteb
SAA

2-18-04
Date

Time

Commonwealth of the Northern Mariana Islands

Department of Public Health

Office of the Secretary

NOTICE AND CERTIFICATION OF FINAL ADOPTION OF THE PROPOSED AMENDMENTS TO THE RULES AND REGULATIONS GOVERNING THE MEDICAID DRUG FORMULARY

I, Pedro T. Untalan, MHA, Acting Secretary of the Department of Pubic Health of the Commonwealth of the Northern Mariana Islands, which has promulgated AMENDMENTS TO THE RULES AND REGULATIONS GOVERNING THE MEDICAID DRUG FORMULARY as originally published in the Commonwealth Register, volume 26, number 1, page 21526, January 22, 2004, by signing below hereby certify that as published such Rules and Regulations are a true, complete, and correct copy of the Rules and Regulations previously proposed which, after the expiration of appropriate time for public comment, have been finally adopted with the attached listed modification. I further request and direct this Notice and Certification to be published in the CNMI Commonwealth Register. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 23 day of February 2004 at Saipan, in the Commonwealth of the Northern Mariana Islands.

2/23/04

PEDRO T. UNTALAN, MHA
Acting Secretary of Public Health
Department of Public Health

Pursuant to 1 CMC 2153, as amended, this Notice and Certification of Adoption, and the Amendments to the Rules and Regulations Governing The Administration of the Medical Referral Program to which they apply, have been reviewed and approved by the Office of the Attorney General.

Date 2/23/04

BENJAMIN I. SACHS
Acting Attorney General

Received by: Date 2/23/04

THOMAS TEBUTEB
Special Assistant for Administration

Filed by: Date 2.23.04

BERNADITA B. DELA CRUZ
Commonwealth Registrar

MEDICAID OUTPATIENT DRUG FORMULARY

All generic medications are covered under this formulary. The following name brand medications are also covered if generic alternatives don't exist or the physician determines that use of the name brand is medically necessary (and so states on the prescription). Some name brands require prior authorization (listed as "PA required" or "PA REQ."). All prescriptions over $500 require prior authorization. The Medicaid Administrator shall have the authority for medical necessity or other good cause to add other drugs to this outpatient formulary, or to otherwise authorize Medicaid reimbursement.

NAME BRAND MEDICATIONS

ANTI-INFECTIVES

Cephalosporins.....
- OMNICEF

Erythromycins.....
- ZITHROMAX
- BIAXIN, -XL

Quinolones.....
- CIPRO
- LEVAQUIN

Antituberculosis.....
- MYAMBUTOL

Antifungal.....
- FULVICIN UF, FULVICIN /G

Antiviral.....
- VALTREX

Presently all drugs specifically indicated for the treatment of HIV and its opportunistic infections are on formulary.

Antimalarial.....
- DARAPRIM
- PRIMAQUINE
- FANSIDAR
- ARALEN
- LARIAM

Amebicides.....
- YODOXIN

Anthelmintics.....
- MINTEZOL

Miscellaneous Antiinfectives.....
- TRIMPEX
- DAPSONE
- THALOMID
- RIFAMATE
- FLAGYL 750mg

ANTINEOPLASTICS AND IMMUNOSUPRESSANTS

All oral FDA-approved antineoplastic and immunosuppresive agents are eligible.

ENDOCRINE MEDICATIONS

Glucocorticosteroids.....
- PEDIAPRED

Mineralocorticoids.....
- FLORINEF

Androgens .....
- TESTODERM PATCH
- ANDRODERM PATCH
- ANDROGEL

Estrogens.....
- PREMARIN
- ESTRATAB
- VIVELLE, -Dot
- ESTRADERM
- FEMHRT
- PREMARIN
- PREMPHASE,
- PREMPRO
- ESTRATEST, -HS

Antithyroid Drugs.....
- TAPAZOLE

Thyroid Hormones.....
- ARMOUR THYROID
- SYNTHROID
- LEVOXYL
- LEVOTHROID
- CYTOMEL

Other Endocrine Drugs.....
- PARLODEL
- ACTONEL
- EVISTA

CONTRACEPTIVES

Teens should be referred to the Family Planning Clinics for free medications and supplies. Adults may receive the following (along with generics) as Medicaid covered benefits.

Mono-Phasic Oral Contraceptives.....
- MIRCETTE
- OVCON-35, OVCON-50
- OVRAL
- ORTHO-CEPT,
- YASMIN
- NUVARING
- ORTHO-EVRA

Tri-Phasic Oral Contraceptives.....
- ORTHOTRICYCLEN
- ESTROSTEP 21
- ESTROSTEP Fe
- TRI-NORINYL
- TRI-NORINYL

Progestin Only Oral Contraceptives.....
- MICRONOR, NOR-Q-D
- OVRETTE

Progestins.....
- PROMETRIUM

By injection
- DEPO-PROVERA

DIABETIC MEDICATIONS

Oral Hypoglycemics.....
- GLUCOTROL XL
- GLUCOVANCE
- AMARYL
- PRANDIN
- PRECOSE

Thiazolidinediones.....
- AVANDIA
- ACTOS

Insulins.....
- HUMULIN
- NOVOLIN
- HUMALOG
- NOVOLOG

ALL INSULIN SYRINGES COVERED.....

Glucose Test Strips.....
- ACCU-CHECK, ONE TOUCH

Glucagon.....
- GLUCAGON KIT

CARDIOVASCULAR MEDICATIONS

Cardiac Glycosides.....
- LANOXIN

Nitrates.....
- NITROSTAT
- NITROLINGUAL SPRAY
- IMDUR
- MONOKET
- ISMO SR
- DILATRATE SR

Beta-1 Specific.....
- TOPROL XL

Non-Selective.....
- ZEBETA
- LEVATOL
- COREG

Calcium Antagonists.....
- DILACOR XR,
- TIAZAC
- CARDIZEM CD SR
- DYNACIRC CR
- NORVASC
- NIMOTOP
- PLENDIL

Antidysrhythmic Drugs.....
- PROCANBID
- TONOCARD
- ETHMOZINE
- TAMBOCOR
- MEXITIL

Angiotensin Converting Enzyme Inhibitor.....
- LOTENSIN
- ACCUPRIL
- ALTACE

Angiotensin Converting Enzyme Inhibitors Combination.....
- LOTENSIN/HCT
- CAPOZIDE

Angiotensin II Antagonists (ARB).....
- **COZAAR**
- DIOVAN
- AVAPRO
- BENICAR

Angiotensin II Antagonist Combination.....
- DIOVAN HCT
- AVALIDE
- LOTREL

Antiadrenergic Agents-Peripheral Acting.....
- FLOMAX

Loop Diuretics.....
- DEMADEX

Thiazide & Related Diuretics.....
- ENDURONYL & ENDURONYL FORTE

Cholesterol Lowering Agents.....

HMG CoA Reductase.....
- LIPITOR

Other Cholesterol Lowering Agents.....
- LORELCO
- TRICOR
- COLESTID
- COLESTID FLAVORED (can only)
- COLESTID TABLETS
- WELCHOL

Miscellaneous Cardiovascular Drugs.....
- ST. JOSEPHS,BAYER, etc. -OTC

RESPIRATORY MEDICATIONS

Antihistamines.....

Consider OTC PRODUCTS as first line therapy

Single-Entity Products.....
- ALLEGRA
- ZYRTEC

Combination Products.....
- BREXIN LA
- TRINALIN

Lower Sedating Combination Antihistamines.....
- SEMPREX-D
- ALLEGRA D
- ZYRTEC D

Nasal Antihistamines.....
- ASTELIN NASAL SPRAY

Antitussives & Expectorants.....
- HUMIBID DM
- CODICLEAR DH
- CODIMAL DH
- HISTUSSIN HC

Adrenergic Stimulants-Inhalers.....
- ALUPENT INHALER
- MAXAIR AUTOHALER
- COMBIVENT
- PROVENTIL HFA
- SEREVENT

Adrenergic Stimulants-Oral Tabs.....
- BRETHINE
- VOLMAX

Xanthine Derivatives.....
- UNIPHYL, SLO-PHYLLIN

Corticosteroids for Inhalation.....
- PULMICORT
- AZMACORT

FLOVENT
Leukotriene Inhibitor.....
ACCOLATE
Other Drugs for Asthma.....
ATROVENT INHALER
ADVAIR
Respiratory Specialty Drugs.....
PULMOZYME (PA Required)
TRACLEER (PA Required)

GASTROINTESTINAL MEDICATIONS

Antidiarrheal Preparations .....

Consider OTC Imodium as first line therapy

Antiulcer Drugs.....
H2 Antagonists.....
PEPCID AC-OTC
Proton Pump Inhibitors.....
PREVACID
PROTONIX
H.pylori treatments.....
PREVPAC
Other GI products.....
CYTOTEC
Antiemetic.....
TORECAN
TRANS-DERM SCOP
ZOFRAN,ZOFRAN ODT
Digestants.....
COTAZYM
PANCREASE
VIOKASE
CREON

GENITOURINARY

Vaginal Antiinfectives.....

Consider OTC PRODUCTS as first line therapy

DIFLUCAN 150 TAB
TERAZOL
CLEOCIN VAG CREAM
METROGEL-VAGINAL
Anticholinergic-Antispasmodics.....
DETROL
Miscellaneous Genitourinary.....
CARDURA
FLOMAX
PROSCAR

CENTRAL NERVOUS SYSTEM

Antidepressants.....
ANAFRANIL
CELEXA
PAXIL
EFFEXOR, -XR
WELLBUTRIN SR
ZOLOFT
Antipsychotic Agents.....
ZYPREXA
RISPERDAL
Monoamine Oxidase Inhibitors.....
PARNATE
CNS Stimulants.....
DEXEDRINE
ADDERALL
CYLERT
METADATE CD
PROVIGIL
Other CNS Drugs.....
ARICEPT
EXELON

Smoking Deterrents: Patients should be referred to the Community Guidance Center for its smoking cessation program, where the medications and supplies are free.

ANALGESICS

Non-Narcotic Analgesics.....
ESGIC-PLUS
AXOCET
Narcotic Analgesics.....
FIORICET/CODEINE
KADIAN
OXYCONTIN
DURAGESIC
ACTIQ
Non-Steroidal Anti-Inflammatory Drugs.....
VOLTAREN
Cox-2 Inhibiting.....
CELEBREX
Antirheumatics.....
CUPRIMINE
PLAQUENIL
RIDAURA
Migraine Agents.....
AXERT
ERGOMAR
AMERGE
IMITREX

NEUROMUSCULAR

Anticonvulsants.....
MYSOLINE
ZONEGRAN
Antiparkinson Drugs
PERMAX
REQUIP
MIRAPEX
TASMAR
COMTAN
Skeletal Muscle Relaxants.....
DANTRIUM
Anticholinesterase Muscle Stimulants.....
MESTINON

NUTRITIONAL PRODUCTS

Prenatal Vitamins.....
NIFEREX PN
PNFORTE
PRECARE
Vitamins.....
MEPHYTON
ROCALTROL
CHROMAGEN
Minerals.....
LURIDE (tablets & drops)
Misc. Nutritional.....
CARNITOR

HEMATOLOGICAL AGENTS

Hematopoetic.....
AQUASOL A
NIFEREX-150 FORTE
Anticoagulant Drugs.....
COUMADIN
LOVENOX (7 day supply maximum for first Rx, PA required after first Rx)
Antiplatelet Drugs.....
PLAVIX
ASA/ER
Miscellaneous Antiplatelet Agents.....
PLETAL

OPHTHALMIC MEDICATIONS

Alpha-adrenoceptor Agonists.....
ALPHAGAN
Non-steroidal Anti-Inflammatory Drugs.....
ACULAR
VOLTAREN
Anti-allergic Agents.....
ZADITOR
LIVOSTIN
ALOMIDE
PATANOL
Ophthalmic Mast Cell Stabilizers.....
ALOCRIL
Antibiotics and Antibiotic Combinations.....
OCUFLOX
Antivirals.....
VIROPTIC
VIRA-A
Artificial Tear Products/Lubricants.....
REFRESH TEARS -OTC
LACRI-LUBE S.O.P
REFRESH P.M.
Beta-adrenoreceptor Antagonists.....
BETOPTIC S SUSPENSION
BETOPTIC SOLUTION
Carbonic Anhydrase Inhibitors.....
AZOPT
Prostaglandin's.....
XALATAN
Prostamides.....
LUMIGAN

EAR, NOSE AND THROAT MEDICATIONS

OTIC Anti-infectives.....
FLOXIN OTIC
OTIC Steroid-Anti-infective Combinations.....
CERUMENEX
VOSOL
Corticosteroids, Inhaled Nasal.....
RHINOCORT AQ
VANCENASE AQ -DS
BECONASE -AQ
FLONASE
NASONEX
TRI-NASAL
Miscellaneous Nasal.....
NASALCROM
ATROVENT
0.03% NASAL SPRAY

DERMATOLOGICALS

All topical dosage forms of listed items are formulary
Topical Antifungals.....
LOPROX **PA REQ.**
OXISTAT **PA REQ.**

Topical Antivirals.....
ZOVIRAX
Topical Corticosteroids.....
GROUP I (VERY HIGH POTENCY)
DIPROLENE, -AF
ULTRAVATE **PA REQ.**
GROUP II (HIGH POTENCY)
ACLOVATE
DIPROSONE
LIDEX -E
VALISONE
GROUP III (MEDIUM POTENCY)
DERMA-SMOOTHE
ELOCON
SYNALAR HP
GROUP IV (LOW POTENCY)
Topical Corticosteroids in Combination.....
MYCOLOG II
Scabicides/Pediculocides.....
Treatment of choice is OTC Nix
Anorectal.....
ANUSOL HC SUPP
CORTENEMA
CORTIFOAM
PROCTO-CREAM HC
PROCTO-CREAM HC 2.5%
PROCTOFOAM HC
Anti-Psoriatics.....
SORITANE
DRITHO-CRÈME
DOVONEX
TAZORAC
Miscellaneous Topicals.....
ACTINEX
ALDARA
CONDYLOX GEL
EFUDEX
ELIDEL **PA REQ.**
LAC-HYDRIN
REGRANEX GEL

OTHER

MYCOPHENYLATE
GENGRAF

Commonwealth of the Northern Mariana Islands

Department of Public Health

Office of the Secretary

NOTICE AND CERTIFICATION OF FINAL ADOPTION OF THE PROPOSED AMENDMENTS TO THE RULES AND REGULATIONS GOVERNING THE ADMINISTRATION OF THE MEDICAL REFERRAL PROGRAM

I, Pedro T. Untalan, MHA, Acting Secretary of the Department of Pubic Health of the Commonwealth of the Northern Mariana Islands, which has promulgated AMENDMENTS TO THE RULES AND REGULATIONS GOVERNING THE ADMINISTRATION OF THE MEDICAL REFERRAL PROGRAM as originally published in the Commonwealth Register, volume 26, number 1, page 21531, January 22, 2004, by signing below hereby certify that as published such Rules and Regulations are a true, complete, and correct copy of the Rules and Regulations previously proposed which, after the expiration of appropriate time for public comment, have been finally adopted without modification. I further request and direct this Notice and Certification to be published in the CNMI Commonwealth Register. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 23 day of February 2004 at Saipan, in the Commonwealth of the Northern Mariana Islands.

Date 2/23/04

PEDRO T. UNTALAN, MHA
Acting Secretary of Public Health
Department of Public Health

Pursuant to 1 CMC 2153, as amended, this Notice and Certification of Adoption, and the Amendments to the Rules and Regulations Governing The Administration of the Medical Referral Program to which they apply, have been reviewed and approved by the Office of the Attorney General.

Date 2/23/04

BENJAMIN J. SACHS
Acting Attorney General

Received by: Date 2/23/04

THOMAS TEBUTEB
Special Assistant for Administration

Filed by: Date 2-23-04

BERNADITA B. DELA CRUZ
Commonwealth Registrar

Commonwealth of the Northern Mariana Islands

Department of Public Health

Office of the Secretary

NOTICE AND CERTIFICATION OF
FINAL ADOPTION
OF SCHEDULE OF FEES

—

I, Pedro T. Untalan, MHA, Acting Secretary of the Department of Pubic Health of the Commonwealth of the Northern Mariana Islands, which has promulgated a proposed Schedule of Fees as originally published in the Commonwealth Register, volume 26, number 1, page 21659, January 22, 2004, by signing below hereby certify that the below published Schedule of Fees is a true and correct copy of the Schedule of Fees formally adopted by the Department of Public Health, after the expiration of appropriate time for public comment, and receipt of the same.

I request and direct this Notice and Certification to be published in the CNMI Commonwealth Register. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 23 day of February 2004 at Saipan, in the Commonwealth of the Northern Mariana Islands.

2/23/04

PEDRO T. UNTALAN, MHA
Acting Secretary of Public Health
Department of Public Health

Pursuant to 1 CMC 2153, as amended, this Notice and Certification of Adoption, and the Amendments to the Rules and Regulations Governing The Administration of the Medical Referral Program to which they apply, have been reviewed and approved by the Office of the Attorney General.

Date 2/23/04

BENJAMIN I. SACHS
Acting Attorney General

Received by: Date 2/23/04

THOMAS TEBUTEB
Special Assistant for Administration

Filed by: Date 2.23.04

BERNADITA B. DELA CRUZ
Commonwealth Registrar

DEPARTMENT OF PUBLIC HEALTH
PARTIAL AMENDMENT TO SCHEDULE OF FEES

DESCRIPTION	Amended Fees
Forensic Services, per hour	$ 200.00
Daily occupancy rate at the Transitional Living Center [1]	$ 100.00

[1] ***(This amount does not include medication costs, clothing, personal care items, recreational costs, and other items for which the patient remains separately responsible.)***

DELETED FROM CHC FEE SCHEDULE	CPT CODE
(These services are not available through CHC Providers)	
Eye Examination	92002
Eye Examination	92004
Eye Examination	92012
Eye Examination	92014
Eye Examination	92018
Special Eye Evaluation	92020
Special Eye Evaluation	92060
Special Eye Evaluation	92081
Visual Field Exam	92082
Visual Field Exam	92083
Serial Tonometry Exam	92100
Galucoma Provocative Test	92140
Eye Exam with photos	92230
Eye Exam with photos	92235
Eye Exam with photos	92250
Color Vision Examination	92283
Eye Photography	92285
Internal Eye Photography	92286
Contact Lens Fitting	92311
Contact Lens Fitting	92313
Prescription of Contact Lens	92315
Prescription of Contact Lens	92317
Prescription of Contact Lens	92325
Prescription of Contact Lens	92326
Remove Eyelid Lesion	67800
Revise Eyelashes	67820
Revise Eyelashes	67825
Treat Eyelid Lesion	67850

DISCUSSION OF PUBLIC COMMENTS RECEIVED IN
RESPONSE TO THE PROPOSED SCHEDULE OF FEES

At the time the proposed Schedule of Fees was published, the public was asked to provide comments. A number of comments, both oral and written, were received and considered by the Department of Health. Copies of the written comments received in response to the prior public notice are available for inspection at the Department of Health during regular business hours. Discussion of some of the comments on those issues not adopted today will be deferred until those issues are further considered and will then be taken as a whole. The comments received on the rates now adopted covered the following issues, as well as the general issue of the rate increase.

Comment: Some commenters supported a rate increase; others did not. Those opposing it most often cited their concern for indigent persons, which is discussed below. Others said that the legislature should more fully fund the Department of Public Health so that rate increases are not necessary. Other comments supported increasing the Department of Pubic Health rates since, they said, there had not been a rate increase since 1995, existing rates do not recover the costs of care, and the low rates actually prevent private practitioners from being paid fair rates by insurers because the DPH rates establish a "benchmark" for rates.

Response: The Department of Public Health will take some more time and further study and refine some of the specific proposed rates. As a result, only certain parts of the proposed Schedule of Fees are being adopted today. The indigent care issue is discussed below.

Comment: One commenter opposed the rate for Transitional Living Center services because of concern that the persons living there could not afford the rate.

Response: The Transitional Living Center has an ability to pay scale so that persons living there pay in accordance with their ability. Further, the Social Security Administration will not pay SSI benefits to persons living there unless they are charged the cost for their room and board and other expenses. When this was explained to the commenter, he then agreed that the rate would be acceptable.

Comment: Several persons expressed concern that indigent persons could not afford the increased rates.

Response: The poor in the CNMI are covered for medical services through the Medicaid and the Medically Indigent Programs, as well as by employers' obligation to pay for medical care of non-resident workers. In addition, there is a CNMI statute, which authorizes the Department of Health's long-standing practice of never refusing medical services to any person based on his or her inability to pay for the services.

Comment: One commenter stated that the increase in fees for forensic services (litigation/claims related medical services) should have been done a long time ago and probably should be greater in amount. Another questioned the deletion of certain eye related services.

Response: Fees have been charged in the past for forensic services and the rate approximates the cost of providing these services. These eye rates were deleted because these services are not currently available at the Commonwealth Health Center.

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capital Hill
Saipan MP 96950
Tel: (670) 664-2341 Fax: (670) 664-2349

MEMORANDUM AND ORDER

January 15, 2004

To: All Immigration Personnel

From: Pamela Brown, Attorney General

Re: Rescission of Prior Orders/
Discontinuance of Entry Permits

---

1. Rescission of Prior Orders

Reference is made to that certain memorandum dated March 9, 1998 (hereinafter, the "Memorandum") issued by the Acting Secretary of Labor and Immigration and pursuant to which the CNMI restricts the entry of certain persons from the nations of Bangladesh, Nepal, Pakistan, Sri Lanka, and China, and that certain notice dated March 15, 2002 (hereinafter, the "Notice") also issued by the Acting Secretary of Labor and Immigration and pursuant to which the CNMI bars applications of "new-hire nonresident workers" for persons from Bangladesh, Sri Lanka, and the Fujian Province of China. To the extent that the Memorandum and the Notice (both attached hereto) are still in force, they are hereby rescinded in their entirety.

2. Discontinuance of Entry Permits

The Attorney General hereby finds that the governments of the below-listed locations (each an "Excluded Location") have consistently proven unable to provide adequate background information regarding their nationals, citizens, subjects and residents who seek to travel to the Commonwealth. This inability, in turn, has greatly burdened the legal and immigration enforcement systems of the Commonwealth. Moreover, the Commonwealth cannot independently ascertain the backgrounds of such individuals without a substantial diversion of resources from other law enforcement activities. In light of these circumstances, this Office hereby finds that a presumption of entry for nationals, citizens, subjects and residents from an Excluded Location would pose an unacceptable risk to the security, health and welfare of the people of the CNMI.

Based on such findings and pursuant to the authority vested in this Office under 3 CMC § 4312 and Immigration Regulation § 804, you are hereby ordered to discontinue issuance of entry permits to all nationals, citizens, subjects and residents from the following locations:

- Afghanistan
- Algeria
- Bahrain
- Bangladesh
- Cuba
- Egypt
- Eritrea
- Fujian Province of China
- Indonesia
- Iran
- Iraq
- Jordan
- Kuwait
- Lebanon
- Libya
- Morocco
- Myanmar
- Nepal
- North Korea
- Oman
- Pakistan
- Qatar
- Saudi Arabia
- Somalia
- Sri Lanka
- Sudan
- Syria
- Tunisia
- United Arab Emirates
- Yemen

Effective immediately, no Visitor Entry Permit, Authorization to Board, or any other document permitting entry into the Commonwealth, shall be issued to such nationals, citizens, subjects or residents except pursuant to an express written authorization issued by the Attorney General or his duly appointed designee. Violation of this Order may result in criminal charges pursuant to Public Law 9-5.

Notwithstanding the above, if a person arrives in the Commonwealth from an Excluded Location, he or she must be treated with the utmost courtesy and respect. Such persons must be informed that they have a right to appeal directly to the Attorney General. Should he or she request an appeal, whether verbally or in writing, you should promptly contact the Office of the Attorney General. Only the Attorney General, or a person properly designated by the Attorney General, is authorized to reverse or modify this Order or an individual exclusion.

3. Publication and Review

This Order shall be published in the Federal Register pursuant to 1 CMC § 9102 and Immigration Regulation § 804. The discontinuance of entry permits for the Excluded Locations listed herein shall continue until further notice, but shall, in any event, be subject to review and renewal on or before six months from the date of this Order.

Respectfully,

PAMELA BROWN
Attorney General
Commonwealth of the Northern Mariana Islands

Attorney General
Legal Opinion
02 01

Commonwealth of the Northern Mariana Islands
Office of the Attorney General

2nd Floor-Administration Building Capitol Hill
Caller Box 10007, Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/23-67/2368
Fax: (670) 234-7016

April 9, 2002

VIA FACSIMILE
664-2710
Honorable Gregorio V. Deleon Guerrero
Chairman
Saipan and Northern Islands Municipal Council
P.O. Box 500309
Saipan, MP 96950

Dear Chairman Guerrero,

I am in receipt of your request for a legal opinion on the Saipan and Northern Islands Municipal Council's authority to enact local ordinances. The Attorney General has asked that I respond to this request.

ISSUE

Does the Saipan and Northern Islands Municipal Council have the right to enact local ordinances under the N.M.I. Constitution?

LAW

The Saipan and Northern Islands Municipal Council seeks the authority to enact local ordinances. However, the N.M.I. Constitution specifically grants the representatives of senatorial districts the power to enact local ordinances. The N.M.I. Constitution Article II §6 states:

> **Local Laws.** Laws that relate exclusively to local matters within one senatorial district may be enacted by the legislature or by any affirmative vote of a majority of the members representing that district. The legislature shall define the local matters that that may be the subject of laws enacted by the members from the respective senatorial districts, laws enacted through initiative by the voters of a senatorial district under N.M.I. Const. art. VI §3(e); or local ordinances adopted by agencies of local government established under N.M.I. Const. art. VI §6(b).

The legal concept of 'priority of laws' ranks the applicable CNMI laws in order of authority. The N.M.I. Constitution so long as it does not conflict with the U.S. Constitution ranks second in priority with the Covenant and applicable U.S. Constitution sections ranking first. *CNMI v. Tinian Gaming Control Commission, 3 N.M.I. 133, 144-*

149 (1992). In this situation, we must look to the authority vested in the legislature by the N.M.I. Constitution.

In interpreting the meaning of statutes or constitutional clauses, the plain meaning of words will be given effect. *Camacho v. Northern Marianas Retirement Fund, 1 N.M.I. 362 (1990).* The above quoted section clearly grants only the senatorial district representatives the authority to enact local ordinances. The N.M.I. Constitution does not grant any other governmental body the authority to enact local laws. Therefore, it is the opinion of the Attorney General that there is no legal authority for the Saipan and Northern Islands Municipal Council to enact local ordinances.

SECOND ISSUE

Should this issue be certified to the Commonwealth Supreme Court for resolution?

LAW

Regarding the certification of a legal issue to the supreme court, the N.M.I. Constitution article IV section 11 states:

> Whenever a dispute arises between or among Commonwealth officials who are elected by the people or appointed by the governor regarding the exercise of their powers or responsibilities under this constitution or any statute, the parties to the dispute may certify to the supreme court the legal question raised, setting forth the stipulated facts upon which the dispute arises. The supreme court may deny the request to rule on the certified legal question. If the request is accepted, then the ruling of the supreme court shall be binding upon the parties before the court.

It is the opinion of the Attorney General that since the N.M.I. Constitution clearly does not grant the municipal councils the authority to enact local legislation, there is no dispute to certify to the supreme court. This section pertains only to bona fide disputes based on differing interpretations of a legal issue. *Sonoda v. Cabrera, Certified Question, No. 96-001(N.M.I. April 29, 1997)(slip op. at 2.)*

Furthermore, the House has recently proposed Legislative Initiative No. 13-001 which seeks to authorize municipal councils to enact local laws. This would be the most appropriate means of achieving this goal.

Cynthia Fernandez-Romano
Assistant Attorney General

Robert T. Torres
Attorney General

Attorney General
Legal Opinion
#02 02

Commonwealth of the Northern Mariana Islands
Office of the Attorney General

2nd Floor-Administration Building Capitol Hill
Caller Box 10007, Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/2367/2368
Fax: (670) 234-7016

April 11, 2002

Mr. Richard Manglona
Chairman
Rota Municipal Council
Ninth Rota Municipal Council
P.O. Box 144
Rota, MP 96951

Dear Chairman Manglona,

I am in receipt of your request for a legal opinion on the voting procedures of the Rota Municipal Council. The Attorney General has asked that I respond to this request.

ISSUE

May the Council require a unanimous vote for the confirmation of a Resident Director on Rota?

LAW

The Rota Municipal Council is authorized by N.M.I. Const. art. VI Section 6 which states in pertinent part:

> (a) There shall be municipal councils for Rota, Tinian and Aguiguan, Saipan and the islands north of Saipan, to be composed of three members, elected at-large in the island or islands to be served and on a non-partisan basis. ...Each council shall adopt its own Rules of Procedures.

Rota's Municipal Council Rule of Procedure XI Section 9 states:

> Any action of the Council shall require an affirmative vote of a *majority of the members present* unless otherwise provided by the Rules. (emphasis added)

Unless and until the Council's Rules of Procedure are amended to allow for the requirement of a unanimous vote the Council may not require a unanimous vote in any proceeding.

Rota's Municipal Council Rule of Procedure XV Section 1 further states:

> The Rules shall only be amended or repeal (*sic*) by resolution which has been on the calendar at least one Council session before, and adopted by a simple majority of the Council member.

This is the proper procedure to be followed by the Council if it desires to change its rules of procedure regarding voting requirements.

SECOND ISSUE

May the Council amend its rules to allow for voting by secret ballot?

LAW

The Council must follow the above procedures for amending its rules regarding *any* changes in its procedures. However, the Open Government Act may prevent the council from casting votes by secret ballot.

The purpose of the Open Government Act is to ensure that actions taken by government officials are public and that those officials are held accountable for their actions on behalf of the people. The Act applies to governing bodies which is defined by the Act as a:

> "...multimember board, commission, committee, council or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comments."

The Rota Municipal Council clearly fits within this definition. The Open Government Act does not specifically state that the actual voting results of each individual member of a governing body shall be made a matter of public record. However, in keeping with its purpose of holding governmental bodies and officials accountable for their actions while in office, a secret ballot vote would most likely not comply with the Open Government Act. Therefore, it is the opinion of the Attorney General that the Rota Municipal Council should not amend its rules of procedure to allow for secret ballots.

CRomano

Cynthia Fernandez-Romano
Assistant Attorney General

Robert T. Torres
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION

No. 02- 003

To: Hon. Juan Nekai Babuata, Governor

From: Robert T. Torres, Attorney General Robert T. Torres

Date: April 22, 2002

Re: Allotment Reduction Authority of the Governor

RECEIVED
APR 22 2002

Introduction and Issues Presented

This memorandum is in response to your recent query on the Governor's constitutional authority to reduce budgetary allotments to separate branches of the Government at a time when the Government is under continuing appropriations. Specifically you asked the following questions:

1) Whether the Governor and Department of Finance have the constitutional authority and duty pursuant to Article III, Section 1 and Article X, Section 8 of the NMI Constitution to apply a reduction in allotment to the Judicial and Legislative Branches of government?

2) If the Governor and Department of Finance have constitutional authority to apply a reduction in allotment to the Judicial and Legislative branches of government, did amending Article II, Section 16 of the NMI Constitution limit that authority in any manner?

Short Answers

1) Yes 2) No

Factual Summary

The issue in this dispute has arisen due to the Government being under a statutory continuing appropriation due to the lack of an approved budget since 1998, and a decrease in revenue estimate. As a result of a serious downturn in actual revenue collection this fiscal year, the Secretary of Finance informed the Governor of the necessity to reduce the Third and Fourth Quarter allotments in order to avoid a budget deficit.

On January 31, 2002, the Governor issued Directive No. 215 requesting all the executive branch agencies, semi-autonomous agencies and public entities to reduce expenditures. The Governor encouraged the autonomous agencies and entities and other branches to respond likewise. See Exhibit A, attached hereto.

On February 20, 2002, the Acting Governor sent a letter to the Legislature informing the Speaker and the Senate President of the revised decrease in estimated revenue. The revenue estimate for the current Fiscal Year for the General Fund, Non Resident Worker Fee Fund and Alien Deportation Fund was revised downward from $206,975,00 to $193,369,00 or 6.6% less than the estimate revenues for October 2001. The Acting Governor indicated that he instructed the Office of Management and Budget ("OMB") to issue the Second Quarter allotments based on this revised revenue projection. See Exhibit B, attached hereto.

On March 6, 2002, the Acting Governor informed the Legislature that he will be instructing OMB to implement proportionate reductions in Third and Fourth Quarter allotments for all branches, departments, offices, agencies and instrumentalities of the government to which Commonwealth funds are appropriated with the sole exception of the Public School System. (Emphasis added). See Exhibit C, attached hereto. Because the across-the-board cuts would severely impact several agencies, he also requested the Legislature to approve a joint resolution "authorizing reprogramming authority for the Governor in excess of the limits of 1 CMC Sections 7401 and 7402" for the Executive Branch.

On March 11, 2002 the Acting Governor issued a Memorandum to "All Department and Activity Heads" advising them of the proportionate cuts in the Third and Fourth Quarter allotments. See Exhibit D, attached hereto. Although the Acting Governor noted that the total projected resources are reduced by only 6.57%, he states in his Memorandum that the Public School System will be exempt from the budget cuts, and all other agencies would have to absorb a slightly higher reduction of 8.02 percent.

On April 11, 2002, the Chief Justice issued a letter to the Governor regarding the reduction of Third Quarter allotments to the Judiciary Branch. See Exhibit E, attached hereto. In his letter, the Chief Justice stated that the reduction by 8.02% of the Third Quarter allotments violated the separation of powers doctrine. However, the Chief Justice also stated that a 6.57% reduction would be acceptable (a proportional share of the total projected reduction).

Applicable Constitutional and Legal Authority

A. The Covenant – as Applicable.

Section 203(a) of the Covenant[1] provides for the CNMI's form of government. It states as follows:

> **Section 203.** (a) The Constitution will provide for a republican form of government with separate executive, legislative and judicial branches, and will contain a bill of rights.

B. The Commonwealth Constitution- as Applicable.

The Governor derives his authority from Article III of the Commonwealth Constitution. The relevant sections that are applicable to these legal issues are as follows:

[1] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America., reprinted at the note at 48 U.S.C. §1801, U.S. Pub. L. 94-241, 90 Stat. 263 (Mar. 24, 1976).

Section 1: Executive Power. "The executive power of the Commonwealth shall be vested in a governor who shall be responsible for the faithful execution of the laws."

Section 9: Executive Functions.

"a) The governor shall submit to the legislature a proposed annual budget for the following fiscal year. The proposed balanced budget shall describe anticipated revenues of the Commonwealth and recommended expenditures of Commonwealth funds. .... If a balanced budget is approved by the legislature, the governor may not reallocate appropriated funds except as provided by law. If a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year."

Additional constitutional authority is vested with the executive branch in Article X, Section 8 of the Commonwealth Constitution. The relevant portion of that section states as follows:

Section 8: Control of Public Finance. "The Department of Finance or its successor department shall control and regulate the expenditure of public funds."[2]

Finally, Article X of the Commonwealth Constitution requires that the government shall liquidate any deficit within the budget. Article X provides in part as follows:

Section 6: Liquidation of Deficits. "If an operating deficit is incurred ..., the government shall retire the deficit during the second consecutive fiscal year following the year."

C. Commonwealth Statutory Authority: The Planning and Budget Act of 1983 (P.L. 3-68).

The first relevant statute that provides guidance to these issues is the Planning and Budget Act of 1983 (hereinafter "the Act") (found at 1 CMC § 7101, et seq.). In particular, Section 7204 of the Act states in its pertinent parts as follows:

(e) Upon the effective date of the annual appropriation acts, quarterly allotments shall be issued based on such acts. The quarterly allotments **shall be revised quarterly** so as to be consistent with projected changes in estimated revenue collections...Decreases in estimated revenues **may be absorbed proportionately** by **all branches**, offices, departments, and agencies of the Commonwealth. The Office of the Governor and Director of Finance shall establish procedures to insure there is timely compliance with the provisions of this subsection. (Emphasis added).

[2] The Department of Finance is an executive branch agency, whose Secretary reports directly to you. In addition to this broad constitutional authority, the Legislature has passed a statutory framework, commonly known as the Planning and Budgeting Act 1 CMC §7101 et.seq. That statute further delineates the Governor's role in the budgetary and public fund expenditure process. In particular there are two relevant portions of that act to the issue at hand. The first statute specifically deals with situations where the Governor makes a "Change in Revenue Estimate."

A second relevant statute to these issues is Section 7604 of the Act, which states as follows:

> (a) Whenever the Director of Finance determines with reasonable certainty that the actual revenues which the Commonwealth will receive during a fiscal year will differ by more than $200,000 or by more than three percent from the revenue estimates in the budget resolution(s), the director shall promptly inform the Governor.
>
> (b) In the case of a $200,000 or three percent or more **increase** in revenues, the Governor shall transmit within 15 calendar days a special budget message to the legislature proposing to:
>
> (1) Increase the reserve for the fiscal year; or
>
> (2) Provide additional budget authority for the fiscal year.
>
> (c) In the case of a $200,000 or three percent or more **decrease** in revenues, the Governor shall within 15 calendar days:
>
> (1) Transmit a special budget message proposing to reduce the reserve for the fiscal year;
>
> (2) Transmit a special message under 1 CMC § 7601, proposing the rescission of budget authority for such year;
>
> (3) Transmit a special message under 1 CMC § 7602, proposing a deferral of budget authority until the close of the fiscal year; or
>
> (4) Transmit a special message under 1 CMC § 7204(e), mandating an immediate proportionate reduction in the allotment authority of all branches, offices, departments, agencies, and instrumentalities of the Commonwealth which are subject to appropriations.
>
> (d) Any message transmitted under this section shall include a detailed explanation of the changes in revenues, including the specific accounts affected and the reasons for such changes.
>
> (e) Any increases in revenues shall be held in reserve, unless appropriated by the legislature. **Any decrease in revenues** less than $200,000 or three percent **shall be offset** against the reserve, if any, **or shall be dealt with by the Governor** in accordance with the procedures established by subsection (c) of this section if the Governor deems such action is necessary **to prevent a deficit budget for the fiscal year**.

1 CMC § 7604 (emphasis added).

D. Public Law 11-41, the 1999 Fiscal Year Budget

The last relevant law that adds to this discussion is Public Law 11-41, the FY '99 Budget, which was passed in 1998. The relevant and pertinent portions of that act are as follows:

> **Section 501. Allotments.**
>
> (b) Nothing in this section shall be construed as modifying, limiting, or otherwise affecting the authority of the Governor pursuant to Chapter 6 of Division 7 of the Title 1 of the Commonwealth Code.[3]

These sections are the relevant constitutional and statutory authority which will form the underlying backdrop of the discussion and advice that we offer in this opinion.

Discussion and Analysis

The broad decree of authority given to you by the Constitution confirms upon you an affirmative obligation to faithfully execute the laws of the Commonwealth. That duty to execute the laws includes the statutes that are referenced in this opinion. Furthermore it is well-settled law that a statute must be given its plain meaning, and language may not be added to change or alter that meaning. Nansay Micronesia Corp. v. Govendo, 3 N.M.I.12 (1992); Camacho v Northern Marianas Retirement Fund, 1 N.M.I. 362 (1990); Pacific Saipan Technical Contractors v. Rahman, Appeal No. 99-008, slip op. at 7 (N. Mar. I. Supreme Court, 2000).

The Planning and Budget Act also delegates the issuance of quarterly allotments to the Office of the Governor through the Secretary of Finance. 1 CMC § 7204(e). However, Section 501(a) Public Law 11-41 (hereinafter "1999 Budget Act"), enacted in 1998, provides that the funds be distributed and allotted by the OMB.

Statutory Duties of the Governor

In the event that there is a revised decreased revenue estimate of at least $200,000 or three percent, the Governor had four options to respond to this revenue decrease. Section 7604(c) of the Planning and Budget Act provides that when the Secretary of Finance informs the Governor of a 3 percent or more decrease in revenues, the Governor **shall**, in 15 calendar days, respond in one of ways enumerated in the Act. The use of the term "shall" is unambiguous and therefore means "must". Bank of Hawaii v. Teregeyo, 3 CR 876, 881 (1989); Sutton, "Use of 'Shall' in Statutes", reprinted in Sutherland, Statutory Construction, (6th Ed.), Vol. 1A, p. 936. Use of the word "shall" in the statute is mandatory and has the effect of creating a duty. This is particularly so when the statute is addressed to public officials. Aquino v. Tinian Cockfighting Board, 3 N.M.I. 284 (1992).

[3] Chapter 6 of Division 7 of Title 1 of the Commonwealth Code is the afore-referenced Planning and Budget Act, which provides for, inter alia, Changes in Revenue Estimate (1 CMC § 7604).

The first option the Governor had under Section 7604(c) of the Act was to "transmit a special budget message proposing to reduce the reserve for the fiscal year". 1 CMC § 7604(c)(1). In the event that there is a reserve, the Governor will need Legislative concurrence in accordance with 1 CMC § 7204(c).

The Governor's second option was to "transmit a special budget message under 1 CMC § 7601 proposing the recession of budget authority for such year". 1 CMC § 7604(c)(2). Section 7601 of the Act controls the Governor's recession authority. Section 7601(a) requires that the Governor present the recession message to both houses of the Legislature, and the Legislature has 30 days to act or the proposed recession will be deemed accepted. 1 CMC § 7601(b).

The Governor's third option was to "transmit a special message under 1 CMC § 7602 proposing a deferral of budget authority until the close of the fiscal year". 1 CMC § 7604(c)(3). Section 7602 of the Act expressly provides that the Governor does not have deferral authority over the judicial or legislative branches. Thus deferral authority is restricted to the Executive branch.

The Governor's fourth option was to "transmit a special message under 1 CMC § 7204(e) **mandating** an immediate proportionate reduction in the allotment authority of **all branches**, offices, departments, agencies, and instrumentalities of the Commonwealth which are subject to appropriations". 1 CMC § 7604(c)(4) (emphasis added).

Section 7204(e) of the Act states that "[t]he quarterly allotments **shall be revised quarterly** so as to be consistent with projected changes in estimated revenue collections." (emphasis added). Whereas Section 7204(e) provides that revenues may be absorbed proportionately, allowing a permissive proportionate absorption by all branches, Section 7604(c)(4) mandates an immediate proportionate reduction in the allotment authority. Section 7604(e) of the Act further provides that **the Governor** shall deal with any decrease in revenues (for a less than $200,000 or three percent) "to prevent a deficit budget for the fiscal year." Logically, if the decrease in revenues is greater than $200,000 or three percent, then the Governor has an even more compelling duty "to prevent a deficit budget for the fiscal year."

On February 20, 2002, pursuant to your constitutional and statutory duties, you transmitted a message to the Legislature that a reduction in revenues was apparent based upon the ongoing revenue collections. In that message, the new projected revenue estimate for FY 2002 was approximately $193 Million dollars, as opposed to the previous, October 2001, revenue projection of approximately $206 Million dollars.

After the February 20, 2002, message, your office issued a memorandum pursuant to your office's statutory authority on March 11, 2002 advising government departments that there was a reduction in Current Year Funding Level. That memorandum stated that each agency would receive a gross 8.02% reduction in their 3rd and 4th Quarter allotments to correspond to the reduction in revenues. The memorandum went on to state that each agency would be cut by 8.02% percent, which is slightly higher than the 6.57% actual reduction in revenues, because the PSS would be spared any such reduction in order to show the administration's support for education.

Your authority to reduce the budgetary allotment is derived from the Planning and Budget Act, 1 CMC §§ 7604(c)(4) and 7204(e). That statute plainly states that the allotment reductions **apply to all branches**, offices, departments, agencies, and instrumentalities of the Commonwealth, which are subject to appropriations. (Emphasis added). By using broad and inclusive language, such as "all branches...and instrumentalities of the Commonwealth," the legislature was indicating that your authority to reduce

budgetary allotments is not limited to merely executive branch agencies, but also to the other two branches of the government. The legislature and the judiciary are both branches of the government, thus the Governor has the authority to reduce the budgets of those two branches, so long as the $200,000 or 3% reduction in revenues condition is met. Your authority in this regard is not solely derived from these statutes but the Constitution as well.

Article III, section 9(a) of the Commonwealth Constitution confers the Governor with the authority to submit a proposed annual budget. Section 9(a) also provides that if a balanced budget is approved by the Legislature, the Governor may not reallocate appropriated funds except as provided by law. However, if a balanced budget is not approved before the first day of the fiscal year, Section 9(a) does not further restrict the Governor's authority. Therefore, it logically follows that the authority to submit the budget, as well as the Secretary of Finance's constitutional duty to control and regulate the expenditure of public funds, properly places the authority to effect allotment reductions in your office as well.

A review of Article IV of the Constitution, which created the Judicial branch, confers no authority to the Judiciary over its budget. N.M.I. Const. art. IV (amended 1997). Similarly, Article II of the Constitution, which created the legislative branch, only provides that the legislative budget shall be capped at a certain level. N.M.I. Const. art. II, §16 (amended 1997). Section 16 of Article II does not limit the Governor's authority to reduce the other two branches' allotments; rather, it merely limited the ceiling of the legislature's budget.[4] Because 1 CMC § 7604(c) is not in conflict with the CNMI Constitution, it therefore must stand. In sum, section 16 contains no language on whether or not the legislature has any say in the executive branch reducing their budgetary allotment, pursuant to a lawfully exercised statutory authority.

Your express constitutional and statutory authority in the budgetary and expenditure process stands in stark contrast to the lack of any such constitutional authority given to the other two branches. For example, in passing the Planning and Budgeting Act the Legislature could have reserved unto itself, whether by statute or constitutional amendment, a specific allocation of funds from the CNMI Budget. Likewise, in the 1997 initiative formally establishing the Judiciary Branch, the drafters of that initiative (and the voters who approved the initiative) could have allowed for a specific set-aside of the revenues for the Judiciary Branch. I do note, for example, that the Legislature has specifically allocated revenues to the Judiciary for use toward the court building fund account. However, the state of the law presently vests such "allocation reduction authority" within the province of the Governor through the Planning and Budgeting Act. Additionally the express provision in Article X, Section 8 of the CNMI Constitution, where the Department of Finance shall "control and regulate the expenditure of funds," is consistent with the allotment reduction process since it simply provides a method to accomplish that responsibility.

Other jurisdictions have looked at this issue and have addressed it in similar ways. The State of Connecticut has a similar statute wherein the legislature delegated authority to the Governor to reduce allotments based on revenue shortfalls. The purpose of that statute was to avoid a budget deficit. The court in University of Connecticut Chapter AAUP v. Governor 512 A.2d 152 (Conn.1986) held similarly.

[4] Section 16(b) of Article II of the Commonwealth Constitution did affect Section 7401(c) of the Planning and Budget Act in that rather than giving the Speaker of the House of Representatives and the Senate President expenditure authority in each house, individual members became entitled to equal amounts within the established ceilings and allowed the members to pool their funds. Section 505(b) and (c) of Public Law 11-41 further provides that the expenditure authority for the funds so appropriated vests in the individual members.

The substance of that opinion is set forth as follows:

> An examination of this statutory scheme reveals it does not delegate a strictly legislative function. In particular, it does not delegate the legislative authority to appropriate, as the plaintiffs argue. Rather, it delegates to the governor the power over making expenditures by allowing him to reduce quarterly allotments under certain well defined circumstances. See, Opinion of the Justices, 375 Mass. 827, 376 N.E.2d 1217 (1978). As the trial court recognized, the executive branch is most capable of having detailed and contemporaneous knowledge regarding finances. Under the constitutional separation of powers, the governor uses that knowledge in making such spending decisions and to see that the laws are faithfully executed. See Conn. Const., art. IV § 12; Opinion of the Justices, supra, 834, 376 N.E.2d 1217. We find that General Statutes § 4-85(b) does not confer legislative power upon the governor in violation of the separation of powers doctrine contained in article second of our constitution.
>
> The plaintiff next argues that, if we assume the General Assembly had the power to enact the statute it does not set forth sufficient standards to circumscribe the governor's execution of delegable powers appropriately. We disagree.
>
> In passing on the constitutionality of the standards as set forth in the statute we will make every presumption and intendment in favor of their validity, and sustain the enactment unless its unconstitutionality is established beyond a reasonable doubt. See New Milford v. SCA Services of Connecticut, Inc., 174 Conn. 146, 148, 384 A.2d 337 (1977). In order to render admissible a delegation of legislative power, it is necessary "that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform." New Milford v. SCA Services of Connecticut, Inc., supra, 149, 384 A.2d 337, citing State v. Stoddard, supra, 126 Conn. at 628, 13 A.2d 586; Wilson v. Connecticut Product Development Corporation, 167 Conn. 111, 120, 355 A.2d 72 (1974); State v. Griffiths, 152 Conn. 48, 57, 203 A.2d 144 (1964); 1 Am.Jur.2d, Administrative Law § 117.
>
> Under the statute, the governor may exercise his delegated power if (1) due to a change in circumstances since the budget was adopted certain reductions should be made in various allotments of appropriations or (2) the estimated budget resources during such fiscal year will be insufficient to pay all appropriations in full, "in which event the governor may modify such allotments to the extent the governor deems necessary....".
>
> The provision limits the reduction to no more than 3 percent in any fund or 5 percent in any appropriated account. The plaintiffs argue that the standards of "deems necessary" and "a change of circumstances" in subsection (1) permit the governor to make a reduction in an appropriation in his unrestrained discretion. We disagree. The governor's authority under subsection (1) is limited to a change of circumstances since the budget was adopted, as well as the 3 percent reduction limit on any fund and

> the 5 percent reduction limit on any appropriated account. We agree with the trial court that these standards are constitutionally sufficient under our law in that they are "as definit[e] as is reasonably practicable under the circumstances." Wilson v. Connecticut Product Development Corporation, supra.
>
> The duty to supervise the execution of the budget has been vested in the executive branch by our legislature. General Statutes § 4-69 et seq.; see Report of the Connecticut Commission Concerning the Reorganization of the State Departments (1935); Opinion of the Justices, supra, 375 Mass. at 835-37, 376 N.E.2d 1217. To require any more specificity in the standards as set forth in subsection (1) would hamper the flexibility needed for the governor to monitor and administer expenditures and to supervise the execution of the budget.

The University of Connecticut case is squarely on point with the issue before us, as to whether or not your authority to reduce budgetary allotments was properly delegated to you by the legislature. The Connecticut statute is only triggered wherein there is a 1% reduction in revenue shortfall. Our Legislature chose a 3% reduction trigger in 1 CMC §7604. The only remarkable difference with the Connecticut statute, and the CNMI statute, is that in Connecticut, allotment reductions are capped at 3%, where in the CNMI, there is no cap other than to make the cuts proportionate across the Government as a whole.[5]

The foregoing analysis supports my view on the question presented that there is no violation of the separation of powers doctrine when the Executive Branch executes its authority to monitor and administer expenditures to fulfill a constitutionally imposed mandate. In the CNMI Constitution, that mandate is the express prohibition against deficit spending. The Planning and Budgeting Act sets forth the mechanism by which the Executive Branch will carry out and effect that mandate. Further, the Executive Branch has not intruded into the provinces of the Legislative and Judiciary Branches because each branch continues to have reprogramming authority to allocate the resources, albeit reduced, allotted from the current available revenues. Indeed, it is for this precise reason that the Legislature has extended 100% reprogramming authority to the Governor under continuing resolution for the Executive Branch. Likewise, the Legislature and Judiciary continue to have their own authority to exercise fiscal prerogatives within their branches through reprogramming. In the Legislature this is conferred upon the leadership of the two houses. In the Judiciary, this appears to be vested in the Chief Justice.

The United States Supreme Court has also addressed the issue of separation of powers in the case of Bowsher v. Synar 478 U.S. 714, 106 S.Ct. 3181 (1986). In Bowsher, the court was asked to pass approval on the Gramm-Rudman-Hollings Budget Deficit Reduction Act. (1985), Pub.L. 99-177, 2 U.S.C. 901 et. seq. This law purported to reduce the U.S. Budget Deficit by making across the board cuts to all agencies except the Social Security Administration. The act gave the authority to make those cuts to the Comptroller General of the United States.

---

[5] This issue is factually distinguishable from a similar case out of New Mexico. In State ex. rel. Schwartz v. Johnson 907 P.2d 1001 (N.M. 1995), that court invalidated an allotment reduction statute for lacking sufficient standards, mostly because there was no revenue reduction trigger, and the statute gave discretion to the Governor as to which agencies allotments to reduce. Both of those issues were more than adequately dealt with by the CNMI Legislature in passing 1 CMC §7604, as they created specific and articulate standards and a procedure to follow in order for the Governor to properly exercise this authority.

The Court invalidated that portion of the act as a violation of the separation of powers doctrine. The Court noted that Congress could remove the Comptroller General, pursuant to statute. The Court further reasoned that **the act of reducing public expenditures was an executive function** being improperly transferred to a legislative branch employee. However, the Bowsher case is factually distinct from the issue here because the actual authority to reduce the allotments is vested with the Governor consistent with the prohibition against deficit spending. The rule from Bowsher still holds, however, in that the act of reducing public expenditures is properly vested in the Executive Branch. That holding is still respected by the Planning and Budgeting Act.

CONCLUSION

The Office of the Attorney General therefore concludes that there is clear authority, both constitutionally and statutorily, for the Governor to reduce the budgetary allotments for all branches, agencies and instrumentalities of the Government, including the Judiciary and the Legislature. However, there is one attending ancillary issue which follows this conclusion which is discussed below.

In our review of the pertinent documents related to this issue, there is a concern with the March 11, 2002 memorandum which states that PSS will be spared this allotment reduction "in line with this administration's commitment to supporting our children's education." Please be advised that your statutory authority to reduce allotments requires such reductions to be "proportionate." That statutory authority clearly states that the Governor may not discriminate between branches, instrumentalities, or autonomous agencies such as PSS with respect to the reduction of allotments. The Governor's authority to reduce allotments is not unfettered. The "proportionate allocation" rule operates to spread out the fiscal sacrifices, on account of reduced revenues, throughout the CNMI government without exception so long as an entity receives funds appropriated by the Legislature. The Legislative and Judiciary Branches have been subjected to such sacrifices. Other agencies have also been subjected to fiscal constraints and reduction of allotments. The same rule mandates consistent application to an entity such as the Public School System. If the Legislature had so desired to except an entity such as PSS it would have done so. Clearly it did not. Therefore, there is no exception to the rule. PSS must bear the same reduction in allotments.

Furthermore, Section 7604(c)(4) of the Planning and Budget Act uses the word "mandating." In light of the fact that there is no statutory definition of the term "mandate" nor Commonwealth case law defining the term, we look at case law from other jurisdictions.[6] 7 CMC §3401. Generally, a "mandate" is an order, command [or] charge." Xth Olympiad Com. v. American Olym. Assn., 42 P.2d 1023 (Cal. 1935); see also, Morris v. Country of Marin, 559 P2d 606 (Cal. 1977) ("mandatory duty" is an obligatory duty which a governmental entity is required to perform); Bridgman v. American Book Co., 173 N.Y.S. 502,

[6] 7CMC § 3401. Applicability of Common Law.

506 (1958) ("mandate" is "a command, order, or direction... which a person is bound to obey"). Although the action of excepting public education from any reductions in budgetary allotments may be an admirable expression of policy, it does not comply with Section 7604(c)(4), which requires the allotment reductions to be proportionate.

It is noted that there is an issue with this statute's mandatory language being in conflict with seemingly permissive language on the same issue contained in 1 CMC §7204(e). That statute states as follows: "Decreases in estimated revenues may be absorbed proportionately by all branches, offices, departments, and agencies of the Commonwealth."

However, 1 CMC §7204 is specifically dealing with the "Approval of the Annual Budget," whereas 1 CMC §7604 is specifically dealing with a change in revenue estimate situation. The latter statutory provision, which contains the mandatory proportionate reduction, is the specific statute at issue whereas, 1 CMC §7204, which contains the optional proportionate reduction language, is the general statute applicable to revenue shortfalls when there is an approved budget. We do not have a current approved budget, but rather remain under continuing appropriations. See 1 CMC § 7204(d). It is a well-settled rule of construction that a specific statute controls over a general statute. Limon v. Camacho Appeal No. 94-040, slip op. at 12 (N. Mar. I. Supreme Court, 1996), (more specific statute controls over more general one), citing Statutes and Statutory Construction, See 2B Norman J. Singer, §51.05 at 174 (6th Ed.). The apparent conflict, therefore, is of no consequence to the issues in this opinion.

Therefore, the Planning and Budgeting Act plainly requires that any allotment reductions instituted across the Government as a whole must be proportionate, and therefore no agency can be spared from such a reduction. This requirement does not prohibit any official with reprogramming authority from exercising his or her reprogramming authority pursuant to 1 CMC § 7402.

For the foregoing reasons, it is therefore the opinion of the Attorney General that the Governor has the proper legal authority to reduce budgetary allotments across all levels of the government, including the separate branches of the Government, the Judiciary and the Legislature. However, in accordance with that authority, all such allotment reductions must be proportionate. No agency can be forced to accept a larger reduction in order to spare another agency, a "share the pain" rule which is especially appropriate during these times. Indeed, the current fiscal condition of the Commonwealth resulting in the reduction of allotments has prompted your very request for a legal opinion. Having tendered such an opinion it is my humble view that the legal issues are only ancillary to the policy issues for consideration by the Administration, the Legislature and the Judiciary. The reduction of allotments only underscores the constitutional mandate to prohibit deficit spending. At the same time, the three branches must convene and identify those needs and priorities which will allow the central government and the other two branches to serve the public. These difficult fiscal and policy choices are, in my view, the real issues for resolution. To achieve resolution will require frank and open discussion between the three branches of government.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OFFICE OF THE GOVERNOR
Capitol Hill
Saipan, MP 96950

DIRECTIVE

31 JAN 2002
NO. 215

TO: All Executive Branch Employees, Department and Activity Heads

FROM: Governor

SUBJECT: Continuation of Expenditure Controls

Projected revenues for the current fiscal year are $13.6 million less than budgeted expenses. This has been the case since before the beginning of the calendar year, yet allotments for the second quarter were not adjusted down to address the shortfall.

Under these circumstances, ensuring that the government is able to provide essential public services and avoid lay-offs or other work reductions will require all of us to understand the seriousness of the situation and to respond by using care and good judgement. Each of us can make a difference.

In the coming weeks I will be keeping you and all of the public informed of the specifics of our fiscal situation and working with you to find solutions.

In the meantime, please, use the government resources in your control conservatively. Look for ways to save. Consider fully whether any spending decisions you make or recommend are truly necessary.

Share your ideas for saving with your co-workers and with me and Lt. Governor Benavente. We are looking for the best ideas and for innovative thinking, no matter who you are or what your position. Don't hesitate to come to us. The door is open.

Until fiscal conditions improve, the following expenditure controls will be in effect:

1. **Travel.** Travel outside the CNMI or between islands is not allowed at government expense unless authorized in advance by the office of Governor. This restriction applies to locally and federally-funded travel.

2. **Contracts.** No contracts in excess of $2,500 may be entered into or approved unless approved in advance by the office of Governor.

3. **Personnel actions.** No personnel actions involving hiring, re-hiring, reclassification, reassignments, or any other change of status may be processed without approval by the office of Governor. This requirement applies to all requests for personnel actions, whether involving a monetary benefit or being purely administrative in nature. All Civil Service employees who are hired at this time will be placed on Limited Term Appointments, due to the uncertainty of continued funding.

4. **Conversions.** No employee on a Limited Term Appointment may be converted to Civil Service Permanent Status. No New Hire may be converted to Civil Service Probationary Status.

021915

EXHIBIT
PAGE 4

5. **Overtime.** No extra-hour payments will be made to any overtime-exempt employee. All waivers previously granted are canceled with immediate effect.

6. **Overtime exception.** Overtime-eligible employees directly involved in law enforcement, fire protection, emergency management or medical services may be authorized by the Appointing Authorities to receive overtime at levels sufficient to protect and maintain public safety and health. Administrative personnel engaged in law enforcement, fire protection, emergency management or medical services will not be authorized to receive overtime. The Appointing Authorities will be responsible for accomplishing their department or activity mission within these constraints. The Secretary of Finance will be responsible for ensuring that no overtime is paid other than as defined in this Directive.

7. **Purchases.** No purchase of any capital items (e.g., computer equipment, furniture, vehicles) is permitted unless approved in advance by the office of Governor.

8. **Leases.** No lease or renewal of lease, including leases of office space and vehicles, is permitted unless approved in advance by the office of Governor.

9. **Utility conservation.** Department and activity heads will take immediate steps to reduce consumption of electricity, water, sewer, and telecommunications services. Simple steps, such as ensuring that lights are out at the end of the work day, leaks are fixed, and unused telephone lines disconnected, should be undertaken immediately.

10. **Expenditure control taskforce.** In order to assist departments and agencies in implementation of these expenditure controls I am hereby creating an expenditure control taskforce to be headed by the Special Assistant for Administration or his designee. Goals of the taskforce over the next 60 days will be the following reductions from current levels:

    - electricity costs by at least 10%,
    - telecommunications costs by at least 5%,
    - travel expenses by at least 10%,
    - vehicle leases by at least 10%, and
    - office rental expenses by at least 5%.

    In addition, the taskforce will assist managers in adhering to the overtime guidelines in this directive.

    Members of the taskforce will be the Director of Finance, the Special Assistant for the Office of Management and Budget, the Director of the Energy Division, and the Special Assistant for Telecommunications or their designees.

Should this directive conflict with travel or other actions already planned, you are required to postpone your plans.

Any requests for authorization, as required above, or requests for exceptions to these expenditure controls should be submitted to Special Assistant for Administration.

These measures apply to the entire Executive branch, including semi-autonomous agencies and entities. Other branches of government, and autonomous agencies and entities, including the Commonwealth Ports Authority, the Commonwealth Utility Corporation, and the Northern Marianas Retirement Fund, are encouraged to respond, likewise, to the present fiscal circumstances.

These measures are effective immediately.

This Directive supercedes and rescinds Directives No. 210, No. 207, No. 199, and No. 197.

JUAN N. BABAUTA

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta
Governor

Diego T. Benavente
Lieutenant Governor

FEB 2 0 2002

The Honorable Heinz S. Hofschneider
Speaker, House of Representatives
Thirteenth Northern Marianas
Commonwealth Legislature
Saipan, PM 96950

The Honorable Paul A. Manglona
Senate President
Thirteenth Northern Marianas
Commonwealth Legislature
Saipan, MP 96950

Dear Mr. Speaker and Mr. President:

This letter is to inform you that pursuant to Sections 7604 (c) and 7204 (c) of the Planning and Budgeting Act, the revenue estimate for FY for the General Fund, Non Resident Worker Fee Fund and Alien Deportation Fund is hereby revised downward from $206,975,000 to $193,369,000 or 6.6% less than the previous (October 2001) revenue projection.

We have completed our analysis of the actual revenue collections for the first quarter of Fiscal year 2002 (October 1, 2001 through December 31, 2001) and preliminary collection reports for January 2002. Total first quarter revenue declined 20.7% from $59,671,000 in FY2001 to $47,347,000 in FY2002. Of this decline, $8 million came in November, based on October economic activity, and $4 million in December, based on November economic activity. While the revenue trend, compared to the previous year, has been positive for several months, our preliminary analysis of January collections indicates we still have not reached prior year levels. Attached is a report comparing 1st quarter collections to the prior year and detailing our revised revenue estimate.

The revenue estimate of $206 million included in the prior administration's October 24, 2001 budget submission assumed a return to prior year revenue levels by January. While the improvement in economic activity over the last couple months is apparent in our revenue figures, the rate of recovery has not been fast enough to reach prior year levels as yet. Therefore, we have no choice but to reduce the revenue estimate for FY2002 to a

021918

EXHIBIT A

Caller Box 10007 Saipan, MP 96950 · Telephone: (670) 664-2200/2300 Facsimile: (670) 664-22

level consistent with current collections. We will monitor collections closely and provide you with revised estimates as they may become necessary.

In the absence of a budget, I have instructed the Office of Management and Budget to issue second quarter allotments based on this revised revenue projection.

Because of the significant ramifications of these changes, I would like to meet with the presiding officers and the leadership of the legislature to discuss measures that may be taken to protect our reduced resources. My key staff and I are ready to meet with you at your earliest convenience.

Sincerely,

DIEGO T. BENAVENTE
Acting Governor

Encl.: FY 2002 Revenue Estimates Adjusted for Reduced Revenues Based on FY 22002
Based on 3 Month Actuals

DEPARTMENT OF FINANCE

2002 REVENUE ESTIMATES ADJUSTED FOR PROJECTED REDUCED REVENUES BASED ON FY2002 3 MONTH ACTUALS (000's omitted)

OURCES	FY2001 Actual 1st Quarter	FY2002 Actual 1st Quarter	10/24/01 Budget Revenue Estimate	FY2002 02/08/02 Revenue Estimate	Estimated Reduction	Notes
ness Gross Revenue Taxes	14,086	11,925	54,542	52,397	(2,145)	5% improvement each quarter plus $1 million add. CIP
e & Salary Tax	7,870	7,894	33,219	31,576	(1,643)	Continue at 1st quarter level
ional Corporate Income Tax (NMTIT)	7,161	2,920	18,724	18,282	(442)	20% decline from FY2001
ning Jackpot Tax	620	520	2,585	2,485	(100)	Return to FY2001 level in Jan.
se Taxes	5,778	4,508	20,374	19,430	(944)	5% improvement each quarter
ment User Fee	8,917	7,353	32,483	30,444	(2,039)	15% decline from FY2001
el Tax	1,330	738	5,567	4,268	(1,299)	30% decline from FY2001
id Fuel Tax	1,185	1,350	4,074	4,374	300	Continue at FY2001 levels
erage Container Tax	407	343	1,342	1,372	30	Continue at 1st quarter level
Tax	361	260	1,266	1,098	(168)	30% decline from FY2001
Penalties and Interest	291	96	825	825	0	Improved enforcement
Taxes	48,006	37,907	175,001	166,550	(8,451)	
sement Machine Licenses	4,086	3,718	7,806	7,812	6	Rewal of current 1302 machines
igration/Alien Registration Fees	564	572	2,647	2,464	(183)	5% improvement each quarter
er Licenses & Fees	549	456	2,670	1,966	(704)	5% improvement each quarter
pital Charges	3,828	2,800	13,551	12,068	(1,483)	5% improvement each quarter
er Charges for Services	802	427	2,899	2,184	(715)	5% improvement each quarter; adj. For indirect
er Revenue	214	128	1,962	551	(1,411)	5% improvement each quarter
Fees, Services & Other Revenue	10,043	8,101	31,535	27,045	(4,490)	
AL GENERAL FUND REVENUES	58,049	46,008	206,536	193,595	(12,941)	
Resident Worker Fee Fund Transfer	998	754	3,844	3,250	(594)	5% improvement each quarter
Operating Transfers In	998	754	3,844	3,250	-594	
AL G/F REVENUE/TRANSFERS IN	59,047	46,762	210,380	196,845	(13,535)	
F Fund Retained Revenue	423	423	1,690	1,690	0	Appropriation level
tation Fund Local Revenue	201	162	778	699	(79)	5% improvement each quarter
Bond Payment Appropriations			(5,873)	(5,865)	8	Per payment schedules
AL OPERATING REVENUE	59,671	47,347	206,975	193,369	(13,606)	

DEPARTMENT OF FINANCE

2002 REVENUE ESTIMATES ADJUSTED FOR PROJECTED REDUCED REVENUES

BASED ON FY2002 3 MONTH ACTUALS (000's omitted)

mptions 9/28/01 Estimate:

Tourism revenues down 1/3 in 1st quarter; gradual recovery to pre 9/11 level by Jan.

Garment industry declines 10% from 2001 level

Gaming machine license fees and jackpot tax collections continue at current levels

CHC revenue declines due to one time collections in FY2001

$30 million in CIP construction adds $3 million in tax revenues.

mptions 2/8/02 Estimate:

Tourism revenues continue slow recovery but down 30% for year

Garment industry declines 15% from 2001 level

Gaming machine license fees and jackpot tax collections continue at current levels

$40 million in CIP construction adds $4 million in tax revenues

Other revenues improve at 5% per quarter unless other factors are known

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta
Governor

Diego T. Benavente
Lieutenant Governor

The Honorable Heinz S. Hofschneider
Speaker, House of Representatives
Thirteenth Northern Marianas
Commonwealth Legislature
Saipan, PM 96950

MAR 15 2002

The Honorable Paul A. Manglona
Senate President
Thirteenth Northern Marianas
Commonwealth Legislature
Saipan, MP 96950

Dear Mr. Speaker and Mr. President:

Attached please find a draft House Joint Resolution for the purpose of "Authorizing reprogramming authority for the Governor in excess of the limits of 1 CMC Sections7401 and 7402." This resolution is a critical element in the Commonwealth's ability to continue to deliver essential public services by giving the Governor the authority to allocate scarce funds to where they are most needed.

As I informed you in my letter dated February 26, 2002, the estimated revenues of the Commonwealth for fiscal year 2002 are further reduced to $193.3 million. Based on that reduced estimate, I will be instructing the Office of Management and Budget to implement a proportionate reduction of third and fourth quarter allotments for all branches, departments, offices, agencies and instrumentalities of the government to which Commonwealth funds are appropriated with the sole exception of the Public School System. This is in line with this Administration's firm commitment to educational excellence.

The across-the-board cuts, however, will severely impact several agencies. In order to maintain services and avoid layoffs, the governor must have expanded reprogramming authority in order to fund critical departmental and agency needs as they may arise. The resolution also calls for unlimited reprogramming authority for the Mayors of Rota, Tinian and Saipan. This is in recognition that the Mayors are best situated to allocate limited resources to the immediate needs of the communities which they serve.

021922

EXHIBIT C

I ask for your support in expediting the passage of this resolution. I am confident that with a timely budget and improved economic conditions, such reprogramming authority will not be necessary in the future.

Thank you for your cooperation.

Sincerely,

DIEGO T. BENAVENTE

COMMONWEALTH OF THE NO..THERN MARIANA ISLANDS OI .CE OF THE GOVERNOR

Capitol Hill
Saipan, MP 96950

MEMORANDUM

RECEIVED
Office of Management & Budget
MAR 1 1 2002

TO: All Department & Activity Heads

FROM: Acting Governor

SUBJECT: Reduction of Current Year Funding Level

As anticipated in Directive No. 215, projected revenues for the current fiscal year are $13.6 million less than previously estimated. I officially advised the Legislature on February 26, 2002, that total projected resources are reduced from $206,974,997 to $193,369,114. This represents a total reduction of 6.57 percent.

Pursuant to 1 CMC Section 7204 (e), decreases in projected revenues require that there be a proportionate reduction in funds made available to agencies in order to maintain a balanced budget. Because the Public School System (PSS) will be exempt from any budget cuts, all other agencies will have to absorb a slightly higher reduction of 8.02 percent. The decision to spare PSS from any reduction is in line with this administration's commitment to supporting our children's education.

The Office of Management & Budget (OMB) will be issuing your Third and Fourth Quarter allotments to match revised budget levels. These allotments will represent 20.99% of the prior budget level or 22.82% of the revised budget level for each remaining quarter. In preparation, I strongly advise all agencies to review their budgets and determine which areas can absorb these cuts in order to meet personnel expenses.

This reduction puts us in a very difficult situation, especially with respect to the Department of Public Safety and the Department of Public Health. Both of these departments were seriously under funded even before the cuts. Reprogramming from other agencies will be necessary to enable these two agencies to continue providing essential public services throughout the fiscal year. To this end, I have asked the Legislature to give me unlimited reprogramming authority over executive branch funds.

All should refrain from unnecessary spending. We will be looking at all Executive Branch accounts as one. OMB and the Department of Finance will closely monitor the overall financial situation and will be reprogramming funds as needed.

Again, I ask that everyone understand the seriousness of this situation and work together in ensuring that the government is able to continue providing essential public services while avoiding any reduction in work hours, pay cuts, or layoffs. At this reduced budget level, every dollar will have to be spent conservatively to avoid any drastic measures.

DIEGO T. BENAVENTE

021924

EXHIBIT
PAGE 5

Supreme C[illegible]t - THE JUDICIARY • COMMONWEALTH OF THE NORTHERN MARIANA ISLA
Guma' Hustisia / Imwal Aweewe / House of Justice • P.O. Box 502165 • Saipan, MP 96950
Telephone: (670) 236-9700 • Fax:(670) 236-9702 • E-mail: supreme.court@saipan.com

Miguel S. Demapan
CHIEF JUSTICE

RECEIVED
APR 11 2002
cc: Pam

April 11, 2002

The Honorable Juan N. Babauta
Governor of the Northern Mariana Islands
Office of the Governor
Caller Box 10007
Saipan, MP 96950

Dear Governor Babauta:

I am writing this letter to let you know that the proposed cuts to this quarter's disbursement are unacceptable. Not only would a reduced budget jeopardize the judiciary's ability to serve the public as we are required to do Constitutionally and by statute, but your attempt to make these budgetary changes without the Legislature's authorization is an illegal encroachment on that branch's exclusive domain.

I have met with you twice, on each occasion I have requested that you reconsider the actions taken by your Planning and Budget office regarding the reduction of the judiciary's quarterly allotment pursuant to your office's memo dated March 12, 2002. In both instances you promised that you would look into our concerns and hopefully resolve them.

On March 21, 2002, I wrote to you requesting that the judiciary budget be exempted from the reduction. Numerous follow-up calls to your office have gone unanswered.

We received a faxed copy of the Supreme Court's third quarter allotment and saw that it has been reduced by $64,252 or 8.4% (**not** 8.02%). This was surprising, given that Directive No. 215 and the March 21, 2002 Memorandum issued by the Acting Governor seemed to be limited to reducing the budget of the Executive Branch, and there was no mention of the Judiciary's budget being cut.

I am concerned about the legality of your unilateral decision to reduce the Judiciary's budget. Public Law 11-41, Chapter V, Section 501, removed the Executive Branch's authority to reduce appropriated funds without legislative action. This means that the legislative branch is the only one that could amend the budget in the manner you are suggesting. Your action is not only unlawful but also represents an intrusion into the affairs of the third branch. Monies appropriated by the legislature for the use of the judiciary are reposed in trust in your office and as such, any withholding of our budgeted funds without the judiciary's consent is a violation of the separation of powers doctrine.

EXHIBIT

Already, the judiciary's efforts to fulfill our duties are stymied by an inadequate budget. To put us in the position of being unable to serve the public through an illegal mandate is unacceptable. The Judiciary understands the financial situation facing the CNMI, and although the Judiciary is reluctant to have its budget reduced beyond what is already an insufficient amount, we would agree to a reduction of 6.5% (our proportional share of the total projected reduction). Reducing our budget by more than 6.57% would significantly hamper our ability to serve the public and would do a great disservice to the CNMI.

I would be happy to meet with you personally to discuss our concerns.

Sincerely,

Miguel S. Demapan
Chief Justice

xc: Hon. Diego T. Benavente, Lt. Governor
Hon. Paul A. Manglona, Senate President
Hon. Heinz S. Hofschneider, House Speaker
Frankie B. Villanueva, Acting Secretary of Finance
Joaquin C. Blanco, Office of Management and Budget

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta
Governor

Diego T. Benavente
Lieutenant Governor

16 APR 2002

Robert T. Torres
Attorney General
Commonwealth of the Northern Mariana Islands
Second Floor, Administration Building
Capitol Hill
Saipan, MP 96950

Dear Rob:

Re: Request for Legal Opinion

As I verbally requested last Thursday, I am directing you to issue a formal Attorney General Opinion on the following question:

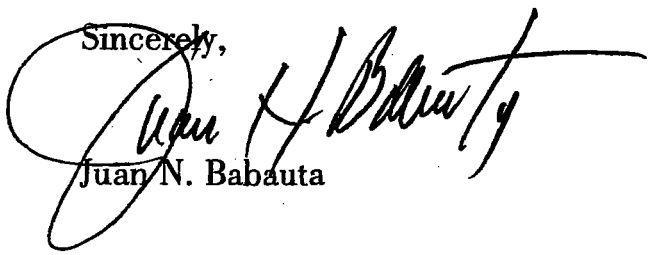
> Whether the Governor and Department of Finance have the constitutional authority and duty pursuant to Article III, Section 1 and Article X, Section 8 of the NMI Constitution to apply a reduction in allotment authority to the Judicial and Legislative Branches of government?
>
> If the Governor and Department of Finance has constitutional authority to apply a reduction in allotment authority to the Judicial and Legislative branches of government, did amending Article II, Section 16 of the NMI Constitution limit that authority in any manner?

Please specifically address whether P.L. 11-41, Section 501 in any way limits the application of the Planning and Budget Act, specifically 1 CMC §7604(c)(4). As you know, the current fiscal state of the Commonwealth

triggered the letters of February 20, 2002 and March 6, 2002 to the Legislature.

Should you have any questions, please do not hesitate in contacting me directly.

Sincerely,



Juan N. Babauta

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL LEGAL OPINION NO 02-04

To: Dr. Joaquin A. Tenorio, Secretary of the Dept. of Labor and Immigration

From: Attorney General: Robert D. Dorr

Date: May 10, 2002

Re: *Replacements of Nonresident Workers Permitted Under Public Law 12-11*

Introduction and Issues Presented

In your letter of April 12, 2002, you requested a formal legal opinion on whether the Secretary of Labor and Immigration can issue non-resident worker replacement permits where no evidence is presented by the Employer that the worker has either departed the Commonwealth or that the worker remains in the Commonwealth but has legally transferred to another employer. A second question is whether allowing such a replacement violates Public Law 12-11.

Short Answer

No replacement permits may be issued by the Secretary of Labor and Immigration unless evidence or proof is established that satisfies one of the three approved methods for replacement allowed by Public Law 12-11.

Legal Background

Public Law 12-11 states the following as to the replacement of non-resident workers:

Section 5. Amendments to P.L. 11-6 with respect to the moratorium on the hiring of non-resident alien workers.

a. Amendment. Public Law 11-6, section 2(c) is amended to read as follows:

(c) Exemption for Replacement Hire. The hiring of a nonresident worker to replace another nonresident worker in the same position shall not be affected by the moratorium imposed by this Act; Provided, however, that this exemption shall only be available if the nonresident worker being replaced has been fully accounted for either by confirmed departure from the Commonwealth **and**

surrender/cancellation of the entry permit of the worker being replaced, by an officially accomplished transfer **or** in any other lawful manner acceptable to the Secretary of Labor and Immigration. An entry permit once issued shall remain in effect for one year after the date of issue. (Emphasis added).

Historical Background

Public Law 12-11 was signed into law as "The Omnibus Labor and Business Reform Act of 2000." In the Act, the stated purpose was articulated as follows: "The Legislature further finds that although there is a need to protect jobs for our local residents, if there is no qualified local person to fill a business need, then the government should adopt policies to help business otherwise meet staffing needs."

One such method to help businesses meet staffing needs was the removal of specific restrictions under Public Law 11-6 which prevented employers from bringing in additional workers beyond the cap of such workers in the Commonwealth. However, section 2(c) of Public Law 11-6 was amended to allow for employers to hire nonresident workers from outside the Commonwealth so long their own workers had moved to other legitimate employment in the Commonwealth. Under Public Law 11-6, section 2(c) the number of nonresident workers in the Commonwealth could increase so that in order to hire another nonresident worker from outside the Commonwealth an employer was required to make the departing employee physically exit the Commonwealth.[1] Public Law 12-11 removed that onerous provision and allowed a replacement if one of the three approved manners for replacement was satisfied.

Discussion

The discussion in this opinion is limited to consideration of the plain meaning of the statute. In our view, there are no ambiguities in the statute in our view warranting construction or interpretation. Nor are there any constitutional deficiencies on the face of the statute. The plain meaning of the law is clear and this opinion is intended to assist your office with the application of the law for the benefit of the line employees and employers.

It is clear that Public Law 12-11 eliminated the requirement that the number of nonresident workers could not increase. Having eliminated that requirement, however, the Legislature fashioned specific and clear language as to instances in which additional workers may be admitted to increase the number of nonresident workers in the Commonwealth. The restrictions upon allowing a replacement worker from outside the Commonwealth became (1) the former nonresident worker employee being replaced has been fully accounted for either by confirmed departure from the Commonwealth and surrender/cancellation of the entry permit of the worker being replaced;

[1] The original relevant "cap" language in Public Law 11-6 stated that "neither the total number of nonresident workers in the Commonwealth nor the total number of nonresident workers employed by any one employer shall in any way be increased by application or use of this subsection."

(2) by an officially accomplished transfer; or (3) in any other lawful manner acceptable to the Secretary of Labor and Immigration. An analysis of the three methods for replacement follows.

1. Confirmed departure and surrender/cancellation of the entry permit of the worker being replaced

This method of replacement contains two parts. First, the worker must depart the Commonwealth. Second, the entry permit of the departed worker must be surrendered or cancelled before another worker is admitted to replace him/her. Both departure of the person and surrender or cancellation of that person's permit must be accomplished before a replacement worker may be permitted to enter the Commonwealth.

If the nonresident worker does not depart the Commonwealth, but the employer submits a surrendered or cancelled permit – the employer may not be allowed to replace that person with a worker from outside the Commonwealth. Similarly, if the nonresident worker departs the Commonwealth (supported by a verification of departure) but the employer does not submit a surrendered or cancelled permit the employer may not be allowed to replace that person from off-island. Therefore, in cases in which employees desert their employers and remain in the Commonwealth either legally or illegally, the employer may not be allowed to bring into the Commonwealth a replacement from off-island. Relief to the employer may be afforded through the administrative hearing process with an affirmative complaint against the employee for breach of contract or abandonment of employment. If the abandoning employee is actually deported; is afforded transfer relief through hearing or settlement, the employer may be able to replace that worker.

2. Officially accomplished transfer

There are only three methods of an officially accomplished transfer: permit expiration transfer, consensual transfer, and administrative order transfer. Each is briefly detailed below.

A. Permit Expiration Transfers

Permit expiration transfers were first permitted pursuant to P.L. 11-6, Section 3 (b) (signed into law March 27, 1998). That section states

> (b) Transfers after the initial contract period. When a nonresident worker's initial or renewal contract expires, he or she may cease to work for that employer and seek new employment with a new employer without the necessity of exiting the Commonwealth. In such a case, no reimbursement or indemnification is required of the former employer by the new employer. The nonresident worker must secure new employment within a limited period of time as provided by regulation. At the end of such period, if the nonresident worker has not secured new employment, he or she must depart the Commonwealth or be subject to deportation as provided by law.

The Rules and Regulations promulgated by the Division of Labor pursuant to P.L. 11-6, Section D(3)(b)(promulgated Commonwealth Register Vol. 20, No. 7, pp. 15970-15977; adopted Commonwealth Register Vol. 20, No. 10, p. 16260) state as follows:

> b. An employee has 45 days from the date of expiration of a contract to find a new employer. The 45 days runs from the date of expiration of the previous contract to the date of submission of a completed application. An application that is facially deficient upon review by a member of the processing staff will not be accepted. If an application is accepted and then is discovered to have deficiencies, the employer will have 10 days to rectify the deficiencies. Failure to correct the deficiencies within the prescribed period will result in rejection of the application. That application can only be resubmitted or a new application with a different employer processed if the initial 45 day period has not yet run.

The language of P.L. 11-6 and the regulations accompanying the statutory language were amended by P.L. 12-11, Section 5(b) (August 3, 2000). The applicable provision states as follows:

> Amendment. Public Law 11-6, section 3(b) is amended to read as follows:
>
> (b) Transfers after the initial contract period. When a nonresident worker's initial or renewal contract expires, he or she may cease to work for that employer and seek new employment with a new employer without the necessity of exiting the Commonwealth. In such a case, no reimbursement or indemnification is required of the former employer by the new employer. The Department of Labor and Immigration shall strictly enforce the requirement of 30 days notice by the employer to renew or not to renew the contract of a nonresident worker. Such notice shall be in writing and a copy filed with the Department of Labor and Immigration. If a notice not to renew is timely served upon the employee, the employee shall have 15 days after the end of the contract term to secure new employment. If the employer fails to serve timely notice upon the employee, then the employee shall have a total of 45 days after the end of the contract term to secure new employment. At the end of such period, if the nonresident worker has not secured new employment, he or she must depart the Commonwealth or be subject to deportation as provided by law.

The new statutory requirement from Public Law 12-11 is now controlling law. As Public Law 12-11 is a statute and not a regulation, it also supersedes the regulations published for Public Law 11-6. There is no savings clause. Public Law 12-11 provides no exceptions to the 45 day total: there is no language to confer discretion on the Secretary to allow for hardships or any other legitimate reason to extend stays or presence beyond the permitted time period allowed by law.

It should be noted that the privilege to hire a replacement worker does not become effective until the nonresident worker is hired by a different employer. If the 45 day period is still running or the nonresident worker does find a job within the time limit but refuses to or has yet to depart, the former employer cannot hire a replacement. Once the nonresident worker has officially accomplished the transfer by receiving an entry permit under the new employer or the worker has departed, only then may the former employer hire a replacement worker to be admitted from outside the Commonwealth.

B. Consensual Transfers

Consensual transfers were first permitted pursuant to P.L. 11-6, Section 3 (a) (signed into law March 27, 1998). That section states

> (a) Consensual transfers during the contract period. If a nonresident worker wishes to change employment during this contract period, he must obtain the consent of both current and prospective employers and the approval of the Department of Labor and Immigration. The new employer shall assume all legal responsibilities for the transferred worker. If the transfer takes place during the initial contract period between the employer and employee then the new employer shall reimburse the former employer for all actual costs associated with the recruitment and hiring of the worker. As used in this section, the term "initial contract period" means the term of the first contract of employment following the nonresident worker's first entry to the Commonwealth for employment.

The Rules and Regulations promulgated by the Division of Labor pursuant to P.L. 11-6, Section D(3)(b)(promulgated Commonwealth Register Vol. 20, No. 7, pp. 15970-15977; adopted Commonwealth Register Vol. 20, No. 10, p. 16260) state,

> a. Transfers are permitted during the contract period with the permission of all parties.
>
> b. Before commencing the consensual transfer procedure, the employer should advertise the position in accordance with the Nonresident Workers Act, 3 CMC Section 4432.
>
> c. In order to effectuate a consensual transfer, the new employer must provide the designee of the Director of Labor with the following documentation:
>
> 1. three (3) copies of the consensual transfer form;
> 2. a copy of the employee's work and entry permit (i.e., the LIIDS card);
> 3. a copy of the new employer's business license;
> 4. a two (2) year work certification form (experience) if the employee is changing job categories;
> 5. a bond; and
> 6. any additional documentation deemed necessary by the Director of Labor or his or her designee.

d. After the Director's designee receives the documentation enumerated above, he or she shall set an appointment for an interview with the current employer, the prospective employer, and the employee.
e. The consensual transfer must be approved by the Director of Labor or his or her designee prior to submission of the new application for a work and entry permit. The completed application must be submitted within forty five (45) days from the date of approval by the Director of Labor or his or her designee. However, as soon as the consensual transfer is approved by the Director of Labor or his or her designee, the accepting employer becomes responsible for all costs associated with the nonresident worker, including but not limited to medical and repatriation costs.
f. For transfers during the initial contract period, the original employer may have his or her recruitment and hiring costs reimbursed by the prospective employer. The right of reimbursement belongs to the original employer; therefore the original employer may waive reimbursement during the initial contract period if he or she chooses.

These rules and regulations have not been amended since they were promulgated. Public Law 12-11 does not discuss consensual transfers. It is our view that replacements following consensual transfer are permitted by Public Law 12-11 given that the Legislature made no distinction between the types of transfers existing at the Division of Labor when the amendments were made.

It should be noted that consensual transfers become effective as soon as they are approved by the Director of Labor or his designee which occurs when all the parties hold a brief meeting at the Division of Labor. However, consensual transfers do not become officially accomplished until the transferred employee receives an entry permit under the new employer. Only at that time may the previous employer hire a replacement worker.

C. Administrative Order Transfers

Administrative Order transfers are allowed pursuant to the Nonresident Workers Act. 3 CMC §4444 Enforcement: Administrative Hearing states, "(e) In addition to such sanctions, orders and relief that be elsewhere authorized the agency may: (5) Transfer an affected nonresident worker to another employer with the consent of the worker and new employer."

Administrative Order transfers are accomplished at the end of the labor hearing in which a nonresident worker has prevailed. In most cases, the nonresident worker is provided with forty five (45) days to transfer in order to provide them with the same time limits as those nonresident workers who have successfully completed their contracts and who seek a permit expiration transfer.

It should be noted that the right to hire a replacement does not become effective until the nonresident worker is hired by a different employer. If the nonresident worker has a pending case or the case is over, but he or she has not yet found an employer, the previous employer cannot hire a replacement. Once the nonresident worker has officially accomplished the transfer by receiving an entry permit under the new employer, then the previous employer may hire a replacement worker.

3. In any other lawful manner acceptable to the Secretary of Labor and Immigration[1]

Public Law 12-11 created a method for replacement not contained in Public Law 11-6 by allowing for replacements if it was done "in any other lawful manner acceptable to the Secretary of Labor and Immigration." A review of the body of administrative and statutory law on labor matters reveal that there has been no official method established since the implementation of Public Law 12-11 which has utilized this catch-all provision. There have been no rules and regulations promulgated which would aid in interpreting this section of the statute. The rules and regulations promulgated pursuant to P.L. 11-6 have never been amended in any way.

It should be noted that the Attorney General's Office would not be the ultimate decision maker in the process. The discretion to decide whether to approve a transfer is made by the Secretary of Labor and Immigration to whom the Commonwealth Legislature has provided such authority as to this provision. In order to ensure that the Secretary of Labor and Immigration deems that the action was done in a lawful manner, the employer would need to have the written consent of the Secretary. The Attorney General's Office could only review a decision by the Secretary of Labor and Immigration to decide if the replacement was effectuated in a lawful manner pursuant to the statute.

The Attorney General's Office would counsel the Secretary of Labor and Immigration to use this power sparingly, if at all. This cautionary advice is made due to the fact that once it is used, its usage or non-usage in other similar situations would call into question whether the Secretary is using his authority in an arbitrary manner. The lack of a definition, scope, or description of situations in which discretion is to be exercised is reason for concern. Exposure as to civil liability would be minimized if there is deliberate and heightened scrutiny on applications for replacement seeking the discretion of the Secretary.

If the Secretary of Labor and Immigration would like to authorize replacement in any other lawful manner, then the Department of Labor and Immigration must promulgate rules and regulations in the Commonwealth Register which set forth strict guidelines on how this section of the statute will be interpreted. This would allow the Department of Labor and Immigration to educate both the business community and the nonresident worker population regarding interpretation of the statute and would also provide time for public comment.

[1] This office does not analyze whether this section of P.L. 12-11 is vague or overbroad.

Conclusion

For the foregoing reasons, the Office of the Attorney General hereby issues this formal legal opinion to provide direct guidance to the Secretary of Labor and Immigration as to the scope of the replacement language of Public Law 12-11. This opinion does not address the procedures by which the Division of Labor follows to process such replacement applications. As to those procedures, they must predictable and not arbitrary or capricious. Further, the opinion also gives notice to employers and nonresident worker employees of the articulated legal position on the issue so that they may consider the means in which to properly effect transfer or replacement concerns. Based on the discussion above, the following rules are articulated:

1. If evidence is presented by the employer that the former worker has departed the Commonwealth and the entry permit of the worker being replaced is surrendered/cancelled, then replacement from outside the Commonwealth is permitted.

2. If evidence is presented by the employer that the former worker has an officially accomplished transfer (by permit expiration, administrative order, or consensually), then replacement with a worker form outside the Commonwealth is permitted.

3. If evidence is presented by the employer that a former employee is being replaced in a lawful manner acceptable to the Secretary of Labor and Immigration, then replacement from outside the Commonwealth is permitted.

4. If a replacement application does not fit within any of the three methods listed above, applications for replacement workers from outside the Commonwealth may not be accepted or approved.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL LEGAL OPINION NO: 02-05

To: Dr. Joaquin A. Tenorio, Secretary of the Dept. of Labor and Immigration

From: Attorney General Robert D. Law

Date: May 10, 2002

Re: Employers' Ability to Allocate Nonresident Worker Positions to another Employer

---

Introduction and Issues Presented

In your letter of April 30, 2002 you requested a legal opinion on whether employers may allocate nonresident worker positions another employer.

Short Answer

No. An employer may not allocate a nonresident worker position assigned to it to another employer.

Factual Background

The factual scenario presented is as follows. An employee completes his contract at Employer A. Employee then finds a job at Employer B within the 45 day period allowed by statute (or is allowed to transfer in any other officially accomplished manner). Employer A is allowed to replace Employee with a replacement worker such as an off-island hire pursuant to Public Law 12-11, but does not wish to do so. Employer A wishes to transfer the privilege to hire a replacement worker (because of the "open" position since vacated by Employee) from off-island to his friend Employer C who then applies to the Department of Labor and Immigration to bring in an off-island hire.

Legal Background

Public Law 12-11 amended Public Law 11-76 and allows for the permanent transfer of non-resident worker garment manufacturing employees. It states in relevant part as follows:

> b. Each licensed garment manufacturer shall be allocated a quota of non-resident alien workers pursuant to Schedule A. Provided, however, that the Secretary of Labor and Immigration shall, by regulation, establish a mechanism for the reallocation of non-resident alien workers among manufacturers based on need. To offset the cost of increased administration, the Secretary may assess a reasonable reallocation fee.
>
> c. If a license for garment manufacturing is revoked, not renewed, or otherwise permitted to lapse, the quota allocated to that to that [sic] licensee shall be reallocated, at the discretion of the Secretary of Labor and Immigration, to another qualified manufacturer.

Public Law 12-11 also addresses the general class of non-resident workers and states as follows,

Section 5. Amendments to P.L. 11-6 with respect to the moratorium on the hiring of non-resident alien workers.

> a. Amendment. Public Law 11-6, section 2(c) is amended to read as follows:
>
> (c) Exemption for Replacement Hire. The hiring of a nonresident worker replace another nonresident worker in the same position shall not be affected by the moratorium imposed by this Act; Provided, however, that this exemption shall only be available if the nonresident worker being replaced has been fully accounted for either by confirmed departure from the Commonwealth and surrender/cancellation of the entry permit of the worker being replaced, by an officially accomplished transfer or in any other lawful manner acceptable to the Secretary of Labor and Immigration. An entry permit once issued shall remain in effect for one year after the date of issue.[1]

Historical Background

[1] P.L. 11-6, Section 2(c) (signed into law March 27, 1998) previously contained language setting a "cap" on the number of non-resident workers in the Commonwealth. Section 2(c) of P.L. 11-6 stated as to the moratorium that "neither the total number of nonresident workers in the Commonwealth nor the total number of nonresident workers employed by any one employer shall in any way be increased by application or use of this subsection." That language was removed with the amendment made by P.L. 12-11.

Public Law 12-11 was "The Omnibus Labor and Business Reform Act of 2000." The statute's stated purpose was clear with the following language: "The Legislature further finds that although there is a need to protect jobs for our local residents, if there is no qualified local person to fill a business need, then the government should adopt policies to help business otherwise meet staffing needs."

One such method to help businesses meet staffing needs was the amendment to Section 2(c) of Public Law 11-6 to now allow employers to hire nonresident workers from outside the Commonwealth if their own workers had moved to other legitimate employment in the Commonwealth. The limiting language capping the number of non-resident workers other than garment workers was removed. Under Public Law 11-6, section 2(c) the number of nonresident workers in the Commonwealth was not allowed to increase, therefore in order to hire a nonresident worker from outside the Commonwealth an employer was required to make an employee exit the Commonwealth. Public Law 12-11 changed that provision to allow businesses meet staffing needs.

Analysis

1. General Nonresident Workers/ Non-Garment Industry

This office maintains that in the absence of language which allows for the allocation of a non-resident worker permit to be sold as an asset or reassigned, it should not be created by inference. Public Law 12-11 eliminated the requirement that the number of nonresident workers could not increase. The only restrictions upon getting a replacement worker from off-island became (1) the nonresident worker being replaced has been fully accounted for either by confirmed departure from the Commonwealth and surrender/cancellation of the entry permit of the worker being replaced; (2) by an officially accomplished transfer; or (3) in any other lawful manner acceptable to the Secretary of Labor and Immigration. An analysis of the three methods for replacement is contained in a separate Attorney General Opinion and will not be repeated here except to note that there is nothing which allows for the allocation of nonresident workers to be allocated or reassigned to another employer.

Public Law 12-11, however, contains language regarding replacement of a non-resident worker which may allow for a reallocation of nonresident worker positions. Public Law 12-11 allows for replacements of non-resident workers if such replacement was done "in any other lawful manner acceptable to the Secretary of Labor and Immigration." After researching this matter, there has been no official method established since the implementation of Public Law 12-11. There is no articulated or claimed lawful manner of replacement deemed acceptable to the Secretary pursuant to this "catch-all" provision. There are no duly promulgated and adopted rules and regulations promulgated which would effect this provision for replacement of workers. The existing rules and regulations, promulgated pursuant to P.L. 11-6, have never been amended in any way to address or include the new provision for replacement in a "lawful manner acceptable to the Secretary."

If the Secretary of Labor and Immigration so desired to exercise what appears to be discretionary authority to authorize replacement "in any other lawful manner" such as the allowance to transfer allocations of nonresident workers, then the Department of Labor and Immigration may do so by promulgating rules and regulations in the Commonwealth Register. Those regulations would set forth clear, articulable, and strict guidelines as to the manner in which this section of the statute will be applied and interpreted. Employers would then have clear guidelines before seeking to replace workers in this manner. Further, regulations would allow the Department of Labor and Immigration to educate both the business community and the nonresident worker population regarding interpretation of the statute and would allow an opportunity for public comment. This office maintains, however, that in the absence of language which allows for the allocation to be sold as an asset or reassigned and in the absence of regulations, transfer of workers in this manner cannot be created by inference.

2. Garment Manufacturing Nonresident Workers

The only person who is able to reallocate nonresident workers' positions is the Secretary of Labor and Immigration (pursuant to Public Law 12-11 above). As to garment workers, that may only be done in the garment industry once a factory's business license is revoked, renewed or permitted to lapse. There is no provision granting the liquidating company in question to sell its allocation as an asset of the corporation. While the Secretary currently possesses the discretion to reallocate within the garment industry, there are no rules and regulations which govern his actions. This office strongly recommends that rules and regulations be promulgated and adopted prior to any reallocation in order to eliminate any question of arbitrary or capricious actions by the agency.

It should be noted that the Secretary of Labor and Immigration is required to enact rules and regulations prior to reallocating positions within the garment industry. That reallocation should be based upon need. This requirement is contained within Section 6 of Public Law 12-11, subsection (b) (set forth above). It is not clear how reallocation based upon need and its attendant requirement for regulations should be interpreted in light of subsection (c) which allows reallocation at the discretion of the Secretary of Labor if a garment manufacturing license has lapsed. Even with such discretionary authority, the Secretary would need to adopt a clear policy guideline for the exercise of that discretion so that it is not abused or arbitrary. This office asserts that the Department of Labor and Immigration should draft regulations for both subsection (b) and (c) in order to eliminate any questions regarding reallocation within the garment industry prior to authorizing any reallocation.

Conclusion

For the foregoing reasons, the Office of the Attorney General opines that the Secretary of Labor and Immigration must act expeditiously to promulgate rules and regulations relating to the allocation and replacement of nonresident workers. The foregoing discussion, however, leads us to the following opinion as to the question presented:

1. Employers may not swap or reassign allocations of nonresident worker positions outside the garment industry. Such reassignment or transfer is not permitted under Public Law 12-11.
2. If the Secretary is to allow replacements through "any lawful manner" pursuant to Public Law 12-11, the Secretary must promulgate regulations which set forth the standards for the exercise of that authority.
3. The Secretary of Labor and Immigration may reallocate the quota for a garment manufacturer whose license has lapsed. Before such exercise of authority, the Attorney General's Office strongly recommends that rules and regulations be promulgated prior to any reallocation.

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor-Administration Building Capitol Hill
Caller Box 10007, Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/2367/2368
Fax: (670) 234-7016

Attorney General Legal Opinion
02 - 06

May 15, 2002

VIA FACSIMILE
670- 664-4759
Ms. Meliza Guajardo
Acting Administrator
CNMI Scholarship Office
Caller Box 10007
Saipan, MP 96950

Dear Ms. Guajardo,

I am in receipt of your request for a legal opinion on Education Assistance Program ('EAP') parameters. The Attorney General has asked that I respond to this request.

ISSUE

Are recipients of EAP scholarships eligible to receive funds towards summer semester tuition?

LAW

The Educational Assistance Program is governed by its published rules and regulations. Section 14(D) of its rules and regulations states in pertinent part:

> ...Summer course work must be part of the student's declared academic field of study. Summer session is an option for students to enroll, however the Scholarship Office will not fund for summer session.

This states quite clearly that EAP scholarship funds will not be provided in order to pay for summer semester tuition. These rules are not subject to change or interpretation as differing situations arise.

The Scholarship Advisory Board may amend the EAP rules and regulations as it may see fit so long as its actions are within statutory authority. In so doing, the Board must follow the Administrative Procedure Act and publish its amendments accordingly.

SECOND ISSUE

May the Scholarship Office promulgate emergency regulations in response to scholarship recipients requests to receive financial disbursements towards summer tuition?

LAW

The Administrative Procedure Act at 1 CMC §9104(b) states in pertinent part:

> If an agency finds that the *public interest so requires, or that an imminent peril to the public health, safety, or welfare* requires adoption of a regulation upon fewer than 30 days' notice, and states in writing its reasons for that finding, it may, with the concurrence of the Governor, proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency regulation.

As the matter at hand deals with a discrete group of students who have requested disbursement of financial assistance towards summer tuition, this matter does not affect the "public" at large. Therefore, this situation does not qualify as a basis for the promulgation of emergency regulations.

Nor does this qualify as an "imminent peril to the public health, safety, or welfare" of the Commonwealth public. In short, emergency regulations may not be published in order to assist these students in receiving summer tuition assistance as there is no valid basis for their promulgation under these statutory guidelines.

It is the opinion of the Attorney General that in conformity with its rules and regulations, the Scholarship Office is not obligated to provide financial assistance towards summer tuition for EAP scholarship recipients.

Cynthia Fernandez-Romano
Assistant Attorney General

Robert T. Torres
Attorney General

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor-Administration Building Capitol Hill
Caller Box 10007, Saipan, MP 96950

Attorney General
Legal Opinion
02-07

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/2367/2368
Fax: (670) 234-7016

VIA FACSIMILE
664-4759
Meliza Guajardo
Acting Scholarship Administrator
Scholarship Office
Caller Box 10007
Saipan, MP 96950

May 28, 2002

Dear Ms. Guajardo,

I am in receipt of your request for a legal opinion regarding the administration of the EAP scholarship program. The Attorney General has asked that I respond to this request.

FIRST ISSUE

Do third-year students who have already received financial assistance under EAP or PL 7-32 qualify for the full benefits of the scholarship established under PL 10-58?

PL 10-58 provides for college scholarships in the amount of up to $12,000 per year for a period of up to four years to eligible students who pursue a professional degree in teaching. PL 10-58 as amended by PL 11-34 lists the criteria the recipient must maintain in order to qualify for this scholarship:

(a) are a United States citizens [*sic*] or national;
(b) have resided in the CNMI for at least three (3) years prior to enrollment in a college or university;
(c) are or will be a full time student enrolled in an accredited teacher training program at a college or university;
(d) have signed a fully executed Post Secondary Teacher Education Program Scholarship agreement or successor agreement;
(e) agrees to return to the CNMI after graduation from college and teach in the CNMI public or private schools for a period of two years for each year of scholarship assistance, or if failing or refusing to complete this obligation agrees to remit the whole amount of the moneys provided through this scholarship fund to the CNMI government;
(f) as a condition of continuing assistance, scholarship recipients must maintain a cumulative grade point average of 2.5 on a 4.0 scale;
(g) as a condition of continuing assistance, scholarship recipients must maintain full-time enrollment in the college or university they attend;

(h) as a condition of continuing assistance, scholarship recipients are required to submit a certified copy of their grades for each semester/quarter to the CNMI Scholarship Office.

Based on these criteria it is clear that having received a scholarship from the Educational Assistant Program (EAP) or PL 7-32 does not disqualify a student from the Teacher Education Program Scholarship (TEPS). The legal maxim *expresio unius est exclusio alterius* means "where the form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." 2A N. Singer, Sutherland Statutory Construction §47:23 (6th edition 2000). In other words, the terms under which this scholarship may be awarded are not to be restricted by outside sources such as the EAP rules and regulations. The conditions under which the TEPS may be awarded are listed above and should be narrowly construed as the *only* restrictions that may be applied to the statute. *Marianas Visitors Bureau v. Commonwealth, Civ. Nos. 94-0516 (Super. Ct. June 23, 1994)(Memorandum Decision and Judgement).*

In sum, scholarship funds received under EAP and PL 7-32 are not to be counted towards the four-year scholarship provided under PL 10-58.

SECOND ISSUE

Are recipients of scholarships under PL 7-32 who have obtained their baccalaureate degree within two years in the program and wish to pursue further education entitled to the remaining three years of the scholarship?

PL 7-32 provides scholarships for graduating high school students with the highest academic rank in their class. PL 7-32 as amended by PL 11-77 §3 states the parameters of the scholarship program:

> There are hereby established annual *scholarships to any accredited college or university* in the Commonwealth or the United States or its territories to pay for textbooks, tuition, a fixed stipend, room and board, other school fees and costs, and transportation, for a period of up to five consecutive years; provided, however, that the total amount of the annual scholarship shall not exceed $15,000.00 per student per academic year. (*emphasis added*)

From this language it is clear that this statute does not limit the type of degree program for which a student may receive this scholarship. It is a basic rule of statutory construction that when a statute is clear and unambiguous, its plain meaning should be adhered to without the imposition of unjustified restrictions or enlargements. *Commonwealth v. Hasinto, 1 N.M.I. 377, 382 (1990).* In this situation, we must presume that the legislature intended for eligible students to receive this scholarship for use at "any accredited college or university" regardless of the particular academic program the recipient has chosen to pursue.

If a recipient has completed an educational program within the first two years of this program, he or she would be entitled to the remaining three years of this scholarship program. Please feel free to contact me with any questions at 664-2341.

Cynthia Fernandez-Romano
Assistant Attorney General

Robert T. Torres
Attorney General

COPY

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION No. 02-08

To: Director of Personnel, Office of Personnel Management

cc: Chairman, Civil Service Commission
Chairman, 9th Municipal Council, Rota
Director of Personnel's Representative, Rota

Thru: Attorney General

From: Deputy Attorney General

Date: July 2, 2002

Re: *Legal Opinion re: Employees of 8th Rota Municipal Council*

This memorandum is in response to your April 24, 2002, request for legal opinion.

ISSUES

1. Did the employees of the 8th Rota Municipal Council acquire civil service status? If yes, when was it effective?

   Short Answer: Yes, effective upon their initial hire as municipal council employees.

2. Did the employees of the 8th Rota Municipal Council have any right to continued employment after the expiration of their excepted service appointments? If they did, please define and clarify the extent of these rights.

   Short Answer: Yes, even if they signed excepted service contracts, the employees were never exempt from the civil service and as civil service employees, they are entitled to continued employment unless terminated pursuant to the PSSR&R.

3. Four (4) of the employees continued to work after January 11, 2002, and should be compensated for the periods of work. Is there any payment due to those employees who were willing to continue working but ceased work due to the completion of the excepted service appointment and management's failure to complete the conversion process?

   Short Answer: Yes.

4. Twenty-two (22) of the employees "waived their right to civil service status" in order to obtain payment for their unused annual leave, and five (5) did not. Is their "waiver" valid?

   Short Answer: No.

LEGAL ANALYSIS

I. Did the employees of the 8th Municipal Council acquire civil service status? If yes, when was it effective?

The general rule for Commonwealth government employees is that every employee is a member of the Commonwealth Civil Service System as implemented by the Civil Service Commission (hereafter "Commission"). N.M.I. Const. art. XX, § 1 (Second Const. Conv., Amend. 41 (1985))[1] ("The legislature shall provide for a non-partisan and independent civil service with the duty to establish and administer personnel policies for the Commonwealth Government"); Sonoda v. Cabrera, Certified Question No. 96-001 (N.M.I. S.Ct. 1997); Sonoda v. Cabrera, 255 F.3d 1035 (9th Cir.2001); 1 CMC § 8131(a). However, there are exceptions to this rule.

The first exceptions are stated in the Commonwealth's Constitution. Article XX of the N.M.I. Constitution provides:

> The commission's authority shall extend to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches.

N.M.I. Const. art. XX, § 1 (emphasis added). Therefore, elected officials, gubernatorial appointees in the executive branch, the administrative staffs of the legislative branch, and the administrative staffs of the judicial branch are not a part of the civil service system, but are exempt from the civil service system. Employees of the 8th Municipal Council do not fall within any of these categories, and are therefore not exempt under Article XX itself.

---

[1] The original constitutional provision on "Civil Service" was under Article III, § 16, which stated:

> Civil Service. The legislature shall provide for a non-partisan and independent civil service commission with the duty to establish and administer personnel policies for the Commonwealth Government. The commission's authority shall extend to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches. Appointment and promotion within the civil service shall be based on merit and fitness demonstrated by examination or by other evidence of competence.

Amendment 41 added to the article as follows:

> Civil Service. The legislature shall provide for a non-partisan and independent civil service commission with the duty to establish and administer personnel policies for the Commonwealth Government. **The Commission shall be composed of seven members appointed by the governor with the advice and consent of the senate. Six members shall serve a term of six years, staggered in such manner that the term of one member expires each year, and one member shall serve a term of four years expiring concurrently with the term of the governor. Members of the civil service commission may be removed only for cause.** The commission's authority shall extend to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches. **Exemption from the civil service shall be as provided by law, and the commission shall be the sole authority authorized by law to exempt positions from civil service classifications.** Appointment and promotion within the civil service shall be based on merit and fitness demonstrated by examination or by other evidence of competence.

In 1978, the CNMI Legislature enacted Public Law 1-9, the Northern Marianas Civil Service Act, which was codified under 1 CMC § 8101 et seq. The Civil Service Act provided for eleven exemptions to the system. 1 CMC § 8131(a). The Civil Service Act was subsequently amended to add new sub-sections specifically exempting certain positions.[1]

In 1985, Amendment 41 to the CNMI Constitution added two new provisions to the constitution. The first provision provided for the appointment of Civil Service Commission members, their terms, and their removal basis. The second provision, pertinent here, provides for an exemption from civil service and exemption from classifications.

Article XX provides that "exemption from the civil service shall be as provided by law, and the commission shall be the sole authority authorized by law to exempt positions from civil service classifications." N.M.I. Const. art. XX (as amended, 1985) In 1992, the Commonwealth's Supreme Court interpreted this very provision in Manglona v. Civil Service Comm'n, 3 N.M.I. 243, 252 (1992). The Court stated:

> **We hold, based on our construction of the last sentence of Article XX, Section 1, of the CNMI Constitution, that neither the Commission nor its Personnel Officer has any authority to review the contracts of personnel and employees of the offices of the Mayors of Rota and Tinian. (footnote omitted) Nor do they have the authority to review or approve the exempt status of the employees of those offices.**

Manglona, 3 N.M.I. at 251-252. In Manglona, the Court found that pursuant to the above constitutional provision, the CNMI Legislature enacted 1 CMC § 8131(a)(13) which added to the list of exempted positions the staff employees of the mayors. Id. at 248. The most recent additions to the list of exempted position is from Public Law 13-1, which added the personnel and staff of the municipal council of the CNMI. Prior to the enactment of P.L. 13-1, the employees of the municipal council were a part of the civil service system.

CONCLUSION as to Question No. 1

In this case, the CNMI Legislature did not exempt the employees of the municipal councils from civil service until Public Law 13-1 was passed into law on February 13, 2002. Therefore, the employees of the 8th Municipal Council had civil service status since their employment with the Council began and are entitled to the protections provided for under the PSSR&R.[2] As civil service employees, they are subject to the benefits and protections of the Personnel Service System Rules and Regulations ("PSSR&R"). As such, they are also subject to other statutory restrictions on civil service employees, including the civil service pay scales, and can be lawfully terminated through the PSSR&R procedures.

---

[1] On March 28, 1985, Public Law 4-34 added a new paragraph (12) to exempt "Officers, faculty and professional employees of the northern Marianas College." However, this paragraph was repealed in 1993 by Public Law 8-18.

[2] An exception to this general rule is for limited term appointees that were never converted to permanent appointees giving them civil service status. See PSSR&R Part III.B3(C).

II. Did the employees of the 8th Rota Municipal Council have any right to continued employment after the expiration of their excepted service appointments? If they did, please define and clarify the extent of these rights.

Under CNMI law at the time, regardless of the fact that they signed "excepted service appointment" contracts, the 8th Rota Municipal Council employees' positions were not one of the statutorily exempted positions and so they were civil service employees. Having concluded that the employees of the 8th Rota Municipal Council had civil service status when their employment with the Council began, their civil status continued after the expiration of their "excepted service appointments" and they have a constitutionally protected property interest to continued employment in the civil service system. Sonoda v. Cabrera, at 1042.

PL 13-1 did not provide for a "grandfather" provision to the existing employees of the Municipal Councils to allow the existing employees to remain with the Council as civil service employees. The CNMI Legislature could have provided that the existing employees' civil service status be not affected.[1] Rather, PL 13-1's transition section states:

> Any Commonwealth government employee who loses civil service status as a result of this Act shall, for a period of three years, have reemployment rights for any civil service position for which he or she is qualified, and shall be entitled to transfer into such employment pursuant to applicable rules, regulations and procedures.

P.L. 13-1, § 5 (effective February 13, 2002).

Therefore, since the enactment of Public 13-1 on February 13, 2002, the 9th Rota Municipal Council can offer only excepted service contracts. Should an employee accept an offer of employment with the current municipal council, he or she must resign from the civil service system and accept an excepted service contract. Accepting an excepted service contract means they will no longer be entitled to the protections provided for under the PSSR&R. As non-civil service employees (or "exempted employees"), they may be terminated without cause and are not entitled to any sort of grievance procedure to protest their discharge under the Civil Service Commission. Sonoda v. Cabrera, 255 F.3d 1035, 1040. Should an employee decline an offer, the employee has, pursuant to Section 5 of PL 13-1, "reemployment rights for any civil service position for which he or she is qualified, and shall be entitled to transfer into such employment pursuant to applicable rules, regulations and procedures".

Conclusion as to Question No. 2

In order to assure continued employment, the employees must make a knowing and voluntary decision to either continue working for the Council as excepted service employees or contact the Office of Personnel and Management and seek the Director of Personnel's assistance in finding comparable civil service positions available elsewhere in the CNMI government. However, the employees must still comply with the PSSR&R, as required under PL 13-1, and they may still be terminated from government employment

[1] See, e.g., Public Law 10-19, § 3: "The civil service status of existing employees transferred to the Northern Marianas Retirement Fund pursuant to this chapter shall not be affected thereby. New employees hired by the Northern Marianas Retirement Fund to administer the government life and health insurance programs shall be exempt from civil service pursuant to the fund's general exemption from civil service."

if the provisions of the PSSR&R are followed and the facts warrant termination. Furthermore, the employees' compensation after the expiration of their "excepted service appointment" must be at the same rate as other comparable civil servants, and not at the "excepted service appointment" rates. This means some employees will have to accept a reduction of salary if the employee was paid more than a comparable civil servant during their term of employment with the 8th Rota Municipal Council.

III. **Four (4) of the employees continued to work after January 11, 2002, and should be compensated for the periods of work. Is there any payment due to those employees who were willing to continue working but ceased work due to the completion of the excepted service appointment and management's failure to complete the conversion process?**

Yes, even if they did not actually perform any work for the government, the employees had a property right which was taken away by incorrect advice provided to them from the management. The result is the same as if the employee was wrongfully terminated; the proper remedy is to reinstate the employees as civil service employees and pay them the back pay for the period they were wrongfully terminated and not given the opportunity to continue work. The back pay should be calculated at the civil service rate, and not at the previous pay level held at the 8th Rota Municipal Council.

IV. **Twenty-two (22) of the employees "waived their right to civil service status" in order to obtain payment for their unused annual leave, and five (5) did not. Is their "waiver" valid?**

The Ninth Circuit Court has found that an employee cannot "waive" his civil service status. Sonoda v. Cabrera, 255 F.3d at 1042, fn. 3. In Sonoda, the Ninth Circuit reasoned that "the CNMI Supreme Court has held that only the legislature may exempt employees from the civil service system. Surely, this must mean that an individual is precluded from exempting himself from the system via a contract." Id. Therefore, the employees' "waiver" is not valid because it is not pursuant to the PSSR&R, but for a contract to waive civil service status in exchange for payment of their annual leave.

BY:

Ramona V. Manglona
Deputy Attorney General

Concurred by:

Robert T. Torres
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

RECEIVED
DEPT. OF COMMERCE
8/8/02 by Walker

Attorney General
Legal Opinion
02-09

MEMORANDUM

To: Fermin Atalig, Secretary, Department of Commerce

From: Assistant Attorney General

CC: Jesse Palacios, Insurance Administrator

Date: August 7, 2002

Re: Propriety of Insurance Companies Denying Third Party Claims in Light of P.L. 11-55

The prior Secretary of Commerce requested a legal opinion in December 2000 regarding the propriety of insurance companies denying coverage under P.L. 11-55 based upon their exclusion sections. Specifically, your office has asked whether, in light of P.L. 11-55, insurance companies can exclude coverage for the driver not having a driver's license or driving under the influence. The Attorney General has asked that I respond to your request.

ISSUE

Whether insurance companies may, in light of P.L. 11-55, deny a third party claim because the insured or another party violated an exclusion of the policy such as driving under the influence, or not possessing a valid driver's license.

ANSWER

No, they may not. Such exclusion is against public policy and the stated purpose of P.L. 11-55 and, therefore, must be reformed to be consistent with the provisions of the law pursuant to 9 CMC §8216(b), as amended by P.L. 11-55.

LAW

P.L. 11-55, the Mandatory Liability Auto Insurance Act, was enacted on January 29, 1999. The law requires all individuals who register their motor vehicle or operate a motor vehicle on the public roads to be covered by the minimum liability motor vehicle insurance. The Legislature, in Section 2 of the Act, outlined the purpose the legislation:

> The Legislature finds that there is substantial problem (sic) in the Commonwealth with damages caused to persons and property by uninsured motorists. The unfortunate and unjust result of this problem is that innocent victims of motor vehicle accidents are often burdened with damages that are never paid by the uninsured motorist that caused such injuries. It is therefore the intent of this Act to ensure, in the most effective way practical, that any time a person operates or owns a vehicle, as a condition thereof, they must first have liability insurance in relation thereto. The Legislature finds that a person who suffers damages as a result of a motor vehicle accident caused by another should not have to bear such financial burden, rather, *the party most at fault should bear such burden.* By these means, this Act establishes the following hierarchy of liability for the payment of such damages: First, any person who *negligently, recklessly, or intentionally*, causes a motor vehicle accident in which another person or property is injured, such perpetrator should pay for those damages, and must by law and as a condition of owning or operating a motor vehicle, *have the financial responsibility by way of liability insurance to be capable of paying such damages* up to the minimum limits set forth in this Act. [Emphasis added].

Additionally, 9 CMC §8216(b) provides that:

> After the effective date of this chapter, all contracts and insurance polices entered into, formed, or otherwise agreed upon shall be consistent with the provisions of this chapter; if any such contracts or policies are inconsistent with this chapter, they shall be reformed to be consistent, as provided in this chapter.

Generally, intentional torts are permissibly excluded under insurance contracts, especially under homeowners insurance. However, with respect to automobile insurance, "[t]he interpretation of an automobile liability policy, such as in this case, necessarily involves consideration of strong public policy concerns that do not apply in the context of homeowners insurance." *Allstate Indemnity Company v. Wise,* 2001 WL 574907, ¶2 (Fla. 2001), *rev. den.*, 3/22/02, Table No. S.Ct.-17831. The financial responsibility laws are designed to protect the public from losses resulting from ownership and operation of motor vehicles, up to specified minimum amounts per person and per accident. *See Ins. Co. of N. America v. Avis Rent-A-Car Sys., Inc.,* 348 So.2d 1149 (Fla.1977). An insurance policy procured to comply with the Financial Responsibility Law is "an insurance policy for the benefit of the public using the highways of this State. Therefore, it may not contain exclusions which destroy the effectiveness of the policy as to any substantial segment of that public." *Makris v. State Farm Mut. Auto. Ins. Co.,* 267 So.2d 105, 108 (Fla. 3d DCA 1972).

As stated in *Allstate*, supra at ¶3:

> [i]ndeed, courts in other states have been reluctant to apply criminal acts exclusions when examined in light of the public policy concerns inherent in automobile liability policies. *See, e.g., Farm Bureau Mut. Ins. Co. v. Blood,* 230 Mich.App. 58, 583 N.W.2d 476, 478-79 (1998) (finding exclusion for damages arising out of criminal acts ambiguous; coverage upheld under farm owners' liability policy for bodily injury and property damage arising from automobile accident); *Mendoza v. Rivera-Chavez,* 88 Wash.App. 261, 945 P.2d 232, 236-237

(1997) (declining to uphold felony exclusion in automobile insurance policy); *Allstate Ins. Co. v. Peasley,* 80 Wash.App. 565, 910 P.2d 483, 485 (1996) (when applying criminal acts exclusion, drew distinction between homeowners insurance and public policy favoring coverage in automobile insurance cases).

Financial responsibility laws vary from state to state, but these laws can be divided roughly into two categories. Some states, such as the Northern Mariana Islands, require all car owners to have compulsory bodily injury liability insurance of certain minimum limits. Other states compel bodily injury liability insurance only for drivers who have had an accident or some traffic infraction that demonstrates they are high-risk drivers. Those states which require all car owners to have bodily liability insurance generally require coverage for operating under the influence as a result of public policy. *See generally, Donegal Mutual Insurance Co. v. Long,* 564 A.2d 937 (Pa. 1989). As noted in *Donegal* at 943-944:

> The purpose of the Motor Vehicle Responsibility Law is to require owners of registered vehicles to be financially responsible. The clause in the rental agreement which excludes coverage for liability arising from the operation of the vehicle while under the influence of drugs or alcohol is inimical to this purpose. If the clause were permitted to stand, the owners of rental vehicles would have an avenue to avoid their financial responsibility to the victims of accidents whenever the driver of the leased vehicle was intoxicated or sometimes when he was negligent. Victims of accidents with rental vehicles might therefore find themselves without recourse to compensation for their injuries, or perhaps only to the extent of their own uninsured motorist coverage, absent the fortuity that the driver of the rental vehicle is covered by other insurance or possesses sufficient assets for compensation. The public policy enunciated by the Motor Vehicle Financial Responsibility Law, pursuant to its 1985 provisions, is to foster financial responsibility for damages caused to individuals on the roadways, not to promote uninsurance.

As further stated in *Donegal*:

> A financial responsibility act is remedial in nature and is therefore to be liberally construed to carry out the declared public policy and achieve the legislative objective. Otherwise stated, liability insurance policies executed, filed, and approved pursuant to the provisions of such statutes will be liberally construed so as to attain the legislative intent to protect the general public from loss by injury or death caused by the *negligence* of the insured, his agent, his servant, or his independent contractor.
> *Conversely, the purpose of the financial responsibility acts of protecting injured claimants is not to be defeated by imposing restrictions on the claimant not called for by the statute.* [Emphasis in the original].

Donegal at 587, quoting *Couch on Insurance 2d* (Rev. Ed.) § 45:733.

Public policy plays a role in this opinion. Courts have held that insurance companies may limit their liability unless the limitation is contrary to public policy. *See, e.g Mendoza v. Rivera-Chavez,* 999 P.2d 29 (Wash.

2000) (holding that a felony exclusion clause which does not focus on the victim, but rather focuses on the risk of the insurer violates public policy as the purpose of the Financial Responsibility Act is to protect the public from motorists who are unable to compensate victims of accidents).

"The term 'public policy' ordinarily includes the notion of the general 'public good,' as well as the policies enunciated by the jurisdiction's constitution, common or statutory laws, and judicial decisions[.]" *Salviejo v. State Farm Fire and Casualty Co,* 958 P.2d 552 (Hi. 1998) at 557 quoting 7 L. Russ & T. Segalla, *Couch on Insurance 3d* § 101:15, at 101-51 to 101-52 (1997). As further explained in the case of *Hartline v. Hartline,* 39 P.3d 765 (Ok. 2001):

> Even in the absence of a violation of a law's express provision, an exclusion may nonetheless be invalid for nonconformity to the *policy of the law.* The principal purpose of *law-mandated liability insurance* is the protection of the public from the financial hardship which may result from the use of automobiles by financially irresponsible persons. To effectuate this policy, *any vehicle operating on the roads of this state* must be secured against liability to innocent victims in the event harm occurs from its negligent operation. This clearly articulated public policy overrides contrary private agreements that restrict coverage where the contractual strictures do not comport with the purpose of the Act. [Emphasis added].

Hartline, at 771, 772.

See also Adams v. Thomas, 729 So.2d 1041 (La.. 1999). In *Adams,* the Louisiana court held that the exclusion in an automobile liability policy which excludes the named insured and anyone driving the insured vehicle with the permission of the named insured who had the permission of the named insured and who has an invalid driver's license contravenes the purpose of the compulsory automobile liability insurance law. The court noted that the purpose of the law is to provide compensation for persons injured by the operation of an insured vehicle and to deny coverage to a person who is in an automobile accident with an unlicensed driver "would result in an impermissible restriction on the intent and purpose of the legislature's statutory scheme enacted to ensure that all Louisiana motorists have available to them automobile liability insurance coverage". *Id* at 1044.

The public policy regarding the financial responsibility laws have been discussed frequently in states where negligence is the standard covered by most statutes.

> While it may be readily conceded that automobile liability insurance policies are contracts, it must also be recognized that they carry public considerations reaching beyond simply the rights of the parties to the contract. It is the public policy of this state to assure financial remuneration for damages sustained through the negligent operation of motor vehicles on the public highways of this state not only by the owners of such automobiles but also by all persons using such vehicles with the owner's permission, express or implied. *Allstate Insur. Co. v. Sullivan,* 643 S.W.2d 21, 22 (Mo. App. E.D. 1982) quoting *Winterton v. VanZandt,* 351 S.W.2d 696 (Mo.1961).

Finally, in 1993, prior to enactment of any CNMI law requiring auto insurance, the CNMI Superior Court hinted that some insurance policy exclusions may be against public policy only if the legislature in the

jurisdiction has passed financial responsibility laws outlawing such exclusions. *See Ada v. Saipan Sanko Transportation, Inc.*, Civ. No. 92-0674 (N.M.I. Super Ct. Dec. 30, 1993). *See also, Lizama v. Kintz*, Civ. No. 90-09609 (N.M.I. Super Ct. Oct. 11, 1994).

CONCLUSION

In the instant situation, while the statute does not specifically require coverage for DUI offenses or failure to possess a driver's license on one's person, given the legislative findings, coverage should be permitted. The Legislature has made it clear by its findings and purposes that the insurance required pursuant to P.L. 11-55 is to cover *negligent, reckless or intentional acts.* [Emphasis added]. As such, it is public policy that the insurance is provided to compensate innocent third parties and their property that is involved in an auto accident.

Sincerely,

Deborah L. Covington
Assistant Attorney General

Concurred by:

Ramona V. Manglona
Deputy Attorney General

Department of Commerce

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
Caller Box 10007 CK., Saipan, MP 96950
Tel. (670) 664-3000/1/2 *Fax: (670) 664-3067

RECEIVED
Office of the Attorney General
Civil Division
Date: DEC 21 2000
Time: 4:00PM
Rec'd by: CARILYN

MEMORANDUM

TO : Attorney General DATE: 12/21/00

FROM : Secretary of Commerce/Insurance Commissioner

SUBJECT : Section 8118 of Public Law No. 11-55
(The Mandatory Liability Auto Insurance Act)

Due to a spate of denied third party liability claims and inquiries inundating the Insurance Commissioner's Office regarding Public Law 11-55 (P.L. 11-55), we are once again requesting for an interpretation or an opinion of Section 8118(b) of P.L. 11-55. For your information, we requested for an interpretation or opinion in August of this year (please see the attached memorandum to Assistant Attorney General Allan Dollison) and, until now, we have not received a response.

We were hoping that Jerry Cody, Hearing Officer, DOLI, would set a precedence with our first insurance hearing for a third party liability insurance denial claim but, according to your review of the delegation under 4 CMC 7108 of the Commonwealth Insurance Act, Mr. Cody does not have the authority to hear insurance matters because the Insurance Commissioner may only delegate his powers, duties, or functions to Department of Commerce employees.

Understandably, we need an interpretation or an opinion from the Office of the Attorney General as soon as possible. Insurance companies are denying claims based on the "exclusions" section of their automobile insurance policies. Are exclusions (e.g., no driver's license, D.U.I., etc.) found in insurance policies considered inconsistent with this law?

Your prompt attention to this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact us.

Thank you.

FRANKIE B. VILLANUEVA, C.P.A.

Attachments

021957

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION No. 02-10

To: Ed Tenorio, Special Assistant for Management & Budget

CC: Office of the Governor
Major of Rota
Rota Legislative Delegation

From: Attorney General

Date: August 12, 2002

Re: **In re OMB-Rota** Mayor's Declaration of Local Emergency

---

This memorandum is in response to your July 17, 2002, request for legal opinion. It is based on a review of the following documents: Rota Mayor's reprogramming requests for funds from Local Law 13-2 and Public Law 13-3 dated July 8, 2002, Rota Mayor's CIP reprogramming request dated July 10, 2002, Rota Mayor's Declaration No. 2002-01 (Declaration of Local Disaster Emergency), OMBM-02-031 dated July 17, 2002, Chairman of Rota's Legislative Delegation letter to OMB Special Assistant Edward S. Tenorio, dated July 22, 2002 and AGOM 02-425, Dated August 1, 2002.

ISSUES

1. Upon declaration of a Local Disaster Emergency, does the Mayors' constitutional authority to mobilize resources include the unlimited reprogramming authority over all funding resources, including all locally appropriated funds and any CIP fund balances from previous years?

Short Answer: No

2. Can the Mayor of Rota reprogram funds from Rota Local Law 13-2 appropriations without the approval of the designated expenditure authorities and the chairman of the Rota Legislative Delegation?

Short Answer: No

3. Can the Rota Mayor reprogram funds re-appropriated under Public Law 13-3 outside the projects or programs and without the approval of the Rota Delegation?

Short Answer: No

LEGAL ANALYSIS

I. Upon declaration of a Local Disaster Emergency, does the Mayors' constitutional authority to mobilize resources include the unlimited reprogramming authority over all funding resources, including all locally appropriated funds and any CIP fund balances from previous years?

A. The Mayors' Emergency Powers under the CNMI Constitution:

The CNMI Constitution grants the authority to declare a state of emergency to the Governor of the CNMI. N.M.I. Const. art III, § 10. This same section gives the Governor the power to mobilize available resources to respond to that emergency. Id. Under the CNMI constitution, the mayors of local governments become the principle local officials for coordinating activities with disaster control for the mobilization of resources. N.M.I. Const. Art VI, § 3(f).

Therefore, the Mayors' ability to mobilize resources during a state of emergency under the CNMI Constitution is dependent upon the Governor's declaration of a state of emergency. This ability to mobilize resources is limited under the CNMI Constitution to activities that coordinate with disaster control whenever resources must be mobilized.

B. The Mayors' Emergency Powers under CNMI law:

CNMI law states that when the Governor declares a state of emergency pursuant to N.M.I. Const. art. III, § 10, the Mayors shall act as the principal local officials responsible for mobilization of resources. 1 CMC 5108. This statute does not specifically state that the Mayors coordinate with disaster control whenever resources must be mobilized. However, "a court is justified in holding that a statute was intended to be subject to constitutional requirements and those requirements are to be considered as embodied in the statute if its terms do not exclude such requirements." 2A N. Singer, Statutes and Statutory Construction §45:12 (6th Edition, 2000 Revision). Therefore, under this principle of statutory construction, the Mayors continue to be subject to the constitutional requirement contained in N.M.I. Const. Art VI, § 3(f) to coordinate with Disaster Control whenever resources must be mobilized.

CNMI law also gives the Mayors ability to declare a Local Disaster Emergency independently from the Governor. 3 CMC 5123(a). However, when the Mayors declare a Local Disaster Emergency, the effect of that declaration is limited to activation of the response and recovery aspects of any and all applicable local disaster emergency plans. 3 CMC 5123 (b). The Mayor may authorize the furnishing of aid and assistance according to those plans. Id.

This same statute states that when the Governor declares the state of emergency, the Mayors become the principal local officials for coordinating activities with the Disaster Control Office. 3 CMC 5123 (c). These activities involve the mobilization of resources. Id. This statute does not allow for the independent mobilization of resources by the Mayors of the CNMI.

CONCLUSION as to Question 1

The Mayors have no independent Constitutional authority to mobilize resources during a state of emergency, even when that state of emergency has been declared by the Governor. When the Mayors independently declare a Local Disaster Emergency, their powers are limited to the activation of response and recovery aspects of all applicable disaster emergency plans. They have no statutory authority to reprogram funds based on a declaration of a Local Disaster Emergency. Therefore, Declaration No. 2002-01 does not give the Rota Mayor the authority to reprogram appropriated funds without following the reprogramming procedures specified by respective appropriation laws.

II. Can the Mayor of Rota reprogram funds from Rota Local Law 13-2 appropriations without the approval of the designated expenditure authorities and the chairman of the Rota Legislative Delegation?

A. Under the CNMI constitution, the CNMI legislature may grant the Mayors the power to reprogram appropriations.

The CNMI Constitution states that:

> If a balanced budget is approved by the legislature, the governor may not reallocate appropriated funds except as provided by law. N.M.I. Const., art. III, §9(a).

It further states that:

> A Mayor shall administer government programs, public services, and appropriations provided by law for the island or islands served by the mayor. N.M.I. Const., art. VI, §3(b).
>
> Local taxes paid to the chartered municipal governments of Rota, and Tinian and Aguiguan, and Saipan may be expended for local public purposes on the island or islands producing those revenues. N.M.I. Const., art. VI, §8(a).

Therefore, the Mayors, under the CNMI constitution, are limited to administering legislative appropriations. Only the Governor may reallocate appropriated funds, and then, only as provided by law.

B. CNMI statutes provide clear guidelines for reallocation of Capital Improvement (CIP) Funds and budgetary appropriations.

CNMI law grants the power to reallocate appropriated CIP funds only to the Governor, and then only according to strict guidelines. 1 CMC 7302. There is no provision in the statue governing appropriations for CIP funds that gives reallocation power to the Mayors.

CNMI law allows for the Mayors to reprogram up to 10 percent cumulative of funds appropriated by the annual appropriation acts for the operations and activities under the Mayors' jurisdiction. 1 CMC 7402(c). The Mayors may request additional reprogramming authority from the CNMI legislature. 1 CMC 7402(c). The procedures for requesting additional reprogramming authority are found at 1 CMC 7402(d).

On 7/3/02, the CNMI legislature granted expanded reprogramming authority with respect to the budgets of each of the Mayors. H.J.R. 13-013. This resolution states in part that:

> The Mayor of Rota and the Mayor of Tinian and Aguiguan shall have unlimited reprogramming authority with respect to the budgets of the Municipality of Rota and the Municipality of Tinian and Aguiguan, respectively; provided further that the Mayor of Saipan and the Mayor of the Northern islands shall also have unlimited reprogramming authority with respect to the budgets of their respective offices. H.J.R. 13-013 (emphasis added).

Under this resolution, the expanded authority is limited to the fourth quarter of Fiscal Year 2002. Id.

It is a basic principle of statutory construction that if the language of a statute is clear and without ambiguity, the "plain meaning" of the statute is to be accepted without resorting to any rules of statutory construction or statutory interpretation. Pellegrino v. Commonwealth, 5 N.M.I. 242, 247 (1999); Estate of Faisano v. Tenorio, 4 N.M.I. 260, 265 (1995).

The language of 1 CMC 7302, 1 CMC 7402(c), 1 CMC 7402(d) and H.J.R. 13-013 limits the reprogramming authority of the Mayors of the CNMI in the following manner:

a) they are prohibited from reprogramming CIP funds and

b) they have limited reprogramming authority within their budgetary allocations. Those limits are outlined specifically by statute to 10% of their budget, absent legislative authorization. The Mayors of Rota and Tinian have unlimited reprogramming authority with respect to the budgets of the Municipality of Rota and the Municipality of Tinian and Aguiguan for the fourth quarter of the Fiscal Year 2002 only. (The Mayor of Saipan and the Mayor of the Northern islands also have unlimited reprogramming authority with respect to the budgets of their respective offices during that same time period.)

C. The Mayor of Rota may not reprogram from Rota Local Law 13-2 appropriations without the approval of the designated expenditure authorities and the chairman of the Rota Legislative Delegation.

Public Law 13-2 is a local appropriations act allocating $142,000 from local license fees. As such, it is an allocation whose reprogramming is not controlled to 1 CMC 1402(c) mentioned above. This statute gives the Mayor of Rota expenditure and reprogramming authority over only sections 2(a) (Dialysis patients subsistence allowance), 2(b) (Agricultural Fair), and 2(c) (Mes Man Amko). Rota Local Law No. 13-2, §2. Expenditure and reprogramming authority over sections 2 (d-r) rests by statute with the heads of agencies, school principals, foundation presidents, etc. Id.

Additionally, this law limits the Mayor's reprogramming authority for the local license fees allocated to him.

It states:

> Any reprogramming of funds appropriated under Section 2 of this Act by the expenditure authority, as authorized by this Act, shall be made in consultation with the Chairman of the Rota Legislative Delegation. Rota Local Law No. 13-2, §3 (emphasis added).

CONCLUSION as to Question 2

The Mayor of Rota must follow reprogramming procedures specified by Rota Local Law 13-2.[1] The Mayor did receive approval from the Chairman of the Rota Delegation for his Rota Local Law 13-2 reprogramming request of July 8, 2002. However, this approval is without effect because it authorized reprogramming of funds over which the Mayor had no expenditure authority.

III. Can the Mayor of Rota reprogram funds re-appropriated under Public Law 13-3 outside the projects or programs and without the approval of the Rota Delegation?

As was stated above, it is a basic principle of statutory construction that if the language of a statute is clear and without ambiguity, the "plain meaning" of the statute is to be accepted without resorting to any rules of statutory construction or statutory interpretation. Pellegrino v. Commonwealth, 5 N.M.I. 242, 247 (1999); Estate of Faisano v. Tenorio, 4 N.M.I. 260, 265 (1995)

Public Law 13-3 states:

> Fund balances...are hereby re-appropriated and authorized to be expended for government operations and various community improvement projects and programs as follows: (listing specific programs in parts (a) through (d)). Public Law No. 13-3 §2. (emphasis added).

[1] On July 22, 2002, the Chairman of the Rota Delegation approved the Mayor's reprogramming action dated July 8, 2002 regarding funds from Rota Local Law No. 13-2. However, this reprogramming action addressed funds over which the Mayor had no expenditure authority. (Rota Local Law No. 13-2 Section 2 d, e, f, g, h, i, j, k, l, m. n, and q)

The Mayor may reprogram funds within the projects or programs subject to the approval of the Rota Delegation. Public Law No. 13-3 §3 (emphasis added).

CONCLUSION as to Question 3

Following the principle of statutory construction discussed above, the "plain meaning" of this statute is clear. The re-appropriated monies are to be expended for the specific government operations and various community improvement projects and programs cited in the statute. The Mayor of Rota may not reprogram funds re-appropriated under Public Law 13-3 outside of the projects or programs for which the funds were allocated. Additionally, if the Mayor of Rota wishes to reprogram these funds within the projects or programs required by the statute, he can do so only with the approval of the Rota Legislative Delegation.

BY:

Angela L. Bennett
Assistant Attorney General

Concurred by:

Robert T. Torres
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

Attorney General
Legal Opinion
#02-11

To: Frank B. Villanueva, Secretary of Finance

From: Deborah L. Covington, AAG

CC: Ramona V. Manglona, Deputy Attorney General

Date: August 15, 2002

Re: Governor's Reprogramming Authority

On July 2, 2002, you requested a legal opinion regarding the Governor's reprogramming authority in regard to funds appropriated under Public Laws 10-66, 11-25, and 9-29. The Attorney General has requested I respond directly to your request.

ISSUE PRESENTED

What is the Governor's reprogramming authority in regards to funds appropriated under Public Laws 10-66, 11-25 and 9-29 in light of Section 518 of P.L. 11-41 that suspended certain earmark provisions.

SHORT ANSWER

P.L. 11-41, the last budget act passed by the Legislature remains in effect pursuant to continuing resolution. As such, the earmarked provisions that were suspended pursuant to §518 of P.L. 11-41 remain suspended, and those funds are available for appropriation by the Governor. Additionally, H.J.R. 13-013 expands the Governor's reprogramming ability for a limited time, subject to certain restrictions contained in the joint resolution as outlined below.

APPLICABLE LAW AND DISCUSSION

In 1995, the former Governor signed P.L. 9-22 into law. P.L. 9-22 established the license fees for poker and pachinko machines pursuant to 4 CMC §§1503(a)(2) and (a)(5) respectively. Additionally, P.L. 9-22 also earmarked those license fees for particular programs.

Public Law 9-29 amended P.L. 9-22, which provided allocation of the poker machine license fees collected pursuant to 4 CMC §1503(a)(2). Specifically, Public Law 9-29 provided that 90% of all revenue collected pursuant to 4 CMC §1503(a)(2) shall be earmarked for the Retirement Fund. Additionally, this Act provided that 50% of all fees collected from the licensing fees imposed for pachinko slot machines under 4 CMC §1503(a)(5) shall be earmarked to the Retirement Fund, while the remaining license fees collected under (a)(5) shall be earmarked for the School Lunch Program Trust Fund.

P.L. 10-1 also contained certain earmark provision. Specifically, P.L. 10-1 earmarked fees received from nonresident work permits for an alien deportation fund for the purpose of deportation and any other related costs.

Public Law 10-66 amended 3 CMC §4424(c) and provided that fees collected pursuant to §4424(a) of the Non-resident Worker's Act shall be deposited into a special fund known as the "Commonwealth Nonresident Worker Fee Fund". Pursuant to Section 4 of P.L. 10-66, the revenue collected shall be earmarked for the Northern Marianas College Human Resources and Business Development Account. Additionally, $575,000 of these fees shall be earmarked for the Division of Labor for use in enforcing the provisions of this Act. Further, section 4 of the Act provides that funds earmarked under this section shall require annual Legislative appropriation and shall not be subject to reprogramming.

Public Law 11-25, like P.L. 10-66, also earmarked certain fees raised by the Government. P.L. 11-25 amended certain revenue provisions that were earmarked by P.L. 9-29. Specifically §13 of P.L. 11-25 provided that 50% of all revenues raised from licensing poker machines under 4 CMC §1503(a)(2) be earmarked for the Retirement Fund, thus reducing P.L. 9-29's 90% allocation. Additionally, §13 of the Act provides that 50% of all fees raised from licensing pachinko machines shall be earmarked for the Northern Mariana Islands Retirement Fund without further appropriation. Further, Section 14 of the Act provides that 40% of all revenues raised from licensing amusement machines under 4 CMC §1502(a)(2) shall be deposited into the General Fund.

P.L. 11-25 left intact certain earmark provisions established by P.L. 9-22. As a general rule, a statute will be an implied repealer of an earlier enacted statute only where the two are in "irreconcilable conflict" and "an intent to repeal is 'clear and manifest'". *In re North*, 167 F3d 1234, 1243 (D.C. Cir. 1994) (Sentelle, Cir. J. Delivering Op. for Special Division) (quoting *Rodriquez v. United States*, 480 U.S. 522, 107 S. Ct. 1391, 1392 (1987). In enacting P.L. 11-25, the Legislature did not express a clear and manifest intent to repeal two of the previously earmarked provisions. Where they "are capable of co-existence, it is the duty of the courts...to regard each [statute] as effective". *Radzanower v. Touch Ross & Co.*, 426 U.S. 148, 96 S. Ct. 1989, 1993 (1976) (quoting *Morton v. Mancart*, 417 U.S. 535, 94 S. Ct. 2474, 2483 (1974). As such, the 50% earmark codified at 4 CMC § 1508(c) as amended by P.L. 9-22 for the School Lunch Program, was left intact, as well as the 10% allocation from the poker machine fees pursuant to 4 CMC §1508(a) as amended by P.L. 9-22. The 10% earmark was designated to be placed in a separate trust account in the General Fund known as the Human Resources Development Trust Fund to be used for the Job Training Partnership Act.

Shortly thereafter, P.L. 11-41 was passed, suspending certain earmark provisions in prior laws. Section 518 of P.L. 11-41 provides:

> The earmarking provisions in Public Laws 10-66, 9-29, and 11-25 are hereby suspended for the 1999 fiscal year such that monies earmarked under these laws that are not specifically appropriated with reference to those laws for their earmarked purpose(s) are hereby transferred into the General Fund for general appropriation under this Act. The earmarking and automatic appropriation of funds under Public Law 10-1 is not affected or amended by this Act.

It is a basic rule of statutory construction that where the legislature alters existing law, the provisions of both the new and the preexisting statute must be given effect if at all possible. Sands, 1A *Sutherland's Statutory Construction,* §22.35, at p. 297 (5th ed. 1993). If the amendatory act cannot be reconciled with the requirements of the altered provision, the last expression of the legislative will must be given effect. *Commonwealth v. Lizama*, Crim. No. 91-106, (Amended Order) (Superior Court Nov. 1, 1991 at p. 12); *rev. on other grounds,* 3 N.M.I. 402 (1992).

Public Law 11-41's Current Effect

P.L. 11-41, an appropriations bill enacted into effect in fiscal year 1999 remains in effect today until a new appropriations bill is passed into law. If a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year. N.M.I. Const. Art. III, §9(a). 1 CMC §7204(d), also provides in part:

> Funds for operations of the Commonwealth shall be appropriated pursuant to annual appropriation acts. If the annual appropriation acts are not enacted into law prior to the beginning of the budget year, the appropriations levels, and such of the criminal penalties, and administrative provisions for government operations and obligations as are not inconsistent with the provisions of this part, shall continue as provided in the annual appropriation acts of the current year. These continuing appropriations shall be expended in quarterly or less allotments for the purposes and items previously appropriated. Such allotments may exceed 25 percent only upon written justification by the person with spending authority, and, in the case of the executive branch departments, approval by the Governor in writing.

Furthermore, §7204(d) has placed conditions on reprogramming funds in excess of the allotted 25%. That is, the reprogramming of such funds must comply with 1 CMC §7401 et. seq. and no funds expended under a continuing appropriation shall be used to expand existing operations or programs, or to initiate new operations or programs.

Authority to Reprogram

With respect to the Governor's authority to reprogram funds, such authority and limitations on such authority is found in 1 CMC §7402(b). This section provides:

> The Governor may reprogram funds appropriated by the annual appropriation acts for the operations and activities of departments, agencies, and offices of the executive branch up to 25 percent cumulative and in total; provided, that any reprogramming

which increases or decreases the annual appropriations or allocations by the annual appropriation acts for a particular executive office, department, or agency of the Commonwealth by more than 25 percent cumulative and in total shall be subject to prior approval by joint resolution of the legislature pursuant to subsection (d) of this section; and provided further, that any reprogramming pursuant to an executive order issued pursuant to N.M.I. Const. art. III, § 15, which establishes a new position, function, program or duty not otherwise authorized by law, shall be subject to prior approval by joint resolution pursuant to subsection (d) of this section.

Nothing in this section shall authorize the Governor to reprogram funds allocated or appropriated by the annual appropriation acts for Covenant training funds or for the operations and activities listed in 1 CMC § 7401(b) through (p).

With respect to the earmark provisions provided by P.L. 9-22, i.e. the 10% designated for the JTPA and the 50% designated for the school lunch program, such programs are not operations and activities listed in 1 CMC §7401(b) through (p) thus the Governor is not prohibited from reprogramming those funds.

With respect to the earmarks made to the Retirement Fund, had they not been suspended pursuant to §518 of P.L. 11-41, the Governor would not have been permitted to reprogram those funds because they were for operations and activities listed in 1 CMC §7401(m). Due to the suspension of the earmark under P.L. 11-41 and its continued effect due to the continuing resolution, the Governor is permitted to reprogram those particular funds.

House Joint Resolution 13-013 and its Limitations

In general, the Governor's authority to reprogram is limited to monies for the operations and activities of the departments, agencies and offices of the executive branch. It is further limited to 25% cumulative of funds appropriated by the annual appropriations act. It is, however permitted to increase by more than 25% cumulative in total, subject to prior approval by joint resolution of the legislature. The Thirteenth Northern Marianas Commonwealth Legislature passed such a joint resolution, H.J.R. 13-013, authorizing the Governor to reprogram continuing appropriation allocations, based upon P.L. 11-41, in excess of the 25% cumulative and in total, solely for the operations and activities of the executive branch. There are limitations to the Governor's authority, however. The Joint Resolution provides that such reprogrammed funds shall not be used to fund any travel or official representation accounts within the executive branch, and that the expanded reprogramming authority granted pursuant to the Resolution shall apply only to the fourth quarter of the Fiscal Year 2002. In other words, as of September 30, 2002, the 25% limitation will apply unless a new budget is passed.

Limits on Reprogramming

While the Joint Resolution has expanded the Governor's ability to reprogram, such authority is still subject to limitations as provided by other sections of the Budgeting Act. General limits on reprogramming are also found in 1 CMC §7402(a) which provides:

(2) No funds may be reprogrammed to any account which has been zero-funded by the legislature or to any account for which the legislature has not made an appropriation.

(3) No Covenant funds or interest thereon may be reprogrammed or otherwise transferred or borrowed from capital improvement and economic development accounts to government operational accounts.

Additionally, if the Governor fails to timely submit the proposed annual budget to the legislature, 1 CMC §7205(b)(1) terminates the Governor's reprogramming authority until 10 days following the date that the budget is submitted.

There are also limits on the authority to reprogram capital improvement project (CIP) funds pursuant to 1 CMC §7302. The Governor may reprogram unobligated funds appropriated for capital improvement projects only after a reprogramming request has been approved pursuant to 1 CMC § 7402(d) or after a project has been certified complete by the administering authority. With respect to reprogramming unobligated funds from a capital improvement project which has not been certified complete, the Governor may reprogram such funds, only after a reprogramming request has been approved pursuant to 1 CMC § 7402(d).

Finally, the Governor may reprogram under his Emergency Powers, pursuant to N.M.I. Constitution Art. 3, §10 in the case of invasion, civil disturbance, natural disaster, or other calamity as provided by law. However, in accordance with 1 CMC §7403, Governor shall as soon as practicable transmit to the legislature a report describing in detail the emergency which required exercise of such authority, the measures being taken to deal with the emergency, and a financial plan for meeting the cost of these measures.

With respect to the ability to reprogram funds pursuant to P.L. 11-41, the suspended provisions of P.L. 10-66, 9-29, and 11-25 continue until a new appropriations bill is passed or until the suspension is otherwise repealed. As such, the Governor may reprogram the funds whose earmark has been suspended pursuant to P.L. 11-41. It is important to note, however, the earmark provisions of P.L. 9-22, specifically the earmark of the 10% of poker fees designated for the Human Resources Development Trust Fund and reserved for the Job Training Partnership Act as well as the earmark of 50% of pachinko machine fees designated for the School Lunch Program are still in effect and have not been suspended. As such, these funds are not subject to reprogramming by the Governor.

CONCLUSION

P.L. 11-41, the last appropriation bill passed into law remains in effect during this period of continuing resolution. The Governor may continue to reprogram the poker and pachinko funds which were previously earmarked, but which earmark was suspended under P.L. 11-41, however, funds which were earmarked under P.L. 9-22 and were not effected by the suspension pursuant to P.L. 11-41 remain earmarked for their particular program. They may, however, be subject to reprogramming because neither program is one listed in 1 CMC §7401(b) through (p).

The Governor may not reprogram funds to an account that has been zero-funded by the legislature or to any account for which the legislature has not made an appropriation. Additionally, there are limitations on reprogramming capital improvement funds.

Finally, in accordance with House Joint Resolution 13-013, the Governor may reprogram the continuing appropriations, based on P.L. 11-41, as revised, and in excess of the 25% cumulative and in total solely for the operations and activities of the executive branch. However, the Joint Resolution provides that such reprogrammed funds shall not be used to fund any travel or official representation accounts within the executive branch, and that the expanded reprogramming authority granted pursuant to the Resolution shall apply only to the fourth quarter of Fiscal Year 2002.

Please do not hesitate to contact me should you have any further questions regarding this matter.

Sincerely,

Deborah L. Covington
Assistant Attorney General

Concurred By:

Robert T. Torres
Attorney General

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor-Administration Building Capitol Hill
Caller Box 10007, Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/2367/2368
Fax: (670) 234-7016

September 10, 2002

Attorney General Legal Opinion # 02-12

Brien Sers Nicholas, Esq.
UIU Building, 1st Floor
P.O. Box 502876
Saipan, MP 96950

Dear Mr. Nicholas,

I am in receipt of your request for a legal opinion on whether Commonwealth Utilities Corporation Board members are entitled to compensation for attending committee meetings.

ISSUE

Are Commonwealth Utilities Corporation ("CUC") Board members entitled to compensation for attendance at committee meetings?

LAW

The compensation of board members for meetings attended in furtherance of their official duties is governed by 1 CMC §8247 which states as follows:

> § 8247. Compensation of Board Members of Government Corporations and Councils.
> *(a) Notwithstanding any other provision of law, members of government corporations, councils, commissions, agencies and boards, and elected municipal councils may receive as compensation for meetings actually attended no more than $60 for a full-day meeting and no more than $30 for a half or less day meeting.* A member who is employed by the Commonwealth shall receive his regular salary under administrative leave status in lieu of compensation for meetings held during working hours. (emphasis added)

(b) A member traveling on official business shall receive travel and per diem compensation at the rates and guidelines established for executive branch employees.

(c) A member may receive reimbursement for extraordinary expenses actually incurred in the performance of his duties upon the submission of receipts or other proof of extraordinary expenses to the board and the specific approval of the board to reimburse the member for his extraordinary expenses.

Source: PL 4-32, § 8; subsection (a) amended by PL 12-3, § 1.

As applied to committee meetings composed of CUC board members, there is no limitation in the above statute which would preclude the compensation of these members for such meetings. So long as these committee meetings are in furtherance of CUC board member duties in service to CUC and in turn Commonwealth at large, the above statute is applicable. To conclude otherwise would be to infuse this statute with significance contrary to its plain meaning. "[A] basic principle of statutory construction is that language must be given its plain meaning." *Commonwealth v. Hasinto, 1 N.M.I. 377, 382 (1990).*

If the committee acts on behalf of the governing body, conducts hearings or takes testimony or public comments during its meeting, the committee must follow the Open Government Act ("OGA"). 1 CMC §9902(c). The requirements of the OGA can be found at 1 CMC §9901 *et seq.*

In the absence of specific legislation to the contrary, it is the opinion of the Attorney General that CUC board members are entitled to compensation for attendance at board committee meetings in accordance with 1 CMC §8247.

BY:

Ramona V. Manglona
Deputy Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION No. 02-013

To: Mr. Juan I. Tenorio, Director of the Office of Personnel Management

CC: Governor
Lt. Governor
Mayor of Saipan
Administrator, Retirement Fund

From: Deputy Attorney General

Date: September 24, 2002

Re: In re Rehiring of individuals who have retired and received a 30% bonus under 1 CMC §8401

This memorandum is in response to your May 30, 2002 request for a legal opinion regarding the re-employment of two former employees of the CNMI government: (1) Mr. Michael C. Malone, who retired and received a 30% bonus under 1 CMC §8401 on Dec. 21, 2001 and (2) Mr. Manuel C. Tenorio, who retired and received a 30% bonus under 1 CMC §8401 on Dec. 30, 1999.

This opinion is based on a review of pertinent CNMI statutes, and the following documents: (1) The Mayor of Saipan's March 22, 2002 letter to the governor requesting an exemption under 1 CMC §8392(a)(5) for Mr. Malone, (2) Two exemptions from the Governor, one for Mr. Malone, dated March 26, 2002, and the other for Mr. Tenorio, dated March 18, 2002, (3) Your memorandum of May 30, 2002, (4) The Retirement Board's concurrence with the Governor's exemption, dated May 23, 2002, and (5) The Retirement Board's rescission of that concurrence, dated August 13, 2002.

This opinion addresses the following issues:

ISSUES

1. Is the rehire of individuals who retired pursuant to 1 CMC §8401 ("Commonwealth Early Retirement Bonus Act" P.L. 8-30), permissible under 1 CMC §8402 or 1 CMC §8392?

   Short answer: Rehiring of retired individuals who have been granted exemptions by the Governor is permissible under 1 CMC §8392(a)(5). 1 CMC §8392 prevails because 1 CMC §8402 was repealed by P.L. 11-114.

2. Does 1 CMC §8392 (a)(5) apply in any way to the specific cases of employees who retired pursuant to 1 CMC §8401?

   Short Answer: 1 CMC §8392 is the statute governing the rehire of employees who retired pursuant to 1 CMC §8401. The employment restriction exemption which applies to the rehire of Mr. Malone and Mr. Tenorio is 1 CMC §8392(a)(5).

3. Are there any existing statutory authorities for the Municipal Councils to confirm any Mayoral appointees other than "all resident department heads" as provided in Article VI, Section 7(a)(3) of the Commonwealth Constitution?

   Answer: This question is not relevant to the rehiring of retired individuals by the Mayor of Saipan. However, the Municipal Councils of Rota and Tinian may only confirm mayoral appointees for resident department heads which are stationed on their island or islands. N.M.I. Const. Art. VI § 7 (a)3. Additionally, 1 CMC §8402(b), which allows mayoral appointees confirmed by Municipal Councils to be rehired after retirement, was repealed.

Legal Analysis

I. Is the rehire of individuals, who retired pursuant to 1 CMC §8401(Commonwealth Early Retirement Bonus Act" P. L. 8-30) permissible under 1 CMC §8402 or 1 CMC §8392?

A. Rehiring of retired individuals granted exemptions by the Governor is permissible under 1 CMC §8392(a)(5).

The legislature of the CNMI first addressed the issue of rehiring retired individuals in 1989, with the passage of the Northern Mariana Islands Retirement Fund Act ("NMIRFA") (Public Law 6-17). This statute allowed only those elected to public office to be "employed" after retirement. In 1990, the CNMI legislature amended the NMIRFA, expanding the categories of retired government employees who could be rehired by the CNMI government to include (1) those appointed by the Governor to a position requiring the advice and consent of the Senate or House of Representatives or both; and (2) individuals hired in positions for which professionals were not readily available in the local labor market, such as teachers for Northern Marianas College and the Public School System, attorneys of the Attorney General's office and the Public Defender's office, nurses and doctors, audit staff of the OPA and former elected officials. See P.L. 6-41. In 1991, the legislature added employees hired under Title V of the Older American's Act, and those specifically exempted by the Governor, with the concurrence of the Retirement Board. See P.L. 7-39 and P.L. 7-40.

The intent of these exemptions is summarized in P.L. 7-40:

> The Legislature finds that the exemptions which allow retired government employees who are receiving retirement benefits to work for the

Commonwealth government are insufficient to cover numerous situations where it is beneficial to the Commonwealth and the retired government employee to resume work for the government. It is the intent of this legislation to allow more retired governmental employees to work for the government when exempted by the governor."

All of the amendments that allow the rehire of individuals who had formerly retired from CNMI government employment are codified in 1 CMC §8392.

In 1993, the CNMI legislature decided to encourage the retirement of government employees by establishing the Early Retirement Bonus Program ("ERBP"). P.L. 8-30. This program was later codified as 1 CMC §8401 *et seq.* This legislation allowed eligible employees to receive an early retirement bonus of 30 percent of their annual salary. These individuals were then prohibited from government reemployment with some exceptions. 1 CMC §8402. The exceptions included individuals who were: (a) elected to public office; (b) appointed by the Governor to a position requiring the advice and consent of the Senate or both Houses of the Legislature, or by a Mayor to a position requiring confirmation by the municipal council; (c) appointed by the Governor as a special assistant to the Governor; (d) appointed by a board or commission to head an autonomous agency of the government; (e) hired as a teacher, nurse, doctor or attorney for the government.

The Early Retirement Bonus Program ("ERBP") was repealed by P.L. 11-114, which became law on January 18, 2000. The ERBP was a financial burden to the Government and the Retirement Fund, according to legislative records and the Governor's letter approving P.L. 11-114.

Therefore, the current law governing rehiring of retired government employees is 1 CMC §8392. This law prevails over the repealed and the more restrictive exemptions of 1 CMC §8402. (See discussion in Part B below.)

It is a basic principle of statutory construction that if the language of a statute is clear and without ambiguity, the "plain meaning" of the statute is to be accepted without resorting to any rules of statutory construction or statutory interpretation. *Pellegrino v. Commonwealth*, 5 N.M.I. 242, 247 (1999); *Estate of Faisano v. Tenorio*, 4 N.M.I. 260, 265 (1995).

The language of 1 CMC §8392 limits the rehiring of individuals as government employees who have received retirement benefits from the government of the Northern Mariana Islands. This statute contains five exceptions.[1] The exemption pertinent to this

[1] 1 CMC §8392 states: (a) A person who has retired and received retirement benefits from the government of the Northern Mariana Islands shall not be employed by or under an employment or consulting contract with the government of the Northern Mariana Islands or its public corporations, boards or commissions unless the person is: (1) Appointed by the Governor to a position requiring the advice and consent of the Senate or House of Representatives or both. (2) Hired in a position for which professionals are not readily available in the local labor market, including, for example, teachers for the Public School System and the Northern Marianas College, attorneys for the offices of the Attorney General and Public Defender, nurses and doctors for the Commonwealth Health Center, audit staff for the office of the Public Auditor, and former elected officials. (3) Elected to public office. (4) A Title V employee under the federal Older Americans Act. A retiree may be hired under Title V of the Older Americans Act [42 U.S.C. §3001 et seq.] and continue to receive benefits from the Northern Marianas Retirement Fund. Those benefits will be based on the computed service and wages

discussion is 1 CMC §8392(a)(5). Mr. Malone and Mr. Tenorio were given an exemption from the Governor, with the concurrence of the Retirement Fund, on May 23, 2002 under 1 CMC §8392(a)(5).

The Retirement Fund later rescinded its concurrence on August 13, 2002, citing the repealed statute 1 CMC §8402 as the basis for that rescission. The NMI Retirement Fund should reconsider its rescission decision because the statute that they relied upon as justification for the rescission has been repealed.

B. 1 CMC §8392 prevails over 1 CMC §8402 because 1 CMC §8402 was repealed by P.L. 11-114 and has no force or effect of law.

1 CMC §8402 was repealed by P.L. 11-114. P.L. 11-114 became law on January 18, 2000.

P.L. 11-114 has two sections that pertain to the repeal of 1 CMC §8402: (1) the expiration and repealer clause, §3, and (2) the savings clause, §5.

P.L. 11-114 §3 states:

> The Commonwealth Early Retirement Bonus Act (P.L. 8-30) which took effect on October 1, 1993 shall expire and become automatically repealed by this Act on December 15, 1999.[2] The expiration of such law shall not have any effect on the entitlement acquired, pursuant to such law, by any employee or retiree prior to such expiration. P.L. 11-114 §3. (emphasis added)

P.L. 11-114 §5, termed the savings clause, states:

> "This Act and any repealer contained herein shall not be construed as affecting any existing right acquired under contract or acquired under statutes repealed or under any rule, regulation or order adopted under the

---

earned upon his or her retirement. He or she shall not be required to contribute to the Retirement Fund on wages earned as a recipient of Title V of the Older Americans Act. Any retiree who was hired under Title V of the Older Americans Act prior to October 11, 1991, and who has contributed to the Retirement Fund from such wages, shall be entitled to a refund of all such contributions. Nothing in this section shall be construed to violate any provision of N.M.I. Const. art. III, §20. (5) Specifically exempted by the Governor, with the concurrence of the Retirement Board (b) A person who has retired and received a retirement benefit shall not be eligible to receive prior service credit if the person continues to receive retirement benefits from the government while accruing service that is eligible for credit as prior service credit upon reemployment with the government. (c) Provided, however, that any person who elected to retire pursuant to the provisions of N.M.I. Const. art. III, § 20(b) may be employed by the Commonwealth for no more than 60 calendar days in any fiscal year without forfeiting any retirement benefits. (d) Retirees are allowed to return to government employment as classroom teachers, nurses, doctors and other medical professionals for a period not to exceed two years without losing their retirement benefits. However, no such re-employed retiree shall have their retirement benefits recomputed based on any re-employment during which retirement benefits are drawn, but every such re-employed retiree shall nevertheless be required to contribute to the retirement fund during the period of re-employment, at the same rate as other government employees. Source: PL 6-41, § 15 (repealing PL 6-17, ch. 8, § 83811); amended by PL 7-39, §§ 6, 7, 8; PL 7-40, § 3; PL 8-31, § 13; PL 11-2, § 4. (emphasis added)

[2] This opinion does not address the effect of repeal and expiration of the ERBP taking effect on December 15, 1999, and the statute becoming law on January 18, 2000.

statutes. Repealers contained in this Act shall not effect any proceeding instituted under or pursuant to prior law. The enactment of this Act shall not have the effect of terminating, or in any way modifying, any liability, civil or criminal, which shall already be in existence at the date this Act becomes effective." P.L. 11-114 §5. (emphasis added)

The expiration and repealer clause and the savings clause in P.L. 11-114 preserves entitlements already acquired, existing rights, proceedings already instituted and civil or criminal liabilities which were already in existence on the date that the repealer became effective. The rehiring limitations of 1 CMC §8402 were not preserved by either clause. Therefore, 1 CMC §8402 would have no effect on the rehiring of individuals who retired pursuant to 1 CMC §8401 if they applied for rehire after January 18, 2000.[3]

Governor Juan N. Babauta granted employment restriction exemptions under 1 CMC §8392 (a)(5) for Mr. Malone on March 26, 2002 and Mr. Manuel Tenorio on March 18, 2002. Both of these individuals sought rehiring after P.L. 11-114 became law, and are therefore not subject to the hiring limitations of 1 CMC §8402.

CNMI caselaw supports this analysis. In *Marianas Corp. v. CNMI,* the court stated:

> Unless express or implied legislative intent indicates otherwise, the repeal of a statute operates only prospectively; it does not undo the consequences of its operation while it was in force. Chism v. Phelps, 228 Ark. 936, 311 S.W. 2d 297, 77 ALR 329, 335 (Ark. 1958)... a repealed statute is treated as if it never existed except as to transactions past and closed. Ex Parte McCardle, 19 L.Ed. at 265; 1A Sutherland §23 at 279. *Marianas Corp. v. CNMI,* 1 CR 408 at 413,414 (1983).

A review of the discussion on the floor of the House and Senate prior to the passing of P.L. 11-114 confirms this analysis. The legislators of both the House and Senate discussed preserving the benefit of a 30% retirement bonus for those individuals who had acquired the entitlement under 1 CMC §8401.

However, the legislators did not discuss preserving the hiring limitations in 1 CMC §8402. On the contrary, the legislative history indicates that the legislators in the House[4] specifically anticipated that the retirement fund would allow "double dipping" by those teachers, nurses and doctors who had retired, and accessed the benefits allowed under 1 CMC §8401.[5]

---

[3] Individuals rehired after January 18, 2000, will also not have to repay any bonus that they received under 1 CMC 8401 because the provision requiring that repayment, 1 CMC 8402, was repealed.

[4] The Senate legislative record contains no information regarding the effect of repealing the rehiring limitations of this section.

[5] Under 1 CMC 8392(a)(4), and (d), individuals who were retired and then were rehired under Title V of the Older American's Act, or were rehired as teachers, doctors, nurses and other medical professionals are allowed to receive their retirement benefits and their salary at the same time (termed "double dipping"). (See footnote one.) The repealed statute did not allow "double dipping" for this same group of employees. 1 CMC 8402

The House legislative record states in pertinent part:

> Floor Leader Teregeyo: ...will (these) teachers who recently retired (be) allowed to re-enter the service?
>
> Speaker Attao: The answer to your question is yes and that is coming from the legislative—from the initiative. The double dipping nai: teachers, nurses and doctors.
>
> Floor Leader Teregeyo: Yes, I know ... even if (we) repeal Public Law 8-30, we are going to again go into a cycle of not being able to meet our obligations...I sympathize (with) those teachers, those government employees who retired because they had contributed their time and services in most instances...but I also would like this body...to review those initiatives that we allowed double-dipping. If we don't cap those, we could never, never ever come to realize meeting our obligations with the retirement fund...11th NMC Legislature, 3rd regular session, 1999, Jan 15, 1999, p.62

Principles of statutory construction also govern the effect of a repeal of a statute. Those principles support this analysis.

> "The effect of the repeal of a statute having neither a savings clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed the statute is considered as if it had never existed... 1A N. Singer, Statutes and Statutory Construction §23:34 (6th Edition, 2002 Revision) (emphasis added).

CONCLUSION as to Question No. 1.

Therefore, according to sections 3 and 5 of P.L. 11-114, CNMI caselaw, and the principles of statutory construction, the rehiring limitations of 1 CMC §8402 were repealed. These limitations have no affect on individuals who acquired their 30% bonus and sought rehiring after 1 CMC §8402 was repealed. Any of these individuals who seek rehire would be governed by the provisions of 1 CMC §8392.

II. Does 1 CMC §8392 (a)(5) apply in any way to the specific cases of employees who retired pursuant to 1 CMC §8401?

1 CMC §8392 is the statute which governs employees who retired, received an early retirement bonus pursuant to 1 CMC §8401, and wish to re-enter government employment. (See Part I. B. regarding the repeal of 1 CMC §8402.) In order to be rehired after retirement, these employees must qualify for one of the exemptions in 1 CMC §8392. The specific exemption that applies to the rehire of Mr. Malone and Mr. Tenorio is 1 CMC §8392(a)(5). Under this exemption, the Governor must specifically exempt an employee and the Retirement Board must then concur.

Through the authority vested in him under 1 CMC §8392(a)(5), the Governor exempted Mr. Malone on March 26, 2002 and Mr. Tenorio on March 18, 2002. The Retirement Board concurred with the Governor's exemption of both Mr. Malone and Mr. Tenorio on May 23, 2002. (See Part I. A regarding the impact of the Retirement Board's August 13, 2002 rescission.)

CONCLUSION as to Question No. 2.

Individuals who were past employees of the CNMI government, retired and received a 30% early retirement bonus under 1 CMC §8401, can be rehired as employees of the government of the Northern Marianas Islands, specifically the Mayor's Office of Saipan, if they have received an exemption under 1 CMC §8392(a) (5). P.L. 11-114 repealed 1 CMC §8402 that limited the rehire of individuals who received a bonus pursuant to 1 CMC §8401.

BY:

Angela L. Bennett
Assistant Attorney General

Concurred by:

Ramona V. Manglona
Deputy Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

To: Governor AG Legal Opinion No. 02- 014

From: Acting Attorney General

CC: Lt. Governor

Date: November 5, 2002

Re: Authority to Borrow Funds for the Limited Purpose of Paying Rebates and Refunds

---

Issue Presented

By letter dated November 1, 2002, you have requested this Office to provide a legal opinion with respect to the following issue:

> Does Article X, §4 of the N.M.I. Constitution, which provides that no public debt may be incurred for operating expenses of the government, allow the borrowing of funds by the government for the specific and limited purpose of paying tax refunds and tax rebates that are currently due and owing to CNMI taxpayers?

Short Answer

Yes, the government is constitutionally permitted to borrow funds from a private institution for the specific and limited purpose of paying tax refunds and tax rebates that are currently due and owing to CNMI taxpayers, provided certain procedures, as outlined below, are followed.

Applicable Law

N.M.I. Constitution Article 10, Section 4 provides:

> Public Debt Limitation. Public indebtedness other than bonds or other obligations of the government payable solely from the revenues derived from a public improvement or undertaking may not be authorized in excess of ten percent of the aggregate assessed valuation of the real property within the Commonwealth. Public indebtedness *may not be authorized for operating expenses* of the Commonwealth government or its political subdivisions.
>
> (Emphasis added).

N.M.I. Constitution Art. 10, Section 3 provides:

> Public Debt Authorization. Public debt may not be authorized or incurred without the affirmative vote of two-thirds of the members in each house of the legislature.

4 CMC §1714, as amended by P.L. 11-49 provides as follows:

> Special Rebate Trust Account.
>
> At least 75 percent of all amounts paid to the government with respect to taxes imposed under this chapter shall not be placed into the General Fund or commingled with other funds, but shall be deposited by the Secretary of Finance into one or more FDIC or FSLIC insured special purpose trust accounts in banks within the Commonwealth. The proceeds may be withdrawn from the trust accounts only for the purpose of:
>
> (a) Making rebates for any fiscal year as provided in this chapter;
>
> (b) Payment into the General Fund, but only after a final determination, including a judicial determination if requested by any taxpayer, that the amount in question is not validly subject to rebate under this chapter, or
>
> (c) Payments into the General Fund of the interest or earnings derived from such trust accounts.

4 CMC §1103(s) defines the term "rebate offset" and provides as follows:

> "Rebate offset" means an adjustment, reduction, return, credit, nontaxable refund, or other nontaxable payment of all or part of any tax, as provided by the Commonwealth of such amount of the taxes paid by a person. The term "rebate offset" shall apply only to any tax imposed on income from sources within the Commonwealth. The term "rebate offset" shall not apply to any tax imposed on income exempted by subsection (z)(1) of this section.

Pursuant to Northern Marianas Territorial Income Tax (NMTIT) §6402, in the case of any overpayment, the Secretary may credit the amount of such overpayment, including interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

Discussion

a. Borrowing funds for the specific and limited purpose of paying tax refunds and rebates that are currently due and owing is permissible under N.M.I. Constitution Art. 10, Section 4.

Article 10, Section 4 of the N.M.I. Constitution explicitly permits public indebtedness provided that such indebtedness is not used for "operating expenses of the CNMI government or its political subdivisions". While CNMI case law and the statutes do not define the term "operating expense", the Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands (December 6, 1976) (hereinafter "the Analysis") does shed light on this issue. Specifically, the Analysis states that:

> [o]perating expenses are the normal costs of obtaining and delivering government services. This section (Art. 10, §4) does not permit deficit financing of any government operating expenses. All such financing must be from current revenues. This means that the proceeds of all public debt must be earmarked and cannot be made a part of general revenue.

Analysis at 141.

The term "operating expenses" is also defined by Black's Law Dictionary (5th Ed. 1979). That term is defined as follows:

> Those expenses required to keep the business running. *E.g.* rent, electricity, heat. Expenses incurred in the course of ordinary activities of an entity. *Id.* at 984.

Furthermore, that term as defined in Black's Law Dictionary (7th Ed. 1999) is defined as "[a]n expense incurred in running a business and producing output."

Accordingly, the language of Art. X, Section 4 of the N.M.I. Constitution stating that "[p]ublic indebtedness may not be authorized for operating expenses of the Commonwealth government or its political subdivisions" necessarily means that no public indebtedness may be incurred to fund daily CNMI Government operations, such as payroll and the payment of vendors.

In the case of *Pangelinan v. CNMI et. al.*, 3 CR 1148 (Dist. Ct. App. Div., 1987) the court in establishing the rules to be followed in interpreting the N.M.I. Constitution stated at page 1161:

> The general principals which apply to statutory construction are equally applicable in cases of constitutional construction. *Johnson v. State Electoral Board,* 53 Ill.2d 256, 290 N.E.2d 886, 888 (Il. 1972). In interpreting the language of a constitutional provision, the Court applies the plain and commonly understood meaning of the words, unless there is evidence that a contrary meaning was intended. *Coalition For Political Honesty, et. al. v. State Board of Elections,* 65 Ill.2d 453, 359 N.E.2d 138, 143 (Il. 1976).

In general, when interpreting statutory language, words and phrases are to be given their plain or ordinary meaning. *Govendo v. Micronesian Garment Mfg. Inc.*, 2 N.M.I. 270 (1991). Plain meaning has been

defined as the words or statute ordinary contemporary meaning. *CNMI v. Delos Santos,* 3 C.R. 661 (D.Ct. App. Div. 1989).

As stated in the Analysis to the N.M.I. Constitution, "operating expenses are the normal costs of obtaining and delivering government services." *Analysis* at 141. Applying the principles of statutory construction as set forth herein, it is apparent that the plain meaning of the term "operating expense" as stated in Article X, Section 4 of the N.M.I. Constitution, does not include funds used to replenish the rebate trust account for the limited purpose of paying refunds and rebates. The expenditure of the loan proceeds would not constitute an "operating expense" because such funds are not being used to cover "the normal costs of obtaining and delivering government services". The CNMI does not "obtain or deliver government services" by borrowing these funds, rather, the tax rebates that will be paid from this fund are "an adjustment, reduction, return, credit, nontaxable refund, or other nontaxable payment of all or part of any tax, as provided by the Commonwealth of such amount of the taxes paid by a person". The tax refunds are a return of the overpayment of a particular individual's tax liability and such payments are not normally appropriated by the Legislature as operating expenses "to obtain and deliver government services."

Such an interpretation is further supported because operating expenses are expenses that generally must be appropriated by the Legislature as part of the budget. Refunds and rebates, on the other hand, are not "operating expenses" because they are not appropriated by the Legislature in the yearly budget and are not a cost of obtaining and delivering government services.

Furthermore, the Analysis states that "the proceeds of all public debt must be earmarked and cannot be made a part of general revenues". *Analysis* at 141. The Special Rebate Trust Account statutory provision states that "75% of all amounts paid to the government with respect to taxes...shall not be placed into the General Fund or commingled with other funds." 4 CMC §1714. Borrowing the funds, if earmarked for the Special Rebate Trust Account for the limited purpose of paying tax refunds and tax rebates will be consistent with these provisions.

Accordingly, the CNMI Government may borrow funds from a private institution for the specific and limited purpose of paying tax refunds and tax rebates that are currently due and owing to CNMI taxpayers, without violating N.M.I. Constitution Article X, Section 4.

b. Limitations on Public Debt Authorization.

Although the CNMI is permitted to incur public debt for the specific and limited purpose of paying tax refunds and tax rebates that are currently due and owing to CNMI taxpayers, there are certain limitations and procedures that must be followed in order to do so.

First, Article X, Section 3 of the N.M.I. Constitution provides that in order to authorize or incur public debt, two-thirds of the members in each house of the legislature must authorize the debt. As stated in the Analysis to Section 3:

> Public debt means obligations of the Commonwealth government that are fixed, such as bonds, notes, debentures, or other forms of debt. It does not include obligations that involve a substantial contingency, such as loan guarantees where there is a reasonable

> expectation that the loan will be repaid by the borrower and guarantee by the Commonwealth will not require the expenditure of public funds.

If the CNMI Government decided to borrow funds from a private financial institution for the specific and limited purpose of paying tax refunds and tax rebates that are currently due and owing to CNMI taxpayers, it would incur "public debt" as that term is defined. As such, the borrowing of such funds for the specified purpose of paying tax rebates and refunds requires approval by two-thirds of each house of the legislature.

Secondly, pursuant to Art. 10, §4, because the public debt may not be used for operating expenses, the proceeds of such public debt must be earmarked and cannot be made a part of general revenues. As such, the funds will be limited for the sole purpose of paying tax rebates and refunds, and are not permitted to be used for any other purpose.

Finally, Art. 10 §4 requires an assessment of real property in the CNMI, and limits the amount of public debt incurred that may be incurred. Specifically, this section provides that public debt may not be authorized in excess of ten percent of the aggregate assessed valuation of the real property within the Commonwealth. According to the Analysis:

> [t]his means that if the Commonwealth incurs any debt, there must be an assessment of the value of some real property in the Commonwealth, and the public debt incurred must be ten percent or less of the aggregate valuation of the real property assessed.

As such, the CNMI must assess the value of some of the real property in the CNMI and the amount borrowed from a financial institution may not exceed ten percent of the assessed land value.

Conclusion

The CNMI Government may constitutionally borrow funds from a private financial institution for the specific and limited purpose of paying tax refunds and tax rebates that are currently due and owing to CNMI taxpayers. However, two-thirds of the members in each house of the legislature must authorize, by affirmative vote, the incurrence of such debt. Furthermore, prior to any debt being incurred, the CNMI must assess the valuation of real property in the Commonwealth, and any debt incurred may not exceed ten percent of that assessed value.

By: _____
Ramona V. Manglona
Acting Attorney General

_____
Deborah L. Covington
Assistant Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION No. 03-01

To: Governor
cc: Secretary, Department of Finance
Thru: Attorney General
From: Benjamin Sachs, Assistant Attorney General
Date: January 6, 2003
Re: *Public Law 13-24 – Right of Commonwealth Employees to Lump Sum Payment of Annual Leave on Termination of Employment – Effect of Funding Limitations – Governor's Veto of Budgetary Appropriation for 30% Bonus and Lump Sum Payment of Annual Leave*

I write in response to your question about the effect of funding limitations on the ability of the government to satisfy its obligations to pay lump sum annual leave benefits to government employees leaving government service under applicable rules and regulations.

QUESTION PRESENTED AND CONCLUSION

Whether the government is obligated to pay government employees their annual leave upon separation after the effective date of Public Law 13-24, or only for hours accumulated prior to the effective date of the law?

> My conclusion is that the lump sum payment of annual leave benefits on termination of employment is among the rights presently granted to government employees. Because this right is not conditioned on the availability of funds, it does not expand and contract in response to annual fiscal infusions. Therefore, in calculating the lump sum payable to a government employee leaving government service with unused annual leave, the hours accumulated and neither expended nor capped on and after September 11, 2002 must be taken into account.

ANALYSIS

The disposition of leave for civil service employees is governed by the Personnel Service System Rules and Regulations (PSSR&R). Under Part VII.A8 of the PSSR&R, entitled Disposition of Leave Upon Separation, an employee who is separated from the Personnel Service for any reason will receive "a lump-sum payment for all annual leave accrued to the employee's credit and remaining unused at the time of separation."

The disposition of leave for excepted service personnel is governed by the Excepted Service Personnel Regulations. Under Part I.8F of the Excepted Service Personnel Regulations, an employee who is permanently separated from Excepted Service employment will receive "a lump-sum payment for all annual leave accrued to his or her credit at the time of separation and payable to him or her at the next regular pay period."

Similarly, the Conditions of Employment, which form an integral part of excepted service employment contracts for both local hires and outside of CNMI hires, consistently provide that:

> "The Employee who terminates his employment at the completion of the present employment contract or resigns, and is departing the duty station on final separation, will receive on the next regular pay day a lump-sum payment of all unused annual leave at the current hourly rate, based on twenty-six (26) bi-weekly pay periods and 2,080 hours in a work-year, provided the necessary documents of clearance are received by the Northern Mariana Islands Payroll Office."

See Conditions of Employment (Local Hire), at ¶ 4(A)(3) [Rev. 9/13/01]; Conditions of Employment (Outside of CNMI Hire), at ¶ 4(A)(3) [Rev. 7/17/01].

On September 10, 2002, Public Law 13-24 was signed into law. However, you exercised your veto power[1] with respect to several sections of the law, including the following:

> Section 520. 30% Bonus and Lump Sum Payment of Annual Leave for Executive, Judicial and Legislative Branch Employees. There is hereby appropriated $90,000 to pay for the 30% retirement bonus and lump sum payment of unused annual leave. All agency heads shall ensure equal treatment of all government employees who elect to retire and are qualified to receive the 30% bonus and their unused annual leave as a lump sum payment. The Secretary of Finance shall be the expenditure authority over this appropriation and shall process such payments upon request of the appropriate agency and based on the chronological order the requests were received by the Department of Finance.

Among the reasons given in your veto message for your decision to veto this section was that "[s]imply put, the appropriated amount of $90,000 is totally inadequate given the parameters of the benefit given in this section ...." Subsequently, the Legislature sustained your veto.

---

[1] Article II, § 7(a) of the NMI Constitution provides that "[t]he governor may veto an item, section, or part in an appropriation bill and sign the remainder of the bill; provided that the governor may not veto an item, section, or part governing the manner in which an appropriation may be expended if any appropriation affected by the item, section, or part is approved." The veto power, when properly exercised, thus serves as an important gubernatorial check on the legislative power of appropriation. See *Florida House of Representatives v. Martinez*, 555 So.2d 839 (Fla. 1990).

The language in the applicable rules and regulations governing the disposition of leave, as well as the contractual conditions of employment described above, represent a firm commitment and resolve that government employees leaving government service will receive a lump sum payment of their annual leave benefits. The amount of money necessary to assure that this commitment will be satisfied in any year is, by its very nature, not subject to precise prediction.

Your request for a legal opinion implicitly raises the question of whether the legislature, by drastically under-funding the benefits provided under § 520, intended to condition the right of government employees to receive a lump sum payment of annual leave benefits on the availability of funds, with the effect that your veto of § 520 may have resulted in a limitation of governmental liability for non-payment of hours accumulating on and after September 11, 2002.

The primary task in construing a statute is to ascertain and give effect to the intent of the legislature. To discern legislative intent, one must look to the language of the statute, and words and phrases must ordinarily be given their plain and ordinary meaning, absent a specific legislative definition. It is presumed that the legislature knew and understood the applicable PSSR&R and Excepted Service Personnel Regulations governing disposition of leave benefits for government employees when the legislature passed Public Law 13-24.

Applying these rules of statutory construction to Public Law 13-24, I conclude that the right of government employees to receive a lump sum payment of annual leave benefits, including hours accumulating on and after September 11, 2002, was not legislatively conditioned on the availability of funding. The applicable regulations created an entitlement, and nowhere did the legislature equate that entitlement to the funds available from time to time for that purpose. If the legislature had intended the rights granted under the regulations to expand and contract in response to its annual fiscal infusions, the legislature ought to have made that intention crystal clear.

Instead, the legislature made funding available for the lump sum payment of annual leave for government employees in two sections of Public Law 13-24 besides vetoed § 520. First, under §103(e), "personnel" expenses are legislatively defined to mean "appropriations for salaries, employer's contribution to the Northern Marianas Retirement Fund, overtime, night differential, hazardous pay and other employee wages and benefits" (emphasis added). By virtue of this definition and the various appropriations to government departments and agencies to cover "personnel" expenses during FY 2003, the legislature obviously intended to satisfy the government's obligations to pay for benefits such as annual leave which might become due this fiscal year.

Second, under § 510, the legislature recognized the applicability of departmental and agency reprogramming authority, in accordance with the provisions of 1 CMC §7402, to funds appropriated pursuant to Public Law 13-24. Under subsection 7402(c), department and agency heads are granted specific, limited reprogramming authority to transfer between appropriations for operating and personnel expenses "where necessary to pay ... lump sum annual leave...." By virtue of such reprogramming authority and the vacancy savings which can be anticipated due to the termination of

employment, lump sum payments of annual leave benefits for government employees need not be or become a totally "unfunded liability" in any year.

SUMMARY

Present CNMI law creates an entitlement on the part of government employees to lump sum payments of annual leave on termination of employment. The right is not legislatively conditioned on the availability of funds. It did not expand in response to the legislature's initial inclusion of § 520; moreover, it did not contract in response to your subsequent veto deleting § 520 based on your determination that "the appropriated amount of $90,000 is totally inadequate given the parameters of the benefit."

In calculating the lump sum payable to a government employee leaving government service with unused annual leave, the hours accumulated and neither expended nor capped on and after September 11, 2002 must be taken into account.

I trust this responds to your inquiry.

BY:

Benjamin Sachs
Assistant Attorney General

Concurred by:

Ramona V. Manglona
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION No. 03-02

To: Secretary of Department of Finance

From: Assistant Attorney General
Thru: Attorney General

Date: February 18, 2003

Re: Personnel Actions for the Mayor of Saipan

This memorandum is in response to your 11/08/02 request for a legal opinion regarding the personnel actions by the Mayor of Saipan. You requested that the answer apply to both the Department of Finance ("DOF") and the Office of Management and Budget ("OMB").[1]

This legal opinion answers the following question:

Must the Mayors receive certification from DOF and OMB that funds and a vacant FTE are available prior to filling a vacant position or changing the salary for an already filled position?

Short Answer: Yes

The constitutional and statutory basis for this answer is contained in the discussion below.

The Mayors must receive certification from DOF and OMB that funds and a vacant FTE are available prior to filling a vacant position or changing the salary for an already filled position.

LAW

This legal opinion addresses the difference between the "expenditure authority" granted to the mayors by the current appropriations bill,[2] P.L. 13-24 § 508, and "certification authority" granted by

[1] If the Office of Personnel Management ("OPM") has specific questions regarding the personnel actions of the Mayor of Saipan, they should direct those questions to this office

[2] Appropriations bills are temporary laws. P.L. 3-90. The designation of expenditure authority within appropriations bills is within the discretionary appropriations powers of the Legislature.

permanent statute to the DOF and OMB.

"Expenditure authority" is "a term of legislative art referring to the budgeting and accounting methods by which particularly authorized public officials may expend, obligate, encumber or otherwise commit public funds." AG Memorandum August 25, 1992. This term appears to be a combination of the definitions of "budget authority"[3] and "expenditures"[4] contained in the Planning and Budgeting Act of 1983 ("BPA"), P.L. 3-68, codified at 1 CMC 7101 et seq.

"Certification authority" is also a term of legislative art that refers to the constitutional obligations of the DOF to control and regulate the expenditure of public funds. It also refers to the statutory obligations of both the DOF and OMB under 1 CMC 7401 and 1 CMC 7405.[5]
NMI Constitution Article X, § 8 grants to the CNMI DOF absolute authority "to control and regulate the expenditure of public funds..." To implement the broad authority granted to the DOF, the CNMI Legislature has enacted various public laws now set forth in the Commonwealth Code. These include 1 CMC 2553(g) granting to the DOF the right to dispense funds pursuant to the authority of law and 1 CMC 2257 granting to the DOF authority to adopt rules and regulations for "those matters within its jurisdiction..."

CNMI law defines in two statutes the role of DOF and OMB in the expenditure of public funds for government employment.

These statutes state in pertinent part:

> No expenditure of Commonwealth funds shall be made unless the funds are appropriated in currently effective annual appropriation acts or pursuant to 1 CMC 7204(d). 1 CMC 7401.
>
> No person, including the Civil Service Commission, may reclassify or adjust the salary of a government employee whose salary is paid

---

[3] Under the BPA, " 'Budget Authority' means authority granted to a Commonwealth agency, generally in an appropriations bill, to incur obligations which will result in immediate or future spending. In most cases budget authority is not the amount of money an agency or program actually will spend during a fiscal year, but merely the upper limit on the amount of new spending commitments it can make." 1 CMC 7103(e). (emphasis added)
[4] Under the BPA, " 'Expenditures' means actual spending. The term is generally interchangeable with outlays." 1 CMC 7103(k). (emphasis added) Expenditure authority also means that the designated public official may "expend, obligate, encumber, or otherwise commit public funds." 1 CMC 7401.

[5] This statute was first promulgated in 1986, as a section of a temporary appropriations bill, P.L. 5-9, § 310. It expired in September, 1986. However, in 1991, the Legislature made this section a "permanent amendment" within a temporary appropriations bill, pursuant to P.L. 3-90 §10(b). P.L. 8-2 § 408. In 1993, the Legislature modified and amended this statute in a permanent law that was not attached to an appropriations bill. P.L. 8-26 § 1. Therefore, this statute stands as it is currently codified, even though its legislative history, as indicated in the Commonwealth Code, inaccurately indicates that P.L. 5-9 § 310 was the initial form of this permanent law, not P.L. 8-2 § 408.

> from appropriations from the general funds without first receiving from the Office of Management and Budget and the Department of Finance certification that lawful and sufficient funds for that purpose are available. Likewise, no new or vacant position may be filled without first receiving from the Office of Management and Budget and the Department of Finance a certification that a full-time employee (FTE) and personnel funds for that position are available. Source: PL 8-2, § 408, modified; PL 8-26, § 1, modified; PL 9-66, § 509, modified. 1 CMC 7405

The CNMI legislature has recently emphasized the importance of DOF and OMB certification that a vacant FTE exists prior to hiring. The Appropriations and Budget Authority Act of 2003, § 505 states in pertinent part:

> In addition to any other penalties or remedies as may be provided by law, any person who hires or approves the hiring of any person, in violation of this provision, shall be personally liable for the costs of employment of the person hired illegally, together with reasonable costs and attorneys fees in any action brought by any taxpayer to recover on behalf of the Commonwealth monies improperly spent, of which spending is hereby declared as not for a public purpose, as a result of such illegal hiring. A right of action is hereby created in every Commonwealth taxpayer to enforce this section, as a supplement to all other rights and remedies as my already exist at law or in equity. Sections 301 and 401 of this Act are specifically made subject to this section. P.L. 13-24 (emphasis added)[6]

The CNMI Supreme Court has specified that even though the personnel and staff of the Mayors' offices are exempt from the civil service system, these positions must be hired "within the FTE ceilings and the annual budget for the exempted position." Manglona v. Civil Service Commission, 3 N.M.I. 243 at 251(1992).

The Legislature has the power to adopt laws which can grant to the Mayors powers and duties in addition to those contained in the Constitution. N.M.I. Const. art. VI, § 3(h). Without specific legislative action, the power and authority of the Mayors is limited to that set for the in the CNMI Constitution. Inos v. Tenorio, Civil Action No. 94-1289 (NMI Superior Ct., June 14, 1995).

Rules of Construction:

In interpreting statutes, the NMI Supreme Court has stated that "when the statutory

[6] This section does not indicate that it is a "permanent amendment" to a particular statute. Therefore, absent legislative action, this section will expire September 30, 2003.

meaning is unambiguous, the statutory language is conclusive." Island Aviation Inc. v. Mariana Islands Airport Authority, 1 C.R. 353 (D.N.M.I. 1983). Where the language or the statute is clear and without ambiguity the "plain meaning" of the statute is to be accepted without resorting to any rules of statutory interpretation. Govendo v. Micronesian Garment Mfg. Inc., 2 N.M.I. 270 (CNMI superior Ct., 1991). In the CNMI, for purposes of constitutional or statutory interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time. Aldan v. Mafnas, 2 N.M.I. 122 (1991) *rev'd on other grounds* 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116, 115 S.Ct. 913(1995); E-Tours Inc. v. Marianas Visitors Authority, Civil Action No. 00-0078, (NMI Superior Ct., April 19, 2000).

ANALYSIS:

The people of the CNMI, through the adoption and amendment of the Northern Mariana Islands Constitution have granted the Governor and the DOF, the authority to control and regulate the expenditure of public funds in the Commonwealth. This authority has been supplemented by the CNMI Legislature, which, as noted above, has acknowledged and clarified the broad constitutional authority over expenditure of public funds vested in the DOF.

The people of the CNMI have vested the mayors with temporary expenditure authority over public funds appropriated for their respective offices. P.L. 13-24 § 508 (a). Within the First and Second senatorial districts, the mayors also have temporary expenditure authority over resident government departments. Id.

Conclusion:

The Mayor does not possess the power to certify the availability of funds or FTE's for his personnel since none has been granted by the NMI Constitution or the Legislature. The power of the Mayor is limited by the absence of legislation either exempting him from the requirements of 1 CMC 7405 or specifically granting him certification authority. The Legislature chose to grant the power of certification of availability of funds and FTEs to the DOF, not the office of the Mayor. Under the principle of statutory construction that the express mention of one thing implies the exclusion of another, the Mayor must obtain certification from the DOF that FTE's and funds for those FTEs are available, prior to filling those positions.

If you have any questions about this opinion, please contact me.

Sincerely,

Angela L. Bennett

ANGELA L. BENNETT
Assistant Attorney General

Concurred by:

RAMONA V. MANGLONA
Attorney General

cc: Mayors of Saipan, Tinian and Rota
Senate President,
House Speaker,
Director of Personnel,
Retirement Fund,
Special Assistant,
Office of Management & Budget

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

To: Benjamin T. Manglona, Mayor AG Legal Opinion No. 03-03

From: Attorney General

Date: February 26, 2003

Re: Public Purpose Issue – Payment of NMI Beauty Pageant Expense

---

Issue Presented

By letter dated February 20, 2003, you have requested this Office to provide a legal opinion with respect to the following issue:

> Whether a $1,500 payment from your office to a Rota resident for the purpose of paying the entrance fee the NMI beauty pageant and for paying incidental expenses such as travel, accommodation, and clothes is for a public purpose, as defined by P.L. 11-84 and the regulations enacted thereunder.

Short Answer

Payment for an individual's entrance fee for the NMI beauty pageant and for payment of incidental expenses such as travel, accommodations and clothes is not for a public purpose as defined by P.L. 11-84 and the regulations thereunder.

Applicable Law

N.M.I. Constitution Art. 1, Section X provides:

> Public Purpose. A tax may not be levied and an appropriation of public money may not be made, directly or indirectly, except for a public purpose. The legislature shall provide the definition of public purpose.

1 CMC §121 as enacted by P.L. 11-84 provides:

> The term "public purpose" shall include, but not be limited to, any purpose which meets one or more of the following criteria:
>
> (a) The benefits are equally available to the entire community;

(b) The service or commodity supplied is one needed by a large number of the community pursuant to customs and traditions as applicable;

(c) The enterprise bears directly and immediately upon the public welfare;

(d) The needs to be met by its nature requires a united effort under unified control and cannot be served well by separate individuals;

(e) Where benefits accrue to individuals, the community has an interest in having those individuals benefited (for example, sports teams, school and school-related activities, recognition of individuals and organizations, funerals, or other recognized cultural or community events);

(f) The activity or service is in line with the historical development of the Commonwealth and with the general purpose of its constitution and laws;

(g) A special emergency exists, such as may be brought about by war or public calamity, (for example, typhoons);

(h) The expenditure is reasonably related to the operation of government or its objective in the promotion of the public health, safety, morals, general welfare, security, prosperity, and the contentment of a community of people or residents within the locality, (for example, fiestas and other community celebrations, expenses related to or hosting off-island visitors attending governmental events, meetings, conferences, or state funeral expenses).

(i) Notwithstanding any other provision of this act or other law to the contrary, expenditures authorized and regulated by legislative rules are expressly declared to be for a public purpose, unless proved by clear and convincing evidence that the expenditure in fact was for a personal or political activity.

To determine whether a specific appropriation or expenditure is for a public purpose the foremost test shall be whether it confers a direct benefit to a culturally or traditionally significant part of the community as opposed to an incidental or secondary benefit and whether the community has an interest in having the individual or individuals benefited. Tradition and custom as well as the particular facts and circumstances of each case shall be taken into consideration when determining whether a public purpose is being served by a specific appropriation or expenditure. Each and every governmental, agency, departmental, commission, board, authority and public corporation official or employee with expenditure authority shall be governed by this test.

(Emphasis added).

Section 1100.4(B) of the Regulations for Control of Public Funds, Commonwealth Register, Vol. 22, No. 9, September 20, 2000 provides in part:

> Examples of personal or political expenditures that are not allowable. Because all official representation expenditures and other governmental expenses must be for a public purpose, the following are examples of expenditures which are not consistent with the CNMI Constitution mandate that an expenditure of public funds be only for a public purpose; therefore they will be routinely rejected if submitted for payment or reimbursement.
>
> (1) Personal items such as food or clothing, personal membership fees, and contributions in cash or donation of any tangible or intangible item or product to any person [other than those which meet the definition of "Public Purpose" in Section 1100.3(r) (sic should be "s")].
>
> .....
>
> (3) Travel expenditures for individuals, who are not government employees, including but not limited to airline tickets, hotel accommodations, gifts, meals and related expenses.

Section 1100.3(s) of the Regulations which defines the term public purpose contains the same definition as provided in 1 CMC §121, above.

Discussion

You have indicated in your letter that that you believe there is a public benefit for Rota if it helps this queen candidate. Specifically you have indicated that there will be "good publicity" in that it will promote Rota and help Rota with its tourism attraction campaign.

You have not indicated whether this individual is a government employee; as such this Office's decision is based upon the assumption that she is not. With respect to the $500, you indicated that it will be used for incidental expenses such as travel, accommodations, clothes, etc.. This expenditure is not permitted, as it is not for a public purpose pursuant to Reg. §1100.4(B)(3). The section specifically excludes travel expenditures, hotel accommodations, meals, and related expenses for individuals who are not government employees. The amount for clothes would be excluded under Reg. §1104(B)(1) unless that personal item meets the definition of public purpose.

With respect to the $1,000 that will be used as an entrance fee to the NMI beauty pageant association, the expense depends upon whether it meets the criteria outlined in 1 CMC §121. Section 121(e) arguably may allow such expense. That section allows an expense to an individual if the community has an interest in having those individuals benefited (for example, sports teams, school and school-related activities, recognition of individuals and organizations, funerals, or other recognized cultural or community events).

The foremost test of whether an expense is for a public purpose is whether it confers a direct benefit to a culturally or traditionally significant part of the community as opposed to an incidental or secondary benefit whether the community has an interest in having the individual or individuals benefited. 1 CMC §121. Additionally, tradition and custom as well as the particular facts and circumstances of each case shall be taken into consideration when determining whether a public purpose is being served by a specific appropriation or expenditure.

In the instant situation, the Rota candidate's entry into the beauty pageant would be an incidental or secondary benefit to the community, if any. While it may be argued that if she wins, there may be a direct benefit in that it may help promote tourism, such benefit, if any, is only speculative. Furthermore, there is no showing that such a pageant is part of tradition and custom, nor is there a showing that the community has an interest in having this particular individual benefited as outlined in 1 CMC §121(e). Section 121(e) is primarily used for recognition of a particular individual for a particular achievement or for cultural or community events. It is used once a person has achieved recognition, not before. In this particular case, the Rota candidate has not achieved recognition at this point in time, and an expense for entry into the pageant would confer only an incidental or secondary benefit on the community. As such, any payment of the $1,500 entry fee for a candidate into the NMI beauty pageant would not serve a public purpose.

Conclusion

Payment for an individual's entrance fee for the NMI beauty pageant and for payment of incidental expenses such as travel, accommodations and clothes is not for a public purpose as defined by P.L. 11-84 and the regulations thereunder.

By:

Ramona Manglona
Attorney General

Deborah L. Covington
Assistant Attorney General

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/2367/2368
Fax: (670) 234-7016

February 26, 2003

Mr. Juan B. Tudela
Mayor of Saipan
PO Box 501457
Saipan, MP 96950

Attorney General
Legal Opinion
#03-04

Re: Interpretation of Public Law 13-24, Section 602(b):

Dear Mayor Tudela:

The Attorney General's office received a copy of your letter of September 17, 2002 to Mr. Herman S. Sablan, Director of Procurement and Supply for the Department of Finance. I understand from that letter that you have interpreted the Appropriations and Budget Authority Act of 2003 (P.L. 13-24) as exempting your office from all procurement procedures pertaining to the hiring of independent services contractors, consultants, and professional services contractors. Public Law 13-24 § 602(b). Attorney General Mona Manglona has directed me to research that specific exemption, and to provide your office with my legal analysis. This letter is in response to that directive.

This legal opinion[1] applies to the following question:

What exemption do the mayors, municipal councils, or the Legislature receive under the ABAA (P.L. 13-24 § 602(b))?

Short Answer: The P.L. 13-24§ 602(b) exempts Mayors, Municipal Councils and the Legislature from the Local Bidding Preference mandated in 1 CMC 7404.

The statutory basis for this answer is contained in the discussion below.

P.L. 13-24 § 602(b) gives a limited exemption from the "local bidding preference" in 1 CMC 7404 to the Mayors, Municipal Councils and the Legislature.

LAW

This legal opinion addresses a new exemption granted to the mayors, municipal councils and the Legislature by the current temporary appropriations bill,[2] Public Law 13-24 § 602(b). Section 602(b) of P.L. 13-24 in pertinent part states:

[1] This opinion does not address expenditure of funds generated through the Mayors' offices.
[2] Appropriations bills are temporary laws. P.L. 3-90. Pursuant to P.L. 3-90 §10(b), this new exemption in P.L. 13-24 will not expire when P.L. 13-24 expires on September 30, 2003 because this section contains the following language: "shall remain in effect until subsequently amended." P.L. 13-24 § 602(b).

The following sentence is inserted at the end of 1 CMC 7404(a) and shall remain in effect until subsequently amended: "Provided however that this section shall not apply to the procurement of independent services contractors, consultants, and professional services contractors by any of the mayors or municipal councils and by the Legislature." (emphasis added)

1 CMC 7404 (a), the bidding preference section of the Planning and Budgeting Act ("PBA") of 1983, 1 CMC 7101 et seq., states in pertinent part:

(a) The requirements in this section are in addition to any other applicable requirements provided by law. (emphasis added)

1 CMC 7404 is also known as the "Local Preference Act of 1999." P.L. 11-87. In this statute, the Legislature generally "granted local businesses a preference if their bid or proposal was not more than 15% higher than the amount bid or proposed by any competing contractor..." 1 CMC 7404(g)

NMI Constitution Article X, § 8 grants to the CNMI DOF absolute authority "to control and regulate the expenditure of public funds..." To implement the broad authority granted to the DOF, the CNMI Legislature has enacted 1 CMC 2551 et seq. 1 CMC 2553(g) grants to the DOF the right to dispense funds pursuant to the authority of law and 1 CMC 2257 grants to the DOF authority to adopt rules and regulations for "those matters within its jurisdiction...". Pursuant to the authority to promulgate rules and regulations, the DOF promulgated procurement regulations. The regulations that apply to contractors for independent services, consultants, and professional services include, but are not limited to, 4-102 and 4-103.

Exemptions from statutory regulation

The Legislature has the power to adopt laws, which can grant to the Mayors powers and duties in addition to those contained in the Constitution. N.M.I. Const. art. VI, § 3(h). This power includes the power to exempt from regulation by statute. Without specific legislative action, the power and authority of the Mayors is limited to that set forth in the CNMI Constitution. Inos v. Tenorio, Civil Action No. 94-1289 (NMI Superior Ct., June 14, 1995).

Rules of Construction:

In interpreting statutes, the NMI Supreme Court has stated that "when the statutory meaning is unambiguous, the statutory language is conclusive." Island Aviation Inc. v. Mariana Islands Airport Authority, 1 C.R. 353 (D.N.M.I. 1983). Where the language or the statute is clear and without ambiguity the "plain meaning" of the statute is to be accepted without resorting to any rules of statutory interpretation. Govendo v. Micronesian Garment Mfg. Inc., 2 N.M.I. 270 (CNMI superior Ct., 1991). In the CNMI,

for purposes of constitutional or statutory interpretation, the express mention of one thing implies the exclusion of another, which might logically have been considered at the same time. Aldan v. Mafnas, 2 N.M.I. 122 (1991) *rev'd on other grounds* 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116, 115 S.Ct. 913(1995); E-Tours Inc. v. Marianas Visitors Authority, Civil Action No. 00-0078, (NMI Superior Ct., April 19, 2000).

ANALYSIS:

The people of the CNMI, through the adoption and amendment of the Northern Mariana Islands Constitution have granted the DOF, the authority to control and regulate the expenditure of public funds in the Commonwealth. This authority has been supplemented by the CNMI Legislature, which, as noted above, has acknowledged and clarified the broad constitutional authority over expenditure of public funds vested in the DOF.

The CNMI Legislature granted the mayors with expenditure authority over public funds appropriated for fiscal year 2003 for their respective offices. P.L. 13-24 § 508 (a). In P.L. 13-24, the legislature has also granted the mayors an exemption from the local preference requirement of 1 CMC 7404 when evaluating bids from independent services contractors, consultants and professional services contractors. P.L. 13-24 § 602(b).

However, the mayors have not been granted statutory exemptions from any other procurement regulations, which apply to contracting for services supplied by independent services contractors, consultants and professional services contractors. Absent a specific exemption, the mayors must follow all applicable statutes and regulations, which apply, to the procurement of those contracts. This includes Procurement and Supply Regulations.

Conclusion:

The Mayor's office is not exempted from the procurement regulations that apply to contracting for the services of independent services contractors, consultants, and professional services contractors because none has been granted by the NMI Constitution or the Legislature. The power of the Mayor is limited to exemption from the requirements of 1 CMC 7404. Under the principle of statutory construction that the express mention of one thing implies the exclusion of another, the Mayor, absent a specific exemption from applicable procurement regulations, must follow all applicable procurement laws and regulations.

If you have any questions about this opinion, please contact me.

Sincerely,

Angela L Bennett

ANGELA L. BENNETT
Assistant Attorney General

Concurred by:

RAMONA V. MANGLONA
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION NO. 03-05

To: Director of Personnel Juan L Tenorio

From: Attorney General: _____

Date: March 12, 2003

Re: Salary Limit for Resident Department Head for Public Health

---

I. Introduction and Issue Presented

I am writing in response to your request for an opinion on the "legally permissible salary" for Mr. Larry B. Hocog as the Resident Department Head for Public Health on Rota.[1]

II. Short Answer

The answer to your question is that Mr. Hocog, as a resident department head, may not be paid more than $45,000.00, regardless of his education.

III. Relevant Facts

You state the following in your letter:

1. The Mayor of Rota has submitted a Request for Personnel Action (RFPA) to appoint Larry B. Hocog as the Resident Department Head with an annual salary of $80,000.00.

2. The Mayor of Rota "feels that 1 CMC 8245(a), which allows an $80,000.00 per annum salary for the Secretary of Public Health "if the Secretary holds an M.D. or Ph.D." applies to Dr. Hocog."

3. Section 515(b) of Public Law 13-24 establishes a maximum salary of $45,000.00 per annum for resident department heads.

4. Larry B. Hocog is an M.D. by education, but his license to practice medicine expired on January 31, 2001.

5. No other resident department head is being paid at the department secretary salary level.

---

[1]Mr. Larry B. Hocog should not be referred to as "Dr." or allowed to render any medical services, during any time he does not possess a valid license to practice medicine in the CNMI. See 3 CMC 2221.

Further, at this time Mr. Hocog continues to be unlicensed and not authorized to render any medical services in Rota or elsewhere in the CNMI.

IV. Analysis

The CNMI Constitution provides that the Mayor of Rota may appoint, in consultation with the head of the department, a resident department head to serve in Rota. NMI Const., art. VI, section 3(g).

Section 515(b) of Public Law 13-24 establishes a maximum salary of $45,000.00 per annum for resident department heads. That law states, in pertinent part:

> Section 515. Maximum Salaries.
>
> (b) Not with standing 1 CMC section 8245(c), the annual compensation for resident department heads shall not be more than $45,000.00.

1 CMC section 8245(a) provides the salary limits for director/secretary level positions as follows:

> The following appointed positions within the Commonwealth government shall be paid base annual salaries as follows: (a) Department director/activity head:...Secretary, Public Health Services $60,000, or $80,000 if the Secretary holds an M.D. or a Ph.D.

The general principle of statutory construction is that the validity or meaning of a legislative act does not depend upon the subjective motivation of its draftsman but rests instead on the objective effect of the legislative terms. If words used have a reasonably or easily understood meaning, the intent of the legislators is not looked into. County of Los Angeles v. Superior Court, 119 Cal.Rptr. 631, 532 P.2d 495 (CA 1975).

Where the language used in a statute is plain, you cannot read words into it that are not there, either expressly or by implication. The courts will not do this because it would be legislation, not construction. The words must be given their reasonable meaning and we cannot strain their construction to make up for omitted words. Yu Cong Eng v. Trinidad, 271 U.S. 500, 70 L.Ed. 1059, 46 S.Ct. 619 (1926); 16 Am Jur 2d, Constitutional Law, section 58.

These general principles of law have been adopted in numerous CNMI judicial rulings. For example, CNMI courts construe statutory language according to its plain meaning, where it is clear and unambiguous. Gioda v. Saipan Stevedoring Company, Inc., 1 NMI 310, 315 (1990). See also Townhouse, Inc. v. Saburo, 2003 MP 002 at ¶ 11 (1/14/03). Where the language of a statute is clear and without ambiguity the plain meaning of the statute is to be accepted without resorting to any rules of statutory construction or interpretation. Govenda v. Micronesian Garment Mfg. Inc., 2 NMI 270 (CNMI Supr. Ct. 1991). "[W]hen the statutory language is unambiguous, the statutory language is conclusive." Island Aviation Inc. v. Mariana Islands Airport Authority, 1 C.R. 353 (CNMI 1983). When the statutory language is clear, courts will not construe the language contrary to its plain meaning. King v. Board of Elections, 2 NMI 398 (1991). Plain meaning has been defined as a word's

ordinary, contemporary, common meaning. CNMI v. Delos Santos, 3 CR 661 (D.N.M.I., App.Div.1989).

Applying these rules of construction, the language of section 515(b) of Public Law 13-24 is clear and unambiguous. Mr. Hocog is a resident department head, not the Secretary of Public Health Services. Thus he can only receive the salary of a resident department head. His salary is limited to $45,000.00.

Please advise if you have further questions.

By: _____
RAMONA V. MANGLONA
Attorney General

_____
CLYDE LEMONS. JR.
Deputy Attorney General

Cc: Governor, Mayor of Rota, Secretary Dept. of Public Health, Office of Management and Budget, Secretary Dept. of Finance, Rota Municipal Council

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

AGO Legal Opinion #:03- 06

To: Gregorio C. Sablan, Executive Director
Commonwealth Election Commission
From: James Livingstone, Assistant Attorney General
Date: March 17, 2003
Re: In re: M.R.J.: Voter Status

This is in response to your recent Request for Legal Opinion wherein you requested the Attorney General advise your office regarding the status of M.R.J. as a U.S. citizen and eligible CNMI voter.

Question

Is M.R.J. a citizen of the United States and, thus eligible to vote in CNMI elections?

Short Answer

You did not provide enough facts to answer this question. We recommend that you request that M.R.J. provide proof within thirty days that she is in fact a United States citizen (such as a passport issued by the United States) and, therefore, eligible to vote in the CNMI.

Facts

M.R.J. was born in Chuuk State in 1954 and at some point became domiciled in the NMI. She registered to vote in CNMI's 1974 general election as well as each CNMI election since at least 1977. She has also voted in each CNMI election from 1977 to the present with the exception of elections held in 1983, 1985, and 1987.

Separately, M.R.J. obtained a passport issued in her name by the FSM in 1994. The passport lists her as a citizen of the Federated States of Micronesia ("FSM") and indicates that her birth in Chuuk State is the basis of that citizenship.

FSM, like CNMI, is a former Trust Territory of the Pacific Islands ("Trust Territory") that was administered by the United States. FSM signed a Compact of Free Association with the United States in October 1982 to withdraw from the Trust. The Compact was officially implemented in November 1986 and the United Nations admitted FSM as a member in 1991. FSM has maintained a close relationship with the United States and the Compact provides its citizens with some of the same rights enjoyed by citizens of the United States. For instance, M.R.J.'s passport provides that "[t]he

rightful owner of this passport . . . is entitled to diplomatic and consular protection of the United States under Section 126 of the Title One of the [Compact]."

Analysis

M.R.J. should not yet be removed as an eligible voter. The only question regarding M.R.J.'s ability to vote in the CNMI regards whether she became a United States citizen under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), 48 U.S.C. § 1801 note, reprinted in CMC at B-101 et seq. Based on the facts you provided, it is unclear if she did so. Assuming she did become a United States citizen, there is also not sufficient information to determine if M.R.J. intended to relinquish that citizenship by obtaining her FSM passport. The facts you provided indicate that she did not have such intent.

As a threshold matter, CNMI voting rights are directly tied to citizenship status. An individual cannot register to vote in CNMI elections if that individual is not a citizen of the United States. 1 CMC § 6201 (2000). Therefore, if M.R.J. is not a citizen of the United States, she should be removed from the roll of registered voters.[1] Conversely, if she is a United States citizen, she should not be removed from the roll unless there is some other ground to do so.

You did not provide enough facts to determine if M.R.J. became a United States citizen. She is not a United States citizen by birth, but she may have become one under the Covenant. The Covenant provides that a citizen of a Trust Territory became a citizen of the United States if they were domiciled in the Northern Mariana Islands for the five years prior to November 4, 1986 and registered in elections of the islands prior to January 1, 1976. See Covenant, § 301. M.R.J.'s passport indicates that she was a citizen of Chuuk State, a Trust Territory. Further, you indicate in your letter that M.R.J. did register to vote in the general elections for the Mariana Islands District in 1974. Thus, M.R.J. could have become a citizen of the United States if she was also domiciled in the Mariana Islands between November 5, 1981 and November 4, 1986.

Assuming M.R.J. became a citizen of the United States under the Covenant, the question arises if she relinquished that status when she obtained a passport issued by FSM in 1994. In order to prove such a relinquishment, the government must show:

(1) that [s]he committed an expatriating act, as defined by statute;
(2) that [s]he did so voluntarily;
(3) that [s]he intended to relinquish [her] citizenship

[1] The Commonwealth Election Commission ("Commission") must hold a hearing prior to removing a voter from the voting roll. Commonwealth Election Commission Regulation Section 3.9 sets forth the specific requirements for the hearing. Generally, a quorum of the Commission must be present. The challenged voter must be given reasonable advance notice and the opportunity to be heard and may be represented by counsel. The decision to deny registration must be made by 3/4 of the Commissioners who attend the hearing. The decision must be rendered within three days of the hearing.

Kahane v. Shultz, 653 F. Supp. 1486, 1488 (S.D.N.Y. 1987); see also Vance v. Terrazas, 100 S. Ct. 540, 545-546 (1980); Richards v. Secretary of State, Department of State, 752 F.2d 1413, 1418 (9th Cir. 1985). The government has to show by a preponderance of the evidence that M.R.J. committed an expatriating act. 8 U.S.C. § 1481(c). Once that is shown, M.R.J. is presumed to have committed that act voluntarily. Id. "There is no presumption, however, that the expatriating act was performed with an intent to relinquish citizenship." 752 F.2d at 1418 (citing 100 S. Ct. at 549). That showing must also be made by a preponderance of the evidence. It is likely that obtaining a foreign passport would be considered an expatriating act, but there is not enough information to determine that M.R.J. intended to relinquish her citizenship.

Expatriating acts are those that are inherently inconsistent with citizenship. Examples of expatriating acts include obtaining naturalization of a foreign state or making an oath or affirmation to a foreign state. 8 U.S.C. § 1481(a). Acting as a citizen of a foreign country and obtaining a foreign passport are such acts. See id.; Action, S.A. v. Rich, 951 F.2d 504, 506-507 (2nd Cir. 1991). Because M.R.J. represents herself as a citizen of FSM and obtained a foreign passport, it is likely that she has committed an expatriating act.

If it can be shown that M.R.J.'s actions constitute an expatriating act, then M.R.J. would have the burden to show that the act was not committed voluntarily. She could do this by showing that the act was committed under some sort of duress, such as economic or physical. "Some degree of hardship must be shown." 752 F.2d at 1419. There are no facts indicating that M.R.J. obtained her FSM passport as a result of any kind of duress. Any such facts would have to be raised by M.R.J. to rebut the presumption that she acted voluntarily.

Finally, it would have to be shown that M.R.J. intended to relinquish her citizenship when she obtained her FSM passport. In other words, M.R.J. would have to have known that obtaining a FSM passport would cause her to lose her United States citizenship. This does not have to be proven with direct evidence; circumstantial evidence may be used. Kahane v. Shultz, 653 F. Supp. 1486, 1492 (E.D.N.Y. 1987). Still, it is a difficult showing to make. Indeed, one court held that "it may well be that a declaration of intent to retain citizenship, made simultaneously with the commission of the expatriating act, will suffice to preserve the actor's citizenship." Id. at 1493.

Kahane is illustrative. Mr. Kahane moved from New York to Israel and, because of his Jewish decedent, automatically became an Israeli citizen. He founded a political party in Israel, was elected to and served in the Israeli Parliament, took a declaration of allegiance to Israel (as required by law for the office), and made Israel his "permanent home." However, when he was elected to office, despite his actions to the contrary, he indicated that he wanted to remain a United States citizen. As a result, the court found that his intent was to remain a United States citizen.

Similarly, in Rich, Mr. Rich became a naturalized Spanish citizen, swore an oath of allegiance to Spain, and renounced his United States citizenship. 951 F.2d at 506. He then obtained "Spanish citizenship, a Spanish identity card, and a Spanish passport." Id. The court, however, rejected claims that he intended to waive his United States citizenship because it held his other actions were

inconsistent with his announced intent. It found he continued to use a United States passport, did not change his business status in Switzerland to reflect his change of status, and ignored requests from the United States consulate to clarify his status for fifteen months until it was advantageous for him to be a non-United States citizen.

Here, there is not sufficient information to determine if M.R.J. meant to relinquish her citizenship, assuming she obtained it, and there are facts that indicate that she did not have such intent. Although she received a FSM passport, her actions indicate her intent to remain a United States citizen. Principally, she continued to live in the islands and vote in CNMI elections, which required her to be a United States citizen. Further, it seems she did not intend to give up the all of the benefits of citizenship. Indeed, she still had some of the benefits of a United States passport, such as diplomatic and consular protection of the United States, despite carrying a FSM passport. These facts are inconsistent with the intent to renounce United States citizenship or give up its benefits.

We recommend further investigation into the relevant facts before attempting to remove M.R.J. from the voting rolls. Some relevant facts include determining: if M.R.J. considers herself a citizen of the United States or FSM, if she was domiciled in the CMNI between 1981 and 1986, what other actions she has taken to become a citizen of FSM, or if she has renounced her United States citizenship.

Conclusion/Recommendation

Based on the facts that you provided it is unclear if M.R.J. is a United States citizen. She may have become a citizen under the Covenant, but you did not provide enough facts to determine if she did. The fact she carries a passport from the FSM indicates that she may not have ever intended to become a United States citizen. Further, if she did become a United States citizen under the Covenant, her subsequent actions may have caused her to relinquish that citizenship. There are also not enough facts to determine if this has occurred.

We recommend that, within 30 days, you require M.R.J. to state whether or not she is a United States citizen and, if she does so state, prove that she is. She can make this showing by providing a United States passport. If she says she is not a United States citizen or cannot prove that she is, we recommend initiating proceedings to remove her name as a registered voter.

If you have any further questions or comments concerning M.R.J. or the other individuals that you mentioned in your letter, please do not hesitate to contact me.

Opinion by:

James Livingstone
Assistant Attorney

Concurred by:

Ramona V. Manglona
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

AGO LEGAL OPINION #03-07

To: Senator Joaquin G. Adriano, Chairman, Committee on Executive Appointments and Governmental Investigations; Attorney General

From: Angela L. Bennett, Assistant Attorney General

Date: April 11, 2003

Re: Nomination of Francisco I. Taitano to Civil Service Commission

---

This memorandum is in response to your April 2, 2003, request for a legal opinion on the legality of (1) Mr. Taitano's nomination and (2) his serving on the Civil Service Commission ("CSC") assuming the Senate confirms his nomination. The Attorney General has assigned me to prepare the legal response.

ISSUES

(1) Can the Governor appoint Mr. Francisco I. Taitano, an excepted service employee within the Office of the Governor, to serve as a member of the Civil Service Commission?

Short Answer: Yes.

(2) Assuming the Senate confirms Mr. Taitano's appointment, may Mr. Taitano serve as a member of the CSC?

Short Answer: Yes.

LAW

Applicable Constitutional Law:

N.M.I. Constitution, Article XX, § 1 is the applicable constitutional provision that controls the analysis of this opinion. It provides for a Civil Service Commission and states in pertinent part.

> "The legislature shall provide for a non-partisan and independent civil service with the duty to establish and administer personnel policies for the Commonwealth Government. The Commission shall be composed of seven

members appointed by the governor with the advice and consent of the senate."

N.M.I. Const. art. XX § 1 (Second Const. Conv. 1985) (emphasis added). [1]

Applicable Commonwealth Statutory Law:

Two Commonwealth statutes must be included in the analysis of this opinion. The first is from Public Law 1-9 (1978) as amended by P.L. 3-1 (1982), codified as 1 CMC § 8111. This statute is part of 1 CMC § 8101 et seq, which statutorily created the Civil Service Commission.

Section 8111 states in pertinent part:

> (N)o member of the commission may be a candidate for public office or hold an elected position or a position in the executive branch which is filled by appointment by the Governor.

1 CMC § 8111 (emphasis added).

The second applicable statute is from Public Law 1-8 (1978), as amended by P.L. 13-9 (2002), codified as 1 CMC § 2901(a), which addresses appointments of individuals. 1 CMC § 2901(a) states in pertinent part :

---

[1] The original constitutional provision on "Civil Service" was under Article III, § 16, which stated:

> Civil Service. The legislature shall provide for a non-partisan and independent civil service with the duty to establish and administer personnel policies for the Commonwealth Government. The commission's authority shall extend to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches. Appointment and promotion within the civil service shall be based on merit and fitness demonstrated by examination or by other evidence of competence.

commission JNM

In 1985, Amendment 41 added to the article as follows:

> Civil Service. The legislature shall provide for a non-partisan and independent civil service with the duty to establish and administer personnel policies for the Commonwealth Government. The Commission shall be composed of seven members appointed by the governor with the advice and consent of the senate. Six members shall serve a term of six years, staggered in such manner that the term of one member expires each year, and one member shall serve a term of four years expiring concurrently with the term of the governor. Members of the civil service commission may be removed only for cause. The commission's authority shall extend to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches. Exemption from the civil service shall be as provided by law, and the commission shall be the sole authority authorized by law to exempt positions from civil service classifications. Appointment and promotion within the civil service shall be based on merit and fitness demonstrated by examination or by other evidence of competence.

"No person may be appointed as a department head, or a member of a board or commission who is not a resident of the Commonwealth and who is not a citizen or a national of the United States and at least 18 years of age. The appointing authority may waive the requirement of Commonwealth residence when in its judgment the technical or professional expertise of a potential appointment is of critical importance. Notwithstanding any provision of law to the contrary, the appointing authority may waive any statutory employment restriction with the exception of those convicted of a felony, imposed on the appointment when such restriction, in the judgment of the appointing authority, would place an undue burden by limiting the pool of otherwise potential appointees."

1 CMC § 2901(a) (emphasis added).

LEGAL ANALYSIS

I. Can the Governor appoint Mr. Francisco I. Taitano, an excepted service employee within the Office of the Governor, to serve as a member of the Civil Service Commission?

On January 9, 1978, the Commonwealth Constitution came into full force and effect. The original Commonwealth Constitution mandated in pertinent part that:

"The legislature shall provide for a non-partisan and independent civil service commission, with the duty to establish and administer personnel policies for the Commonwealth government."

N.M.I Const. art. III § 16. (emphasis added)

While this article provided for the establishment of a civil service commission, it did not contain a provision regarding the appointment of members to the commission. Also, in 1978, the Commonwealth legislature passed the Northern Marianas Civil Service Act of 1978: Public Law 1-9. Section 3(a) of P. L. 1-9 established the Civil Service Commission. It specified that members of the Civil Service Commission be appointed as follows:

" Establishment: There is hereby established a Civil Service Commission which shall consist of seven (7) members to be appointed as follows: one (1) shall be appointed by the Governor; three (3) shall be appointed by the President of the Senate; and three (3) shall be appointed by the Speaker of the House of Representatives. The President of the Senate shall appoint at least one (1) female and at least one (1) person who is a resident of Rota. The Speaker of the House of Representatives shall appoint at least one (1) person who is of Carolinian descent and at least one (1) person who is a resident of

Tinian. The Commission shall select a chairman by a majority vote. No member of the Commission may be a candidate for public office or hold an elected position or a position in the Executive Branch which is filled by appointment of the Governor."

P.L. 1-9 § 3(a)(emphasis added).

The Trial Court of the Commonwealth of the Northern Marianas declared Section 3(a) of P.L. 1-9 unconstitutional, because the commission appointment scheme was in violation of the separation of powers required by the Commonwealth Constitution. Camacho v. Civil Service Commission, CTC Action 80-11(1980), *aff'd*. 666 F.2d 1257 at 1262 (9th Cir. 1982). On March 9, 1982, the Commonwealth legislature passed Public Law 3-1. P.L. 3-1 repealed P.L. 1-9 § 3(a) in its entirety. P.L. 3-1 reenacted P.L. 1-9 § 3(a) in the form currently codified as 1 CMC § 8111.

In 1985, Amendment 41 repealed Article III § 16, the former constitutional provision concerning the civil service, and created Article XX § 1. This article states, in pertinent part, that the governor shall appoint the members of the Commission, with the advice and consent of the senate. The amendment added no further requirements for appointees.

Under CNMI priority of laws, constitutional provisions are given priority over public laws. *See CNMI v. Tinian Casino Gaming Control Commission*, 3 N.M.I. 133, 144-149 (1992). The framers of the constitution chose not to limit the appointment power of the executive branch any further than requiring the advice and consent of the senate. A public law cannot have priority over the constitution by requiring more limitations on gubernatorial appointment power. Therefore, any interpretation of 1 CMC § 8111 that limits the appointment power of the governor is unconstitutional.

The Office of the Attorney General has previously issued an opinion on the ability of the legislature to restrict the appointment powers of the Governor. Issued on October 4, 2000, this opinion states in relevant part:

> "(O)nly when required by the NMI Constitution, may the Legislature limit, restrict or inhibit the appointing authority of the Governor. Absent a constitutional limitation the Governor's power to appoint subordinate Executive Branch officials is absolute and the separation of powers doctrine requires that the Legislature not become involved in the Governor's discharge of what is an exclusive Executive function."

AGO Legal Opinion, October 4, 2000 at 2. [2]

Additionally, Public Law 13-9, § 2(b), signed into law on June 17, 2002, expressly allows the Governor to waive any "statutory employment restriction" that could be interpreted to limit the appointment power of the Governor other than conviction of a felony.

This statute provides in pertinent part:

> "Notwithstanding any provision of law to the contrary, the appointing authority may waive any statutory employment restriction with the exception of those convicted of a felony, imposed on the appointment when such restriction, in the judgment of the appointing authority, would place an undue burden by limiting the pool of otherwise potential appointees."

P.L. 13-9 § 2(b) (emphasis added).

Where the language of the statute is clear and without ambiguity, the "plain meaning" must be accepted without resorting to statutory construction or interpretation. Govendo v. Micronesian Garment Mfg., 2 N.M.I. 270 (1991). When the language of a statute is clear, the courts will not construe it contrary to its plain meaning. Id. see also King v. Board of Elections, 2 N.M.I. 398 (1991).

The clear language of Public Law 13-9, section 2(b), addresses appointments of individuals to commissions. Mr. Taitano's appointment is to the Civil Service Commission. Therefore, Public Law 13-9, section 2(b), is applicable here. Public Law 13-9, section 2(b), explicitly states that even if there is a law to the contrary, the appointing authority, in this case the

---

[2] "Separation of Powers" principle is discussed in many cases in the Commonwealth. *See e.g. Mafnas v. Inos*, Civ. No. 90-0031 (Memorandum Decision on Order to Show Cause for Declaratory Relief) (January 22, 1990) (addressing concerns relating to the three equal but separate branches of the Commonwealth government as established in N.M.I. Const. arts. II, III and IV); *Sablan v. Tenorio* 4 N.M.I. 351 (April 18, 1996) (holding that "the separation of powers concept came into being to safeguard the independence of each branch of the government and protect it from domination and interference by others"); *Marianas Visitors Authority v. Commonwealth*, Civ. No. 94-0516 (Decision and Order Granting Application for Temporary Restraining Order) (May 27, 1994).

Several legal opinions issued by the Office of the Attorney General also set forth and properly rely upon the Separation of Powers doctrine in addressing generally, the issue of the requirement of obtaining the advice and consent of the Senate for gubernatorial appointments. For instance, at the request of the then-Governor, this Office issued a legal opinion regarding "Legislative Advice and Consent for Executive Branch Appointments" dated September 8, 1999 that states: "The appointment of the Executive Branch employees or members of various boards and commissions is solely an executive function, not a legislative function. The people, through adoption of the NMI Constitution, may grant to the Legislature specific limited authority to approve appointments by the Governor to various employment positions or boards and commissions. However, pursuant to the constitutional requirements concepts of "separation of powers" and "priority of law," the Legislature, through enactment of a statute, may not require that an Executive Branch appointment must receive legislative approval through the "advice and consent process" prior to such appointment being effective. Any such statutory requirement is an improper encroachment by the Legislative Branch into the appointive authority of the Executive Branch and violates the constitutional requirement of separation of powers. Therefore such requirement is unenforceable since it violates both the Covenant and the NMI Constitution.

AGO Legal Opinion, September 8, 1999 at 2.

Governor, may waive any statutory employment restriction that a law may impose on his appointment. If 1 CMC § 8111's restrictions prohibiting members of the Commission from holding "a position in the executive branch which is filled by appointment by the Governor" impose limitations on the Governor's appointment power, those limitations are waived under P.L. 13-9 § 2(b).

Thus, even if Mr. Taitano is a person occupying a "position in the executive branch which is filled by appointment by the Governor," the Governor may waive this statutory employment restriction and nominate Mr. Taitano to the Civil Service Commission. Public Law 13-9, § 2(b).

CONCLUSION as to Question I

The CNMI Constitution allows the legislature to limit the power of the Governor to appoint members of the Civil Service Commission, by requiring the Governor to obtain the advice and consent of the Senate. Any further statutory limitation of his appointment power is a violation of the doctrine of separation of powers, and is unconstitutional. Therefore, the Governor may appoint Mr. Taitano to the Civil Service Commission, even assuming that his current employment is in a position filled by appointment by the Governor.

II. Assuming the Senate confirms Mr. Taitano's appointment, may Mr. Taitano serve as a member of the CSC?

Article XX of the Commonwealth's Constitution granted the legislature the authority to "provide" for a Civil Service Commission. Once the Commission's members are duly appointed and confirmed, they must follow the Legislature's directions to ensure a "non-partisan and independent civil service." Since 1 CMC § 8111 prohibits members from engaging in certain acts or holding certain positions in order to serve as a member, the members must be willing to comply with Section 8111's prohibitions in order to serve.[3] In this case, if Mr. Taitano occupies a position in the executive branch that is filled by appointment by the Governor, he must resign that position in order serve as a member of the CSC.

CONCLUSION as to Question 2

All Civil Service Commission members must follow the statute that applies to them, including the dictates of 1 CMC § 8111, after they are duly appointed by the Governor and

[3] It is interesting to note that 1 CMC 8111 prohibits members from engaging in some of the activities that the Constitution in Article XX, which existed in 1978 as Article III, Section 16, excludes from the authority of the Commission. 1 CMC 8111 prohibits members from being elected officials, or holding a position in the executive branch, filled by appointment by the Governor. Similarly, Article XX states that the Commission has no authority over positions filled by election or by appointment of the governor in the departments and agencies of the executive branch.

confirmed by the Senate. This conclusion would apply to Mr. Taitano; if he becomes a member of the Civil Service Commission.

Respectfully Submitted By:

Angela L. Bennett
CNMI Assistant Attorney General

Reviewed and Approved By:

Ramona V. Manglona,
CNMI Attorney General

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366/2367/2368
Fax: (670) 234-7016

April 8, 2003

VIA FACSIMILE 664-3153

AGO Legal Opinion No. 03-08

Mr. Dean Tenorio
Director of Labor
Department of Labor and Immigration
Commonwealth of the Northern Mariana Islands
Afetna Building, 2nd Floor
San Antonio, Saipan, MP 96950

Dear Director Tenorio:

I am in receipt of your request for a legal opinion on Public Law 12-11(6)(b). The Attorney General has asked that I respond to this request.

FIRST ISSUE

In the absence of regulations, what is the validity of a reallocation request approved by DOLI that resulted in the lowering of one employer's worker cap while increasing another's cap by the same number?

BRIEF ANSWER

The reallocation is not valid.

SECOND ISSUE

Assuming the above reallocation is valid, what is the validity if the employer whose worker cap was lowered issues a declaration that no authorized company representative agreed to any such lowering of the cap.

BRIEF ANSWER

Based on the answer to the First Issue, the Second Issue is moot.

LAW

Introduction. In general, administrative agencies are tasked by the Legislature with two functions: (1) to make rules and regulations that have the effect of laws, *i.e.*, quasi-legislative power; and (2) to adjudicate particular controversies, *i.e.*, quasi-judicial power. The distinction between these two powers is sometimes difficult to discern due to the fact that, in exercising one power, the agency often must exercise the other. *See generally, NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (Black, J., concurring). For example, an adjudicatory ruling of an agency is sometimes treated as precedent, and thus has the same effect as a rule. Despite this institutional tension, it is incumbent upon DOLI, to the extent possible, to keep both its quasi-legislative and quasi-judicial functions separate and to exercise both of these functions in a fair manner.

Public Law 12-11(6)(b) states that DOLI "shall" establish a regulatory mechanism for the reallocation of nonresident alien workers among manufacturers based on need:

> Each licensed garment manufacturer shall be allocated to a quota of non-resident alien workers pursuant to Schedule A. *Provided, however, that the Secretary of Labor and Immigration shall, by regulation, establish a mechanism for the reallocation of non-resident alien workers among manufacturers based on need.* To offset the cost of increased administration, the Secretary may assess a reasonable reallocation fee.

P.L. 12-11, Section 6. Amendment of P.L. 11-76 with respect to Garment Industry Cap (Feb. 14, 2000) (emphasis added). To date, such regulations have not been promulgated, no cap reallocation requests have been granted, and no reallocations have been made, except involving manufacturers involved in labor disputes before DOLI, with which this legal opinion is not concerned.

Statutory construction. The clear language of the statute indicates that DOLI *must* promulgate regulations. First, mandatory language ("shall") is used, rather than permissive language ("may"). *See Aquino v. Tinian Cockfighting Board*, 3 N.M.I. 284, 292-93 (1992) ("The word 'shall' is unambiguous . . . it means 'must.' The use of the word 'shall' in the statute is mandatory and has the effect of creating a duty . . . ."); BLACK'S LAW DICTIONARY, at 475 (6th ed. 1990) ("Shall . . . a word of command, and one which has always or must be given a compulsory meaning as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, at 1081 (1991) (stating that "shall" is "used in laws, regulations, or directives to express what is mandatory").

Second, pursuant to doctrines of statutory construction, the plain meaning of clear and unambiguous language should be enforced. *See Commonwealth Ports Auth. v. Hakubotan Saipan Ent. Inc.*, 2 N.M.I. 212, 224 (1991) ("A basic principle of construction is that language should be given its plain meaning."); 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1998) ("Plain Meaning Rule . . . When the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction. It is not allowable to interpret what has no need of interpretation. There is no safer nor better settled canon of interpretation than

when language is clear and unambiguous it must be held to mean what it plainly expresses."); 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.04 ("Clear and Unambiguous Statutes . . . courts are bound to give effect to the literal meaning without consulting other indicia of intent or meaning when the meaning of the statutory text itself is 'plain' or 'clear and unambiguous'.").

Third, the mandatory nature of the statute is supported by ample case law wherein courts have *ordered* agencies to conduct rulemaking pursuant to clear statutory language. *E.g., Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 25 (D.D.C. 2002); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999).[1]

Legislative history. Legislative history indicates that the Legislature intended DOLI to promulgate regulations. First, in the Governor's letter accompanying his signing of PL 12-11, it was stated,

> The businesses are crying out for assistance, and we have an obligation to explore ways to improve our economic climate, but at the same time to protect the needs of our local people. *This bill is an attempt to assist the private sector* but at the same time protect the interest of the local community.

Letter from Governor to Speaker of House of Representatives and President of Senate, at 1 (Aug 3, 2000) (emphasis added). Due to the fact that the statute was intended to benefit employers, it would be inconsistent with this intent for DOLI to reallocate an employer's worker-quota in an *ad hoc* manner, rather than according to a generally applicable regulatory scheme.

Second, the Attorney General's Office, in its commentary on a prior draft of the amendment that did not include explicit authorization for DOLI to promulgate regulations, suggested the following:

> Another problem with the new section is that it us [sic] not clear from this provision if the Department of Labor and Immigration is provided the power to enact rules and regulations. *This provision clearly anticipates the Department of Labor and Immigration to enact regulations*, however, it cannot do so without statutory authorization. This could be remedied quite easily.

---

[1] In some circumstances, the U.S. Congress has even sought to remedy agency delay in promulgating regulations by including "hammer provisions" in statutes that provide remedies for those aggrieved by such delay by allowing for suit in federal court against the agency to compel the promulgation of regulations required by statute. *E.g., Sweet v. Sheahan*, 235 F.3d 80, 87-88 (2d Cir. 2000); *see generally* M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 150-57 (1995) (discussing Congress' increased use of "hammer provisions," which prescribe that if applicable agency has not promulgated final regulations by certain date, agency's proposed or interim regulations become effective, or alternatively, depending on particular legislation, standards set forth in statute become effective); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 81-83, 85-94 (1997) (discussing how courts should address claims brought against administrative agencies for failing to meet statutory deadlines, particularly with regard to Clean Air Act); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 589-90 (1997) (discussing Congress' increased use of "hammers" in environmental legislation).

Letter from Office of the Attorney General, at 7 (June 14, 2000) (emphasis added). Although it can be questioned whether DOLI required express statutory authorization in order to promulgate regulations, the fact of the matter is that subsequent drafts of the amendment were altered to include express authorization, presumably upon the advice of the Office of the Attorney General. Such events indicate that the Legislature intended DOLI to promulgate such regulations.

Judicial interpretation. When the Legislature leaves a "gap" in a statute — whether this gap is implicit or explicit — and regulations are required for the purposes of the statute to be implemented by the administrative agency charged with the enforcement of the statutory scheme, the relevant administrative agency has both the authorization *and the duty* to promulgate such regulations in a fair and impartial manner.

First, in *Wiseman v. DOLI*, the Superior Court held the following: "If [the legislature] has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Civ. No. 98-1299, at 6 (Nov. 8, 2000) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)); *see United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*). The Superior Court then went on to point out that the fact that the Legislature chose not to include specific provisions concerning the area in which DOLI had issued regulations indicated that the Legislature had "explicitly conferred that *duty* upon" DOLI. *Wiseman*, Civ. No. 98-1299, at 6-7 (emphasis added).

Second, a United States Supreme Court case is instructive as to the reasons behind why an agency is charged with the duty of promulgating such regulations. In *Morton v. Ruiz*, members of a Native American tribe who lived outside a reservation brought suit to challenge a denial of benefits by the Bureau of Indian Affairs. 415 U.S. 199 (1974) (cited by *Chevron, U.S.A., Inc.*, 467 U.S. at 843). The District Court dismissed the complaint, and the Court of Appeals for the Ninth Circuit reversed and remanded with instructions. The Supreme Court affirmed and remanded the case based, in part, upon its ruling that it was impermissible for the Secretary of Interior to deny benefits to the plaintiffs based upon restrictive eligibility requirements that were not published in the Federal Register or the Code of Federal Regulations, but rather only in an internally distributed manual not available to the public; the Supreme Court stated:

> [I]n such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries. . . . The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of funds.

Morton, 415 U.S. at 231-32.[2] Applying this principle to the instant situation, where DOLI had an explicit directive to promulgate regulations, reallocations made on an *ad hoc* basis and not according to a generally-applied, public set of guidelines, *a fortiori*, cannot be considered "rational and consistent." *Cf. United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

Administrative Procedure Act. The Commonwealth's Administrative Procedure Act supports the position that DOLI should only be able to reallocate worker-quotas according to duly promulgated regulations. In *Morton*, the U.S. Supreme Court used the purposes of the relevant provisions of the U.S. Administrative Procedure Act at issue in that case to support its conclusion that the agency restrictions were impermissible because they were not published for the public. The Court stated that the Act "was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton*, 415 U.S. at 232.

The version of the U.S. Administrative Procedure Act at issue in *Morton* was essentially equivalent to the Commonwealth's own Administrative Procedure Act: the U.S. version stated, "Each agency shall separately state and currently publish in the Federal Register for the guidance of the Public— . . . (d) *substantive rules of general applicability* adopted as authorized by law, and *statements of general policy or interpretations of general applicability* formulated and adopted by the agency." *Morton*, 415 U.S. at 232 (emphasis added). The Commonwealth's version states, "As used in this chapter: . . . (m) "Rule" means each agency *statement of general applicability* that implements, interprets, or prescribes *law or policy*, or describes the organization, procedure, or practice requirements of any agency." 1 CMC § 9101 (emphasis added).

The APA is thus further support for the position that DOLI should not be able to make decisions affecting the substantial rights of persons in the absence of a "statement of general applicability," unless such a decision is made pursuant to a *bona fide* adjudicatory proceeding. By doing so, DOLI is acting on an *ad hoc* basis in the absence of regulations *under circumstances wherein the Legislature has expressly provided* that DOLI's action in this area must be pursuant to regulations. *Cf. NLRB v.*

---

[2] It should be noted that the Supreme Court has distinguished between administrative policymaking through adjudication and through rulemaking. In *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, the National Labor Relations Board had reversed a position that it had developed through a long series of adjudicative decisions; the Court held that the Administrative Procedure Act did not require rulemaking to be conducted and that the choice to act through a rulemaking or adjudication was within the agency's discretion. 416 U.S. 267, 290-94 (1974). This situation, however, is distinguishable from the instant case wherein DOLI is responding to a reallocation request and thus is not acting in its quasi-judicial capacity, but rather more in its quasi-legislative capacity – and doing so in the absence of regulations that it is required to have promulgated.

Morton was recently cited by *Nichols v. Reno* as being a case "premised on the fair play concept embodied in the principle that due process of law is required for governmental actions that affect the right of individuals." 931 F. Supp. 748, 751 (D. Colo. 1996).

Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (holding that rule-making provisions of APA "may not be avoided by the process of making rules in the course of adjudicatory proceedings") (Fortas, J., with three justices concurring, and with three justices concurring in result).

Grant Dawson
Assistant Attorney General

Ramona V. Manglona
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

To: Secretary of Finance AG Legal Opinion 03-09

From: Attorney General

Date: April 9, 2003

Re: SOF's Authority to Expend Funds from P.L. 13-24's Deficit Reduction Account Based on Governor's Emergency Authority

---

Issue Presented

By letter dated March 17, 2003, you have requested this Office to provide you a legal opinion with respect to the following issue:

> Whether the Secretary of Finance has the authority, based upon the Governor's emergency powers, to use funds from the deficit reduction account established under P.L. 13-24 to satisfy the matching funds requirement for Super Typhoon Pongsona?

Short Answer

> Yes, subject to certain requirements, the Secretary of Finance has authority to use funds from the deficit reduction account established under P.L. 13-24 to satisfy the matching funds requirement for Super Typhoon Pongsona. Specifically, the Governor must declare a state of emergency as provided in N.M.I. Constitution Article III, Section 10, and reprogram funds in accordance with the authority and procedures of 1 CMC §7403(a).

Factual Background

On December 9, 2002, the Acting Governor declared a state of emergency for the island of Rota. See Exhibit "A". On January 1, 2003, the Governor declared a state of emergency for the islands of Saipan and Tinian in light of Super Typhoon Pongsona. See Exhibit "B". The Emergency Declarations stated that it was necessary for the Commonwealth Government to identify and mobilize available resources in response to the impact and damages of Super Typhoon Pongsona. As of this date, the Governor has not transmitted a report to the Legislature describing in detail the emergency which required exercise of such authority, the measures taken to deal with the emergency, and a financial plan for meeting the cost of these measures.

In response to the typhoon, the Federal Emergency Management Agency (FEMA) visited the CNMI and provided assistance to disaster victims under the Individuals & Households Program as described in the Code of Federal Regulations. Under the terms of the FEMA-Commonwealth Agreement, the Federal funds provided under the Stafford Act are limited to 75% of the total eligible cost. The Commonwealth is responsible for 25% of the amount paid by FEMA in January 2003. Subsequently, the Federal Government agreed to reduce the Commonwealth's share from 25% to 10%, thus reducing the CNMI Government's share to $141,929.33. The Commonwealth government has received a bill for the amount due to the Federal Government and the Governor now wishes to use funds from the Deficit Reduction account to pay for this bill relating to disaster costs.

Applicable Law

N.M.I. Constitution Article III, Section 10 provides:

> Emergency Powers. The governor may declare a state of emergency in the case of invasion, civil disturbance, natural disaster, or other calamity as provided by law, and may mobilize available resources to respond to that emergency.

1 CMC §7402(a)(1) provides:

> Except as provided in this section, and in 1 CMC §§ 7302 and 7403, no funds may be reprogrammed, and no obligation or contract for the expenditure of Commonwealth funds shall be made for any purposes other than the public purposes for which the funds are appropriated.

1 CMC §7302 is not relevant to this particular situation, as it deals with reprogramming for capital improvement projects.

1 CMC §7403(a) provides:

> Whenever the Governor uses his authority pursuant to N.M.I. Const. art. III, § 10, the *Governor shall as soon as practicable transmit to the legislature a report* describing in detail the emergency which required exercise of such authority, the measures being taken to deal with the emergency, and a financial plan for meeting the cost of these measures. This plan *shall indicate any function, program, or project which will have to be curtailed or deferred* during the emergency due to the emergency itself or *due to fiscal constraints, any additional revenues which may be needed to ensure sufficient funds*, and any additional information which the Governor deems appropriate. This plan shall also include, if a determination can be made at that time, the recommendations of the Governor *for any necessary reprogramming*, appropriations, or any other statutory changes which the Governor deems advisable to deal with the emergency *or to adjust the fiscal position of the government subsequent to the emergency*. If this determination cannot be made at that time, the recommendation shall be transmitted to the legislature as soon as practical. A state of emergency shall automatically terminate within 60 days of its proclamation; unless the Governor shall,

prior to the end of the 60 day period, notify the presiding officers of the legislature that the state of emergency has been extended, for a like term, and giving the reason for extending the state of emergency.

(Emphasis added).

P.L. 13-24, Section 510 provides:

> Except as otherwise provided herein, reprogramming of funds appropriated under this act shall be in accordance with 1 CMC §7402. Provided that the Governor shall be the reprogramming authority for any government activity or program without a designated reprogramming authority.

P.L. 13-24, Section 512 provides:

> Deficit Reduction. The Secretary of Finance shall reserve at least 2% of the total fiscal year appropriation for the purpose of retiring the government's accumulated deficit. Provided further that notwithstanding any provision of law, in the event of a continuing appropriation, this 2% requirement shall remain in effect until the passage of appropriation act(s) providing budget authority for a subsequent fiscal year.

P.L. 13-24, Section 523 provides that "the criminal penalties set forth in the Planning and Budgeting Act of 1983, as amended (1 CMC §7701 et seq.), shall apply to this Chapter".

Analysis

Article III, Section 10 of the N.M.I. Constitution explicitly permits the Governor to declare a state of emergency in case of a natural disaster and mobilize available resources in response to that emergency.

The Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands (December 6, 1976) (hereinafter "the Analysis") explains the extent of the Governor's power under Article III, Section 10. Specifically, it states in part:

> It is intended that the governor have all the discretionary authority customarily possessed by the chief executive of a state or city in the United States.... The governor may use contingency funds for disaster aid and divert from regular programs during the state of emergency with legislative approval.

Analysis at 77-78.

While generally no new power or authority is created by a public emergency, a situation may call for liberal construction of constitutional powers. *State ex rel. Dept. of Development v. State Bldg. Com'n*, 406 N.W.2d 728 (Wisc. 1987). While the governor has the authority to reprogram funds, the pivotal issue is whether he can reprogram funds from an account that has been set aside for deficit reduction. As stated in *State ex rel. City of Columbus v. Ketterer*, 189 N.E. 252 (Ohio 1934):

> It is true that a Constitution is not a grant, but a limitation of power to legislative bodies, and no emergency constitutes an excuse for the adoption of legislation which the Constitution clearly prohibits. But an emergency may furnish the occasion for the exercise of power contained within the Constitution, not theretofore deemed necessary to invoke.

Id. at 256.

The *Analysis* indicates that it is permissible to divert funds from regular programs during the state of emergency with legislative approval. Furthermore, a review of the Commonwealth Code indicates that it is permissible to reprogram funds due to an emergency.

Under the Commonwealth code, specifically 1 CMC §§7402(a)(1) and 7403(a), the Governor is permitted to reprogram funds, subject to certain procedures being followed. Section 7402(a)(1) limits reprogramming of funds to the purpose that the funds are appropriated. In this case, the Legislature has not appropriated for disaster costs such as the matching requirement by FEMA. In fact, under P.L. 13-24, the Legislature did not make any specific appropriation other than for "operations" and "personnel". The disaster costs in this case would fall into the "operations" category, and so under 1 CMC §§7402 and 7403, the governor may reprogram up to twenty-five per cent of the funds appropriated by the annual appropriation act for the operations of departments, agencies, and offices of the executive

Furthermore, a review of P.L. 13-24, specifically, section 510 provides that reprogramming of funds appropriated under that act shall be in accordance with 1 CMC §7402. While P.L. 13-24, section 521 requires the Secretary of Finance to reserve 2% of the total fiscal year appropriation for the purpose of retiring the government deficit, there is no provision in that section which prohibits or limits the reprogramming of funds. In fact, the general provision of the act, Section 510 specifically provides that *"[e]xcept as otherwise provided herein*, reprogramming of funds appropriated under this act shall be in accordance with 1 CMC §7402". As such, reprogramming of funds is guided by 1 CMC §7402, which makes reference to the reprogramming authority of the Governor in emergency situations as provided for in 1 CMC §7403.

Under 1 CMC §7403, the Governor may reprogram upon using his authority under N.M.I. Const. art. III, §10. However, the Governor is required to transmit, as soon as practicable, a report to the legislature describing in detail the emergency which required the exercise of such authority. 1 CMC §7403(a). Furthermore, as part of this report, the Governor is required to "indicate any function, program, or project which *will have to be curtailed or deferred* during the emergency due to the emergency itself or due to fiscal constraints". *Id.* Furthermore, the plan shall contain:

> [t]he recommendations of the Governor for any *necessary reprogramming*, appropriations, *or any other statutory changes which the Governor deems advisable to deal with the emergency or to adjust the fiscal position of the government subsequent to the emergency.*

Id. (Emphasis added).

As such, the Governor is required to transmit a report to the Legislature describing the damage caused by Super Typhoon Pongsona, as well as indicating any necessary reprogramming to adjust the fiscal position of the government. Furthermore, 1 CMC §7403(a) provides that if the Governor is unable to make such a determination during the time of the emergency, he shall transmit the recommendations as soon as practicable. This provision is mandatory in order to permit reprogramming under 1 CMC §7403.

Also of importance is Section 523 of P.L. 13-24, which provides that the criminal penalties set forth in the Planning and Budget Act, as amended (1 CMC §7701 et seq.) applies. Specifically, 1 CMC §7701(b) provides:

> No officer or employee of the Commonwealth shall willfully and knowingly involve the Commonwealth or any agency in any contract or other obligation for the payment of money for any purpose, or make or authorize any payment out of the Commonwealth Treasury, in advance of, or in the absence of, appropriations made for such purposes, unless such contract or obligation is authorized by law or joint resolution.

As such, should you "willfully and knowingly" authorize any payment out the Treasury in advance of an appropriation for such purpose, criminal liability possibly may attach. It is critical that the Governor follows the reprogramming requirements outlined in 1 CMC §7403(a) prior to your authorizing such expenditure from the Deficit Reduction Reserve.

Conclusion

Subject to certain procedures being followed, the Secretary of Finance has authority to use funds from the deficit reduction account established under P.L. 13-24 to satisfy the matching funds requirement for Super Typhoon Pongsona. Specifically, the Governor must declare a state of emergency, as provided in N.M.I. Constitution Article III, Section 10, and funds may be reprogrammed only in accordance with the authority and procedures outlined in 1 CMC §7403(a). Failure to follow these procedures and requirements may lead to criminal penalties pursuant to 1 CMC §7402.

By: _____
Ramona V. Manglona
Attorney General

_____
Deborah L. Covington
Assistant Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta
Governor

Diego T. Benavente
Lieutenant Governor

STATE OF EMERGENCY DECLARATION

I, PAUL A. MANGLONA, by the authority vested in me as Acting Governor of the Commonwealth of the Northern Mariana Islands by Section 10 of Article III of the CNMI Constitution, hereby declare a State of Emergency for the island of Rota. This emergency declaration is necessary for the Commonwealth Government to identify and mobilize available resources in response to the impact and damages of Super Typhoon Pongsona.

Therefore, pursuant to the definition of a "major disaster" as provided in 1 CMC § 5114 (c), I will be requesting the President of the United States to declare a major disaster for the island of Rota. I have designated Mr. Rudolfo M. Pua as the State Coordinating Officer and Ms. Virginia C. Villagomez as the Governor's Authorized Representative to work with the various federal agencies and officials in assessing damages and coordinating relief efforts. These officials will work in coordination with the Office of the Mayor of Rota.

Date this 9 day of December, 2002.

Paul A. Manglona

PAUL A. MANGLONA

Caller Box 10007 Saipan, MP 96950 Telephone: (670) 664-2200/2300 Facsimile: (670) 664-2211/2311

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta
Governor

Diego T. Benavente
Lieutenant Governor

DECLARATION OF STATE OF EMERGENCY

I, JUAN N. BABAUTA, by authority vested in me as Governor of the Commonwealth of the Northern Mariana Islands by Section 10 of Article III of the CNMI Constitution, hereby declare a State of Emergency for the islands of Tinian and Saipan. This emergency declaration is necessary for the Commonwealth Government to identify and mobilized available resources in response to the impact and damages of Super Typhoon Pongsona base on the results of the joint Federal/State preliminary damage assessment.

Therefore, pursuant to the definition of a "major disaster" as provided in 1 CMC §5114 (c), I have requested the President of the United States to declare a major disaster for the islands of Tinian and Saipan. I have designated Mr. Rudolfo M. Pua as the State Coordinating Officer and Ms. Virginia C. Villagomez as the Governor's Authorized Representative to work with the various federal agencies and officials in assessing damages and coordinating relief efforts.

Date this 1st day of January, 2003.

JUAN N. BABAUTA

022026

Ex. "B"

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

To: Acting Director, Customs — AG Legal Opinion No. 03- 10

From: Deputy Attorney General

Date: May 16, 2003

Re: Whether Tax-Exempt Organizations are Exempt from the Beautification Tax

---

Background

Recently, the Saipan Community School contacted you with respect to the Beautification Tax imposed pursuant to P.L. 13-42 which was enacted on December 19, 2002. Saipan Community School has been granted exemption under Northern Marianas Territorial Income Tax (NMTIT) §501(c)(3) by the Division of Revenue and Taxation from the NMTIT and the Gross Revenue Tax.

Issue Presented

By memorandum dated March 20, 2003, you have requested this Office to provide a legal opinion with respect to the following issue:

> Whether private schools that have received a tax-exempt determination letter from the Division of Revenue and Taxation are exempt from the Beautification Tax imposed pursuant to P.L. 13-42 and enforced by the Division of Customs.

Short Answer

No, they are not. Tax exemptions are a matter of legislative grace. In this particular situation, Saipan Community School is not exempt from the Beautification Tax and must pay such tax on all applicable "consumer goods" as defined in 4 CMC §1401, as amended by P.L. 13-42. Furthermore, simply because an entity receives a tax exempt determination letter from the Division of Revenue and Taxation does not automatically exempt the entity from taxes imposed by the Division of Customs. However, the legislature is authorized to amend the law and specifically exempt Saipan Community School and other tax exempt organizations from this tax if they so choose.

Applicable Law

4 CMC §1411 as amended by P.L. 13-42 provides:

> Environmental Beautification Tax. *Notwithstanding any other provision of law,* a tax at the rate of .42 percent ad valorem is hereby assessed on all consumer goods as defined in §1401(g). The tax shall be collected by the Division of Customs at the point of entry.

(Emphasis added).

4 CMC §1401(g) as amended by P.L. 13-42 provides:

> 'Consumer goods' means all products, goods, and materials entering the CNMI, including but not limited to vehicles, retail products, garment material, construction material and all goods that have any form of packaging that will be disposed of or that has a limited useful life after which it will be disposed; provides that this definition shall not include foodstuffs and medicine for sale or otherwise, and goods, products and materials identified in 4 CMC §1402(c).

4 CMC §1402(c) provides:

> (c) Nonbusiness Use Exemption. Any person may bring for *personal use and consumption* exempt from excise tax imposed by this section the following goods, commodities, resources, or merchandise:
>
> (1) Any goods, commodities, resources or merchandise (including those exempt) that do not exceed a combined total value of $1,000, except as otherwise provided in this section. For purposes of ascertaining which goods, commodities, resources or merchandise equal the first $1,000 of exempted goods, commodities, resources or merchandise, the value of those goods, commodities, resources, or merchandise with the lowest excise rate shall be included first.
>
> (2) An amount of cigarettes that are commercially packaged and that do not exceed 30 packages of 20 cigarettes per package.
>
> (3) An amount of tobacco or tobacco substitute, or chewable tobacco product or other smokable or snuffable substance, material or product other than cigarettes, not to exceed one pound, provided that such substance, material or product is not contraband.
>
> (4) An amount of distilled alcoholic beverages not to exceed 77 ounces.
>
> (5) An amount of beer or other malt beverage not to exceed 288 fluid ounces.
>
> (6) An amount of wine and sake not to exceed 128 ounces.

(Emphasis added).

4 CMC §1402 provides in part, as follows:

> (a) General. For the privilege of first sale, use, manufacture, lease or rental of goods, commodities, resources, or merchandise in the Commonwealth for business purposes or for personal use exceeding the value specified in subsection (c) of this section, there is imposed an excise tax as follows: ...

4 CMC §1402(b)(3) provides that the following items shall be exempt from the *excise* tax:

> ...(3) Books and other educational materials purchased for nonbusiness use by a public or private school or a library open to the public.

Division of Customs Service Rules and Regulations No. 4300 (Commonwealth Register Vol. 18, No. 12, December 15, 1996) §4301.3(o) provides, in part, that the following items shall not be subject to the excise tax of §1402(a) of 4 CMC:

> (o) Tax Exempt Organizations. Persons granted tax-exempt status by the CNMI Division of Revenue and Taxation. In order to qualify for this exemption, the person must present to the Customs Division a copy of the letter issued by the CNMI Division of Revenue and Taxation granting the person tax-exempt status....

Revenue and Taxation Regulations No. 2200 (Commonwealth Register Vol. 17, No. 6, June 25, 1995) § 2404.1(a) provides the general rule for eligible tax exempt entities and states as follows:

> (a) In General. All nonprofit organizations must apply for and be granted tax-exempt status in order to be exempt from the Earnings Tax, the Gross Revenue Tax, and the Northern Marianas Territorial Income Tax.

Discussion

In the CNMI, certain types of entities are permitted to apply for tax-exemption from particular taxes imposed in the Commonwealth. Generally, these entities must apply to the Division of Revenue and Taxation for exemption from the Gross Revenue Tax (GRT), the Earnings Tax, and the Northern Marianas Territorial Income Tax. Rev. and Tax Reg. 2401.1(a). NMTIT §501(c)(3) contains a list of entities eligible for tax exemption and they include private schools, provided certain conditions are met.

While the Division of Revenue and Tax is permitted to grant certain types of entities tax exemption from the GRT, Earnings Tax, and NMTIT, its authority to regulate taxes is limited to particular types of taxes. Specifically, the Division of Revenue and Taxation does not have the authority to administer and grant exemption from the Excise Tax as imposed by 4 CMC §1401, et. seq. Rather, authority for administration of the Excise Tax is with the Director of Customs. 4 CMC §1407(b). See also, Customs Service Rules and Regulations §4300.4(a), Commonwealth Register, Vol. 18, No.12, December 15, 1996; Rev. and Tax Reg. §2200.2, Commonwealth Register, Vol. 17, No.6, June, 1995 [noting that the Rev. and Tax

Regulations apply to 4 CMC, Division 1 except Chapter 4 (Excise Tax) and Chapter 10 (Developer's Tax)].

As a general rule, and as stated in Moorhead v. United States, 774 F.2d 936, 941 (9th Cir. 1985):

> Grants of tax exemptions are narrowly construed against the assertions of the taxpayers and in favor of the taxing power. E.g., *Bingler v. Johnson,* 394 U.S. 741, 752-53, 72 L.Ed. 2d 695 89, S.Ct. 1439 (1969); *Commissioner v. Jacobson,* 336 U.S. 28, 48-49, 93 L.Ed. 477, 69 S.Ct. 358 (1949); *Atlantic Coast Line Railroad v. Phillips,* 332 U.S. 168, 172, 91 L.Ed.2d 1977, 67 S.Ct. 1584 (1947); *Helvering v. Northewest Steel Rolling Mills, Inc.,* 311 U.S. 46, 49, 85 L.Ed. 29, 61 S.Ct. 109 (1940); 3C.*Sands, Sutherland Statutory Construction* §66.09, at 207 (1974). This canon seeks to tax income comprehensively, *Commissioner v. Jacobson,* 336 U.S. 28, 49 (1949) and to minimize differential treatment and foster impartiality, fairness and equality of treatment among taxpayers.

Furthermore, when the statutory language is interpreted the words and phrases are to be given their plain or ordinary meaning. *Govendo v. Micronesian Garment Mfg. Inc.*, 2 N.M.I. 270 (1991) Plain meaning has been defined as the words or statute's ordinary contemporary meaning. *CNMI v. Delos Santos,* 3 C.R. 661 (D.Ct. App. Div. 1989). Where the statutory language is unambiguous, the statutory language is conclusive. *Island Aviation, Inc. v. Mariana Islands Airport Authority,* 1 C.R. 353 (D.N.M.I. 1983).

4 CMC §1411, as amended by P.L. 13-42 prefaces itself with the phrase "*notwithstanding any other provision of law,* a tax at the rate of .42 percent ad valorem is hereby assessed on all consumer goods." (Emphasis added). Thus, the plain statutory language is that despite the fact that some entities may be exempt from certain taxes, such exemption is not to apply to the Beautification Tax. This premise, coupled with the fact that tax exemptions are in the nature of a legislative grace, stands for the proposition that Saipan Community School is not automatically exempt from the Beautification Tax despite having a tax exempt determination letter from the Division of Revenue and Taxation.

While the definition of "consumer goods" provided in 4 CMC §1401(g) states that goods identified in 4 CMC §1402(c) shall not be taxed, such exception is generally not applicable to Saipan Community School. The goods identified in §1402(c) are limited to goods for personal use and consumption, and thus would not be applicable to an educational institution. Furthermore, while 4 CMC §1402(b)(3) exempts, from the excise tax imposed by 4 CMC §1402, books and other educational materials purchased for nonbusiness use by a public or private school, such exemption does not apply to the Beautification Tax imposed pursuant to 4 CMC §1411, as amended by P.L. 13-42.

It should be noted that Saipan Community School's letter for tax exemption refers only to exemption from the Gross Revenue Tax, the Earnings Tax and the NMTIT. It specifically states in the letter that this determination does not apply to the General Excise Tax under 4 CMC §1402. While Customs Regulations provide that the Division of Customs will honor Revenue and Taxation's exemption letter, §4301.3 of the Regulations limits such exemption to the excise tax only. It is also necessary to point out that a determination of tax exemption does not extend to all taxes. For example, Saipan Community School is required to pay employer's withholding taxes, social security taxes and taxes on unrelated business taxable

income as provided in NMTIT §§501(b) and 511. However, it should be noted that because tax exemptions are a matter of legislative grace, the legislature has the authority to amend the beautification tax and exempt Saipan Community School and other tax exempt organizations, if it so chooses. However, until the law is amended, Saipan Community School and other tax exempt organizations will be subject to the Beautification tax.

Conclusion

Saipan Community School is not exempt from the Beautification Tax and must pay such tax on all applicable "consumer goods" as defined in 4 CMC §1401, as amended by P.L. 13-42. Furthermore, simply because an entity receives a tax exempt determination letter from the Division of Revenue and Taxation does not automatically exempt the entity from taxes imposed by the Division of Customs. The Division of Revenue and Taxation lacks authority to make such a determination with respect to excise taxes and other taxes which are under the enforcement authority of the Division of Customs. Finally, the plain language of 4 CMC §1411, as amended by P.L. 13-42, which provides that the Beautification tax applies "notwithstanding any other provision of law", provides that the tax is assessed on all consumer goods unless those consumer goods are specifically exempted in 4 CMC §1401(g). However, the legislature is permitted to amend the law and exempt Saipan Community School and other tax exempt organizations from this tax. Until such amendment, these entities will be subject to the Beautification tax.

By: Clyde Lemons

Clyde Lemons, Jr.
Deputy Attorney General

Deborah L. Covington

Deborah L. Covington
Assistant Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

To: Vince Attao, Chief Parole Officer — Attorney General Legal Opinion #11

cc: Board of Parole

From: Attorney General

Date: May 22, 2003

Re: Attorney General Legal Opinion 2003- 11 BOP 03-001

This memorandum is in response to your April 23, 2003 and April 25, 2002 requests for opinions.

Issue:

Must an inmate sentenced to serve a mandatory minimum sentence serve the minimum sentence before that inmate is eligible for the privilege of parole?

Short Answer:

Yes. 6 CMC 4102 and 6 CMC 4252 which govern parole eligibility and offenses that carry mandatory sentences dictate that an offender must serve the minimum sentence prior to being considered for parole.

Analysis

The CNMI Legislature has granted the Board of Parole the power to administer and oversee the parole process in the CNMI. 6 CMC 4252 as originally enacted, provided general guidelines that the Parole Board was to use to determine parole eligibility:

> The Board of Parole, acting pursuant to applicable Commonwealth laws and the rules and regulations of the Board of Parole, shall have the power to grant parole to any person convicted of an offense under this title or prior law, after the person has completed at least one-third of the minimum term of imprisonment sentenced by the court. After reasonable notice and an opportunity for a hearing, the Board of Parole may revoke parole if there has been a violation of the conditions of parole by a parolee.

The Legislature also prescribed mandatory minimum sentences for certain criminal offenses. 6 CMC 4102 states:

> a) Any person who is armed with a dangerous weapon in the commission of an offense shall be sentenced to serve no less than one-third the maximum term of imprisonment which may otherwise be imposed upon conviction of the offense, which sentence may not be suspended unless the court determines that unique circumstances exist in the light of which imprisonment of the convicted person is inhumane, cruel or otherwise extremely detrimental to the interest of justice, and is not necessary for the protection of the public or any witness.
>
> (b) Any person who is armed with a dangerous weapon which is also a firearm in the commission of an offense shall be sentenced to serve no less than one-third the maximum term of imprisonment which may not be suspended.
>
> b) No penalties pursuant to this section shall be imposed unless being armed with a dangerous weapon is alleged and proved as an element of the underlying offense.
>
> (c) Notwithstanding any provisions in this section, any person convicted of sexual abuse of a child pursuant to 6 CMC § 1311 as presently constituted or hereinafter amended, shall be sentenced to serve no less than one-third the maximum term of imprisonment which may otherwise be imposed upon conviction of the offense, which sentence may not be suspended unless the court determines that unique circumstances exist in the light of which imprisonment of the convicted person is inhumane, cruel or otherwise extremely detrimental to the interest of justice, and is not necessary for the protection of the public or any witness.

6 CMC 4102.(emphasis added).

The primary rule of statutory construction is that the Court must ascertain the intention of the legislature. [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992). When the terms of the statute are clear and unambiguous, they must be applied according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Id. A plain reading of 6 CMC 4102 indicates that an offender sentenced under any offense that carries a mandatory minimum as set forth in the statute must serve at least one-third of the maximum penalty allowed by law.

It is elementary then that when an offender is convicted of an offense punishable by a mandatory minimum sentence, the court must sentence the defendant to the mandatory minimum sentence or to a higher sentence. The only exception created by the statute is in the instance involving a dangerous weapon that is not a firearm where the sentencing court has found that unique circumstances exist in light of which imprisonment of the convicted person is inhumane, cruel or otherwise extremely detrimental to the interest of justice, and is not necessary for the protection of the public or any witness. Other than in the special circumstances set forth in the statute, the courts have no power to sentence the offender to serve less time than the mandatory minimum and that offender may not be considered for parole prior to serving that minimum sentence. It is clear the Legislature intended that imposition of a mandatory minimum sentence would result in a person's not being eligible for parole until the mandatory minimum sentence had been served. It would not serve the legislative intent if an offender could be released on parole prior to serving the sentence required by the statute.

In 2001, the Legislature reinforced its original intent and codified the combined effect of 6 CMC 4252 and 6 CMC 4102 with the passage of PL 12-41 which amended 6 CMC 4252 and states (in relevant part):

> The Board of Parole, acting pursuant to applicable Commonwealth laws and the rules and regulations of the Board of Parole, shall have the power to grant parole to any person convicted of an offense under this title or prior law, after the person has completed at least one-third of the unsuspended term of imprisonment sentenced by the court,
>
> (b) any person whose eligibility for parole has been restricted by the sentencing court, it its discretion, shall not be eligible for parole during the period of restriction, which period may be up to the maximum sentence provided under the law.

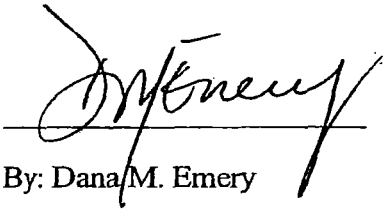
6 CMC 4252 (a) and (b).

Prior to PL 12-41, while the Parole Board may have had the power to grant parole to an offender that had served at least one third of minimum sentence term imposed by the court, that power was not absolute and in fact was tempered with respect to those offenses that carried a mandatory minimum penalty, set forth under 6 CMC 4102. With 12-41 the Legislature made clear its original intent that offenders who were sentenced to certain classes of crimes should not be eligible for consideration for parole until the statutory mandatory minimum term of imprisonment is served.

Conclusion

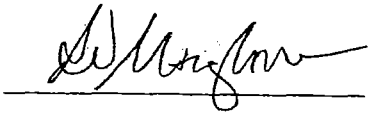
Under 6 CMC 4102 and 6 CMC 4252 an offender must serve at least at least one-third of the unsuspended term of imprisonment before that person may be considered for parole. In the case of

offenses carrying a mandatory minimum sentence, the mandatory minimum term of imprisonment must be served before the offender is eligible.



By: Dana M. Emery

Assistant Attorney General



Concurred By: Ramona V. Manglona

Attorney General

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366
Fax: (670) 234-7016

ATTORNEY GENERAL LEGAL OPINION No. 03-12

To: Governor
Lieutenant Governor
President of the Senate, and Members of the Senate of the Thirteenth Legislature

From: Clyde Lemons, Jr., Acting Attorney General; Benjamin Sachs, Assistant Attorney General

cc: Office of the Senate Legal Counsel

Date: September 8, 2003

Re: *Executive Appointments Subject to "Advice and Consent" of Senate: Analysis of the Constitutionality of 1 CMC § 2904*

QUESTIONS PRESENTED

Whether Sections 11 and 14 of Article III of the Commonwealth Constitution describe the outer limits of the Senate's confirmation authority over executive appointments, or whether the Legislature may by passage of a statute such as 1 CMC § 2904 require that confirmation occur within a prescribed period after submission for confirmation or require automatic termination of the appointment with no possibility of renomination if the Senate fails to confirm within that time period.

Whether 1 CMC § 2904 violates the separation of powers doctrine implicit in Section 203 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant").[1]

SHORT ANSWERS

The authority of the Legislature to give "advice and consent" on executive appointments is part of the executive branch appointment power delegated to the Legislature by the Constitution. As our office has previously determined and again confirms, the 90-day automatic termination provision in 1 CMC § 2904, to the extent that it permits the

[1] Act of March 24, 1976, Pub.L. 94-241, 90 Stat. 263, as amended by Pub.L. 98-213, § 9, 97 Stat. 1461; Pub.L. 99-396, § 10, 100 Stat. 840, reprinted in 48 U.S.C. § 1681 and 1 CMC at pg. B-101, B-106 (1999 Rev.).

Senate or other confirming body to avoid its constitutional responsibility simply by the lapse of time, may be challenged as an unconstitutional contravention of the advice and consent requirement. The automatic termination provision in conjunction with the renomination preclusion is further subject to challenge as an impermissible limitation on the executive branch power of appointment in contravention of the separation of powers doctrine, because it imposes a disqualification not provided by the Constitution and works an arbitrary and irrational exclusion from executive office.

Properly construed merely as a procedural mechanism and temporal guideline for implementing the legislative advice and consent authority, however, the statute is viewed as constitutionally permissible, insofar as it is limited to temporary appointments and only serves as a restriction on the length of time a nominee may serve in office without the Senate's advice and consent.

ANALYSIS

We are called upon to analyze whether 1 CMC § 2904 impermissibly encroaches on the appointive powers of the Governor contained in Article III of the Commonwealth Constitution and is contrary to the separation of powers doctrine implicit in the Covenant and the Constitution.

1. Separation of Powers

Article III, Section 1 of the Commonwealth Constitution vests the executive power of the Commonwealth in the Governor and includes the power of appointment to executive offices. *See Camacho v. Civil Serv. Comm'n,* 666 F.2d 1257, 1263 (9th Cir. 1982) (distinguishing the legislative power to make laws from the executive power to enforce or to appoint the agents charged with the duty of enforcement). Article III, Sections 11 and 14 require the Governor to appoint the Attorney General and the heads of executive branch departments and require that the appointments receive the advice and consent of the Senate.[2]

It is well established by Commonwealth law as well as in all jurisdictions that have considered the issue that the advice and consent function is part of the executive appointment power and must be delegated to the Legislature by the Constitution. *See Camacho,* 666 F.2d at 1263 (power of appointment is executive and the Legislature may not exercise executive power unless expressly provided) (*citing Springer v. Philippine Islands,* 277 U.S. 189 (1928)). *Accord Bradner v. Hammond,* 553 P.2d 1 (Alaska 1976); *Walker v. Baker,* 196 S.W.2d 324 (Tex. 1946). Absent express constitutional authority, any statute purporting to confer advice and consent authority on a legislative body or

[2] Other sections in Article III also specify that designated high level policy-making positions receive the advice and consent of the Senate (and, when applicable, the House of Representatives). *See, e.g.*, Article III, Section 12 – Public Auditor appointed subject to advice and consent of each house of the Legislature; Article III, Section 23 – Resident Executive for Indigenous Affairs appointed subject to the advice and consent of the Senate. *See also* Article VI, Section 6(a) – MPLT trustees appointed subject to the advice and consent of the Senate; and Article XX – Civil Service Commission members appointed subject to the advice and consent of the Senate.

to impose any other restriction or limitation on the executive branch appointment power is a usurpation of the executive function and contravenes the doctrine of the separation of powers. *See Mafnas v. Camacho,* Civ. No. 80-0012 (D.N.M.I. Oct. 21, 1980) (Opinion at 5) ("If the constitution for the respective state reserves in the Legislature the power to require confirmation of executive appointments, then the Legislature has its option to demand it in a statute. However, without the constitutional power, it cannot add to its authority by establishing an executive office and requiring legislative confirmation.").

The applicability of the separation of powers doctrine to the Commonwealth is also well established by Commonwealth law. *See Camacho v. Civil Serv. Comm'n,* 666 F.2d at 1263 ("The Covenant under which the Commonwealth was chartered demonstrates that, unlike the states, the Commonwealth is bound by the doctrine of separation of powers."). The applicability of the doctrine is implicit in § 203 of the Covenant and in the Constitution which establishes three branches of the government and vests specific powers with each. *See* Covenant § 203 ("The Constitution will provide for a republican form of government with separate executive, legislative and judicial branches.... The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor.... The legislative power of the Northern Mariana Islands will be vested in a popularly elected Legislature.... The judicial power of the Northern Mariana Islands will be vested in such courts as the Constitution or laws of the Northern Mariana Islands may provide."); *Camacho v. Civil Serv. Comm'n,* 666 F.2d at 1263 (noting the Constitution followed the dictates of the Covenant).

Under the separation of powers doctrine, the three branches of government are co-equal. *See Mafnas v. Inos,* Civ. No. 90-0031 (Jan. 22, 1990) (Opinion at 8). The doctrine came into being "to safeguard the independence of each branch of the government and protect it from domination and interference by the others." *Sablan v. Tenorio,* 4 NMI 359, 363 (1996). Accordingly, where the Constitution permits encroachment of one branch upon the jurisdiction of another, that authority will be strictly construed. *See Myers v. United States,* 272 U.S. 52 (1926) ("the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."); *Mafnas v. Camacho,* Civ. No. 80-0012 (D.N.M.I. Oct. 21, 1980) ("It is clear from the constitutional history and the Northern Marianas Constitution as adopted, that a strong executive branch was created and in the area of legislative confirmation requirements, only those specified in the Constitution demand legislative oversight").

Illustrative of this principle is the Alaska Supreme Court's opinion in *Bradner v. Hammond,* which states that the express constitutional provisions granting review and approval by the Legislature of certain executive branch officials "marks the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government." *Id.*, 553 P.2d at 7. The court found that the constitutional provisions "delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers" and that the "separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision." *Id.* "To hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch." *Id.*

With respect to 1 CMC § 2904, this Office previously opined in Attorney General Opinion 78-12 (Dec. 5, 1978) that § 2904 "imposes a disqualification not provided by the Constitution and may be beyond the implied restriction on the power of the Legislature. The Legislature cannot enact arbitrary exclusions from office. Qualifications for office must have a rational basis such as age, integrity, training, residence, etc."[3] It is the view of this Office that the automatic termination and renomination preclusion in § 2904 is beyond the Legislature's advice and consent authority and works an arbitrary and irrational exclusion from executive office and thus impermissibly interferes with the executive appointment power in contravention of the separation of powers doctrine. *See Walker v. Baker*, 196 S.W.2d 324, 328 (Tex. 1946) (under the separation of powers doctrine, neither branch of government "can enlarge, restrict or destroy the powers of any one of them except as the power to do so may be given by the Constitution.").

Based on the requirement of separation of powers, as reviewed and clarified in the aforementioned cases and as previously opined in AGO Opinions and memoranda, it is the view of this Office that a statute such as 1 CMC § 2904 which purports to add a provision to the Commonwealth Code requiring that an executive appointment be subject to confirmation by the Senate (or, when applicable, the House of Representatives) within a prescribed period of time and "automatically terminate" with no possibility of renomination upon the Senate's failure to act, may be challenged as an unconstitutional limitation on the executive appointment power and beyond the advice and consent authority delegated to the Senate.[4]

2. Constitutional Duty of Advice and Consent

As indicated above, various provisions of the Commonwealth Constitution require executive appointments to receive the advice and consent of the Senate or other legislative body. This constitutional requirement imposes an affirmative duty on the confirming body to deliberate on executive branch appointees and to either confirm or reject. The executive appointing authority must comply with the constitutional requirement of advice and consent by submitting

---

[3] *See* Attorney General Opinion 78-12 dated December 5, 1978 by Acting Attorney General Michael De Angelo regarding the "Applicability of 90 day provision of Public Law 1-8 and Status of Office" (copy attached hereto as App. I).

[4] This is not a newly adopted position of the Executive Branch. Based on our research, the Attorney General's Office advised the Office of the Governor of this position in Attorney General Opinion 78-12 dated December 5, 1978 by Acting Attorney General Michael De Angelo, a copy of which is attached hereto. Similarly, the unconstitutionality of statutory limitations placed on the executive appointment and removal power has been repeatedly discussed in prior AGO opinions and memoranda. *See* Attorney General Opinion 78-13 (unconstitutionality of PL 1-8 to the extent it imposes an advice and consent requirement not found in the Constitution); Attorney General Memorandum re Legislative Advice and Consent for Executive Branch Appointments (Sept. 8, 1999) (statutorily imposed advice and consent requirement is improper encroachment upon the executive appointment power); comments to H.B. 11-78 (June 3, 1998) (proposed statutory limitations on the Governor's removal authority under Article III, Section 14 of the Constitution); comments to HB 12-257 (Oct. 4, 2000) (Legislature may not limit, restrict or inhibit the appointing authority of the Governor absent Constitutional authority); comments to HB 12-322 (April 16, 2001) (Legislature may not impose an advice and consent requirement not found in the Constitution); comments to HB 13-258 (same).

the nominee for consideration by the Legislature. The Legislature must also meet its constitutional responsibility by taking action on the nomination. This affirmative duty to act by the confirming body has been expressed in prior Opinions of the Attorney General (*see* App. I), and is supported by the Superior Court's decision in *Demapan v. Kara*, Civ. No. 99-0548 (N.M.I. Super. Ct. Jan. 20, 2000). In *Demapan*, the court found that "an acting appointment must be for a reasonable time period, and during this period, the appointee must either be confirmed or rejected by the Senate." *Id.*, (Opinion at 21) (emphasis added). The court also found that failure of the Governor to submit appointments for advice and consent effectively renders the advice and consent provision meaningless. *Id.* at 20. Similarly, the 90-day automatic termination provision in 1 CMC § 2904 obviates the confirmation process and also renders the Constitution's advice and consent provision meaningless.

The plain meaning of "advice and consent" clearly imposes an affirmative duty on the confirming body to take some form of action. In *Murphy v. Casey*, 15 N.E.2d 268 (Mass. 1938), the court reviewed a statute providing that the Massachusetts Commissioner of Agriculture could only be removed from office by the Governor with the advice and consent of an executive council. Although the statute did not expressly require the council to hold hearings to meet its constitutional "advice and consent" duty, the court held that the council must at least "adopt any reasonable methods of forming a proper judgment on the matter before it." *Murphy* stands for the proposition that although a confirming body may not be compelled to hold a particular form of deliberation in its consideration of executive appointments, it must at least adopt and implement reasonable methods for confirming or rejecting such appointments.[5] The framers of the Commonwealth Constitution, through various advice and consent provisions, intended that the Legislature act as a check on the executive appointment power. The Legislature may not circumvent the Constitution through enactment of a statute permitting nonfeasance of their constitutional duty. *Cf. Aldan-Pierce v. Mafnas*, 2 N.M.I. 122 (1991), *rev'd*, 31 F.3d 756 (9th Cir. 1994) (Courts are duty-bound to give effect to the intention of the framers of the Constitution and the people adopting it.).

The 90-day automatic termination provision in 1 CMC § 2904 permits a confirming legislative body to contravene the constitutional requirement of advice and consent and to that extent it may be challenged as unconstitutional. At most, then, the establishment of a 90-day rule should be viewed only as a guideline by which the Senate (or other legislative body) should complete its investigation and deliberation and make its decision pertaining to the particular appointment.

3. Statutorily Imposed Procedural Requirements for Temporary Executive Appointees

Construed as a procedural mechanism for the legislative advice and consent authority, the statute may be applied in a manner that does not run afoul of the separation of powers doctrine or the Constitution. *See In re Seman*, 3 N.M.I. 57 (1992) (In testing the constitutionality of a statute, the language must receive a construction that will conform it to a constitutional limitation, if it is susceptible of such an interpretation. This principle comports with the strong, widely recognized judicial policy in favor of preserving statutes in the face of constitutional challenges whenever possible). As a procedural statute, it is constitutional insofar as it does not impose any substantive limitations or restrictions on

[5] There are few reported cases dealing with advice and consent clauses.

the executive power of appointment. *See Estate of Faisao v. Tenorio*, 4 N.M.I. 260 (1995) (Courts will not impute to the Legislature an intent to pass unconstitutional legislation.); *Wabol v. Villacrusis*, 1 N.M.I. 34 (1989), *rev'd*, 11 F.3d 124 (9th Cir. 1993) (All acts of the Legislature relevant to the Covenant should be interpreted consistent with the Covenant, unless a contrary intention is clear.).

1 CMC § 2904 provides that "[i]f the appointment is not confirmed by the Senate, or House, or by a majority of members from the senatorial district within 90 days from the date the person was temporarily appointed, the appointment shall automatically terminate, the position shall become vacant and the person nominated shall not be renominated."

Preliminarily, it is important to note that by its express language, 1 CMC § 2904 is applicable to temporary appointments only. This is clear from the statute's specific reference to temporary appointments. *See Commonwealth Ports Auth. v. Hakubotan Saipan Enters., Inc.*, 2 N.M.I. 212 (1991) (It is assumed that legislative purpose is expressed by the ordinary meaning of the word used.); *Office of the Attorney General v. Cubol*, 3 CR 64 (D.N.M.I. App. Div., 1987) (Court should avoid interpretation which renders words surplusage). The statutory provision does not encompass circumstances where an executive appointee awaiting confirmation has not taken temporary possession of the office.

This conclusion is compelled by the statute's reference only to temporarily appointed persons and by an understanding of the underlying policy concern the statute was implemented to address: to prevent the Governor's circumvention of the advice and consent requirement through temporary appointments.

The underlying policy concern has been discussed in prior opinions by this Office and in opinions by Senate legal counsel analyzing the statute. In Attorney General Opinion 87-24, a copy of which is attached hereto as App. II, then Attorney General Alex Castro and Chief Solicitor Richard Weil opined that "the Legislature in PL 1-8, Sec. 4 (1 CMC § 2904) adopted language requiring confirmation within ninety days after a nominee was 'temporarily appointed.' It appears that the legislative intent was to prevent a permanent appointee to a department head position from serving more than ninety (90) days in an acting capacity while awaiting confirmation." The opinion concluded that where an appointee does not serve on a temporary basis, the 90-day confirmation requirement does not apply. "The ninety (90) day confirmation requirement also does not apply to permanent appointments of department heads where such appointees are not also designated to serve on an interim basis pending confirmation."

This construction is also reflected in a memorandum by Assistant Senate Legal Counsel regarding the "Application of P.L. 1-8 to Nominees to the Board of the Marianas Sports Council" (Sept. 1, 1982), a copy of which is attached hereto as App. III. The legislative counsel noted that the underlying policy concerns of the statute were "to prevent a governor from managing the executive agencies (and thus government operations generally) with temporary department heads who are not subject to the check and balance function of legislative confirmation." The legislative counsel went on to opine that "[s]ince the individuals proposed by Governor Tenorio for the sports council have not been appointed as temporary or acting members, the 90-day time limit does not apply.... A more general ramification

of this analysis is that there will usually not be time limits for legislative confirmation of commission and board appointees, since these appointees rarely serve on an acting basis."[6]

This interpretation of 1 CMC § 2904 is consistent with the Superior Court's opinion in *Demapan v. Kara,* which found that the Governor's authority under Article III, Section 11 of the Constitution does not permit the Governor to make repeated interim appointments to circumvent the confirmation process and usurp the power delegated to the Legislature. *Id.,* Civ. No. 99-0548 (N.M.I. Super. Ct. Jan. 20, 2000) (Opinion at 22-23). The court stated the process and procedure established by 1 CMC §§ 2901 and 2904 ensure that the nominee goes through the confirmation process as constitutionally required. *Id.* at 20.

Because the Constitution is silent on "advice and consent" process, such statutory procedural measures are appropriate and are in the public interest. Such measures ensure that any person appointed by the Governor to serve on an "acting" basis or to "temporarily" occupy an executive office will not bypass the advice and consent procedure required by the Constitution. *See Sonoda v. Cabrera,* Certified Question No. 96-001 (Amended Opinion on Certified Question of Law) (Opinion at 2) ("It is a well established legal principle that '[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the Legislature is valid unless prohibited by that Constitution.' Thus, when the Constitution is silent, the power rests with the people through their elected representatives in the Legislature, to create, make or change laws..."); *cf. Walker v. Baker,* 196 S.W.2d 324 (Tex. 1946) (where procedures and circumstances for senate advice and consent were set forth in the constitution, the Senate could not add to such circumstances by calling a special session to consider confirmation of a nominee).

Accordingly, it is the opinion of this Office that 1 CMC § 2904 is a permissible legislative undertaking to the extent it provides a procedural mechanism to ensure the constitutional check and balance of Senate advice and consent is not circumvented and is carried out within a reasonable period of time. It is also the opinion of this Office, based on the express language and legislative purpose, that § 2904 is applicable to "acting" and "temporary" appointments only. Concomitantly, where the Governor's nominee for executive office has not assumed the duties of office on a temporary or acting basis, the policy concern is not implicated and the nominee is not subject to the statute's strictures.

---

[6] Notably, the aforementioned legislative counsel's opinion was subsequently contradicted by the informal opinion of Senate Legal Counsel Pam Brown, in a later memorandum (April 27, 1992) attached to Senate Resolution 8-16 (May 6, 1992). However, the resolution does not have the force of law. *See Analysis of the Constitution of the CNMI* at 43 ("The legislature cannot enact laws by a resolution, which merely expresses the agreement of the legislators without force of law."). Moreover, the Senate Legal Counsel's memorandum is not viewed as persuasive because the opinions expressed therein are not thoroughly researched or supported by legal authority. *See United States v. Borja,* 2003 MP 8, ¶ 21 (2003) ("[W]e are of the belief that the opinion of the Attorney General should be treated as persuasive authority only so far as it is properly and thoroughly researched.").

CONCLUSION

The power to confirm executive officers is an executive power which may be lawfully exercised by the Legislature only to the extent granted by the Commonwealth Constitution. Thus, we analyze the power to confirm executive officers as part of the appointment process, incapable of existence independent of the power of appointment.

After careful review, we find that Sections 11 and 14 of Article III of the Constitution set the maximum rather than the minimum parameters of the Legislature's power to confirm appointments of executive officers. This follows from the fact that Senate confirmation is a delegated function taken from an executive function, and thus the breadth of this delegated authority must be strictly construed.

Applying this strict interpretative criterion, we conclude that the Legislature is without authority to enact a statute which purports to automatically terminate an executive appointment if the nomination is not acted upon within a prescribed period of time and which further precludes the possibility of renomination. Such a statute is in contravention of the separation of powers doctrine implicit in § 203 of the Covenant, and beyond the "advice and consent" authority delegated to the Legislature in the Constitution.

We further conclude that the advice and consent provisions in the Constitution impose on the Legislature an affirmative duty to act. Insofar as the statute permits an executive appointment to expire without action by the Legislature, it contravenes the constitutional responsibility of advice and consent delegated to the Legislature.

In addition, we conclude that the statute is constitutionally permissible to the extent that it provides a procedural mechanism and temporal guideline for the advice and consent process, and that the statute should be given effect on this limited basis only.

Finally, we conclude that the scope of applicability of the statute is expressly limited to temporary appointments only, and does not apply to nominees who do not and will not act on a temporary basis pending Senate confirmation.

We trust this is responsive to your inquiry.

CLYDE LEMONS, JR., Acting Attorney General

BENJAMIN SACHS, Assistant Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OFFICE OF THE GOVERNOR
Saipan, Northern Mariana Islands 96950

MEMORANDUM

TO : Office of the Governor

DATE: Dec. 5, 197

FROM : Acting Attorney General

SUBJECT: Applicability of 90 day provision of Public Law 1-8 and Status of Office

Section 11 of Article III of the Constitution of the Commonwealth creates the Office of Attorney General who shall be appointed with the advice and consent of the Senate.

Public Law No. 1-8 (Executive Branch Organization Act of 1978) Title I(a) Administrative Provisions, Chapter 1, Section 2 provides:

"Appointments to positions which require the advice and consent of the Senate and/or House or which require the advice and consent of members of senatorial districts shall be submitted within thirty (30) days following the date the person was temporarily appointed to the appropriate presiding officer. If the Senate and/or the House shall be in recess at the time of submission, the appointment shall go over to the next regular session for appropriate action unless a special session is called. In the case of those appointments which require the advice and consent of the majority of the members of the Legislature from the senatorial district in which the appointee shall serve, the members shall convene upon receiving notice that a submission has been received whether the Senate and/or House is in session or not.

If the appointment is not confirmed by the Senate and/or House by a majority of members from the senatorial district within ninety (90) days from the date the person was temporarily appointed, the appointment shall automatically terminate and the position shall thereupon become vacant and the person nominated shall not be renominated." (Emphasis Supplied)

The general principal of law is that the validity or meaning of a legislative act does not depend upon the the subjective motivation of its draftsmen but rests instead on the objective effect of the legislative terms. If the words used have a reasonable or easily understood meaning, the intent of the legislators is not looked into. County of Los Angeles v. Superior Court, 119 Cal. Rptr. 631, 532 P.2d 495. The plain meaning rule applies here. Where the language used in a statute is plain, you cannot read words into it that are not there, either expressly or by implication, even to save its constitutionality. The Courts will not do this because it would be legislation not construction. The words must be given their reasonable meaning and we cannot strain their construction to make up for omitted words. Yu Cong Eng v. Trinidad, 271 U.S. 500, 70 L.Ed 1059, 46 S.Ct. 619; 16 Am. Jur. 2d S. 58.

Section 2 relates to three (3) types of appointments requiring confirmation:

1. By the Senate (ie. Attorney General, Executive Department Heads)

2. By the Senate and House (ie. Public Auditor)

3. By the members of the Legislature from the senatorial districts in which the appointee shall serve (ie. Resident Department Heads)

The first sentence of Section 2 applies to all 3 types of confirmations. The second sentence applies only to Nos. 1 and 2 and allows consideration of an appointment over to the next regular session if the Legislature is in recess. The third sentence applies to No. 3 only and requires the members of the Legislature from the senatorial district to convene whether in session or not. There is an important distinction made in Sentences 2 and 3 as to time of consideration: Confirmations of the Senate and/or House of Commonwealth-wide appointments may be delayed but senatorial district appointments may not be.

The fourth sentence applies only to No. 3 and specifies "by the Senate and/or House by a majority of members from the senatorial district." The plain meaning of this sentence is clear and consistent with the stated intent of the Legislature to allow delays in considering Commonwealth-wide appointments but not those in a senatorial district. If the Legislature meant this provision to apply to all appointments it could have easily stated: "If any appointment is not confirmed within ninety (90) days, etc." By using other words and not repeating the language in the first sentence, the Legislature is presumed to have done so for a reason. Reading the fourth sentence together with the second and third, it is consistent and logical that the 90 day provision applies only to senatorial district confirmation.

Section 2, sentence four provides that if the appointment is not confirmed within 90 days it automatically terminates "and the person nominated shall not be renominated." If a person is rejected for good cause he may be re-appointed but if the Legislature takes no action he is disqualified from that office, possibly forever. This provision would impose a penalty on the person for the inaction of the Legislature.

The right to hold office is a fundamental civil right and any law restricting that right will be strictly construed in favor of eligibility. De Bottari v. Melendez, 44 Cal.App. 3d 910, 119 Cal.Rptr. 256; 59 A.L.R. 2d 721; 128 A.L.R. 111.

The governmental interest can easily and conveniently be protected by means less burdensome to fundamental rights. The process of advice and consent is not merely for the Legislature to say yes or no, but so that the Legislature advises the Governor as to its objections, reasons, feelings or basis of a decision.

The deprivation of any rights, civil or political may be punishment. A disqualification from the pursuits of a lawful vocation, or from positions of trust, or from the privilege of appearing in courts, etc. may also, and often has been imposed as a punishment that may be prohibited as a bill of attainder. United States v. Brown, 381 U.S. 437, 14 L.Ed. 2d 484, 85 S.Ct. 1707. A bill of attainder is a legislative act which inflicts punishment or a penalty without a judicial trial and is prohibited by Section 1 of Article I of the Commonwealth Constitution. If the provision applies only to Executive Branch appointments and inflicts a penalty of being barred forever from the office in question it acts as a bill of attainder. United States v. Lovett, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073.

If this provision applies to constitutional offices (ie. Attorney General, Public Auditor, etc.) it imposes a disqualification not provided by the Constitution and may be beyond the implied restriction on the power of the Legislature 143 A.L.R. 704. The Legislature cannot enact arbitrary exclusions from office. Qualifications for office must have a rational basis such as age, integrity, training, residence, etc. In any event, if it does apply it works as a bill of attainder and conflicts with the Constitution.

When an office has been created by the Constitution it cannot be filled in any other manner than the manner directed by the Constitution. King v. Board of Regents, (Nev.) 200 P.2d 221. The general rule regarding an appointment by the Governor with the advice and consent of the Senate is that the appointment vests in the appointee a right to hold office until the appointment is adversely acted upon by the Senate. Barret v. Duff, 114 Kan. 220, 217P. 918. The Commonwealth Constitution implies an affirmative action by the Legislature.

Michael De Angelo

Michael De Angelo

A.G. OPINION NO. 87-

OFFICE OF THE
ATTORNEY GENERAL

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MEMORANDUM

TO : Administrator, NMI Retirement Fund DATE: 8/19/87

FROM : Chief Solicitor

SUBJECT: Board Member Term (Supplemental Opinion to 87-19)

In a portion of Attorney General's opinion No. 87-19 on this subject dated June 30, 1987, we construed 1 CMC 2904 which deals with legislative consideration of executive appointments. Because of ambiguities in the statute, we have had occasion to review the applicability of 1 CMC 2904 to Mr. Sablan's appointment. To resolve the ambiguities, we have considered information bearing on the legislature's intent in passing PL 1-8, Sec. 4 (1 CMC 2904), including comments by counsel to the legislature, and are revising our earlier opinion to hold that 1 CMC 2904 does not apply to board and commission members. Accordingly, Mr. Sablan's position did not become vacant because the legislature failed to confirm him within ninety (90) days after reappointment.

The legislature in PL 1-8, Sec. 4 (1 CMC 2904) adopted language requiring confirmation within ninety (90) days after a nominee was "temporarily appointed". It appears that the legislative intent was to prevent a permanent appointee to a department head position from serving for more than ninety (90) days in an acting capacity while awaiting confirmation. A member of a board or commission, however, does not begin to serve until after confirmation; there is no temporary appointment of a board or commission member and the ninety (90) day confirmation requirement therefore does not apply. The ninety (90) day confirmation requirement also does not apply to permanent appointments of department heads where such appointees are not also designated to serve on an interim basis pending confirmation.

We therefore revise that portion of our opinion dated June 30, 1987 dealing with the question of whether 1 CMC 2904 applies to Mr. Sablan's appointment. We conclude that it does not because he was not "temporarily appointed", and therefore the Senate's failure to

Rec 8/24/87 to SAB & LR
John B. Sablan for

confirm him within ninety (90) days did not create a vacant position on the retirement fund board.

RICHARD WEIL
Chief, Solicitor's Division

JOHN F. BIEHL
Deputy Attorney General

ALEXANDRO C. CASTRO
Attorney General

The Senate
THIRD NORTHERN MARIANAS COMMONWEALTH LEGISLATURE
P. O. Box 129
Saipan, CM 96950
Phone: 6534

Attach to testimonies of the appointees. pwh

MEMORANDUM

September 1, 1982

TO : President of the Senate
Chairman, EAGI Committee

FROM : Assistant Senate Legislative Counsel

SUBJECT : APPLICATION OF PL 1-8 TO NOMINEES TO THE BOARD OF THE MARIANAS SPORTS COUNCIL

After careful analysis of Title 1(a), Chapter 1, Section 2 of Public Law 1-8, and consultation with the Attorney General, I have concluded that the Senate should act on Governor Tenorio's appointments to the Sports Council Board.

My legal opinion is that Section 2, concerning executive appointments requiring some form of legislative advice and consent, does not apply in situations where the appointee is not designated by the Governor to serve in the position in an acting or temporary capacity. The statute appears clear on this point:

> "If the appointment is not confirmed...within ninety (90) days from the date the person was temporarily appointed, the appointment shall automatically terminate." (emphasis added)

This interpretation is consistent with the underlying policy concern of the statute - to prevent a governor from managing the executive agencies (and thus government operations generally) with temporary department heads who are not subject to the check and balance function of legislative confirmation.

Since the individuals proposed by Governor Tenorio for the Sports Council have not been appointed as temporary or acting members, the 90-day time limit do not apply and the Senate may proceed to consider the appointments.

A more general ramification of this analysis is that there will usually not be time limits for legislative confirmation of commission and board appointees, since these appointees rarely serve on an acting basis.

Independent of my opinion regarding specific applicability of Public Law 1-8 to the Sports Council appointments, I have concluded that there exist some ambiguities and drafting errors in Section 2 of Title 1(a), Chapter 2. I recommend the Senate consider amending this section of the statute.

JAMES A. DOERTY

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-236(
Fax: (670) 234-701

ATTORNEY GENERAL LEGAL OPINION No. 03-13

To: Juan N. Babauta, Governor
Diego T. Benavente, Lieutenant Governor

From: Clyde Lemons, Jr., Acting Attorney General

cc: Pam Brown, Governor's Legal Counsel
Maya Kara, Lt. Governor's Legal Counsel
Acting Secretary, Department of Finance
All Department Directors and Agency Heads

Date: October 8, 2003

Re: Constitutional Authority and Duties of Article X, Section 8

The following opinion is provided in response to your request of July 29, 2003 concerning the authority of the Department of Finance to control and regulate public funds.

A. QUESTIONS

Your memorandum presented two issues for consideration:

1. Whether Article X, Section 8 of the N.M.I. Constitution mandates that the Department of Finance, or its successor agency, control and regulate the expenditure of public funds incorporates revenue generated by autonomous agencies, public corporations, and other instrumentalities of the Commonwealth?

2. Whether the language of the Constitution requiring the promulgation of "regulations including accounting procedures that require public officials to provide full and reasonable documentation that public funds are expended for public purposes" requires the Department of Finance to promulgate one set of procurement regulations for the entire Commonwealth government?

B. SHORT ANSWERS

1. Analysis of the language of Article X, Section 8 of the N.M.I. Constitution establishes that the authority granted to the Department of Finance to "control and regulate the expenditure of public funds" extends to all agencies and instrumentalities of the Commonwealth including "autonomous agencies," public corporations, and other instrumentalities of the Commonwealth. Such an analysis is supported by: 1) the plain meaning of the language of the N.M.I. Constitution, 2) interpretation of contemporaneous adopted constitutional sections, 3) court interpretations, 4) a contemporaneous Attorney General opinion, 5) intent of the framers, 6) the purpose of the framers in enacting this Section and the specific mischief that they were attempting to address, 7) the history of this constitutional section, and 8) interpretations by states. The framers intended this broad grant of authority as a check and balance on the expenditure authority granted to other agencies and instrumentalities of the Commonwealth. Recent misuses of this expenditure authority by public officials confirm the need for the establishment of a strong centralized financial authority.

2. The Constitution is clear; the Department of Finance has a mandated duty to establish regulations that ensure that "public funds are expended for public purposes." N.M.I. Const. art. X, § 8. Failure to establish these regulations would be a violation of this constitutional duty. Although Article X, Section 8 establishes detailed standards to be met in the establishment of expenditure regulations, it leaves considerable discretion with the Department of Finance on how to accomplish this task.

The regulations do not require the establishment of "one set of regulations," rather the method chosen on how to accomplish this duty is left to the Department of Finance. However, both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid. This authority extends to all agencies and instrumentalities of the Commonwealth, and was specifically intended to "prevent the legislature or any other agency from establishing its own separate finance department" and thus circumventing this centralized control. Second Constitutional Convention, Committee on Finance and Other Matters, Recommendation No. 59.

The Department of Finance has not complied with this constitutional duty; however, as the Department's current regulations specifically exclude certain autonomous agencies and public corporations. Department of Finance, *C.N.M.I. Procurement Regulations*, § 1-105 (2000). Accordingly, we recommend that the Department of Finance should modify its regulations to address the expenditure activity of these entities in order to be in compliance with the duty imposed by the Constitution.

C. ANALYSIS

1. First Issue — Limits Of Authority Of The Department Of Finance

The first issue raised is to determine the nature of the authority granted to the Department of Finance and whether this authority extends to "autonomous agencies," public corporations, and other instrumentalities of the Commonwealth? This issue requires an examination of the specific meaning of the language of this section.

a) The Plain Meaning of the Language Used

The authority of the Department of Finance to control finances is provided in the first sentence of Article X, Section 8 which states: "The Department of Finance, or its successor department, shall control and regulate the expenditure of public funds." N.M.I. Const. art. X, § 8. In interpreting the meaning of the Constitution, the starting point is to determine the plain meaning of the terms used. Camacho v. Northern Marianas Retirement Fund, 1 N.M.I. 362 (1990); Noman J. Singer, *Statutes and Statutory Construction*, § 46:01 (6th ed. 2000). In this case, the plain meaning is that the Finance Department is mandated, ("shall"), to place restraints on expenditure activities, ("control"), by rule or restriction ("regulate"). The scope of this authority is established by the term "public funds," and thus how this term is defined will control the extent of the authority granted. The plain meaning of this term is that it refers to all moneys belonging to a government or any branch or instrumentality of the government. *Black's Legal Dictionary,* 1229 (6th ed. 1990). Applying the plain meaning rule to Article X, Section 8 thus confers upon the Department of Finance authority over the expenditures of all agencies and instrumentalities of the Commonwealth.

b) Interpretations of Contemporaneously Adopted Sections of the Constitution

This broad definition of the term public funds is supported by other uses of the term in other areas of the Constitution. For instance, in Article X, Section 9, the Constitution grants broad authority to taxpayers "in order to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty." C.N.M.I. Const. art. X § 9. Courts have interpreted this authority liberally in order to provide taxpayers with broad authority to challenge government expenditures. Mafnas v. Commonwealth, 2 N.M.I. 248(1991).

The grant of authority to the Department of Finance in Article X, Section 8 and to taxpayers in Article X, Section 9 were both adopted by the Second Constitutional Convention as part of the "Uniform Fiscal Management Policy Act" and the term should be interpreted consistently for both sections. Second Constitutional Convention, Committee on Finance and Other Matters, *Recommendation No 59.* Both sections use the term "public funds" to establish authority for the establishment of a broad check and balance to government expenditure authority of "public funds." N.M.I. Const. art. X §§ 8, 9. In fact, the language of Article X, Section 9 states that this authority extends to "the government or one of

its instrumentalities" and this is consistent with the remedial nature of both sections of the Constitution. N.M.I. Const art. X § 9.

Similarly, in describing the authority of the Public Auditor, the Constitution states that he or she "shall audit the receipt, possession and disbursement of public funds by the executive, legislative and judicial branches of the government, an instrumentality of the Commonwealth or an agency of local government." N.M.I. Const. art. III § 12. This constitutional section includes the funds of all branches and instrumentalities of the Commonwealth within its definition of the term "public funds" and thus is consistent with providing Article X, Section 8 similar reach.

c) Court Interpretations

The issue has been raised whether this central government authority definition of public funds applies to "autonomous agencies" or "public corporations." Standards for determining the nature of independent agencies were established in a 1994 Superior Court decision. Marianas Visitors Bureau v. Commonwealth, Civ. No. 94-0516 (N.M.I. S. Ct. 1994).

In Marianas Visitors Bureau, the Marianas Visitors Bureau ("MVB") asserted that as a quasi-corporation that has private sources of funds, it was an independent agency beyond the Governor's reorganization power. *Id.* at II. The court rejected this argument and held that the MVB "was unquestionably an instrumentality of the Commonwealth government." *Id.* at III.D. The court stated: "the Covenant which establishes the Commonwealth's existence authorizes only three branches of government" and this "leaves no room for "independent" agencies which are truly independent of not falling within any one of the three branches of government." *Id.* at II.D.3(c).

Applying this analysis to the present case supports the position that that all "independent" or "autonomous agencies" whose base of legal authority is derived from the Constitution or Covenant must fall within one of the three branches of the Commonwealth government. Furthermore, these agencies and instrumentalities are entrusted with "public funds," and their expenditure authority is controlled by the checks and balances established under Article X, Sections 8 (Finance Department authority) and 9 (Taxpayer's Right of Action), and Article III, Section 12 (Public Auditor).

d) Previous Attorney General Opinion

Application of the authority of Article X, Section 8 to "public corporations and independent agencies" is consistent with earlier Attorney General Opinions. For example, in 1986, then Attorney General (now Supreme Court Justice) Alexandro C. Castro issued an opinion that the recent adoption of this constitutional amendment extended the authority of the Department of Finance to "public corporations and independent agencies." Op. Att'y Gen. 86-12 (1986). This opinion was contemporaneous to the adoption of this amendment (1985) and thus is reflective of the framer's intent.

e) Intent of the Framers

The broad interpretation of the definition of the term "public funds" is supported by analysis of the intent of the framers of Article X, Section Eight. One of the fundamental principles of constitutiona interpretation/construction is to determine the intent of the framers and the people adopting it. Whitma v. Oxford National Bank, 176 US 559, 563 (1900). Common analytical methods for identifying the intent of the framers include identification of the specific mischief that the amendment was directed towards resolving, and history. Singer, § 45:05.

i) Specific Mischief and Purpose of the Framers

Both Article X Sections 8 and 9 were adopted as amendments to the N.M.I. Constitution to correct abuses of expenditure authority by public officials. These Sections both established a check to the power to expend public funds. *Recommendation 59, Committee on Finance and Other Matters, Second Constitutional Convention.* During the first years of the Commonwealth, the government had experienced abuses of expenditure authority by officials who had converted public funds to private purposes. *Id.* The financial structure of the original Constitution did not provide the Finance Department with authority to challenge the spending decisions of other branches or agencies of the government. *Id.* This previous structure allowed other branches of the government to defy any attempt of the finance department to require assurances that funds were being spent for public purposes. *Id.*

In order to correct these abuses, the Second Constitutional Convention recommended adoption of the "Uniform Fiscal Management Policy Act" which established a centralized authority with a duty to ensure that "public funds were expended for public purposes," N.M.I. art. X, § 8, and allowed taxpayers the right to bring an action against "the government or one of its instrumentalities" to prevent the "expenditure of public funds for other than public purposes." N.M.I. art. X, § 9.

Establishment of broad constitutional authority to challenge the public fund expenditures by any branch or instruments of the Commonwealth by either the Finance Department or a taxpayer establishes a check and balance to expenditure authority. Second Constitutional Convention, Committee on Finance and Other Matters, *Recommendation 59.* Additionally, by establishing this centralized authority of the Finance Department in the Constitution prevented "the legislature or any other agency from establishing its own separate finance department" and thus circumventing this centralized control. *Id.*

Examination of the specific mischief, which initiated Article X § 8, and the purpose of the framers in adoption this constitutional amendment clearly supports a finding of the granting of broad constitutional authority over the expenditure of all "public funds" of the Commonwealth. Furthermore, this documents a specific intent to prevent the circumventing of this centralized control by placing expenditure authority in agencies or instrumentalities beyond this authority. Current history of the Commonwealth confirms the need for centralized control of expenditures and establishment of checks on expenditure authority to prevent abuses.

ii) History of Article X, Section 8

The history and committee discussion of constitutional amendments provides valuable insight into intent of the framers. Singer § 45:05. Words left out in a final version because they were voted down in a Constitutional Convention are to be noticed as giving meaning to the intent of the framers. Singer, § 48:04. Article X, Section 8 underwent change as it proceeded through the Second Constitutional Convention. Initially, the Committee on Finance and Other Matters provided an exception to the authority of the Department of Finance to "control and regulate the expenditure of public funds" for "public corporations that do not depend on appropriated public funds." Second Constitutional Convention, Committee on Finance and Other Matters, *Recommendation No. 59*. However, in subsequent committee reviews the exception to this authority was deleted. *Id*; Second Constitutional Convention, Convention Proceedings, *Convention Journal*, July 17, 1985. The language excluding the exception was adopted by both the Second Constitutional Convention and the electorate. *Id*; N.M.I. art X, § 8. Thus, the history of Article X, Section 8 specifically indicates that the framers considered and rejected the exclusion of "independent agencies" from the authority of the Department o Finance.

Both the purpose and history of Article X, Section 8 support a finding that the framers wished to extend the authority of the Department of Finance to all agencies and instrumentalities of the Commonwealth. As these two elements are used to indicate intent of the framers, this supports a finding that this was their intent.

f) Interpretation by States

Other states also interpret the term "public funds" broadly. Iowa defines the term to mean "the moneys of the state or a political subdivision or instrumentality of the state including a county, school district, drainage district, unincorporated town or township, municipality, or municipal corporation or any agency board, or commission of the state or political subdivision. I.C.A. § 12C.1.1(2003). Similar definitions are used throughout the states such as Kentucky, KY ST § 311.715(2003), Colorado, CO ST § 11-10.5-103(12) (2003), Florida, FL ST § 215.85(3)(b)(2003), and Minnesota, MN ST § 47.41(2003). These definitions express a common interpretation that the concept of "public funds" is determined not by the source of funds, but the legal foundation of the organization's authority. Under this authority, "public funds," applies to all agencies, instrumentalities, school districts, or municipal corporations formed under the authority of the Commonwealth Covenant and Constitution.

g) Conclusion

Analysis of the language of Article X, Section 8 of the N.M.I. Constitution establishes that the authority granted to the Department of Finance to "control and regulate the expenditure of public funds" extends to all agencies and instrumentalities of the Commonwealth including "autonomous agencies," public corporations, and other instrumentalities of the Commonwealth. Such an analysis is supported by: 1) the plain meaning of the language of the N.M.I. Constitution, 2) interpretation of

contemporaneous adopted constitutional sections, 3) court interpretations, 4) a contemporaneous Attorney General opinion, 5) intent of the framers, 6) the purpose of the framers in enacting this Section and the specific mischief that they were attempting to address, 7) the history of this constitutional section, and 8) interpretations by states. The framers intended this broad grant of authority as a check and balance on the expenditure authority granted to other agencies and instrumentalities of the Commonwealth. Recent misuses of this expenditure authority by public officials confirm the need for the establishment of a strong centralized financial authority that can require accountability of all expenditures of public official to ensure that "public funds are expended for public purposes."

2. Second Issue -- Duty Of The Department Of Finance

The second issue posed is whether the language of the Article X, section 8 requires the Department of Finance to promulgate one set of procurement regulations for the entire Commonwealth government? This question concerns interpretation of the specific duty required by this section of the Constitution. The first sentence of article X, section 8 concerned the authority granted to the department of Finance to "control and regulate" the expenditure of public funds; the second sentence deals with the duties associated with this authority, and thus is the focus of this second issue. N.M.I. Const. art. X § 8.

a) Plain Meaning of the Language

The second sentence of Article X, Section 8 states: "The Department shall promulgate regulations including accounting procedures that require public officials to provide full and reasonable documentation that public funds are expended for public purposes." N.M.I. Const. art. X § 8. In interpreting the meaning of the Constitution, the starting point is to determine the plain meaning of the terms used. Camacho v. Northern Marianas Retirement Fund, 1 N.M.I. 362 (1990); Singer, § 46:01. In this case, the plain meaning is that the Finance Department is mandated, ("shall") Singer, § 32A:11(I), to develop (promulgate), *Black's*, 1214, obligatory procedures (regulations), *id* at 1286, which includes consideration of the impact on appropriation levels (accounting procedures) *id.* at 19, and require documentation that is not overly burdensome (reasonable). *Id.* at 481. The plain meaning of the second sentence of Article X Section 8 thus establishes specific duties and standards related to the authority granted to the Department of Finance.

b) Conclusion

The Constitution is clear; the Department of Finance has a mandated duty to establish regulations that ensure that "public funds are expended for public purposes." N.M.I. Const. art. X, § 8. Failure to establish these regulations would be a violation of this constitutional duty. Although Article X, Section 8 establishes detailed standards to be met in the establishment of expenditure regulations, it leaves considerable discretion with the Department of Finance on how to accomplish this task.

The regulations do not require the establishment of "one set of regulations," rather the method chosen on how to accomplish this duty is left to the Department of Finance. However, both the

Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid. This authority extends to all agencies and instrumentalities of the Commonwealth, and was specifically intended to "prevent the legislature or any other agency from establishing its own separate finance department" and thus circumventing this centralized control. Second Constitutional Convention, Committee on Finance and Other Matters, Recommendation No. 59.

The Department of Finance has not complied with this constitutional duty however; as the Department's current regulations specifically exclude certain autonomous agencies and public corporations. Department of Finance, *C.N.M.I. Procurement Regulations*, § 1-105 (2000). Accordingly, we recommend that the Department of Finance modify its regulations to address the expenditure activity of these entities in order to be in compliance with the duty imposed by the Constitution.

James R Stump
JAMES R. STUMP, Assistant Attorney General

Clyde Lemons
CLYDE LEMONS, JR., Acting Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

ATTORNEY GENERAL LEGAL OPINION 04-01

To: Henry Hofschneider, Commissioner
Chief of Land Claims
Ramon Salas, MPLA Land Exchange Manager
David Demapan, MPLA Controller
Alan Lane, MPLA Legal Counsel

From: Attorney General

Date: January 27, 2004

Re: Taxability of Land Compensation Proceeds

This Legal Opinion is in response to your recent request regarding the taxation of land compensation proceeds. It is our understanding that MPLA will be issuing compensation awards for both the land and also for the interest. The land compensation will be paid for land taken pursuant to the government's constitutional powers, while the interest portion is for interest on the land award to compensate for the delay in receipt of the land proceeds.

Issues Presented

1. Whether the land compensation award and the interest award are taxable under CNMI law.

2. What are the reporting requirements and withholding requirements required of MPLA?

Summary Answer and Overview

Interest income and the land compensation income are treated differently for tax purposes. Both the interest income and the land compensation income must be reported on the recipient's income tax return. With respect to non-business entities receiving compensation, while neither the interest portion nor the land portion of the compensation is subject to the Earnings Tax, both portions are taxable under the Internal Revenue Code. With respect to the land compensation portion, the tax paid on such is subject to a 100% rebate. With respect to the interest portion, such income is not subject to rebate unless the recipient chooses to subject such income to taxation under the Earnings Tax.

For business entities receiving compensation, both the interest portion and the land portion of the compensation is subject to the Gross Revenue Tax. With respect to the land compensation portion, the tax paid on such is subject to a 100% rebate. With respect to the interest portion, the rebate percentages are limited to the normal 90/70/50 rebate percentages.

MPLA is required to issue Form 1099-S for the portion of income attributed to land compensation and Form 1099-INT for the portion of income attributed to interest income. Generally, withholding is not required unless the recipient fails to provide a taxpayer identification number. Instead, the recipient will be required to make estimated tax payments on both the interest income and the land compensation income. Failure to do so will result in the imposition of an estimated tax penalty.

Analysis

Covenant[1] §601 and 602 provide the authority for the CNMI to impose taxes. In general, §601 provides that the income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax. Section 602 provides that the Government of the CNMI may impose by local law taxes in addition to those imposed under §601, and that the Government may provide for rebate of those taxes. In accordance with §602, the government has imposed the Earnings Tax[2] and the Gross Revenue Tax[3].

Earnings Tax

Prior to P.L. 11-36, the CNMI imposed an earnings tax pursuant to 4 CMC §1202(b)(2) on one half of the gain as determined under NMTIT §1001 received from the sale of real property in the CNMI that was not in the course of carrying on a business. Effective September 14, 1998, P.L. 11-36 amended §1202(b)(2) and specifically excluded sales of private real property to the CNMI for public purposes[4]. As such, the proceeds from the sale of private real property to MPLA for a public purpose will not be subject to the Earnings Tax.

---

[1] *The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America.* Joint Resolution of March 24, 1976. Pub. L. No. 99-241. 90 Stat. 263 (1976), reprinted in the Commonwealth Code at page B-116.

[2] 4 CMC §1202.

[3] 4 CMC §1301 *et seq.*

[4] Four CMC §1202 as amended by P.L. 11-36 now reads:

> (a) There is imposed on every person a yearly tax on such person's total earnings.
>
> (b) For purposes of this chapter, "earnings" shall mean:
>
> ...
>
> *(2)* One half of the gain as determined under NMTIT section 1001 received from the sale of real property located in the Commonwealth that was *not in the course of carrying on a business. Provided, however, that the sale of private real property to the Commonwealth government for a public purpose shall not be deemed a sale of real property for the purposes of this subsection.*

(Emphasis added).

With respect to any portion of compensation received for interest proceeds, with the amendment of 4 CMC §1202(b)(4) by P.L. 10-80, interest proceeds are no longer subject to the Earnings tax. Prior to 1997, the Earnings Tax specifically taxed interest proceeds, however, in 1997, P.L. 10-80 amended former section 1202(b)(4) and specifically excluded interest proceeds from the definition of "earnings". As such interest proceeds are no longer subject to taxation under the Earnings tax.

Gross Revenue Tax

The Gross Revenue Tax will generally be imposed on businesses[5] that receive monies for land compensation. Four CMC §1303(a) provides in part "[e]xcept as otherwise provided, there is imposed on every person, a yearly tax on the person's total gross revenue[6]." Thus a business[7] will be subject to the gross revenue tax on the portion of compensation attributed to the land and to the interest.

NMTIT

The Northern Marianas Territorial Income Tax (NMTIT) is the mirror form of the U.S. Internal Revenue Code enacted by the U.S. Congress applicable in the CNMI pursuant to Covenant §601(a)[8]. As explained in 4 CMC §1701(a), the U.S Internal Revenue Code is referred to as the Northern Marianas Territorial

[5] Revenue and Tax Regulations §2203.1(a), Com. Reg. Vol. 17, No. 6, June 1995, provides:

In General. Pursuant to 4 CMC Chapter 3, there is imposed on every person a yearly tax on such person's total gross revenues. Except as provides in §2203.1(c) of these Regulations, "gross revenues" means those items identified in 4 CMC §1103(k) and §2203.1(b) of these regulations *that are derived in the course of carrying on a business* as defined by 4 CMC §1103(c) and §2200.7(a) of these Regulations. Items that are not derived in the course of carrying on a business are subject to the Earnings Tax or the Wage and Salary Tax, as appropriate and applicable, imposed at 4 CMC §1202 or 4 CMC §1201, respectively. (Emphasis added).

[6] 4 CMC §1103(k) defines "gross revenue". "Gross revenue" means the total amount of money or the value of other consideration received from *selling real or personal property in the Commonwealth*, from leasing property employed in the Commonwealth, or from performing services in the Commonwealth. Gross revenue includes the gross receipts, cash or accrued, of a person received as compensation for personal services not in the form of salaries or wages as defined in this section, *and the gross receipts of a business* derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and all receipts, actual or accrued by reason of the capital of the business engaged in, *including interest*, discount, rentals, royalties, fees, or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor cost, taxes, royalties, interest or discount paid or any other expenses. Gross revenue shall not include the following: (1) Refunds and cash discounts allowed and taken; (2) Money received and held in a fiduciary capacity; or (3) Wages and salaries which are taxed under chapter 2 of this division [4 CMC § 1401 et seq.]. (Emphasis added).

[7] Revenue and Tax Regulations §2200.7(a) provides "the term "business" shall have the same meaning as a "trade or business: as that term is applied under §162 of the Northern Marianas Territorial Income Tax; thus, "business" normally means any regular and continuous activity carried on by a person for the purpose of earning income pr profit. Except as otherwise provided, an employee shall not be considered as operating a business, and *a partnership or a corporation shall be considered as operating a business.*" (Emphasis added).

[8] Covenant §601(a) provides: The income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax on the first day of January following the effective date of this Section, in the same manner as those laws are in force in Guam.

Income Tax ("NMTIT"). As required by the Commonwealth Code[9], certain changes in the nomenclature of the Internal Revenue Code ("IRC") terms must be made in order to mirror the IRC as the NMTIT. Because the NMTIT is applied in mirrored form, provisions of the NMTIT are not subject to amendment by the local legislature. Instead, the local legislature can only minimize the impact of the internal revenue law by use of the local rebate provisions authorized by the U.S. Congress.

a. Compensation attributed to Land Proceeds

With respect to the income tax imposed on the portion of compensation attributed to the land proceeds, gross income includes gains realized on the sale or exchange of property[10]. This includes gain from the sale of property to a state or local government[11]. This is the result even if the disposition is made in response to the state or local government's exercise of its right of eminent domain[12]. The gain from the sale or disposition of property is calculated pursuant to NMTIT §1001[13].

The NMTIT generally takes gains and losses into account only when they are realized by a sale or exchange[14]; that is, when a transaction occurs that gives rise to economic gain. When a taxpayer receives

[9] 4 CMC §1701(e) provides: In applying the NMTIT for any purpose contained within this division, except where it is manifestly otherwise required, the applicable provisions of the IRC shall be read so as to substitute "Commonwealth of the Northern Mariana Islands" for "United States," "Governor or his delegate" for "Secretary or his delegate," "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue," "Superior Court of the Northern Mariana Islands" for "district court," "Supreme Court of the Northern Mariana Islands" for "United States Courts of Appeal," "Attorney General" for "district counsel," "Attorney Generals Office" for "Department of Justice," and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this chapter.

[10] NMTIT §61(a)(3), NMTIT Reg. §1.61-6(a).

[11] *Fullilove v. U.S.*, 71 F.2d 852 (5th Cir. 1934), *aff'd* 7 F.Supp. 468 (W.D. La. 1934), *cert. denied* 293 U.S. 586 (1934).

[12] *Baltimore & Ohio R.R. v. Comm'r.*, 78 F.2d 460 (4th Cir. 1935), *aff'g* 29 B.T.A. 368 (1933); *Bliss v. Comm'r.*, 27 B.T.A. 803 (1933).

[13] (a) Computation of gain or loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164(d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164(d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

(c) Recognition of gain or loss. Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized.

[14] NMTIT §1001(a), (c); NMTIT Reg. §1.1001-1(a).

money or other property as consideration for the condemnation of his property, there has been an "exchange" for income tax purposes[15].

Gain from the exchange of property is the excess of the amount realized from the exchange over the property's adjusted basis[16], while loss is the excess of the adjusted basis over the amount realized[17]. The "amount realized" in an exchange is the sum of any money received plus the fair market value of any property (other than money) received[18].

While gain or loss must generally be recognized for income tax purposes, some provisions of the internal revenue laws provide for nonrecognition of the gain. As explained in *Wilson v. Comm'r*[19]:

> Generally, gain or loss realized on an exchange of property must be recognized. Sec. 1001(c). An important exception to this general rule is provided by section 1033, which allows gain realized from certain involuntary conversions to be deferred.
>
> Realized gain can be deferred under section 1033 if (1) nonrecognition treatment is elected, (2) qualified replacement property is purchased within time limits specified, and (3) the cost of the qualified replacement property equals or exceeds the amount realized on the conversion. Sec. 1033(a)(2)(A).

While a taxpayer may elect to defer the recognition of gain as provided by NMTIT §1033, the underlying transaction must be reported on the return and adjustments made accordingly. In sum, the compensation received for land is taxable and must be reported on a person's income tax return. With respect to decedent's estates, such compensation must be reported on the income tax returns for decedent's estates.

---

[15] See sec. 1033(a); *Kieselbach v. Comm'r.*, 317 U.S. 399, 402 (1943); *Tifenbrunn v. Comm'r.*, 74 T.C. 1566, 1570 (1980); *Feinberg v. Comm'r.*, 377 F.2d 21, 26 (8th Cir. 1967) (acquisition of property in condemnation proceedings constitutes "sale or exchange" of property for income tax purposes).

[16] 4 CMC §1703(c) provides guidance in determining a property's for the determination of adjusted basis. Specifically it provides in part:

"(c) Basis Limitation; Qualified Fresh-Start Assets.

(1) The basis for purposes of determining gain and allowance for depreciation, amortization and like purposes, of all qualified fresh-start assets shall be the higher of their basis as determined under the NMTIT, or their fair market value on January 1, 1985.

(2) "Qualified fresh-start assets" means:

(i) All real property located in the Commonwealth;..."

[17] NMTIT §1001(a).

[18] NMTIT §1001(b).

[19] 1996 Tax Ct. Memo LEXIS 434 at 17 (Tax Ct. Memo, 1996).

With respect to treatment of the land compensation proceeds under the local rebate provisions, the taxpayer is permitted to receive a rebate on the tax paid on the amount received for the land. 4 CMC §1708(b)(1)(iii) as amended by P.L. 12-31 provides:

> (iii) In the case of a taxpayer who paid tax pursuant to the Revenue and Tax Act of 1982, as amended, on cash compensation received from the sale of the taxpayer's private land to the Commonwealth government for public purpose on or after January 1, 1994, the rebate offset base is the tax on the amount paid for the land by the government to the landowner notwithstanding subsection (c) of this section, and the rebate offset amount is 100 percent of the rebate offset base.

Thus, the rebate is based upon the *tax* on the amount paid for the land by the government. As such, in order to receive a rebate on the land compensation proceeds, one must report the transaction on person's tax return, and pay tax on the gain recognized by the transaction.

b. Compensation attributed to Interest Income

With respect to the interest portion of the award, for Federal (CNMI) income tax purposes, interest is generally treated differently than the underlying obligation to which it relates[20]. That is, amounts received as interest are not part of the "amount realized" from the exchange of property[21]. As explained in *Wilson v. Comm'r*[22]:

> ... interest paid to compensate the property owner for delay in payment of a condemnation award is taxable as ordinary income to the recipient even though it is considered part of just compensation under State law. *Kieselbach v. Comm'r.*, 317 U.S. 399, 403 (1943); *Tifenbrunn v. Comm'r.*, 74 T.C. 1566, 1571 (1980); *Fierreira v. Comm'r.*, 57 T.C. 886, 871 (1972); *Fulks v. Comm'r.*, T.C. Memo 1989-190, 57 T.C.M. (CCH) 242 (1989).

---

[20] *Wheeler v. Comm'r*, 58 T.C. 459, 461-462 (1972).

[21] *Kieselbach v. Comm'r*, 317 U.S. 399, 403 (1943); *Tifenbrunn v. Comm'r*, 74 T.C. 1566, 1572 (1980). In *Kieselbach*, the City of New York took possession of taxpayer's property in 1933. In 1937, the Supreme Court of New York awarded $73,246.57, which was comprised of the principal amount of $58,000 and interest in the amount of $15,246.57. On their return, the taxpayers included the entire amount as the "amount realized" and characterized it as a capital gain. The Court rejected the taxpayer's argument that the interest income was part of the sales price. In doing so the Court stated:

> The sum paid these taxpayers above the award of $ 58,000 was paid because of the failure to put the award in the taxpayers' hands on the day, January 3, 1933, when the property was taken. This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value or payments to meet the constitutional requirement of just compensation is immaterial. It is income under § 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under § 117. The sale price was the $ 58,000.

[22] 1996 Tax Ct. Memo LEXIS 434 at 26 (Tax Ct. Memo, 1996).

The NMTIT[23] provides that as a general rule, interest received by or credited to the taxpayer constitutes gross income and is fully taxable. Interest income includes...the interest portion of a condemnation award[24]. Thus, with respect to the portion of compensation received for interest, that amount is fully taxable and is required to be reported as taxable income on a person's income tax return.

i. Rebate on Interest Income – Non-business entities

For any rebate attributed to interest income, with respect to non-business entities, rebate will only be permitted on the interest income portion if the interest income is also taxed under the Earnings Tax. As explained above in the Earnings Tax portion of this memorandum, because interest income is no longer subject to (as opposed to being specifically exempted from) the Earnings Tax, generally it will not be eligible for rebate under the normal rebate rates in accordance with 4 CMC §1708(d)(1)(ii)[25]. However, in accordance with 4 CMC §1708(d)(2) a person may elect to subject the interest income to taxation under the Earnings Tax, thereby allowing the interest income to be subject to the rebate provisions. A person may want to subject his interest income to the earnings tax if he has a substantial amount of taxable interest income and thus wants tax relief. The rates will be the 90/70/50 percent rates provided in 4 CMC §1708(b)(1)(i).

ii. Rebate on Interest Income – Business Entities

With respect to any rebate attributed to interest income for business entities, because the business is subject to the gross revenue tax on the interest income, it is eligible for rebate under 4 CMC §1708. The rates will be those provided in 4 CMC §1708(b)(1)(i) if the business is not a corporation, or subsection (b)(1)(ii) if the business is a corporation.

c. Reporting requirements – Statements required.

With respect to MPLA's obligations, as the payor of taxable land compensation and interest income, it is required to furnish the taxpayer with Forms 1099 that indicate the specific income paid. The type of income determines the type of Form 1099 that is to be used. Form 1099-S is to be used for the portion of income attributed to land compensation proceeds, while Form 1099-INT is to be used for the portion of income attributed to interest.

NMTIT §6041[26] requires every person who makes payment of $600 or more to file a Form 1099[27]. Section 6041, in mirror form, is specifically applicable to the CNMI government[28].

---

[23] NMTIT §61(a)(4) and NMTIT Reg. §1.61-7(a).

[24] NMTIT Reg. §1.61-7(a).

[25] This section provides in part: "A person, who has any income from sources within the Commonwealth that is not subject to any taxes under chapter 2 [4 CMC § 1201 et seq.] or 3 [4 CMC § 1301 et seq.] of this division, shall not be entitled to any rebate offset under this section with respect to the tax on such income..."

[26] § 6041. Information at source.

Thus, MPLA, as a governmental unit or agency or instrumentality thereof is required to issue to the payee a Form 1099-INT for the interest income received and a Form 1099-S for the income attributed to the land compensation proceeds.

(a) Payments of $ 600 or more. All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments to which section 6042(a)(1), 6044(a)(1), 6047(e), 6049(a), or 6050N(a) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a)(2), 6044(a)(2), or 6045), of $ 600 or more in any taxable year, *or, in the case of such payments made by the United States, the officers or employees of the United States* having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

(Emphasis added).

.....

(c) Recipient to furnish name and address. When necessary to make effective the provisions of this section, the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

(d) Statements to be furnished to persons with respect to whom information is required. Every person required to make a return under subsection (a) shall furnish to each person with respect to whom such a return is required a written statement showing—

(1) the name, address, and phone number of the information contact of the person required to make such return, and

(2) the aggregate amount of payments to the person required to be shown on the return.

The written statement required under the preceding sentence shall be furnished to the person on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made. To the extent provided in regulations prescribed by the Secretary, this subsection shall also apply to persons required to make returns under subsection (b).

[27] It should be noted that while NMTIT §6049(a) also imposed reporting requirements for certain interest payments, it is not applicable in the instant situation due to its specific definition of the term "interest" in §6049(b). Because the type of interest income in the instant situation is not specifically included in the definition as provided by §6049(b), the reporting requirements of §6041 are applicable.

[28] NMTIT Reg. §1.6041-1(i) provides:

(i) Payments made by the United States or a State. Information returns on:

(1) Forms 1096 and 1099 and

(2) Forms W-3 and W-2 (when made under the provisions of § 1.6041-2)

---

of payments made by the United States or a State, or political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, shall be made by the officer or employee of the United States, or of such State, or political subdivision, or of the District of Columbia, or of such agency or instrumentality, as the case may be, having control of such payments or by the officer or employee appropriately designated to make such returns.

c. Withholding Issues

Generally, income tax withholding will not be required for either the interest income or the amounts paid for the land compensation. Instead, the taxpayer/recipient, including estates and corporations, will be required to make estimated tax payments on such income in accordance with NMTIT §6654(d). Failure to make estimated tax payments may result in the imposition of an estimated tax penalty.

Backup withholding, as provided for in NMTIT §3406(a)[29], is required only in limited circumstances. Such withholding is required only if a payee fails to furnish is taxpayer identification number (TIN) to the payor as required by law, the TIN is obviously incorrect, the payee underreports his receipts of interest or dividends and fails to properly respond to the Division of Revenue and Taxation's demands. For 2004, the backup withholding rate is 29%[30].

CONCLUSION

Both the interest income and the land compensation income must be reported on the recipient's income tax return. With respect to non-business entities receiving compensation, while neither the interest portion nor the land portion of the compensation is subject to the Earnings Tax, both portions are taxable under the internal revenue code. With respect to the land compensation portion, the tax paid on such is subject to a 100% rebate. With respect to the interest portion, such income is not subject to rebate unless the recipient chooses to subject such income to taxation under the Earnings Tax.

With respect to business entities receiving compensation, both the interest portion and the land portion of the compensation is subject to the Gross Revenue Tax. With respect to the land compensation portion, the tax paid on such is subject to a 100% rebate. With respect to the interest portion, such income is subject to 90/70/50 rebate percentages.

---

[29] § 3406. Backup withholding.

(a) Requirement to deduct and withhold.

(1) In general. In the case of any reportable payment, if—

(A) the payee fails to furnish his TIN to the payor in the manner required,

(B) the Secretary notifies the payor that the TIN furnished by the payee is incorrect,

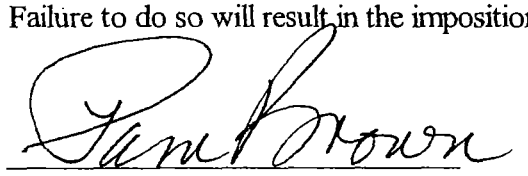
(C) there has been a notified payee under-reporting described in subsection (c), or

(D) there has been a payee certification failure described in subsection (d), then the payor shall deduct and withhold from such payment a tax equal to the product of the fourth lowest rate of tax applicable under section 1(c) and such payment.

(2) Subparagraphs (c) and (d) of paragraph (1) apply only to interest and dividend payments. Subparagraphs (C) and (D) of paragraph (1) shall apply only to reportable interest or dividend payments.

[30] Internal Revenue Manual 5.19.3.1 (9/1/2002).

MPLA is required to issue Form 1099-S for the portion of income attributed to land compensation and Form 1099-INT for the portion of income attributed to interest income. Generally, withholding is not required unless the recipient fails to provide a taxpayer identification number. Instead, the recipient will be required to make estimated tax payments on both the interest income and the land compensation income. Failure to do so will result in the imposition of an estimated tax penalty.



Pamela S. Brown
Attorney General

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950

TELEPHONE: (670) 664-2341
TELECOPIER: (670) 664-2349
writer's email: spn1499@saipan.com

Office of the Attorney General Civil Division

MEMORANDUM

Attorney General Legal Opinion # 04-02

To: Joaquin D. Salas, Director
Coastal Resources Management Office
tel: 670.664.8309 fax: 670.664.8315

From: Pamela Brown, Attorney General

Date: January 30, 2004

Re: OSHA regulations and CNMI scientific diving operations

This is in response to your recent request for a legal opinion regarding potentially restricted diving activity for all CNMI natural resources agencies by reason of regulations of the US Department of Labor's Occupational Safety and Health Administration (OSHA). You stated that it was essential that your dive team continue to dive in order to accomplish their tasks.

QUESTION PRESENTED

Does federal law require CNMI scientific divers to attain OSHA-approved certification prior to undertaking their underwater SCUBA activities?

SHORT ANSWER

No OSHA certification is required. OSHA does not regulate CNMI government diving programs since CNMI is an exempted "state" for OSHA purposes.

DISCUSSION AND ANALYSIS

Background

Because of the multi-island aspect of the CNMI, the well-being and prosperity of its population is intrinsically tied to the surrounding marine environment. The CNMI's principal environmental and natural resource agencies, the Commonwealth's Department of Fish and Wildlife (DFW), the Governor's Division of Environmental Quality (DEQ), and the Governor's Coastal Resource Management Office (CRM), frequently require their employees or contractors to examine underwater sites and collect data on living things and geologic features or conditions under the sea.[1] Continuing that scientific work is essential, in the view of the agencies.

I have received your request asking whether OSHA regulations prohibit CNMI government-related scientific divers from diving until CNMI complies with OSHA regulations. This Opinion therefore addresses one aspect of these agencies' activities. These agencies are concerned with the safety and training of the "scientific diving" of their employees. In general, OSHA, the US Department of Labor's Occupational Health and Safety Administration, regulates divers who work with compressed air (SCUBA) or hosed-in air. This Opinion examines whether OSHA's diving regulations govern these scientific diving activities, concluding that they do not.

Law

1. OSHA's regulations generally governing diving

OSHA was created by the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.*, 84 Stat. 1590 ("the Occupational Safety and Health Act"). The U.S. Department of Labor, through OSHA, regulates working conditions in the United States. In particular, it regulates safety and health through the Occupational Safety and Health Administration, or "OSHA".

Among OSHA's many regulations are those addressing underwater diving. 29 CFR 1926, Subpart Y. The OSHA regulations of Subpart Y incorporate by reference OSHA's construction regulations of Subpart T (commercial diving operations). 29 CFR 1926, §§ 1926.1071-92 referencing, respectively, 29 CFR §§ 1910.401 - 441.[2]

Although by definition, and, therefore, as a general matter, the "commerce" that the regulations govern does NOT include commerce in the "Trust Territories"[3] – an entity which included the CNMI when the general regulations were promulgated in 1974[4] and the diving regulations in 1977[5] – the diving regulations specifically state that they apply in the Trust Territory.[6] Because specific language controls over the general in statutes and regulations,[7] the diving regulations would, without more, apply in the CNMI.

2. OSHA's NOT regulating "state" employers like the CNMI

However, OSHA does not regulate the diving activities of employees or contractors of the CNMI because the CNMI is a "state" for OSHA purposes. OSHA's regulations do not apply to state or federal government employers. 29 USC § 652 (5) and (7)[8]; 29 CFR 1910.2(c).[9,10]

CNMI, as part of the "Trust Territory"[11] in 1970 when the Occupational Safety and Health Act became law, was defined as a "state" in the Occupational Safety and Health Act. 29 USC § 652(7). Therefore an employee of a state or federal government is NOT an "employee" subject to OSHA regulations.[12] As subdivisions of the CNMI government, the CRM, DEQ and DFW are exempt from OSHA. 29 CFR 1975.5(b) [13]

But contractors may be treated differently – the courts have held that nonprofit contractors for exempt governments are regulated by OSHA as independent firms. These cases tend to turn on the extent of independence that a closely-controlled nonprofit contractor is given, particularly with respect to the hiring and management of workers. *E.g. Tricil Resources, Inc. v. Brock*, 842 F.2d 141 (6th Cir. 1988); *Brock v. Chicago Zoological Soc.*, 820 F.2d 909 (7th Cir. 1987). *See, generally*, Kristine Cordier Karnezis, J.D., Annotation, *Who Is "Employer" for Purposes of Occupational Safety and Health Act* (29 USCA §§ 651 et seq.),153 ALR Fed 303 (1999).

The OSHA exception for CNMI as a "state" in the 34-year-old statute survives the Marianas' change in status from that of Trust Territory to Commonwealth. The CNMI is a successor entity to the Trust Territory mentioned in the 1970 Act and 1974 regulations. The language of the Covenant suggests that the Occupational Safety and Health Act would continue to apply because (1) ordinarily a law generally applicable to the states was applicable to the new CNMI[14] and (2) section 502 of the Covenant explicitly continues in effect the laws of the US applicable to Guam and the states.[15] The Occupational Safety and Health Act, by its terms, was applicable to the states and to Guam.[16]

3. Federal agency agreement that OSHA does not cover CNMI government diving

Apart from my Office's above reading of the Act and Regulations, EPA and NOAA apparently consider the OSHA regulations to be INapplicable to CNMI government-related diving. (Email memo of 1/7/04 fr Pat Young, EPA, to DEQ Director, CNMI, *et al.*; Email memo of 1/27/04 fr Jonathan Kelsey, NOAA to Erica Cochrane, CRM.)[17] Further, EPA says that OSHA has told it that OSHA considers the CNMI a "state", and exempt from its regulations. (Email memo of 1/7/04 fr Pat Young, EPA, to DEQ Director, CNMI, et al.)[18]

This confirms that the OSHA regulations, including the diving regulations, do not govern

CNMI's activities or the activities of CNMI's employees.

4. Related issue: the ability of a covered employer to create an exempted diving program

Assuming, *arguendo*, that OSHA regulations did generally apply, they offer their own exception to coverage. By their own terms the regulations do not apply to any diving operation defined as scientific diving and which is under the control of a diving program containing at least a dive safety manual and dive control board. 29 CFR 1910.401(a)(2)(iv).[19] "Scientific diving" means carrying out research tasks, and does not include construction or demolition activities.[20] Thus, were OSHA requirements applicable to CNMI diving, the Commonwealth could avoid them by developing its own program.

5. No apparent impact on CNMI grants from the federal government

A related question is whether the OSHA dive regulations might impact CNMI's related grants from federal government agencies. Put differently, if this Opinion were wrong, and OSHA regulations did apply, would CNMI lose or have to repay US grant funds?

While the CNMI receives grants from many US government agencies, those relating to diving are, apparently, from the EPA (to DEQ)[21] and from the US Department of the Interior or US Department of Commerce/NOAA for the Coral Reef Initiative (to CRM)[22]. The grant agreements require CNMI to observe federal law. For instance, the Standard Form 424B, "Assurances - Nonconstruction Programs", which is part of the NOAA application package, and which grant recipients sign, presents a list of assurances for certification, including:

> As the duly authorized representative of the applicant, I certify that the applicant:
>
> . . . .
>
> 18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

(Available on NOAA's web site.)[23] This language is typical of federal grant agreements.[24] IF the OSHA diving regulations were applicable to CNMI, the applicant will have to have certified that his/her agency will comply with OSHA requirements. Having made this certification, were the government to violate Federal law, it would violate the grant agreement. It would thereby provide a basis for the US Government's terminating the award and recouping funds.

But this is a highly unlikely scenario. Given the clear language of the Occupational Safety and Health Act and OSHA regulations exempting CNMI as a state, and the opinion of the CNMI's liaisons with EPA and NOAA that the OSHA regulations do NOT apply, the revocation of such grants because of the lack of a CNMI scientific diver

program is remote. Even more remote would be the revocation of an unrelated grant to another CNMI agency from a US agency that had little or no contact with diving operations.

Conclusion

The OSHA diving regulations display a concern for adopting careful, tested procedures to insure the safety and health of commercial divers. Many of the procedures required for the private sector would appear to benefit the CNMI's scientific diving personnel and the public's safety. CNMI environmental agencies who field divers frequently may wish to adopt the kind of program that OSHA encourages for "scientific diving". My Office would be happy to assist with any such program development.

However, while potentially desirable, no such program development is mandated. The OSHA regulations do NOT apply to the Commonwealth's diving activities because the Commonwealth is exempt under the Occupational Safety and Health Act as a state. Given that the OSHA requirements by their terms do not apply to the CNMI, the risk of a grant termination or revocation is minimal to nonexistent. DFW, DEQ, CRM and/or other CNMI agencies need do nothing more with respect to OSHA regulations and may otherwise continue their diving programs.

0 AGO Legal Op 04- Diving and OSHA regs.wpd

Endnotes

1.Other key environmental and natural resources offices which might occasionally require diving efforts are the Department of Lands and Natural Resources, the Environmental Health Bureau of the Department of Public Health, and the Solid Waste Division of the Department of Public Works.

2.The "diving" regulations of Subpart Y themselves incorporate by reference OSHA's construction regulations of Subpart T, so that each of the following regulation on the left incorporates the regulation on the right:

1926.1071 scope and application	from	1910.401
1926.1072 definitions	from	1910.402
1926.1076 Qualifications of dive team	from	1910.410
1926.1080 safe practices manual	from	1910.420
1926.1081 Pre-dive procedures	from	1910.421
1926.1082 Procedures during dive	from	1910.422
1926.1083 Post-dive procedures	from	1910.423
1926.1084 SCUBA diving	from	1910.424
1926.1085 Surface-supplied air diving	from	1910.425
1926.1086 Mixed-gas diving.	from	1910.426
1926.1087 Liveboating	from	1910.427
1926.1090 Equipment.	from	1910.430
1926.1091 Recordkeeping requirements	from	1910.440
1926.1092 Effective date	from	1910.441

Appendix A to Subpart Y -- Examples of Conditions Which May Restrict or Limit Exposure to Hyperbaric Condidtions [sic] from § 1910 Appendix A to Subpart T; Appendix B to Subpart Y -- Guidelines for Scientific Diving [N0 Text in Original]

3.*See* nn.8 and 9.

4.The annotations to the CFR identify the 1974 promulgation of the definitions section of the regulations:

> HISTORY: [39 FR 23502, June 27, 1974]
>
> AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:
> Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Numbers 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), or 6-96 (62 FR 111), as applicable.
> Sections 1910.7 and 1910.8 also issued under 29 CFR Part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106-113 (113 Stat. 1501A-222); and OMB Circular A-25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

29 CFR 1910.2.

5.The diving regulations became effective October 20, 1977. 29 CFR 1910.441 (Effective date).

6. § 1910.401 Scope and application.

(a) Scope. (1) This subpart (standard) applies to every place of employment within the waters of the United States, or within any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, **Guam, the Trust Territory of the Pacific Islands**, Wake Island, Johnston

Island, the Canal Zone, or within the Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1331), where diving and related support operations are performed.

29 CFR 1910.401 (emphasis added).

7.*Limon v. Camacho*, 5 N.M.I. 21, 1996 MP 18, Slip Op. at 11 (1996), *citing* 2B Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, § 51.02 at 121 (5th ed. 1992) (later expression of the legislature controls over earlier law); and § 51.05 at 174 (more specific statute controls over more general one).

8.A "State" includes the Trust Territory according to the Occupational Safety and Health Act:

652. Definitions

For the purposes of this Act --

. . . .

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

. . . .

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, **but does not include the United States** (not including the United States Postal Service) **or any State** or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) **The term "State" includes** a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, **Guam, and the Trust Territory of the Pacific Islands.**

29 USC § 652 (Definitions) (emphasis added).

9.The OSHA regulations define "employer" and an "employee" of such an employer:

§ 1910.2 Definitions.

As used in this part, unless the context clearly requires otherwise:

. . . .

(c) Employer means a person engaged in a business affecting commerce who has employees, but **does not include the United States or any State** or political subdivision of a State;

(d) Employee means an employee of an employer who is employed in a business of his employer which affects commerce;

(e) **Commerce means trade**, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or **within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands)**, or between points in the same State but through a point outside thereof;

29 CFR 1910.2 (emphasis added).

10.If OSHA does not govern the government's activity there is no private right of action to enforce OSHA standards against the government. *Federal Emp. for Non-Smokers' Rights (FENSR) v. U.S.*, 446 F. Supp. 181 (D.DC 1978), *aff'd w/o op.* 598 F.2d 310 (D.C. Cir. 1979).

11.The Annotation to the Act's "Definitions" section, 29 USC § 652, addresses the "termination" of the Trust Territory:

History, Ancillary Laws and Directives

> Termination of Trust Territory of the Pacific Islands. For termination of Trust Territory of the Pacific Islands, see 48 USCS §§ 1681 prec. note.

The referenced note addresses the CNMI:

> Preceding § 1681
>
> HISTORY; ANCILLARY LAWS AND DIRECTIVES
>
> Other provisions:
>
> Termination of Trust Territory of the Pacific Islands. **The Trust Territory of the Pacific Islands, including the Northern Mariana Islands**, the Federated States of Micronesia, the Marshall Islands, and Palau, **terminated**. The Trusteeship agreement terminated with respect to the Republic of the Marshall Islands on October 21, 1986, **with respect to** the Federated States of Micronesia and **the Commonwealth of the Northern Mariana Islands on November 3, 1986**, and with respect to the Republic of Palau on October 1, 1994. See Presidential Proclamation No. 5564, Nov. 3, 1986, 51 Fed. Reg. 40399, which appears as 48 USCS § 1801 note, and Presidential Proclamation No. 6726, Sept. 27, 1994, 59 Fed. Reg. 49777, which appears as 48 USCS § 1931 note.

48 USC prec. § 1681 (2003) (emphasis added).

12.*See* n.7.

13.By regulation, the Secretary has explicitly exempted subdivisions of states:

§ 1975.5 States and political subdivisions thereof.

(a) General. The definition of the term "employer" in section 3(5) of the Act excludes the United States and States and political subdivisions of a State:

> (5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

The term "State" is defined as follows in section 3(7) of the Act:

> (7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

Since States, as defined in section 3(7) of the Act, and political subdivisions thereof are not regarded as employers under section 3(5) of the Act, they would not be covered as employers under the Act, except to

the extent that section 18(c)(6), and the pertinent regulations thereunder, require as a condition of approval by the Secretary of Labor of a State plan that such plan:

> (6) Contain[s] satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan.

(b) Tests. Any entity which has been (1) created directly by the State, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate, shall be deemed to be a "State or political subdivision thereof" under section 3(5) of the Act and, therefore, not within the definition of employer, and, consequently, not subject to the Act as an employer.

. . . .

29 CFR 1975.5(b).

14.The Covenant, as the "supreme" law of the CNMI, provides that:

> 'Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands.

Covenant § 105; Covenant to Establish Commonwealth of the Northern Mariana Islands in Political Union with the United States of America Act March 24, 1976, P.L. 94-241, 90 Stat. 263. *Also*, Covenant § 102 ('supreme" law).

15.The Covenant's section on applicability of laws treats the CNMI as one of the states:

Constitutional provisions are applicable as though the NMI were a state:

> Section 501. (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States:
>
> . . . .

Covenant § 501. The Covenant provided that certain laws would apply unless specifically mentioned:

Section 502. (a) **The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands,** except as otherwise provided in this Covenant:

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States [42 USCS §§ 428 and 1381 et seq.]; the Public Health Service Act as it applies to the Virgin Islands [42 USCS §§ 201 et seq.]; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands [former 50 USC Appx. §§ 2018 et seq.];

(2) **those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and**

(3) those laws not described in paragraph (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

(b) The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

Covenant § 502 (emphasis added). *See Temengil v. TTPL, 1 CR 417,* 473 (Dist. Ct. 1983) (Statutes of US apply unless Covenant states otherwise).

16.*See* n.8.

17.EPA's liaison with the CNMI, Patricia Young, indicated in January, 2004, that EPA had learned from OSHA that the latter agency believed that its diving regulations did not govern CNMI activity:

From: Young.Patricia@epamail.epa.gov
mailto:Young.Patricia@epamail.epa.gov

To: deq.director@saipan.com <mailto:deq.director@saipan.com ;
fran.castro@saipan.com <mailto:fran.castro@saipan.com

Cc: pete.palacios@saipan.com <mailto:pete.palacios@saipan.com

Sent: Wednesday, January 07, 2004 12:47 PM

Subject: MMT Diving Program

Hi John, Pete and Fran:

Thanks for the copy of the letter from Jeff Moots regarding the CNMI's diving program. I am looking further into the statements made in the letter that the CNMI's diving program is overseen by OSHA, and that failure to comply with the OSHA regulations concerning scientific diving could subject both DEQ and the CNMI to "possibly significant OSHA sanctions."

Yesterday I called Connie Hunt, of Region 9 OSHA (she comes out to Saipan to oversee the garment factory inspections). I explained to her the situation and she stated that OSHA has jurisdiction over federal employees/employers and private employers/employees. They have no jurisdiction over state/commonwealth/local government employee or employers. Thus the CNMI government and its workers are not covered under OSHA regulations. She gave the extreme example that if there was a fatality on one of these MMT dives, OSHA would not/could not investigate it because it has no jurisdiction over the CNMI government.

If there were a local agency comparable to OSHA (for example in California, there is Cal OSHA) that entity would have jurisdication [sic] over local government employee/employers. (Is there one in CNMI?) Thus, bottom line is that the OSHA regs don't apply to the CNMI dive program.

. . . .

Thus, if the MMT were NOT a CNMI government operation, but was a private operation, and it engaged in scientific diving, and met the requirements for an exemption, it would not be subject to these requirements (and apparently it does meet the requirements). But because it is a government agency, OSHA has no jurisdiction anyway.

. . . .

hope this helps.

pat

Pat Young
Commonwealth of the Northern Mariana Islands and Republic of Palau Program Manager; Pacific Insular Area Programs; Cross Media Division (CMD-5); 75 Hawthorne St.; San Francisco, CA 94105

New Phone Number: 415/972-3775
New FAX Number: 415/947-3560

email address: young.patricia@epa.gov <mailto:young.patricia@epa.gov

- - -

NOAA's liaison with the CNMI indicated that his agency believed that the OSHA regs did not apply to CNMI scientific diving:

From: Jonathan Kelsey [mailto:Jonathan.Kelsey@noaa.gov]
Sent: Tuesday, January 27, 2004 12:04 AM To: Erica Cochrane
Cc: Pam Brown; Jack Salas; Pat Young; Mark Monaco; John Christensen Subject: Re: FW: MMT Diving Program

Hafa Adai, Folks -

Thanks for all of the information. After further reading of the OSHA standards, it does appear that OSHA regs do not apply to "state" agencies and NOAA OCRM concurs with EPA Region IX. Therefore, unless there were local CNMI laws or regulations pertaining to this issue, there would be no federal requirements pertaining to CNMI agency diving activities funded by federal grant funds, unless stipulated specifically by certain programs.

In the case of the NOAA coral monitoring and management grants, to date, no specific requirements have been issued with present and prior grants. As such, it would seem that unless local laws/regulations exist, NOAA grant funded diving activities should be able to recommence asap.

cheers,
Jonathan

18.See n.17.

19.The scientific diving exception is as follows:

> (a) (2) This standard applies to diving and related support operations conducted in connection with all types of work and employments, including general industry, construction, ship repairing, shipbuilding, shipbreaking and longshoring. However, this standard does not apply to any diving operation:
>
> . . . .
>
> (iv) Defined as scientific diving and which is under the direction and control of a diving program containing at least the following elements:
>
> (A) Diving safety manual which includes at a minimum: Procedures covering all diving operations specific to the program; procedures for emergency care, including recompression and evacuation; and criteria for diver training and certification.

(B) Diving control (safety) board, with the majority of its members being active divers, which shall at a minimum have the authority to: Approve and monitor diving projects; review and revise the diving safety manual; assure compliance with the manual; certify the depths to which a diver has been trained; take disciplinary action for unsafe practices; and, assure adherence to the buddy system (a diver is accompanied by and is in continuous contact with another diver in the water) for SCUBA diving.

29 CFR 1910.401(a)(2).

20.The regulations define scientific diving:

> Scientific diving means diving performed solely as a necessary part of a scientific, research, or educational activity by employees whose sole purpose for diving is to perform scientific research tasks. Scientific diving does not include performing any tasks usually associated with commercial diving such as: Placing or removing heavy objects underwater; inspection of pipelines and similar objects; construction; demolition; cutting or welding; or the use of explosives.

29 CFR 1910.402 (Definitions).

21.Phone conversation of 1/28/04, AJBarak, Asst AG, with Dir. John Castro.

22.Phone conversations of 1/28/04: AJBarak, Asst AG, with Dir. John Castro; AJBarak with Erica Cochrane, CRM; Phone conversation of 1/29/04: AJB with Dir. Joaquin Salas, CRM.

23.The NOAA application package URL is http://www.ogp.noaa.gov/grants/appkit.htm.

24.Federal Office of Management and Budget Circular A -102 provides for the federal government's standard grant application packages, including the quoted language. 62 FR 45934 (August 29, 1997). The URL is: http://www.whitehouse.gov/omb/circulars/a102/a102.html.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR HON. JUAN. A. SABLAN MEMORIAL BLDG., CAPITOL HILL
CALLER BOX 10007, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

Attorney General Legal Opinion # 04-03

To: Legal Counsel, Northern Marianas Retirement Fund

Director, Office of Public Auditor

From: Angela Bennett, Assistant Attorney General

Thru: Pam Brown, Attorney General

CC:

Date: February 3, 2004

Re: Receipt of government contract funds concurrently with retirement benefits

---

Introduction and Issues Presented

This memorandum is in response to your requests for a legal opinion on the issues numbered below.

Operating Definitions:

Contract means contracts with the CNMI government for employment, consulting, independent services, professional services, and sole source contracts.

Contract for employment includes those employment contracts disguised as consulting contracts, independent services contracts, professional services contracts and sole source contracts.

Consulting means "deliberating, seeking advice and opinion, and applying for information."[1]

Advice means "a recommendation regarding a decision or course of conduct."[2]

Government funds means funds received pursuant to a contract as defined above.

---

[1] *Inos v. Tenorio*, Civ. No. 94-1289 (Decision June 14, 1995 at 28 (citing *Mid-American Regional Council v. Mathews*, 416 F. Supp. 896, 904 (D.C. Mo. 1976));

[2] Webster's Ninth New Collegiate Dictionary, 1992.

1. Can a person who has retired from employment with the CNMI government receive funds from that same government under a contract when that person is not exempt under 1 CMC § 8392 (a)?

Short Answer: Yes, as long as (a) that contract is not a contract for employment, or consulting and (b) that contract complies with all applicable procurement regulations.

2. Can a person who has retired from employment with the CNMI government and is receiving funds from the government under a valid contract continue to receive retirement benefits ("double-dip")?

Short Answer: Yes, if they (a) are re-employed by or consulting for the CNMI government and qualify for an exemption under 1 CMC §8392(a) or (b) have a contract that is not for employment or consulting and complies with all applicable procurement regulations. If they are an early retiree, pursuant to C.N.M.I. Constitution, Article III, Section 20(b), and re-employed by the C.N.M.I. government, they may "double dip" for only 60 days during each fiscal year, regardless of their exemption status, unless they are classroom teachers, doctors, nurses, and other medical professionals. This group of early retirees may "double-dip" for two years.

3. Must a person who receives an early retirement bonus from the CNMI government under 1 CMC §8402 repay that bonus if they receive funds from the CNMI government under a valid contract?

Short Answer: No, the person who receives an early retirement bonus does not have to repay that bonus upon executing a valid contract with the CNMI government because the repayment provision was repealed by P.L.11-114.

The application of any of the opinions expressed in this document is fact specific and depends upon a review of the particular contract in question

Applicable Constitutional and Legal Authority

A. The Commonwealth Constitution, as Applicable.

Article III, Section 20 (b) of the N.M.I. Constitution provides for retiree reemployment and double-dipping.

In 1985, this section stated as follows:

> An employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system shall be credited an additional five years and shall be eligible to retire. An employee who elects to retire under this provision may not be reemployed by the Commonwealth Government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year.

In 1997, this section was amended to add the following:

> "except that the legislature may by law exempt reemployment of retirees as classroom teachers, doctors, nurses, and other medical professionals from this limitation, for reemployment not exceeding two (2) years. No retiree may have their retirement benefits recomputed based on any reemployment during which retirement benefits are drawn, but every such reemployed retiree shall nevertheless be required to contribute to the retirement fund during the period of reemployment, at the same rate as other government employees. The legislature may prohibit recomputation of retirement benefits based on reemployment after retirement in any event or under any circumstances."

Source: Second Const. Conv. Amend. 19 (1985); amended by House Legislative Initiative 10-4 (1997).

B. Commonwealth Statutory Authority: 1 CMC 8392

The only relevant statute that provides guidance on these issues is 1 CMC 8392. This statute states as follows:

> Reemployment and Double Dipping:
>
> (a) A person who has retired and received retirement benefits from the government of the Northern Mariana Islands shall not be employed by or under an employment or consulting contract with the government of the Northern Mariana Islands or its public corporations, boards or commissions, unless the person is:
>
> (1) Appointed by the Governor to a position requiring the advice and consent of the Senate or House of Representatives or both.
>
> (2) Hired in a position for which professionals are not readily available in the local labor market, including, for example, teachers for the Public School System and the Northern Marianas College, attorneys for the offices of the Attorney General and Public Defender, nurses and doctors for the Commonwealth Health Center, audit staff for the office of the Public Auditor, and former elected officials.
>
> (3) Elected to public office.
>
> (4) Title V employee under the federal Older Americans Act. A retiree may be hired under Title V of the Older Americans Act [42 U.S.C. § 3001 et seq.] and continue to receive benefits from the Northern Marianas Retirement Fund. Those benefits will be based on the computed service and wages earned upon

his or her retirement. He or she shall not be required to contribute to the Retirement Fund on wages earned as a recipient of Title V of the Older Americans Act. Any retiree who was hired under Title V of the Older Americans Act prior to October 11, 1991, and who has contributed to the Retirement Fund from such wages, shall be entitled to a refund of all such contributions. Nothing in this section shall be construed to violate any provision of N.M.I. Const. art. III, § 20.

(5) Specifically exempted by the Governor, with the concurrence of the Retirement Board.

(b) A person who has retired and received a retirement benefit shall not be eligible to receive prior service credit if the person continues to receive retirement benefits from the government while accruing service that is eligible for credit as prior service credit upon reemployment with the government.

(c) Provided, however, that any person who elected to retire pursuant to the provisions of N.M.I. Const. art. III, § 20(b) may be employed by the Commonwealth for no more than 60 calendar days in any fiscal year without forfeiting any retirement benefits.

(d) Retirees are allowed to return to government employment as classroom teachers, nurses, doctors and other medical professionals for a period not to exceed two years without losing their retirement benefits. However, no such re-employed retiree shall have their retirement benefits recomputed based on any re-employment during which retirement benefits are drawn, but every such re-employed retiree shall nevertheless be required to contribute to the retirement fund during the period of re-employment, at the same rate as other government employees.

Source: PL 6-41, § 15 (repealing PL 6-17, ch. 8, § 83811); amended by PL 7-39, §§ 6, 7, 8; PL 7-40, § 3; PL 8-31, § 13; PL 11-2, §4.

I. **Can a person who has retired from employment with the CNMI government receive funds from that same government under a contract when that person is not exempt under 1 CMC § 8392 (a)?**

Analysis

A. CNMI law regarding limitations on retirees being reemployed by the CNMI government:

The CNMI Constitution does not prohibit individuals who have retired from employment with the CNMI government from being rehired.[3] N.M.I. Const. art. III § 20 (b). Any re-employment of a retiree comes with a constitutional restriction, however. Those retired individuals who are re-employed must contribute to the retirement fund, but cannot have their retirement benefits recomputed based on that re-employment. *Id.* Individuals who have other types of valid contracts are not eligible for membership in the retirement system. 1 CMC § 8322.

N.M.I. Const. art. III § 20 (b) states in pertinent part:

> "No retiree may have their retirement benefits recomputed based on any reemployment during which retirement benefits are drawn, but every such reemployed retiree shall nevertheless be required to contribute to the retirement fund during the period of reemployment, at the same rate as other government employees. The legislature may prohibit recomputation of retirement benefits based on reemployment after retirement in any event or under any circumstances." (emphasis added)

The CNMI limits by statute, the reemployment of retired individuals with some exemptions. 1 CMC § 8392. This statute states in pertinent part:

> Reemployment and Double Dipping: (a) A person who has retired and received retirement benefits from the government of the Northern Mariana Islands shall not be employed by or under an employment or consulting contract with the government of the Northern Mariana Islands or its public corporations, boards or commissions..." 1 CMC 8392 (a) (emphasis added)

The history of the exemptions illustrates two contradictory positions taken by the CNMI legislature: (1) to encourage the early retirement of long-time government employees, and (2) to rehire those former employees after retirement. In 1985, the CNMI constitution was amended to allow a five-year early retirement credit for any individual who had been employed by the CNMI government for at least 20 years. N.M.I. Const. art. III § 20 (b). In 1993, the legislature passed the Early Retirement Bonus Act of 1993 (P.L. 8-30). With that incentive, many long-time government employees retired. During that same time, the CNMI legislature allowed rehiring of retired individuals through statutory exemptions from the rehire prohibitions in 1 CMC § 8392.[4] The intent of these exemptions is summarized in P.L. 7-40 which states in pertinent part:

---

[3] For constitutional limitations on receiving a salary and retirement benefits ("double-dipping"), see Issue II.

[4] The legislature passed its first rehiring provision in 1989, with the passage of the Northern Mariana Islands Retirement Fund Act ("NMIRFA") (Public Law 6-17). This statute allowed only those elected to public office to be "employed" after retirement. In 1990, the CNMI legislature amended the NMIRFA, expanding the categories of retired government employees who could be rehired by the CNMI government to include (1) those appointed by the Governor to a position requiring the advice and consent of the Senate or House of Representatives or both; and (2) individuals hired in positions for which professionals were not readily available in the local labor market, such as teachers for Northern Marianas College and the Public School System, attorneys of the Attorney General's office and the Public Defender's office, nurses and doctors, audit staff of the OPA and former elected officials. See P.L. 6-41. In 1991, the legislature added retired employees hired under Title V of the Older American's Act, and those specifically exempted by the Governor, with the concurrence of the Retirement Board. See P.L. 7-39 and P.L. 7-40.

> The Legislature finds that the exemptions which allow retired government employees who are receiving retirement benefits to work for the Commonwealth government are insufficient to cover numerous situations where it is beneficial to the Commonwealth and the retired government employee to resume work for the government.

P.L. 7-40 § 2. All of the amendments that allow the reemployment of individuals who had formerly retired from CNMI government employment are codified in 1 CMC § 8392.[5]

Conclusion: Issue 1, Part A.

Based on the analysis contained in the paragraphs above, a retiree may receive CNMI government funds as an employee, or as a consultant, as long as the retiree qualifies for an exemption in 1 CMC § 8392. There is no restriction on retirees receiving government funds under an independent contract.

Therefore, the analysis turns to a discussion of determining whether the retiree is being paid as an employee, a consultant, or as an independent contractor.

B. CNMI law defining "employee"[6] and "consultant": Plain meaning of the term, Regulations, and Restatement of Agency

CNMI caselaw mandates that statutory language be construed according to its plain meaning. *Town House, Inc. v. Saburo*, 2003 MP 002 (citing *Gioda v. Saipan Stevedoring Company, Inc.*, 1 N.M.I. 310, 315 (1990).

The CNMI public employment statute does not contain a definition of the word "employee." 1 CMC 8101 *et seq.* However, the civil service system's Personnel Service System Rules and Regulations (PSSR&R) defines an employee as follows:

> "A person in active pay status holding a position in accordance with Commonwealth of the Northern Mariana Islands Public Law 1-9, as amended, whether permanent, probationary, full-time or otherwise in either the Personnel Service or Excepted Service Systems."

PSSR&R Definitions. A position is defined as:

> "the authorized group of work, duties, and responsibilities assigned by competent authority requiring the full-or part-time employment of at least one person."

---

[5] The legislature has been relatively even-handed in granting exemption power to all three branches of government. P.L. 7-40 pertains to exemptions granted by the governor. Other sections of 1 CMC § 8392 grant exemptions for the legislative and judicial branch (e.g. elected officials at 1 CMC 8392(a)(3)). Members of all three branches can grant exemptions for anyone "hired in a position for which professionals are not readily available in the local labor market." 1 CMC § 8392 (a)(2).

[6] All contracts for employment must follow applicable CNMI statutes and regulations regarding government employment, including certification by the Department of Finance and the Office of Management and Budget that a vacant FTE exists and there is funding for that FTE. 1 CMC § 7405. Recruitment and hiring for civil service positions must be done according to regulations promulgated by the Civil Service Commission, the PSSR&R. 1 CMC 8117; PSSR&R Part III.

PSSR&R Definitions. The PSSR&R does not contain a definition of independent contractor.

Black's Law dictionary defines "employee" as

> "A person in the service of another under any contract of hire...where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.... Generally, when (the) person for whom services are performed has (the) right to control and direct (the) individual who performs services not only as to result to be accomplished by (the) work but also as to (the) details and means by which result is accomplished, (the) individual subject to direction is an "employee." "Servant" is synonymous with "employee."

Black's Law Dictionary, 1990. [7] (emphasis added)

In the absence of statutory or customary law, CNMI law mandates that courts apply the common law as expressed in the Restatements. 7 CMC § 3401. In *Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268 (1995), the CNMI Supreme Court used Restatement (Second) of Agency (hereinafter "Agency") § 2(1), § 220(2), and § 220 cmt. c. (1958) to guide an analysis of whether an individual was an employee[8] or an independent contractor for purposes of assigning liability under the doctrine of *respondeat superior*. *Id.* at 272, 273.

The Court in *Castro* stated:

> " 'A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.' Agency § 2(1). 'A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.' *Id.* § 2(2).
>
> In determining if one is a servant or independent contractor, the court looks to the following factors:
>
> (a) The extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) The skill required in the particular occupation;

---

[7] Black's Law Dictionary defines an independent contractor as "one who, in exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to end product or final result of this work...and not as to means whereby it is to be accomplished... Restatement, Second, Agency, § 2." *Id.*.

[8] In this analysis, the word "servant" means employee, and "master" means employer. These labels are based in the law of agency.

(e) Whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) The length of time for which the person is employed;

(g) The method of payment, whether by the time or by the job;

(h) Whether or not the work is a part of the regular business of the employer;

(i) Whether or not the parties believe they are creating the relations of master and servant; and

(j) Whether the principal is or is not a business. Id. § 220(2).

These factors are all examined and no one factor is dispositive. Id. cmt. c; Community for Creative Non- Violence v. Reid, 490 U.S. 730, 751-52, 752 n.31, 109 S. Ct. 2166, 2178-79, 2179 n. 31, 104 L. Ed. 2d 811, 831-32, 832 n.31 (1989)."

Castro, supra at 273.

The Court in the *Castro* case defined an independent contractor as follows:

" [A] person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent."

Id. at p. 273 n.7. See also Restatement of Law on Agency § 2(3)

Conclusion Issue I, Part B

In order to determine whether a person is an employee or an independent contractor under CNMI law, the analysis must include a discussion of several factors. A functional analysis of the factors determines the extent of control the "employer" has over the "employee." See the *Castro* factors discussed above. If the contract for hire is one within the CNMI government, the analysis should include determining if the person is holding a position described within the civil service system, or the excepted service system that has an assigned appointing authority. See PSSR&R Definitions. The form of the contract of hire is not determinative.

In determining agency or tort liability, there is no express definition in CNMI law of an employee versus independent contractor. CNMI statute and caselaw mandate that, in the absence of a statutory definition of employee or independent contractor, the courts must use applicable sections of the Restatements of Law. Therefore, the court would apply the principles of Agency § 2(1), § 220(2), and § 220 comment c. to determine whether the person receiving government funds is an employee or an independent contractor. Based on the outcome of that analysis, the court would then determine whether or not the person is an agent of the CNMI government and whether or not tort liability exists for the CNMI government. *Castro, supra.*

C. CNMI laws other than public employment law defining "employee"

The Compensation Adjustment Act

The 1984 Compensation Adjustment Act ("CAA") provided a definition of "employee" when it established uniform and consistent salaries for top policy-making appointed officials. This statute defined employees, including independent contractors, for the purposes of coverage by the CAA, in the following manner:

> " 'Employee' includes independent services contractors, consultants, and professional services contractors. "Employee" also includes full-time and part-time personnel. "Employee" includes employees of federal programs who receive their paychecks from the Commonwealth government.

1 CMC § 8243 (a). (emphasis added).[9]

Executive Order 94-3 § 307(b)(3), effective August 23, 1994 through September 10, 2002, excluded independent service contractors, consultants, and professional services contractors from the definition of "employee" under 1 CMC § 8243(a). However, this exclusion is subject to constitutional challenge because it exceeds the Governor's constitutional authority. N.M.I. Const. art. III § 15. Under the standard set in *Sonoda v. Cabrera*, certified question No. 96-001, the governor's authority to make changes affecting existing law is limited to changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration. The legislature enacted 1 CMC § 8243 (a). Only the legislature can change that statute. *Id.*

Executive Order 94-3 also stated that:

> "The function of deciding whether it is in the public interest for the government to obtain professional services by employing more people to work for the government (either in the classified Civil Service or the Excepted Service as determined by the Personnel Officer) or by procuring such services from the private sector is allocated to the Office of the Governor, the Marianas Land Trust, and the various boards and commissions."

E.O. 94-3 § 307 (b)(1)

This provision of the Executive Order is also subject to constitutional challenge, because the legislature, not the governor, determines the number of employees that work for the government by approving a balanced budget setting FTE ceilings and appropriations for the various government agencies. N.M.I. Const. art III § 9. The Governor's ability to employ individuals is further limited by statute. CNMI law mandates that: "no new or vacant position may be filled without first receiving

from the Office of Management and Budget and the Department of Finance a certification that a full-time employee (FTE) and personnel funds for that position are available. 1 CMC § 7405. (emphasis added)

In 2002, pursuant to P.L. 13-24 § 602(a), the legislature amended 1 CMC 8243(a). The statute now reads in pertinent part:

> "Employee" does not include an independent services contractor, a consultant, or a professional services contractor."

1 CMC 8243(a) (emphasis added)

Public Employee Legal Defense and Indemnification Act of 1986 ("PELDIA")

Only government employees[10] are covered under PELDIA. This statute defines employee in the following manner:

> Employee" means an officer, elected or appointed official, exempted service, classified or unclassified employee, or servant of a public entity, whether or not compensated, but does not include an independent contractor of a public entity.

7 CMC § 2303(d). (emphasis added)

Commonwealth Workers' Compensation Law of 1989 ("CWC")

The CWC defines employee as follows:

> 'Employee' means any person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed. "Employee" specifically includes aquacultural and agricultural workers. "Employee" excludes any person whose employment is purely casual and not for the purpose of the employer's trade or business, any corporate director not receiving any compensation, independent contractors, and any person employed by the inhabitant of a private dwelling to reside at the dwelling and perform household domestic service.

4 CMC 9302(l). (emphasis added)

---

[10] In contrast, independent contractors, even if they are "state actors" within a privatized government function, are not generally entitled to qualified immunity. Neither are they qualified for indemnification by the government, absent a specific indemnification agreement. See *Richardson v. Mc-Knight*, 521 U.S. 399 (1997). The Richardson court noted in its rationale for excluding independent contractors from qualified immunity, that: (1) insurance could provide protection from litigation costs, (2) qualified candidates would be attracted to the private sector for higher pay and extra benefits, and would not need the incentive of qualified immunity that attracts workers into government civil service. *Id* at 411.

Northern Mariana Islands Retirement Fund Act ("NMIRF")

Interestingly, under NMIRF Act of 1988, not all government "employees" are eligible for membership in the CNMI government retirement system. The statute states:

> The following employees are not eligible for membership:
>
> (a) Persons whose services are compensated on a fee basis.
>
> (b) Independent contractors.
>
> (c) Persons whose employment is for a specific project.

1 CMC § 8322 (emphasis added)

The statute further states that the retirement fund board "shall determine who are employees and entitled to membership within the meaning of this part." *Id.*

Conclusion Issue I, Part C

A person may be an employee for purposes of a specific CNMI law, regardless of the type of contract of hire they may have. The NMIRF Act is the only act that requires a decision, by the retirement fund board, on whether or not an individual is an employee eligible for membership in the system. Until September, 2002, the CCA arguably applied to all individuals who were employed by the C.N.M.I. government in certain positions, regardless of the form of the contract of hire. After September, 2002, each contract would need to be analyzed to determine whether the person was actually an employee, or an independent contractor, using the factors outlined in this opinion. (See Section B above.) PELDIA would cover any independent contractor who was a "servant" of a public entity, implicating the *Castro* analysis. *Id.* Similarly, the CWC indicates that any person in the service of an employer where the employer has the power or right to control and direct the employee is covered under the act. *Id.*; 4 CMC § 9302(l). Therefore, even independent contractors may be eligible for worker's compensation regardless of the label they have if they are functionally employees. The courts would determine eligibility using the functional analysis required by the statute's definition of employee.

D. CNMI law regarding privatization[11] of government services by contracting with retirees.

[11] Privatization is a shift from government provision of functions and services to provision by the private sector. Konno v. County of Hawa'i, 937 P 2d 397 (9th Cir.1997) at 404. "Contracting out," for purposes of this analysis, occurs when the government transfers the responsibility for performance of its administrative services to a private contractor. *Id.* This private contractor performs the same work under conditions of employment that are similar to that previously performed by a government employee. *Id.* "The purported policy behind privatization is to increase governmental efficiency." Id. (citing Timothy P. Dowling, Note, *Civil Service Restrictions on Contracting Out by State Agencies*, 55 Wash. L. Rev. 419, 425-26 (1980).) "Services can often be provided more efficiently by private entities than by civil servants." *Id.* (emphasis added)

CNMI law allows for the privatization of government personal or administrative services by statute and through government procurement and supply regulations.[12] This privatization can occur through the hiring of independent contractors. However, the CNMI law that governs retirees who contract with the CNMI government as independent contractors prohibits retirees from executing consulting contracts, without qualifying for an exemption under the statute. 1 CMC § 8392 (a). Retirees are allowed to contract as other types of independent contractors, such as professional services contractors, or sole source contractors without an exemption. [13]

All contracts for services that are not employment contracts must follow procurement and supply regulations in order to be valid contracts.

N.M.I. Constitution Article X, § 8 grants to the CNMI Department of Finance ("DOF") absolute authority "to control and regulate the expenditure of public funds..." To implement the broad authority granted to the DOF, the CNMI Legislature has enacted 1 CMC § 2551 et seq. 1 CMC § 2553(g) grants to the DOF the right to dispense funds pursuant to the authority of law and 1 CMC § 2257 grants to the DOF authority to adopt rules and regulations for "those matters within its jurisdiction...". Pursuant to the authority to promulgate rules and regulations, and 1 CMC § 2553(j), the DOF promulgated procurement regulations.

Procurement and Supply Regulations as applied to the CNMI Legislature

Procurement and supply regulations apply "to every expenditure of public funds irrespective of source...these regulations apply to all agencies, departments, branches of the government, political subdivisions..." P&SR Article 1, Part A, § 1-105. Therefore, procurement and supply regulations apply to independent contracts initiated by the legislature under the N.M.I Constitution, and CNMI statutes.

The N.M.I. House of Representatives adopted rules, which address any constitutional challenges to this broad interpretation of DOF's authority extending to the legislature.

The House Rules of the N.M.I. Commonwealth Legislature require that:

---

[12]See for example the P&SR, P.L. 13-24 § 602(a); 2 CMC § 2127(g); 2 CMC § 4874(k); 2 CMC § 6302(a)(3); and 4 CMC § 8123(h) and the appropriations for professional services in various government agency budgets.

[13] It is important to note in determining legislative intent that this provision prohibiting retirees from executing only employment or consulting contracts with the government has existed unchanged since it was first introduced into law in 1989. P.L. 6-14 § 83811. This section of the retirement fund statute has been amended five times, generally expanding the role of retirees in government service. The last amendment was added to this statute in 1998, four years after the terms "independent services contractor" and "professional services contractor" became part of CNMI law in E.O. 94-3. Yet, the legislature chose not to include these types of contracts in the contracting prohibitions of 1 CMC § 8392(a). In the CNMI, for the purposes of statutory interpretation, *expressio unius es exclusio alterius* (the express mention of one thing implies the exclusion of another which might logically have been considered at the same time). Aldan v. Mafnas, 2 N.M.I. 122 (1991), *rev'd on other grounds* 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116, 115 S. Ct. 913, (1995); E-Tours Inc. v. Marianas Visitors Authority, NMI Superior Ct., Civil Action No. 00-0078D, Opinion, April 19, 2000 (Manglona, J.) The legislature did not amend this statute to include these terms, therefore, the statute must be interpreted to exclude them from incorporation into the statute.

> "Purchases made by the House and chargeable to funds available to the House shall be made in accordance with the CNMI Procurement Policy."

13th N.M.C. L. House Rule XIII § 6, p. 27(adopted Jan. 14, 2002); 12th N.M.C.L. House Rule XIII § 6, p. 25-26 (adopted Jan. 10, 2000)[14] (emphasis added)

> "A member, officer or employee of the House of Representatives shall adhere to the spirit and the letter of the rules of the House of Representatives and to the policies thereof."

13th N.M.C.L. House Rule XV § 1(b), p. 28 (adopted Jan. 14, 2002); 12th N.M.C.L. House Rule XV § 1(b), p. 27 (adopted Jan. 10, 2000)[15]

Procurement and Supply Rules and Regulations applicable to independent contracts

The clearest expression of the "spirit and letter" of CNMI Procurement Policy is expressed in the P&SR.[16] These regulations define agreements for services in the following manner:

> "Contract means all types of agreements, regardless of what they may be called for the procurement of supplies, services or construction, including purchase orders." P&SR Part B § 1-201, 3. (emphasis added)

> "Services mean the furnishing of time, labor or effort by a person other than an employee, and not involving the delivery of a specific end product other than reports, plans and incidental documents." P&SR Part B § 1-201, 22. (emphasis added)

The regulations that apply to contractors for independent services, and professional services and sole source contractors include, but are not limited to, P&SR Article 3 Part A, § 3-103, § 3-106, Article § 4-102 and § 4-103.[17] Additionally, the P&SR states that "No Government contract shall be valid unless it complies with these regulations." P&SR Part A § 1-107. Any one responsible for a procurement action that is in violation of P&SR will be individually liable. P&SR Part A § 1-108.

All processing[18] of legislative contracts must, by CNMI law, occur only through the Legislative Counsel's office. 1 CMC § 1106. This process would include review for compliance with all applicable House or Senate Rules, Procurement and Supply regulations, and CNMI law.

Conclusion Issue I, Part D

---

[14] Research going back as far as 1994 indicates this rule has existed in the same section with identical wording.

[15] Research going back as far as 1994 indicates this rule has existed in the same section with identical wording.

[16] Because the P&SR were promulgated according to the CNMI Administrative Procedures Act, they were published in the Commonwealth Register with opportunity for notice and comment by members of the legislature, and reviewed by the Attorney General's office before taking effect.

[17] CNMI procurement regulations do not apply to contracts for employment or for personal services under an excepted service.

[18] Assuming processing to mean the same level of scrutiny that all other CNMI government contracts must undergo.

All types of independent contracts that are the subject of this opinion must comply with CNMI P&SR. Any contract that does not comply with these regulations is void. Any individual who works for any branch of the CNMI government who violates these regulations is personally liable for the amount of the contract.

E. CNMI Business Licensing Law

The following statutes may be applicable in the analysis of any independent contract, that is not an employment contract, because independent contractors must have a valid business license prior to doing business in the CNMI.

> Business License Fees.
>
> Business License Required. Before engaging in or continuing in a business, a person shall first obtain from the Secretary of the Department of Finance a license to engage in or conduct that business.

4 CMC § 5611(a) (emphasis added)

> .Penalty for Violation of Business License Requirements.
>
> Any person found operating or engaging in a business to sell merchandise, goods, or commodities, or providing services for compensation without a valid business license shall be subject to a penalty of $500 and upon written notice to a person under subsection (c) of this section, any continual violation shall subject the person to an additional penalty of $100 per day for every additional day that the person is in violation of the business license provisions.

4 CMC § 5613(a) (emphasis added)

CONCLUSION ISSUE ONE

A person who has retired from employment with the CNMI government may not be re-employed by the CNMI government, absent qualifying for a specific exemption under 1 CMC § 8392.
However, a person who has retired from employment with the CNMI government may receive funds from the government under an independent contract that is not exempt under 1 CMC § 8392 if he/she is an individual or is employed by a business that has a valid contract for independent services, professional services, or is a sole source contractor. Entities wishing to procure services under these types of contracts must follow all applicable CNMI procurement regulations. NMI Const. art. X, § 8; 1 CMC § 2553(g); 1 CMC § 2257; 1 CMC § 2553(j); P&SR. Individuals who wish to contract with the CNMI government must comply with all applicable CNMI business laws.

PSSR&R provides guidance in the determination of whether a particular contract is one for employment or an independent services contract.

Issue II

II. Can a person who has retired from employment with the CNMI government and is receiving funds from the government under a valid contract continue to receive retirement benefits?

The CNMI Constitution and statutes allow individuals who retire from employment with the CNMI government and receive retirement benefits to receive funds from the CNMI government as employees (to "double dip") under the following restrictions:

A. Double-dipping for regular retirees:

The N.M.I. Constitution allows retirees to "double dip" with a penalty.

N.M.I const. Art III § 20 b) states in pertinent part:

> No retiree may have their retirement benefits recomputed based on any reemployment during which retirement benefits are drawn, but every such reemployed retiree shall nevertheless be required to contribute to the retirement fund during the period of reemployment, at the same rate as other government employees.

N.M.I const. Art III § 20 b) (emphasis added). [19]

Therefore, under this article, retirees who continue receiving their retirement benefits while re-employed must pay into the retirement system. However, they cannot have their retirement benefits recomputed based on their re-employment contributions. N.M.I. Const. art III § 20 b).

1 CMC § 8392(d) applies this limitation specifically to classroom teachers, nurses, doctors and other medical professionals by stating:

> However, no such re-employed retiree shall have their retirement benefits recomputed based on any re-employment during which retirement benefits are drawn, but every such re-employed retiree shall nevertheless be required to contribute to the retirement fund during the period of re-employment, at the same rate as other government employees.

1 CMC § 8392(d) (emphasis added).

[19] It is significant to note that Article III § 20 of the CNMI Constitution was added in 1985 and amended in 1997. At neither time were retirees prohibited from contracting independently with the CNMI government and receiving retirement benefits at the same time. Any constitutional limitations were applied only to re-employed retirees.

In 2000, the legislature repealed the hiring limitations for retirees who had retired and received an early retirement bonus under 1 CMC § 8401 *et seq.* P.L. 11-114. In this same law, the legislature repealed the mandatory payback of that early retirement bonus upon re-employment allowed under the exclusions of 1 CMC § 8392(a). (See Attorney General's Opinion 02-13 for a complete analysis of the effect of P.L. 11-114 on the rehiring of retirees who received an early retirement bonus.)

B. Double-dipping for early retirees:

The N.M.I. Constitution limits the time that a certain group of retirees (hereinafter "early retirees") may "double dip."

N.M.I Const. art. III § 20 b) states in pertinent part:

> "An employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system shall be credited an additional five years and shall be eligible to retire. An employee who elects to retire under this provision may not be reemployed by the Commonwealth Government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year..."

N.M.I Const. art. III § 20 b) (emphasis added).

Therefore, if "early retirees" return to employment with the CNMI government, they are limited, by the Constitution, to only 60 calendar days in any fiscal year that they may receive both retirement benefits and a salary.

In 1997, Article III § 20 b) of the CNMI Constitution was amended, allowing legislation to permit "early retirees" to fill certain positions, without loosing their retirement benefits.[20] House Legislative Initiative 10-4 amended this section in the following way:

> "An employee who elects to retire under this provision may not be reemployed by the Commonwealth Government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year, except that the legislature may by law exempt reemployment of retirees[21] as classroom teachers, doctors, nurses, and other medical professionals from this limitation, for reemployment not exceeding two (2) years."

N.M.I Const. art. III § 20 b) (emphasis added).

---

[20] It is significant to note that Article III § 20 of the CNMI Constitution was added in 1985 and amended in 1997. At neither time were early retirees prohibited from contracting independently with the CNMI government and receiving retirement benefits at the same time. The framers applied limitations only to re-employed early retirees.

[21] Meaning "early retirees"

The legislature, in proposing this initiative, found that:

> the number of classroom teachers, doctors, nurses, and other medical professionals is insufficient to meet the demands of the Commonwealth. The Legislature further finds that there are local retirees[22] who could fill these positions who are reluctant to do so because government reemployment would terminate their retirement benefits. The Legislature cannot provide for the utilization of this labor source due to the Constitutional prohibition against reemployment without loss of retirement benefits. The purpose of the amendment is to allow legislation to help reduce reliance on nonresident labor to fill these positions by encouraging qualified retirees to seek employment as classroom teachers, doctors, nurses, and other medical professionals without losing their retirement benefits.

Therefore, this select group of "early retiree" teachers, doctors, nurses, and other medical professionals may work for two years without losing their retirement benefits, even if they elected to take the five-year early retirement credit allowed in N.M.I. Const. art. III § 20.

C. Double-dipping by retirees re-employed under re-hiring prohibition exemptions:

Prior to 1993, 1 CMC § 8392 contained a section that prohibited retirees from receiving retirement benefits while employed by the CNMI government under the exemptions listed in 1 CMC § 8392(a). P.L. 7-39 § 8. In 1993 the legislature passed P.L. 8-31. This statute repealed P.L. 7-39 § 8, removing the prohibition against double-dipping for exempted employees.

However, 1 CMC § 8392(a)(4) contains the following statement: "A retiree may be hired under Title V of the Older Americans Act (42 U.S.C. § 3001 et seq.) and continue to receive benefits from the Northern Marianas Retirement Fund." (emphasis added)

Therefore, whether retirees could continue to receive retirement benefits if hired under any category of exemptions allowed in 1 CMC § 8392 (a) would depend on a legal analysis of the impact of the phrase "and continue to receive benefits from the Northern Marianas Retirement Fund" contained in 1 CMC § 8392 (a)(4) on the other exemptions allowed in 1 CMC § 8392(a).

Retirees hired under the exclusions listed in 1 CMC 8392(a)[23] may work for the government and receive retirement benefits at the same time because:

---

[22] Meaning "early retirees"

[23] Please note the previous AG opinion 02-13 which contains the analysis that the rehiring limitations in 1 CMC § 8402 have been repealed. Therefore, the only limitations on re-hiring individuals who received an early retirement bonus are those contained in 1 CMC § 8392.

(1) 1 CMC § 8392 (a)(4) was added to the statute in 1991, through P.L. 7-39; this same statute made the loss of retirement benefits upon rehire mandatory;[24] Note that in exchange for this loss of benefits, retirees were allowed to have their retirement benefits recomputed based on their re-employment wages.

(2) The legislature expressly repealed this mandatory loss of benefits in 1993 through P.L. 8-30 § 13. Because the repeal of the mandatory loss of benefits upon rehire occurred after P. L. 7-39 was passed, the rule of statutory construction *expressio unius es exclusio alterius* (the mention of one thing implies the exclusion of another which might have been considered at the same time) does not apply in this analysis. If this rule were used to construe the statute to mean that all other retired individuals exempted under this section cannot receive retirement benefits while being employed, it would nullify the legislature's repeal of that restriction in 1993. C.N.M.I. case law regarding statutory construction states that: The objective in interpreting statutes that reflect ambiguity is to "ascertain and give effect to the intent of the legislature." *Faisao v. Tenorio*, App. No. 94-108, C.A. No. 976 (Slip Opinion, April 13, 1995 at p. 11), and if the amendatory act cannot be reconciled with the requirements of the altered provision, the last expression of the legislative will must be given effect. *Commonwealth v. Lizama,* Crim No. 91-106, Amended Order (Superior Court Nov. 1, 1991 at p. 12), *rev. on other grounds*, 3 N.M.I. 402 (1992).

Classroom teachers, doctors, nurses and other medical professionals who are not "early retirees" (have not received retirement credit under N.M.I. Const. art III, §20) are still limited to working two years while receiving retirement benefits. 1 CMC § 8392(d).[25] However, this limitation would not apply if the position that the retiree seeks to fill as a doctor, nurse, other medical professional or teacher qualifies for an exemption under 1 CMC § 8392 (a)(2).

---

[24] P.L. 7-39 § 8 stated that "The last paragraph of 1 CMC 8392(a) is amended to read as follows: (a) a retiree hired under any of the above exceptions, other than pursuant to subsection (4), shall have his/her benefits terminated for the duration of the employment or office. Upon retirement, the benefit shall be recomputed based on the additional service and wages earned. During the employment or office, contributions to the Fund shall be mandatory. Except for positions stated above all government consulting contracts and employment application forms and agreements shall contain a declaration to be made under penalty of perjury, stating that the employee or independent contractor has not retired from and is not receiving retirement benefits for the Commonwealth Government." (emphasis added)

This section merely restated the mandatory termination of benefits provision that existed in the Northern Marianas Retirement Fund Act of 1988 (P.L. 6-17 § 83811) codified at 1 CMC 8301 *et seq.* and in 1990 (P.L. 6-41 § 15). It is interesting to note that P.L. 7-39 was introduced in the House and had its final reading on August 29, 1991. On that same date, the House had its first and final reading of P.L. 7-40, a bill introduced in the Senate. This public law added the exemption currently codified as 1 CMC 8392(a)(5). It states in P.L. 7-40 § 2, Findings and Intent, that "The Legislature finds that the exemptions which allow retired government employees who are receiving retirement benefits to work for the Commonwealth government are insufficient to cover numerous situations where it is beneficial to the Commonwealth and to the retired government employee to resume work for the government. It is the intent of this legislation to allow more retired governmental employees to work for the government when exempted by the governor." (emphasis added) The inconsistency between P.L. 7-39 § 8 and the Findings and Intent of P.L. 7-40 were resolved when P.L. 8-31 § 13 repealed 7-39 § 8 in 1993.

[25] 1 CMC 8392 (d) states in pertinent part: "Retirees are allowed to return to government employment as classroom teachers, nurses, doctors and other medical professionals for a period not to exceed two years without losing their retirement benefits." This provision is more restrictive than is required in the N.M.I. Constitution, and may be subject to an equal protection challenge, because it appears to have no rational government purpose. Additionally, under the 1 CMC 8392(a)(2) exemption, any classroom teacher, nurse, doctor or other medical professional in a position not readily available in the local labor market may be employed and receive retirement benefits, without the 2 year limitation. In order for the restriction in 1 CMC 8392(d) to harmonize with the N.M.I. Constitution, Article III § 20(b), the 2 year limitation should be interpreted to apply only to those who were "early retirees" and want to be re-employed as teachers, nurses, doctors, etc.

Conclusion Issue II

A retiree who is not an "early retiree" and receives retirement benefits from the CNMI government may continue to receive those benefits while being employed under an exemption from the re-hiring prohibition, under a valid employment or consulting contract. An "early retiree" may be re-employed under an exemption, but must forfeit his or her retirement benefits while re-employed, after the first 60 days of each fiscal year. "Early retirees" who occupy positions under 1 CMC § 8392 (d) may "double dip" for two years. Both retirees and "early retirees" may be independent contractors with the CNMI government and continue to receive their retirement benefits without limitation.

Issue III

III. Must a person who receives an early retirement bonus from the CNMI government repay that bonus if they receive funds from the CNMI government under an independent contract or a re-employment contract?

Individuals who received an early retirement bonus under 1 CMC § 8402 and were hired as independent contractors or re-employed under the exclusions of 1 CMC § 8392 (a) do not have to pay back their bonus. 1 CMC § 8402 did not apply to independent contractors. Retirees with a valid exemption may keep their bonus upon re-employment because the statute that required payback of the bonus upon re-employment was repealed. Please see AG Opinion 02-13.

BY:

Angela L. Bennett
Assistant Attorney General

CONCURRED BY:

Pam Brown
Attorney General

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

Attorney General/Civil Division
Tel: (670) 664-2341
Fax: (670) 664-2349

Criminal Division
Tel: (670) 664-2366
Fax: (670) 234-7016

ATTORNEY GENERAL OPINION No. 04-04

Date: February 12, 2004

To: Mr. Juan N. Babauta, Governor
Mr. Diego T. Benavente, Lt. Governor
Commonwealth Utilities Corporation Board
Mr. Bernard Villagomez, Deputy Director

From: Ms. Pamela Brown, Attorney General

cc: Mr. Steve Newman, Governor's Legal Counsel
Ms. Maya Kara, Lt. Governor's Legal Counsel
Secretary Juan S. Reyes, Department of Public Works
Ms. Kay Delafield, CUC Legal Counsel
Mr. Alan Barak, Assistant Attorney General
Mr. Chuck Jordan, Governor's Special Assistant for Capital Improvement Project Management
Mr. Robert Schwalbach, Senior Policy Advisor
Ms. Virginia Villagomez, CIP Administrator
Mr. Ed Tenorio, Special Assistant for Management and Budget
Ms. Cathryn Villagomez, Acting Secretary of Finance

Re: Authority of the Governor to Transfer Funds to the U.S. Army Corps of Engineers

---

On January 28, 2004 the Office of the Attorney General received a request for a legal opinion from Mr. Bernard Villagomez, Deputy Director of the Commonwealth Utilities Corporation, concerning the authority of the Governor Juan N. Babauta to transfer contract administration and associated funds for Commonwealth Utilities Projects to the Army Corps of Engineers.

A. QUESTIONS

This request presented two issues for consideration:

1. Did the Governor of the Commonwealth of the Northern Mariana Islands have authority over the funds identified for three Commonwealth Utility Corporation projects so that he could transfer the associated funds and projects to the U.S. Army Corps of Engineers?

2. If the Governor of the Northern Mariana Islands had this authority, did the agreement with the Army Corps of Engineers follow proper procedures for the commitment of public funds?

B. SHORT ANSWER

1. The Governor and the Department of Public Works had appropriate authority to expend or obligate the funds appropriated for implementation of the Tinian, Rota, and Kagman capital improvement projects. The projects in question were funded by a combination of Covenant Section 702 funds received from the United States Government and Commonwealth Development Authority monies. PL-11-119 § 4; PL 12-64 § 4. Both of these funding sources require the CNMI government to designate specific lists of approved capital projects. *Supplemental Agreement* § II(B); 4 CMC § 10453(a), (b). All three of these projects were identified as such within Public Laws that authorized the commitment of respective funds, and named the Department of Public Works as the expenditure authority for implementation of these projects. PL-11-119 § 6(b); PL 12-64 § 7(b). CNMI law provides that an individual with expenditure authority has the ability to expend and obligate funds. 1 CMC § 7401, (a).

2. The transfer of the appropriated funds and administration of the Tinian, Kagman and Rota capital improvement projects to the U.S. Army Corps of Engineers followed all applicable constitutional, statutory, and procurement regulations, and therefore was valid and proper. The Memorandum of Agreement with the Army Corps of Engineers was an intergovernmental agreement, and as such was exempt from CNMI procurement regulations. CNMI Proc. Reg. § 1-105. Furthermore, a separate Memorandum of Agreement concerning transfer of these Projects and associated funds was duly approved by the CUC Executive Director (as the benefiting agency), the Acting Secretary of Finance (as to certification of funds); the Secretary of Public Works (the expenditure authority), the Attorney General (as to legal form and capacity); and the Governor (as Chief Executive Officer). Subsequent to this second agreement, the Executive Director of the CUC and the Governor specifically authorized transfer of funds necessary to begin implementation of the approved projects.

Based on these facts and points of law, the transfer of administration and funding to the Army Corps of Engineers by the Administration complies with all financial and legal requirements of the CNMI. The actions of the Governor in this matter were within his authority. The May 16, 2003 legal opinion written by CUC's former Legal Counsel, concerning this matter is incorrect and should be disregarded.

C. BACKGROUND

In March of 2003 Governor Juan N. Babauta ("Governor") was advised of a $346,000 penalty being assessed against the Commonwealth for non-compliance with U.S. Internal Revenue Code requirements and the possibility of additional fines unless the Commonwealth significantly increased its spending of tax-free bond proceeds. In order to avoid the imposition of additional penalties, the Governor developed a plan to expedite expenditure of these funds by transferring project management and constructions funds of certain capital improvement projects to the United States Army Corp of Engineers. This approach allowed for quick commitment of funds, and thus compliance with United States Internal Revenue expenditure requirements and avoidance of additional penalties.

On April 30, 2003, the Governor sent a communication to Ms. Lorraine Babauta, Executive Director of the Commonwealth Utilities Corporation, informing her of the danger of additional penalties and requesting the transfer of the administration and management of certain CUC projects to the U.S. Army Corps of Engineers ("USACOE"). Initially, the Governor recommended nine CUC projects for transfer. However, after further analysis, it was determined to transfer only three (collectively, the "Projects"):

1.	The Rota Water Well Drilling Reservoir	$ 705,000 ("Rota Project")
2.	Kagman Subdivision Sewer System	$10,000,000 ("Kagman Project")
3.	New Tinian Wastewater Collection System	$ 5,600,000 ("Tinian Project")

This transfer was accomplished through the use of four interrelated legal documents. The principal document that facilitated this transfer of administration and funding was a 1998 Memorandum of Agreement ("MOA") between the Commonwealth of the Northern Mariana Islands ("CNMI") and the USACOE ("First agreement"). This MOA was adopted under the authority of the United States Intergovernmental Cooperation Act, 31 U.S.C. § 6505, and the Chief's Economy Act (collectively, "Acts"). 10 U.S.C. § 3036(d). These Acts allow the Executive branch of the federal government to offer services, 31 U.S.C. § 6505(a), to other government units on a reimbursable basis. 10 USCS § 3036(d).

Additionally, the Army Corp of Engineers prepared a second Memorandum of Agreement ("Second MOA") between affected CNMI agencies for transfer of project management of these three specific Projects. This Second MOA identified the specific input all CNMI agencies would have in identification of Project scope, budget approval, transfer of funds and payment authorization. On October 7 – 8, 2003 the Second MOA was approved and signed by: Ms. Lorraine Babauta, the CUC Executive Director, Ms. Lorraine Babauta; Mr. Juan S. Reyes Secretary of Public Works; Mr. Robert Schrack, Acting Secretary of Finance; Ms. Mary Lou Ada, Executive Director of the Commonwealth Development Authority; Mr. Clyde Lemons Jr. Acting Attorney General; and Governor Juan N Babauta (second agreement).

Subsequent to the approval of the Second MOA, on December 5, 2003, the Army Corps of Engineers presented Ms. Babauta with specific support agreements ("Support Agreements") for the Tinian and Kagman projects, (support agreements three & four). These Support Agreements authorized the transfer of the initial funds to begin the design and construction of

these projects. Ms Babauta signed the $2,652,500 contract transfer for the Tinian project on December 10, 2003, and the $4,184,700 contract transfer for the Kagman project on December 12, 2003.

D. LEGAL ISSUES

The question posed by Mr. Villagomez concerns the control and authority of the Governor over specific funds and the ability to commit these funds to specific purposes. In order to address this question, it must be restructured into specific issues of law. The legal issues raised by Mr. Villagomez are:

1) Did the Governor acting through the Department of Public Works have authority over the funds identified for the Tinian, Rota and Kagman projects?

2) If the Governor and Public Works had this authority, did the agreement with the Army Corps of Engineers follow proper procedures for the commitment of public funds?

I. FIRST LEGAL ISSUE--AUTHORITY OF THE ADMINISTRATION OVER PROJECT FUNDS

The first issue to be considered is whether the Governor and the Department of Public Works ("collectively, the Administration") had authority over the funds that were transferred to the Army Corp of Engineers. Authority over the use of specific government funds is established by examining Constitutional, statutory, and regulatory restrictions on the specific funds in question. *See*, John Cosgrove McBride, ET AL., *Government Contracts*, § 1.10 (2003). In order to determine whether the Administration had the required legal authorization requires identification of the specific funds that were transferred to the USACOE and identification of any conditions placed on the authority to expend these funds.

a. Source of Funds

The first step in determining authority to expend funds is to identify the source of the funds and whether there are any restrictions placed on the use of these funds. *See, Mc Bride* § 1.01. The three projects being examined were funded by a combination of Covenant Section 702 funds and funds generated by sale of bonds by the Commonwealth Development Authority.

i.) Covenant Section 702 Funds

The Covenant places specific restrictions on the use of funds received under Section 702. CNMI Covenant § 702(a)-(c). Under Section 702 of the Covenant, the United States government provides "direct grant assistance to the Commonwealth of the Northern Mariana Islands." *Id.* The Covenant language of Section 702 provides grant assistance for the seven year period, 1976 through 1983. *Id.* However, subsequent agreements have extended this direct federal grant assistance. The three projects we are examining were funded as a result of a supplemental agreement that was adopted in 1992 and provided grant assistance for the period fiscal year 1994 through 2000. *Agreement of the Special Representatives on Future Financial Assistance for the*

Northern Mariana Island, II (1992)("Supplemental Agreement"). This Supplemental Agreement provided $120 million in direct grant assistance during the seven-year period 1994-2000. *Id.* II(A). The Supplemental Agreement placed three restrictions on the authority to expend these funds:

1. **requirement for clear identification of projects and associated financial information**
   The Supplemental Agreement requires that all capital improvement projects funded with Section 702 funds must be clearly identified along with projected cost estimates and the source of all funds necessary for project implementation.

2. **local revenue matching requirement**
   Under the terms of the Supplemental Agreement, all funds provided under Section 702 funds must be matched by local funds. *Supplemental Agreement,* § II(B). Each project funded by Section 702 funds is required to be funded by a combination of Section 702 and local funds. *Supplemental Agreement*, § II(A).

3. **compliance with applicable federal regulations**
   The Supplemental Agreement requires that all federal funds provided under the Agreement are subject to applicable federal grant regulations. *Supplemental Agreement,* III(A); citing, 43 CFR 12(a). Federal grant regulations specify that local procurement procedures are to be followed in the expenditure of these funds. 43 CFR 12.1.

Thus funds received under the Section 702 *Supplemental Agreement* have three restrictions: clear identification of budget; matching revenue; and compliance with procurement regulations

ii.) Funds of the Commonwealth Development Authority

The local funds provided to meet the matching requirement of the Supplemental Agreement are provided through the Commonwealth Development Authority's bond proceeds. These proceeds place additional restrictions on the authority to expend these funds. The Commonwealth Development Authority ("CDA") is a statutorily created agency whose primary purpose is "to aid in the financing of capital improvement projects". 4 CMC § 10102(a)(2). The CDA is authorized to issue general obligation bonds, 4 CMC § 10452, the proceeds of which can be used for a variety of activities, as determined by the legislature. 4 CMC § 10453(a), (b). Thus, specific legislative authorization is required in order to exercise the authority to expend these funds.

b) Summary—Fund Restrictions

In sum, each funding source for the three Projects placed restrictions on the authority to expend. Specifically, the *Supplemental Agreement* required the identification of capital improvement projects, associated budgets and a blending of federal and local funds. Authority to expend CDA funds requires specific legislative approval of funded capital improvement projects. The next step in determining whether the Administration had authority to transfer these funds to

the USACOE is determining whether the CNMI Administration complied with these requirements.

b. Legislative Authority

Legislative authorization to expend funds is generally received through adoption of specific legislation. CNMI Const. art. II § 5(a). The three capital improvement Projects in question (Kagman project, Tinian project, Rota project) were authorized by specific legislation that identified that fulfilled many of the requirements for establishment of expenditure authority. The three capital improvement projects were funded by two separate public laws, PL 12-64 and PL 11-102.

i.) Public Law 12-64

Many of the conditions on the CNMI expenditure authority for the Tinian and Rota Capital Improvement Projects (identification of project, budget, funding requirements and legislative authorization) were met through the adoption of Public Law 12-64. On September 14, 2001 Governor Pedro Tenorio signed House Bill No. 12-374 which became Public Law 12-64. This law is also referred to as the "Capital Improvement Projects Act of 2001" and provided a $50,187,631 capital improvement program which was funded by CDA bond proceeds ($24,013,521); CDA Bond Interest ($1,200,000); and Covenant Section 702 Funding ($24,974,110). PL 12-64 § 7(b).

This fund total was then divided among the three Senatorial Districts, which in turn had the responsibility for identification of specific projects. Among the specific projects identified and included in the 2001 Capital Improvement Plan was the Rota Well Drilling and Reservoir Project by the Second Senatorial District Leadership (Resolution # 2001-06) for $705,000 and the Tinian Waste Water Collection System by the Tinian Legislative Delegation (T.L.D.R. No. 12-20) for $5,600,000. PL 12-64 § 7(b).

In addition to establishing funding levels, Public Law 12-64 established authority for administration of the funded projects. Specifically, PL 12-64 states, "Expenditure authority over funds appropriated pursuant to this section shall be the Secretary of Public Works." PL 12-64 § 7(b).

ii.) Public Law 11-119

Similarly, adoption of Public Law 11-119 fulfilled many of the conditions to expenditure authority associated with the Kagman Capital Improvement Project (identification of project, budget, funding requirements and legislative authorization). On January 25, 2000 Governor Pedro P. Tenorio signed into law House Bill No. 11-496 which became PL 11-119 and funded $41.6 million of capital improvement projects.

This Law appropriated $50,280,000 for capital improvement projects. The funding for these projects came from two sources 1) $30,000,000 from CDA bond anticipation note; 2) $20,800,000 Covenant Section 702 funding. One of the specific projects identified was the

Kagman Homestead – Wastewater System for $10,000,000 for the Third Senatorial District. PL-11-119(5)(c)(3).

This law identified managerial responsibility for the projects by stating that the expenditure authority for the funds appropriated for the Kagman Wastewater Project "shall be the Secretary of the Department of Public Works with concurrence of the Executive Director of Commonwealth Utilities Corporation." PL-11-119 § 6(b).

In sum, the adoption of Public Laws 11-19 and 12-64 fulfilled the requirement for identification of specific capital improvement projects, required financial information, and provision of matching funds necessary for the exercise of CNMI Administration authority to expend specific funds associated with the three capital improvement Projects. *Supplemental Agreement,* III(A). The remaining condition placed on both CDA and Covenant Section 702 funds was compliance with CNMI procurement regulations. CNMI Const. art. X § 8; *Supplemental Agreement,* III(A); 43 CFR 12(a); 43 CFR 12.1.

II. SECOND LEGAL ISSUE--COMPLIANCE WITH CNMI PROCUREMENT REGULATIONS

Compliance with applicable procurement regulations is the essence of the second legal issue posed in our examination and also the final restriction on the authority of the administration to expend the funds associated with the three capital improvement Projects. The CNMI Constitution, Department of Finance regulations, and the Supplemental Agreement require compliance with necessary restrictions in the exercise of spending authority. CNMI Const. art. X § 8; CNMI Proc. Reg. § 1-105; *Supplemental Agreement,* III(A); 43 CFR 12(a); 43 CFR 12.1. All of these restrictions identify the CNMI Procurement Regulations as controlling this expenditure authority.

The CNMI Procurement Regulations ("CNMI Proc. Regs.") establish the proper processes that must be used when expending government funds. CNMI Proc. Reg. § 1-105. Failure to follow these procedures invalidates the authority to expend funds. CNMI Proc. Reg. § 1-107. The CNMI Proc. Regs. establish different procedures to be followed based on the type of expenditure and associated dollar value.

The transfer of administration and funding to the ACOE was an intergovernmental agreement between the CNMI and the United States. The CNMI procurement regulations state: "these regulations apply to every expenditure of funds irrespective of source, including federal assistance monies and Convenant funds. CNMI Proc. Reg. § 1-105. However, the Proc Reg. Provide an exception to this requirement by stating: "these regulations do not apply to contracts between the government and its political subdivisions or other governments." CNMI Proc. Reg. § 1-105. Therefore, compliance with procurement regulation is not a requirement for intergovernmental agreements, and the individual with expenditure authority may enter into these agreements as long as other restrictions on this expenditure authority have been met. Thus, the last condition on the CNMI Administration's authority to enter into agreement with the ACOE and transfer associated funds was met by the Administration; and they had full authority to undertake these activities

E. CONCLUSION

The Governor and the Department of Public Works had appropriate authority to expend or obligate the funds appropriated for implementation of the Tinian, Rota, and Kagman capital improvement projects. The projects in question were funded by a combination of Covenant Section 702 funds received from the United States Government and Community Development Authority monies. PL-11-119 § 4; PL 12-64 § 4. Both of these funding sources require the CNMI government to designate specific lists of approved capital projects. *Supplemental Agreement* § II(B); 4 CMC § 10453(a), (b). All three of these projects were identified in Public Laws, authorized the commitment of respective funds, and named the Department of Public Works as the expenditure authority for implementation of these projects. PL-11-119 § 6(b); PL 12-64 § 7(b). CNMI law provides individual with expenditure authority the ability to expend and obligate funds. 1 CMC § 7401, (a).

Moreover, the transfer of the appropriated funds and administration of the Tinian, Kagman and Rota capital improvement projects to the U.S. Army Corps of Engineers followed all applicable constitutional, statutory, and procurement regulations, and therefore was valid and proper. The Memorandum of Agreement with the Army Corps of Engineers is an intergovernmental agreement, and as such was exempt from CNMI procurement regulations. CNMI Proc. Reg. § 1-105. Furthermore, additional Memorandum of Agreements concerning transfer of these Projects and associated funds was duly approved by the CUC Executive Director (as the benefiting agency), the Acting Secretary of Finance (as to certification of funds); the Secretary of Public Works (the expenditure authority), the Attorney General (as to legal form and capacity); and the Governor (as Chief Executive Officer).

Based on these facts and the controlling law, the transfer of administration and funding to the Army Corps of Engineers by the Administration complies with all financial and legal requirements of the CNMI and the actions of the Governor in this matter were within his authority.

JAMES R. STUMP
Assistant Attorney General

PAMELA BROWN
Attorney General