

Alicia G. Limtiaco
Attorney General



Phillip J. Tydingco
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

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LEGAL MEMORANDUM

Ref: CD 09-1053

TO: Homeland Security Advisor, Guam Homeland Security

FROM: Attorney General *AK*

SUBJECT: Coast Guard and Conditions of Readiness

By email dated October 26, 2009, you have asked this Office whether the Captain of the Port can declare or set "Conditions of Readiness" for the Port of Guam based on the Guam Emergency Response Plan. You have provided us a copy of a memo dated 26 Oct. 2009 issued by the Acting Commander of the Port entitled "USCG Captain of the Port Guam Establishment of Tropical Storm Condition of Readiness 3 for Guam and the Commonwealth of the Northern Marian Islands (CNMI)."

Background

By memorandum, the Acting Captain of the Port as of 3:30 p.m. October 26, 2009, declared that the Port was in Condition of Readiness 3. Specifically, the Acting Captain stated:

In preparation for the arrival of TROPICAL DEPRESSION TD23W, the U.S. Coast Guard Captain of the Port (COTP) Guam has established Tropical Storm Condition of Readiness (COR) 3. TD23w's current maximum sustained winds are 35 knots with gusts up to 45 knots. The current location of TD23w was approximately 400 miles ESE of Guam at 1500, October 26, 2009. Due to the urgent nature of this storm, it is anticipated that COR 2 will be set at 1645.

The Acting Captain of the Port continued by stating the following:

In accordance with Title 33, Code of Federal Regulations (CFR), Part 160.111(c), the COTP hereby orders the following:

- All commercial vessels must prepare to complete cargo operations and depart the Ports of Guam and the CNMI when COR 2 is established. "Dead" ships or vessels/barges unable to put to sea must make a prompt written application to the COTP (see enclosure (1)).

- Upon the setting of COR 2, all commercial vessels greater than or equal to 200 gross tons must depart and all inbound vessels are prohibited from entering.
- Upon the setting of COR 1, the port and marinas will remain closed to incoming traffic and all cargo and bunker operations will be suspended.

On October 26, 2009, the Governor declared Condition of Readiness 4, as of 8:00 p.m. Tropical Depression 23W was located approximately 295 miles from Guam with maximum sustained winds of 35 mph.

On October 27, 2009, Guam remained in Condition of Readiness 4 and as of 8:00 a.m., the storm was upgraded from a tropical depression, to a tropical storm. It was located 90 miles East of Guam, and was supposed to bring maximum sustained winds of 40-45 mph for Guam.

Question Presented

The question presented is whether the Acting Captain of the Port has the legal authority to make a determination of, and establish the levels of Conditions of Readiness. Guam law provides that it is the Governor of Guam who makes the determination regarding the levels of conditions of readiness. Furthermore, Guam law is not preempted by federal law on this particular issue.

Discussion

U.S. law provides that the Coast Guard may take certain actions to protect the navigable waters and the resources therein from harm resulting from vessel or structure damage, destruction, or loss. Specifically, 33 U.S.C.A. §1225(a)(2)(c) provides:

(a) In general

The Secretary¹ may take such action as is necessary to--

(1) prevent damage to, or the destruction of, any bridge or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to such waters; and

(2) protect the navigable waters and the resources therein from harm resulting from vessel or structure damage, destruction, or loss. Such action may include, but need not be limited to--

...

¹ "Secretary" as used in this provision, means the Secretary of the Department in which the Coast Guard is operated. See 33 U.S.C.A. §1222(2).

(C) establishing water or waterfront safety zones, or other measures for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area;

Additionally, 33 C.F.R. §160.111(c) of the Federal Code of Regulations provides in part that:

Each District Commander or Captain of the Port may order a vessel to operate or anchor in the manner directed when:

. . . .

(c) The District Commander or Captain of the Port has determined that such order is justified in the interest of safety by reason of weather, visibility, sea conditions, temporary port congestion, other temporary hazardous circumstances, or the condition of the vessel.

Thus, the Secretary has clear authority to take action to protect the navigable waters from harm resulting from vessel or structure damage, destruction, or loss. The authority to do so may take the form of limiting access and activity as was done in the instant case. Furthermore, the Captain of the Port may order a vessel to operate in a matter directed when such circumstances would be necessary in the interest of safety by reason of weather or sea conditions.

On the other hand, the Governor is charged with determining the Conditions of Readiness. See 10 GCA §65101 which provides in part:

§65101. Purpose.

Because of the existing possibility of the occurrence of disasters or emergencies resulting from enemy attack, sabotage or other hostile action, as well as from the vicissitudes of nature, and in order to insure that preparations of Guam will be adequate to deal with such disasters or emergencies, and generally to provide for the common defense and to protect the public peace, health and safety and to preserve the lives and property of the people of Guam, it is hereby found and declared to be necessary:

(1) to create within the Office of *I Maga'lahaen Guåhan* an Office of Civil Defense for Guam;

(2) to confer upon *I Maga'lahaen Guahan* and at his discretion to delegate to other officials of Guam the emergency powers provided herein;

Title 10 GCA §65102 outlines the scope of the functions given to the Governor and the Office of Civil Defense and states as follows:

§ 65102. Definition and Scope of Activity.

As used in this Chapter the term Civil Defense *shall mean the preparation for the carrying out of all emergency functions*, other than functions for which United States military forces or other Federal agencies are primarily responsible, to prevent, minimize and repair injury and damage resulting from disaster caused by enemy attack, sabotage or other hostile action or by fire, flood, typhoon or other

causes. These functions include, without limitation, fire fighting services, police services, medical and health services, rescue, engineering, *air raid warning services, communications*, radiological, chemical and other special weapons of defense, evacuation of persons from stricken areas, emergency welfare services (civilian war aid), emergency transportation, plant protection, temporary restoration of public utility services and other functions related to civilian protection, *together with all other activities necessary or incidental to the preparation for the carrying out of the foregoing functions.*

(Emphasis added.)

Declaration of a Condition of Readiness would constitute the preparation for carrying out emergency functions to prevent, minimize and repair injury and damage resulting from disaster caused by a typhoon. *See* 10 GCA §65102. The establishment of a Condition of Readiness may be considered akin to an air raid warning service, and is considered communication to the public in order to alert them to the strength of winds from a typhoon, and the time frame in which the typhoon is expected to reach Guam.

In order to address emergency procedures needed in response to a typhoon, the Office of the Governor and Office of Civil Defense have established the Guam Emergency Response Plan. This plan is found in the "Hazard-Specific Annex A, Tropical Cyclones," issued September 2003. This document provides that the Conditions of Readiness are implemented or set by the Governor through the Office of Civil Defense in coordination with the military. Thus, in accordance with 10 GCA §65101(2), and the Guam Emergency Response Plan, it is the Governor who is the person authorized to issue Conditions of Readiness.

Condition 4, which was set by the Governor during this typhoon, means that damaging winds (39 mph sustained winds or higher) impacting the island are possible within 72 hours. While the Governor issued Condition 4, the Acting Captain of the Port, during this time, and without authority, issued Condition 3. Condition 3 is issued when damaging winds impacting the island are possible within 48 hours.

One issue with respect to the authority of the Governor to issue Conditions of Readiness is whether the federal government has preempted the local government from issuing legislation on, or regulating a particular act. Generally, police powers of the states are not superseded by a federal act unless the U.S. Congress showed a clear and manifest purpose. Congressional purpose may be evidenced in several ways. The scheme of the federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominate that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal citations omitted).

In sum, there are two ways in which preemption may occur absent express preemption language.

First, Congress may *implicitly* occupy a field through pervasive regulations that leave no room for states to supplement or through the federally sensitive nature of the particular subject area (e.g. foreign affairs). Second, even if it does not implicitly occupy the field, federal law preempts local regulation where there is an *actual conflict*.

Beveridge v. Lewis, 939 F.2d 859, 862 (9th Cir. 1991).

A review of 33 CFR §160 *et seq.* and 33 USCA §1225 *et seq.* does not reveal any authority whereby the Captain of the Port or any member of the Coast Guard may issue Conditions of Readiness. Furthermore, the regulations are not so pervasive so as to leave no room for the states to supplement the subject area. Finally, there is no conflict between Guam law, the Guam Emergency Response Plan, and Federal law, as federal law does not address Conditions of Readiness. In sum, Guam has not been preempted by federal law in legislating on this particular subject matter.

Conclusion

Pursuant to local law and the Guam Emergency Readiness Plan, the Governor of Guam is tasked with establishing Conditions of Readiness during a typhoon. Federal law has not preempted the local government in establishing such conditions, as the federal law and regulations do not address the establishment of Conditions of Readiness. In this case, the Acting Captain of the Port who is also a Commander in the U.S. Coast Guard does not have the authority to establish Conditions of Readiness on Guam during a typhoon.



J. PATRICK MASON
Deputy Attorney General