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## TRANSMITTAL LETTER

DATE: December 29, 2017

GL# 34-17-135
Speaker Benjamin J.F. Cruz

TO: Senator Regine Biscoe Lee
Legislative Secretary

FROM: **Clare C. Leon Guerrero**
Secretary for Georgette Bello Concepcion, Esq.

DEC 2 9 2017
Time: 11:23 [ ] AM [ ] PM File No. 13-1364
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VIA: ___ Courier _√_ Hand Delivery ___ U.S. Mail __ Pick-Up

We are sending the following:

2017 DEC 29 PM 1:46

**DESCRIPTION**

Enclosed are the following documents:

1. GSWA Transmittal
2. Solid Waste Rules
3. Statement Re: Need for Immediate Action & Supporting Docs.

Thanks,
Clare

Date: _____

By: _____

**Office of the People**
**Senator Régine Biscoe Lee**
**Legislative Secretary**
Date/Time: 12/29/17 @ 10:53am
Initials: Allen

1356

MEMORANDUM

December 29, 2017

TO: Legislative Secretary, 34th Guam Legislature

FROM: Andrew Gayle, Chairperson, Guam Solid Waste Authority Board of Directors

SUBJECT: This is a Transmittal to *I Lehislaturan Guåhan* of EMERGENCY Rules and Regulations pursuant to the Administrative Adjudication Law, 5 GCA § 9302.

In accordance with the provisions of 10 GCA § 51A104 (c) and the Administrative Adjudication Law ("AAL"), 5 GCA § 9302, the Guam Solid Waste Authority ("GSWA") Board of Directors ("Board") proposes the emergency promulgation of the attached Rules regarding its solid waste operations for the reasons stated in the attached "Statement Re. Need for Immediate Action."

cc: Governor of Guam's Legal Counsel, Sandra Cruz Miller, Esq.
Attorney General of Guam, Elizabeth Barrett-Anderson, Esq.

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**Title 28**

**Public Utilities**

**Chapter 6**

**SOLID WASTE MANAGEMENT**

**GUAM SOLID WASTE AUTHORITY**

**Article 1. Preliminary Statements.**

§6101. Authority. 10 GCA § 51A104 (c) authorizes the Guam Solid Waste Authority to establish and adopt rules for the administration of its operations.

§ 6102. Repeal of Title 29 of the Guam Administrative Rules and Regulations, Chapter 2. The rules promulgated under Title 29 of the Guam Administrative Rules and Regulations, Chapter 2 are hereby repealed in their entirety.

§6103. Purpose. The purpose of these rules and regulations are: 1) to protect public health, safety and welfare by reducing or eliminating health hazards, fire hazards, offensive odors and unsightly litter attributable to accumulations of solid wastes; 2) to ensure proper, cost effective and environmentally sound disposal of solid waste; and 3) to lessen the demand for landfill sites, conserve land resources by providing maximum recovery of useable materials of solid waste within limits of economic feasibility.

§ 6104. All municipal solid waste shall be finally disposed of at the Layon Landfill which is a Sub-Title D Landfill, with its operations and management outsourced to a private operator. The private operator shall be responsible for obtaining all permits and monitoring of the Landfill site. The Layon Landfill shall not be open to the general public.

§ 6105. Only waste deemed acceptable waste under the Layon Landfill's operating permit shall be disposed of at the Landfill.

§ 6105. Schedule of Rates and Charges. All rates and charges are available free of charge at GSWA on a "Schedule of Rates and Charges" form. This schedule shall be considered as an appendix to these Rules. A Schedule of Rates and Charges shall be publicized on the GSWA website.

§ 6106. Collection of Solid Wastes.

(a) GSWA provides for the collection of solid waste from single or multi-family residences with four or less units.

(b) Collection and Transport Assignments. GSWA services all 19 villages on Guam, service includes; trash and recyclables collection as well as bulky waste collection for residential contracted customers. GSWA does not collect from commercial or industrial businesses.

(c) Right to Transport Own Residential Waste. Any person may transport residential solid waste acceptable for disposal to any of GSWA's residential trash transfer stations.

(d) Collection Intervals. All single and multi-family residential solid wastes, other than bulky rubbish and recyclables, shall be collected at least once weekly.

(e) Point of Collection – Single/Multi-Family . GSWA designates the point of collection at the time the customer signs up for service.

(f) Cart Placement on Curb. Carts should be placed at point of collection the night before their service day.

(g) Grading, Demolition and Construction Wastes. GSWA will not accept such waste at the Layon Landfill. Generators of such waste will be referred to properly permitted private commercial haulers.

§6107. Definitions.

(a) Collection service means the removal of solid waste from residential facilities with four or less units.

(b) Bulky waste means appliances, mattresses, hot water heaters and other bulky and metallic waste furniture and appliances.

(c) Cart means a container provided by GSWA designed for storage of waste and/or recyclable material.

(d) Dwelling means a building or portion thereof designed exclusively for residential occupancy.

(e) GSWA means the Guam Solid Waste Authority.

(f) Household hazardous waste means products used in the home, garden, garage and hobby shops with hazardous characteristics such as poisonous, combustible, flammable or corrosive.

(g) Grading, Demolition and Construction Waste means waste materials generated from the grading of land or the construction, remodeling or destruction of structures.

(h) Government means the government of Guam, all of its agencies, whether line or autonomous and all public corporations.

(i) Manager means the General Manager of Guam Solid Waste Authority or his/her designated representative.

(j) Multi-family dwelling means a building, or portion thereof, used and/or designed as a residence for no more than four independent (4) dwelling units.

(k) Occupant means any person whom, alone or jointly or severally with others, shall be in actual possession of any dwelling unit, or of any other improved real property, either as owner or as a tenant.

(l) Single family residence means a detached building designed for and/or occupied exclusively by one (1) family.

(m) Solid waste means garbage, unwanted or discarded waste materials in a solid or semi-solid state.

(n) Solid Waste Management means the purposeful, systematic control of the generation , storage, collection, transportation, separation, processing and disposal of solid waste.

(o) Special solid waste or special collection means solid waste, including but not limited to tires, grading, demolition and construction waste, batteries, air conditioners, cars, treated infectious waste, dead animals and offal, sewage sludge, asbestos waste and medical waste that requires special handling and separate fees as designated by the GSWA Manager and in compliance with all local permit requirements, state, and Federal laws and regulations.

**Article 2. Residential Trash Collection and Recycling.**

§6201. Registration and Carts.

(a) Registration. Residents residing in single family residences or multi-family dwellings as defined herein may register for collection service with GSWA by submitting a completed GSWA registration form, paying in full any balance from a previous account and providing proof of residency (rental lease, title or deed, power/water bills) and a valid identification (driver's license, passport or government of Guam issued identification card). Customers are required to draw as detailed a map as possible to the location of their residence. Each new or returning customer will be provided written information as to how to properly participate in GSWA's collection service. Customers will also be provided a large colored paper with a number on it to guide the collection crew to the location at which the carts will be delivered. Upon delivering the carts, the location will be recorded using the Global Position Satellite (GPS) coordinates. Customers may obtain a second cart for an additional cost.

(b) Carts. GSWA shall provide carts to customers occupying single-family residences and multi-family dwellings, as defined herein, upon setting up an account with GSWA. GSWA will only collect solid waste placed in the carts provided by GSWA. Customers must place carts at the designated collection location twelve (12) hours before the day of collection. Customers are responsible for maintaining and cleaning carts.

(c) Waste in Excess of Cart Capacity. If customers have trash exceeding cart capacity, it must be placed in trash bags and tagged with a GSWA excess trash tag. Upon registering for service with GSWA, customers will receive four (4) excess trash tags. Additional tags may be purchased from GSWA. Bagged trash without a tag will not be collected.

(d) Bulky Waste. Residential customers with accounts in good standing may receive up to two (2) free bulky waste collections each calendar year. Bulky waste collection shall be made by appointment only by calling the GSWA Customer Call Center. Bulky waste scheduled for collection shall be placed at the curb in the same general vicinity where they put their carts out for collection. Customers are allowed to place up to five (5) bulky items at the curb for each scheduled collection. Any additional collections in excess of the two (2) allowed herein shall be made for an additional cost as assessed by GSWA. Non-GSWA customers may also make an appointment for bulky waste collection as long as they are located in a residential unit and pay the assessed collection fee.

(e) Grading, Demolition and Construction Waste. Construction and demolition waste are not permitted at the Layon Landfill. GSWA will refer generators of this type of waste to permitted facilities.

(f) Recyclables. If requested a separate recycling cart will be delivered at no additional cost which will be collected twice per month and transported to a permitted recycling processor. These carts will be collected on the same day as the customers' trash carts are collected.

(g) Responsibilities at Point of Collection. Collection crew shall be responsible for the collection of solid waste from the point of collection to the transportation vehicle; provided, the solid waste was stored in compliance with these rules and regulations. Any spillage or displaced solid waste occurring prior to the arrival of the solid waste collectors at the point of collection shall be the responsibility of the customer. Any spillage or displaced litter caused as a result of the duties of the solid waste collectors shall be collected and placed in the transportation vehicle by the solid waste collectors. Any solid waste
collected shall, upon being loaded into transportation equipment, become the property of the collector. Solid waste collectors shall not be required to reach into solid waste containers to remove contents. Authorized containers emptied by solid waste collectors shall be returned to the point of collection.

§6202. Household Hazardous Waste Program.

(a) Disposal of household hazardous waste as defined herein require special handling.

(b) Residential customers may use this program at no charge but are limited to fifteen (15) gallons or one hundred (100) pounds of household hazardous waste items per day.

(c) Only residential customers may utilize this program. Commercial or other entities wishing to dispose of such products will be referred to properly permitted private facilities which provide such services.

(d) Acceptable household hazardous waste can be found on the GSWA website.

§6202. Residential Tipping Fees and Delinquent Accounts.

(a) Tipping fees shall be set pursuant to 10 GCA §§ 51A104(d) and 51A301.

(b) During the first week of each month, GSWA bills for the most recent previous month of service.

(c) All bills are due and payable upon presentation. Payment should be made at financial institutions designated by the GSWA, to authorized representatives or agents.

(d) After thirty (30) days from the billing date, any unpaid balance shall be considered late and shall result in a reminder call to the customer.

(e) Accounts with any unpaid balance after sixty (60) days from the billing date shall be provided written notice notifying customers that service shall be discontinued unless the accounts are brought current within thirty (30) days of the date of said written notice. If accounts are not brought current within the thirty days' written notice, the carts shall be removed from the customer's location.

(f) Restoration of service following collection of the account. Whenever any delinquent customer, whose service has been discontinued pays the sum due plus pre-payment of an additional month of service and a reinstatement fee, service shall be restored and collection will occur at the next regularly scheduled pick up date. Delinquent customers shall be responsible for any reasonable collection costs incurred by GSWA.

(g) Restoration of service following collection of the account by a collection agency. In the event GSWA refers a delinquent account to a collection agency, service shall be restored upon payment of the total sum due, one month's tipping fee and a reinstatement fee.

(h) Unrecovered or unrepairable carts. Customers shall be responsible for the cost of a new cart to replace any unrecovered or unrepairable carts issued to them before service may be restored.

(i) Under certain circumstances customers may seek a reduction in the amount of tipping fees owed. Customers who can show that they have had their service missed substantially during any given month, may request a meeting with the GSWA Manager or designated representative to seek a reduction in charges.

(j) Nonprofit 501(c) organizations, as defined by the U.S. Internal Revenue Code, seeking to perform community-wide cleanups on public property on a non-regular basis may seek from the GSWA Manager or designated representative, a reduction or elimination of the tipping fees for specified containers or hauling vehicles.

(k) Insufficient funds (NSF) checks. GSWA shall be allowed to recover a fee as set forth in the Schedule of Rates and Charges for each instance where a customer tenders payment for GSWA service with an insufficient funds check.

(1) When the GSWA is notified by the customer's bank that there are insufficient funds to cover the check tendered for GSWA service, GSWA shall make a diligent effort to contact the customer, either in person or by telephone, to inform the customer of the inadequate payment. GSWA may, at its discretion, require the customer to make payment in cash, money order, certified check,
or other means which guarantee the customer's payment to GSWA.

(2) A customer who tenders an insufficient check shall in no way be relieved of the obligation to render payment to GSWA under the original terms of the bill nor defer GSWA's provision for termination of service for nonpayment of bills.

(3) When a customer tenders an insufficient check and does not clear the check after being notified by GSWA, GSWA shall debit the account for the written amount plus a service charge as set forth in the Schedule of Rates and Charges.

(l) Customers may pay their bills with credit cards but will be assessed the fee charged by the credit card companies.

(l) Non-permissible reason to deny or terminate service. GSWA may not deny or terminate service for delinquency in payment for services rendered to a prior customer at the premises where service is being provided, except if it can be determined that there is intent between the parties to circumvent the provisions of these regulations, and where the prior customer continues to reside on the premises.

(m) The customer shall be responsible to keep GSWA informed of the customer's most recent billing address. Any bill which is not paid on or before the specified due date after presentation or deposit in the United States Mail shall be deemed delinquent and collection service shall be subject to the provisions of GSWA's discontinuation of service as set forth herein. Failure to receive bills or notices which have been properly placed in the United States Mail shall not prevent such bills from becoming delinquent nor relieve the customer of his obligations therein. Charges for service commence when the customer signs up for collection service, whether used or not.

**Article 3. Commercial Accounts.**

§ 6301. Registration and Collection.

(a) All commercial trash collection and recycling for commercial entities will be handled by properly permitted private commercial haulers.

(b) Private commercial or other non-governmental entities. An individual commercial entity may open an account for its own waste but must be properly permitted by the Guam

Environmental Protection Agency. GSWA does not provide any curbside solid waste collection or recycling services for commercial entities.

(c) Government Agencies. Government agencies are prohibited from disposing of waste at the Residential Transfer Stations or from utilizing the Household Hazardous Waste Program. Wastes from said agencies shall only be accepted at the Hauler-Only Transfer Station or with prior approval from GSWA, be delivered directly to the Layon Landfill. Government of Guam customers will be issued invoices. Mayors shall receive one free load of waste per day at GSWA facilities. Additional loads are charged in accordance with this Chapter.

(d) Registration. Commercial entities may register for collection service with GSWA by submitting a completed GSWA registration form. Commercial accounts must be approved by the GSWA Manager.

(e) Commercial entities are prohibited from disposing solid waste at the Residential Transfer Stations or hazardous material at the Household Waste Facility.

(f) Unless approved by GSWA management to deliver waste to the Layon Landfill, commercial entities are required to use GSWA's Haulers' Only Transfer Station.

(g) Direct deliveries to Layon Landfill by commercial entities are by appointment only approved by GSWA management. If the commercial entity goes directly to the Layon Landfill without a pre-approved appointment, it will be directed to the Hauler-Only Transfer Station and will not be allowed to deposit its material at the Layon Landfill.

(h) Waste generated by the United States military installations located in Guam will be disposed of and assessed fees under this Chapter as said waste is delivered to the Layon Landfill or transfer stations via a private commercial hauler. The cost of service will be billed to Guam Naval Facilities ("NavFac") and paid directly by NavFac.

**§6302. Commercial Tipping Fees and Delinquent Accounts.**

(a) Tipping fees shall be set pursuant to 10 GCA §§ 51A104(d) and 51A301.

(b) During the first week of each month, GSWA bills for the most recent previous month of service.

(c) All bills are due and payable upon presentation. Payment should be made at financial institutions designated by the GSWA, to an authorized representative or agent. Designated financial institutions and authorized representatives or agents shall be listed on customer billings and the GSWA website.

(d) After thirty (30) days from the billing date, any unpaid balance shall be considered late and shall result in a reminder call to the customer.

(e) Accounts with any unpaid balance after sixty (60) days from the billing date shall be provided written notice notifying customers that service shall be discontinued unless the accounts are brought current within thirty (30) days of the date of said written notice. If accounts are not brought current within the thirty days' written notice, the account will enter a thirty (30) day termination period. At the beginning of the thirty (30) day period, a public announcement will be made of the pending termination to allow the customers of the pending termination of their contracted haulers to make other arrangements for the proper disposal of their trash. Termination shall be accomplished by barring the delinquent commercial hauler from using the disposal facilities.

(f) **Restoration of service following collection of delinquent accounts.** Upon payment of all outstanding account balances, along with a bond (OR SECURITY DEPOSIT) equivalent to the twelve (12) months' tipping fees incurred by the delinquent commercial customer and a reinstatement fee, service shall be restored.

(g) Liability of commercial haulers for payment of unpaid bills remains the responsibility of the haulers even is services is not restored. Delinquent commercial haulers shall also be responsible for any reasonable collection costs incurred.

**Article 4. Hauler-Only Transfer Station**.

§ 6401. Commercial haulers and large generators who self-haul must contact GSWA to register for commercial accounts prior to entering the Hauler-Only Transfer Station.

§ 6402. Customers who visit the Hauler-Only Transfer Station, will drive onto the scales, a GSWA employee will retrieve the customer's account, weigh the vehicle and provide the customer with a dump ticket.

§ 6403. An initial tare weight shall be obtained on each vehicle disposing of acceptable waste at the Hauler-Only Transfer Station for the first time.

§ 6404. Tare weight of hauler vehicle. Tare weights will be specific to each vehicle used to deposit trash at the Hauler-Only Transfer Station and will be provided to the customers. These tare weights will be used to determine the weight of each load. The GSWA retains the right to determine a new tare weight for each vehicle at the GSWA's discretion.

§ 6405. Scales. In the event scales are inoperable, haulers shall accept reasonable estimated weight based on historical data.

§ 6406. After obtaining a dump ticket, the hauler vehicle shall be moved to the transfer station where the hauler shall present the dump ticket to the Station operator then proceed to a designated unloading bay and unload the waste onto the tip floor. The Station operator shall sift through the waste for unauthorized material. If any unauthorized material is found in the waste, said material will be returned to the hauler's vehicle. After dumping the waste onto the tip floor, the hauler shall proceed back to the scales to be weighed a second time as to accurately quantify the amount of waste dumped into the Station for disposal.

§ 6407. Acceptable Material. The only waste accepted at the Hauler-Only Transfer Station are non-hazardous solid wastes. Specifically excluded waste are special waste which include: treated infectious waste, dead animals and offal, sewage sludge, asbestos waste (prior written approval of GEPA is required) and treated medical waste.

**Article 5. Radioactive Waste.**

§ 6501. The Hauler-Only Transfer Stations and the Layon Landfill are equipped with radiation detection sensors. Each load delivered to these facilities shall be screened.

§ 6502. In the event radioactive waste is detected in a load, that load will not be accepted.

§ 6503. If the radioactive waste is brought to the facilities by a GSWA vehicle, said waste shall be placed in a secure container until the radiation subsides and material can be properly disposed.

§ 6504. If the radioactive material is brought to the facilities in a private or non-GSWA government vehicle, the waste will not be accepted and the hauler can either 1) have GSWA place the material placed in a secure container until the radiation subsides and the material can be properly disposed for a for a fee (which is charged by properly permitted private entities that accept such waste); or 2) leave the facilities without depositing the material.

# APPENDIX

# GSWA

# RATE SCHEDULE

| Service Code | Description | Unit Factor | Unit | Unit Price |
|---|---|---|---|---|
| **Description:** | **Bulk Collection** | | | |
| BWC3 | BULKY WASTE CHARGE | 1.00 | EA | 25.000 |
| **Description:** | **CHARGE** | | | |
| REACTV | REACTIVATION CHARGE | 0.00 | EA | 50.000 |
| REINST | REINSTATEMENT FEE | 0.00 | EA | 50.000 |
| RSTNCG | RESTORATION CHARGE | 0.00 | EA | 50.000 |
| RTNCHK | RETURN CHECK FEE | 0.00 | EA | 30.000 |
| **Description:** | **Commercial Trash Disposal** | | | |
| 208100 | Commercial Hauler - Large | 1.00 | TON | 171.600 |
| 208106 | Commercial Hauler - Small | 1.00 | TON | 171.600 |
| REINST | Reinstatement Fee | 1.00 | EA | 1000.000 |
| 208130 | MILITARY WASTE DISPOSAL | 1.00 | TON | 156.000 |
| COMMAC | COMMERCIAL ADDITIONAL CHARGE | 1.00 | EA | 50.000 |
| **Description:** | **Govt of Guam Trash Disposal** | | | |
| 208110 | Government of Guam Agency | 1.00 | TON | 171.600 |
| 208119 | Government of Guam Mayor | 1.00 | TON | 0.000 |
| **Description:** | **RECYCLE COLLECTION** | | | |
| 109710 | Replace 95GA Recycle Cart | 1.00 | EA | 74.750 |
| **Description:** | **Residential Trash Collection** | | | |
| 108100 | Collect Trash Monthly 48GA Cart | 1.00 | MO | 30.000 |
| 108110 | Additional Trash Monthly -48GA Cart | 1.00 | MO | 15.000 |
| 108300 | Collect Trash Monthly 95GA Cart | 1.00 | MO | 30.000 |
| 108310 | Additional Trash Monthly -95GA Cart | 1.00 | MO | 15.000 |
| 109610 | Replace 95GA Trash Cart | 1.00 | EA | 74.750 |
| **Description:** | **Taxes** | | | |
| 999997 | Community Benefit Charge (residential) | 1.00 | MO | 0.380 |
| 999998 | Community Benefit Charge (Commerical/Govt) | 1.00 | TON | 3.570 |
| **Description:** | **Trash Tags** | | | |
| 109550 | Trash Tags | 1.00 | EA | 4.000 |
| **Description:** | **Residential Transfer Station Fees** | 1 | EA Load | Based on Volume Estimated by Attendent Min 7.50 / Max 22.50 Recycled cardboard/ glass bottles free when placed in recycling containers. |

Doc. No. 34GL-17-1356.*.

Statement Re. Need for Immediate Action

The Guam Solid Waste Authority ("GSWA") was created under Title 10 of the Guam Code Annotated, Chapter 51A in 2011. Prior to the creation of the GSWA, its predecessor, the Division of Solid Waste, Department of Public Works was put in Receivership pursuant to Court Order of the U.S. District Court, District of Guam dated March 17, 2008. Pursuant to the District Court March 17, 2008 Order, the Court appointed "a receiver to manage, supervise and oversee the Solid Waste Management Division ("SWM") of DPW." March 17, 2008 Order at 1.

In an Order dated September 2, 2011, the court gave the Receiver full control over GSWA to the same extent as he had over the original DPW solid waste division. *See* September 2, 2011 at 9, attached hereto.

In an Order dated May 2, 2016, the Court ordered the Receivership would terminate on December 31, 2017. See May 2, 2016 Order attached hereto. The Board worked diligently toward meeting this transition deadline which included working with the Receiver in determining which existing rules were no longer applicable and/or outdated.

In its most recent Order dated December 1, 2017, the Court criticized the Board for waiting to take any action to address the rules and regulations until six months ago, and for blaming "the Receiver for the delay in its own responsibility for updating the rules and regulations…[as] the promulgation of rules and regulations to govern GSWA operations post-receivership is primarily a legal matter that is better addressed by the Board and its attorney." *See* Dec. 1, 2017 Order at 6-7, attached hereto. However, neither the Board nor its legal counsel are experts in solid waste management.

The Court has repeatedly reminded parties at numerous hearings that the Receiver is the expert in solid waste management, and that such expertise should be tapped upon. Therefore, it was not unreasonable for the Board to seek the Receiver's operational expertise in reviewing GSWA operational rules and regulations. Nor, was it unreasonable to seek such assistance eight (8) months prior to the expected December 31, 2017 transition date.

The Board was repeatedly advised that the rules and regulations were under review; that Chace Anderson, who is employed by the Receiver, sent suggested changes to David Manning and that suggested changes would be forthcoming.

To its detriment, the Board relied upon these representations and was surprised to receive the Receiver's "narrative" via email at 4:43 p.m. on Nov. 27, 2017, the day before a scheduled Court hearing in the U.S. District Court of Guam, stating the rules would need to be completely reworked. The "narrative" was just that – it did not contain any of the promised suggested revisions or draft rules and regulations. *See* true and correct copy of Memo dated November 26,

2017 attached hereto. The rules implemented by the Receiver during the eight or so years the Receiver operated the GSWA needed be obtained from the Receiver, and the Board was under the false impression that it would be forthcoming.

Notwithstanding, at its November 29, 2017 meeting, the Board adopted all policies, rules and regulations put in place by the Receiver since the Receivership commenced regarding commercial haulers, residential customers, banned materials, the collection of bulky items and metallic goods and penalties imposed for late payments. *See* Board Meeting Minutes of November 29, 2017 attached hereto. The Board instructed GSWA's General Manager to work with staff and the Board's legal counsel to put these policies, rules and regulations in a format acceptable to the Legislative Secretary pursuant to 5 GCA § 9305.

The Board's legal counsel in conjunction with management will begin the process of promulgating the permanent rules and regulations February 1, 2018.

In an Order dated December 1, 2017, the Court ordered Receivership be extended at least until June 30, 2018. The December 1, 2017 Order is attached hereto.

On December 15, 2017, the Board filed the Board filed a Motion for Reconsideration with the U.S. District Court of Guam requesting the Court change the June 30, 2018 date on which the Receivership shall end to March 31, 2018. Attached hereto is a copy of the Board's Motion for Reconsideration.

The GSWA Board finds that the adoption of the attached Rules and repeal of Title 29 of the Guam Administrative Rules and Regulations, Chapter 2 in its entirety, is necessary to comply with the District Court of Guam's Order dated December 1, 2017, attached hereto, that "the Board, its legal counsel and the new general manager [] begin drafting and updating the operational rules and regulations." Furthermore, the Board believes adopting the attached rules will assist the Court in making its decision as to whether to change the June 30, 2018 date on which the Receivership shall end to March 31, 2018.

IN THE DISTRICT COURT OF GUAM

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>GOVERNMENT OF GUAM,<br>Defendant. | CIVIL CASE NO. 02-00022<br><br>**ORDER RE: APPOINTMENT OF RECEIVER** |

In the four years since the Consent Decree was entered, which includes the court meeting with the parties and conducting site visits for the last several months, the following observations have become increasingly clear: (1) there has been an historical and present lack of commitment by the island's leaders in addressing this solid waste crisis, (2) the present Governor is committed to coming into compliance with the Consent Decree, and (3) despite the Governor's bests efforts and those of the employees of the Department of Public Works ("DPW"), they alone cannot solve this problem without a concerted effort by all sectors of the Government of Guam. The problem of a highly dysfunctional, largely mismanaged, overly bureaucratic, and politically charged solid waste system, which this Governor has inherited from past administrations, is beyond correction by conventional methods. Accordingly, this court invokes its equity jurisdiction and Rule 70 of the Federal Rules of Civil Procedure and hereby appoints a receiver to manage, supervise and oversee the Solid Waste Management Division ("SWM") of DPW.

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## I. BACKGROUND

The historical background of this case leading up to the entry of the Consent Decree on February 11, 2004, has been presented in several prior orders and need not be reiterated at length here. The court, however, will stress that the Consent Decree was entered into by the parties after extensive arms-length negotiations.

Since the Consent Decree was entered, protracted litigation has resulted from the Government of Guam's noncompliance, which has led to this court's further oversight.[1]/ Concerned over the Government of Guam's lack of progress, on December 6, 2006 the United States filed a Request for a Status Hearing. *See* Docket No. 56. Thereafter it filed a Motion to Enforce Consent Decree, and the Government of Guam filed a Motion to Modify Consent Decree. *See* Docket Nos. 69 and 76. Both motions were filed on January 31, 2007, and were heard by the U.S. Magistrate Judge on March 8, 2007. The Government of Guam requested another four years to complete its duties and responsibilities under the Consent Decree.[2]/ The U.S. Magistrate Judge subsequently recommended that this court deny that request. *See* Docket No. 125. This court adopted that recommendation. *See* Docket No. 177.

In October 2007, this court began conducting monthly status hearings and site visits. *See* Docket No. 146. For its failure to abide by the mandates of the Consent Decree, this court, *inter alia*, imposed stipulated penalties of more than $2.855 million against the Government of Guam.[3]/ *See* Docket No. 177.

More recently, the court invoked the Supremacy Clause, invalidating Section 98 of Public Law 29-19, thereby removing the impediment that officials from the Government of Guam

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[1]/ Since the entry of the Consent Decree, there have been approximately 200 additional pleadings filed dealing with the enforcement of the Consent Decree.

[2]/ The Government of Guam's "revised schedule" proposed that operations at the new landfill in Dandan begin on or about July 30, 2010, with the eventual closure of the Ordot Dump slated for December 16, 2011.

[3]/At the Government of Guam's request, the court stayed the imposition of these penalties in exchange for the Government of Guam's deposit of said funds with the court as proof of its good faith efforts to come into compliance with the Consent Decree.

argued had prohibited them from proceeding with the development of the Dandan landfill. *See* Docket No. 218.

Despite this court's greater involvement and repeated calls for a unified approach in expeditiously resolving the solid waste crisis, there has been minimal progress. The actions undertaken by the Government of Guam were spurred by this court's orders, rather than out of a genuine commitment to meet its responsibilities to its citizenry. At the March 2008 status hearings, the court was again reminded of how little has been done.

## II. Discussion

The court has repeatedly emphasized that time is of the essence. That time has now run out. The U.S. Environmental Protection Agency ("EPA") issued its first administrative order in 1986 directing that the Government of Guam cease discharging leachate from the Ordot Dump. Despite the passage of 22 years, this dump is still in operation with no realistic end in sight. Accordingly, the court must consider drastic remedies to ensure that this islandwide health and environmental hazard does not continue. These remedial measures include the imposition of monetary damages, the appointment of a special master or court monitor, the imposition of a moratorium and the immediate closure of the Ordot Dump, or the appointment of a receiver.

### A. Alternative Measures

The court first considers whether it should impose monetary damages to exact compliance. "Courts of equity have traditionally viewed injuries to real property as incapable of being repaired by an award of money judgments. . . . A threat to public health may render legal remedies inadequate in environmental cases." Jason Feingold, *The Case for Imposing Equitable Receiverships Upon Recalcitrant Polluters*, 12 UCLA J. Envtl. L. & Pol'y 207, 218 (1993) (hereinafter "*Recalcitrant Polluters*").

The environmental threat here cannot be disputed. The Ordot Dump is unlined on its bottom and uncapped at its top, and thus acts like a sponge, retaining rain water and releasing it after it has percolated through the dump and absorbed contaminants. *See* Docket No. 55. Mr. Pankaj Arora, Environmental Engineer for the U.S. EPA, stated that the "[f]ailure to close the Ordot Dump will cause other environmental and health problems in addition to the continued

discharge of leachate. During the DPW's operation of the Ordot Dump, the Dump has continued to pose a vector issue (*i.e.* flies, rodents, and other pests), an odor problem, and a fire hazard."[4]/ Arora Decl. Docket No. 73. The imposition of monetary damages is an inadequate remedy and would not resolve the continuing harm to the environment and the citizens of Guam.

Moreover, given the Government of Guam's limited financial resources, any monetary damages ordered would divert money better spent on Consent Decree projects. Furthermore, this court cannot ignore that a monetary judgment against the Government of Guam, could "eventually be passed on to nonculpable taxpayers." *See* Summary and Comments, 10 Envt'l Law Rep. 10059 (Mar. 1980).

Next, the court considers the appointment of a special master which is authorized by Rule 53 of the Federal Rules of Civil Procedure. At this point in the litigation, however, such an appointment would be a step backwards in terms of complying with the Consent Decree. The special master would oversee compliance with the Consent Decree and upon submission of a "master's report," this court would conduct "appellate-type review." Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVT'L AFF. L. REV. 809, 820 (1991). This additional level of judicial review would likely result in further delay and inaction by the Government of Guam.

The appointment of a special monitor would be even more problematic and subject to challenge. *See, e.g.*, *Hook v. Arizona*, 907 F.Supp. 1326 (D. Ariz 1995) (challenge to appointment of a special monitor to oversee Defendant's compliance with court-ordered remedial measures due to violations of prison inmates' constitutional rights). "In accomplishing their task, monitors generally play a less intrusive role than masters or receivers. Nevertheless, litigants frequently challenge references to monitors." Feldman, *Curbing the Recalcitrant Polluter*, 18 B.C. ENVT'L AFF. L. REV. at 826. Because there is no authority in statute or rule for such an appointment, this court would have to rely solely on its inherent authority to undertake this measure.

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[4]/ From its own site visits, the court is well aware that not only are the surrounding residents exposed to these health hazards, but the DPW employees tasked to work at the Ordot Dump must likewise endure these deplorable conditions.

This court also rejects the imposition of a moratorium to immediately close the Ordot Dump. Although this prohibition would ensure that no future trash is deposited at the Ordot Dump, it would almost certainly guarantee rampant and widespread illegal dumping. Thus, rather than a specific focus on the discharge of pollutants at one site, there would be an imminent threat of leachate draining into the waters throughout the island. This alternative is not realistic and would indeed result in greater harm to the community.

In sum, these alternative remedies would do little to achieve compliance with the Consent Decree. Accordingly, the court must consider the appointment of a Receiver.

**B. AUTHORITY TO APPOINT A RECEIVER**

The court is fully cognizant that the appointment of a receiver to ensure compliance with federal environmental laws is a remedy reluctantly and rarely used. Such an appointment is rooted in traditional notions of an equitable receivership and in Rule 70 of the Federal Rules of Civil Procedure. Environmental receiverships have gained acceptance as a remedial measure by the courts.

**1. TRADITIONAL NOTIONS OF RECEIVERSHIP**

A traditional receivership involved a court in equity appointing a neutral third party to be responsible for holding and protecting specific property, such as real property, estates, and failed businesses. *See generally* Joanne R. Denworth and James Burn, *Moyer's Landfill: Case Study of a Federal Equity Receivership*, 4 TEMPLE ENVTL. L. & TECH. J. 17, 21 (1985). "Receivers historically have been appointed as custodians for property deemed to be in jeopardy of loss from improper diversion or destruction." Feingold, *Recalcitrant Polluters*, 12 UCLA J. ENVTL. L. & POL'Y at 212.

The concept of a receiver has evolved from being simply a custodian of property, and has been used in certain cases as an agent of reform. "The most dramatic and controversial receiverships of the late twentieth century, the institutional reform cases, exemplify the modern exercise of equitable authority to appoint a receiver to address persistent non-compliance with judicial decrees." *Recalcitrant Polluters*, *supra* at 214. A receiver was appointed to implement court-ordered school desegregation in *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976).

More recently, a receiver was appointed to oversee and administer medical services in California's state prison system. *See Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005) (Findings of Fact and Conclusions of Law Re Appointment of Receiver).

These modern remedial receiverships have also arisen in environmental cases. Environmental receiverships found its genesis in 1979, when the City of Detroit, the City's Water and Sewerage Department and the State of Michigan were sued by the United States Environmental Protection Agency for violating the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* *United States v. City of Detroit*, 476 F. Supp. 512 (1979). The parties entered into a consent judgment, but despite limited progress "failed to comply with the judgment of th[e] court and federal law governing water pollution." *Id.* at 520. The court *sua sponte* ordered the appointment of a receiver "to secure compliance with the law and th[e] court's judgment." *Id.* The court recognized that such authority to appoint a receiver was "founded in the broad range of equitable powers available to [a district] court to enforce and effectuate its orders and judgments." *Id.*

Relying on *City of Detroit*, the court in *Town of Greenwich v. Department of Transportation*, 10 Envtl. L. Rep. 20178 (1980), appointed a receiver to take control of the Connecticut Department of Transportation ("DOT") to close down a power plant for violating air pollution regulations promulgated pursuant to the federal Clean Air Act 42 U.S.C. § 7401 *et seq.* As in *City of Detroit*, the parties in *Town of Greenwich* entered into a consent judgment, but it was undisputed that the DOT did not comply and continued to violate the air pollution regulation. *Id.* The court appointed a receiver "to secure compliance with the law and the judgment of th[e] Court." *Id.*

Since *City of Detroit*, other courts have ordered receiverships when environmental laws were implicated and concerns regarding health and safety had been raised. *See, e.g., Ohio ex rel. Brown v. Chem-Dyne Corp.*, Case No. CA-80-03-0021, 1981 WL 5234 (Ohio App. Oct. 28, 2981) (unreported) (affirming the appointment of a receiver over a private company that had unlawfully accumulated hazardous waste that polluted the water, and then violated a stipulated

agreement to cease the pollution); *O'Leary v. Moyer's Landfill, Inc.*, 677 F.Supp. 807, 815 (E.D. Pa. 1988) (holding that the court "retain[ed] ongoing jurisdiction for the duration of the receivership over claims arising with respect to the property in the Receiver's control as a means of protecting the court's own judgment."); *Dep't of Envt'l Prot. v. Emerson*, 563 A.2d 762 (Me. 1989) (affirming the appointment of a receiver to oversee operation of a tire storage and disposal facility and ensure compliance with state laws regarding, *inter alia*, hazardous waste, solid waste management and hazardous clearance); *Ohio ex rel. Celebrezze v. Gibbs*, 573 N.E.2d 62, 67-68 (Ohio 1991) (affirming appointment of a receiver and further holding that state law "enabl[ed] the trial court to exercise its sound jurisdiction to limit or expand a receiver's powers as it deems appropriate."); *United States v. Acadia Woods Add. #2 Sewer Co.*, 41 F. Supp. 2d 632 (W.D. La. 1999) (appointing a receiver to run a wastewater city treatment plant to ensure compliance with federal Clean Water Act).

**2. AUTHORITY TO IMPOSE A RECEIVERSHIP**

A court has authority, as a court in equity, to establish a receivership. Federal courts are invested with jurisdiction over "all cases in law and equity." U.S. CONST. Art. III, § 2. Indeed, one court stated that its authority to appoint a receiver "is founded in the broad range of equitable powers available to this court to enforce and effectuate its orders and judgments." *City of Detroit*, 512 F.Supp. at 520. Other courts have followed *City of Detroit* and relied on equity jurisdiction to appoint federal receivers in cases where there were violations of environmental laws. *E.g.*, *Town of Greenwich*, 10 Envtl. L. Rep. 20178 ("A court appointed Administrator will be selected . . . [and t]he authority of this Court to exercise such broad remedial power is well articulated by Judge Feikens in *[City of Detroit]* and cases cited therein."); *Alisal Water Corp.*, 326 F.Supp. at 1026 (stating that the evidence at trial "suggests powerfully that significant equitable relief, including the appointment of a receiver for certain specified purposes, is warranted here"); *Acadia Woods*, 41 F. Supp. 2d at 633 (appointing a receiver "based upon the broad range of equitable powers available to this Court to enforce and effectuate its orders and judgment").

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Courts have also relied on Rule 70 of the Federal Rules of Civil Procedure, which states: "[I]f a party fails to comply [with a judgment] within the time specified . . . the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court." Fed. R. Civ. P. 70. *See Town of Greenwich*, 10 Envtl. L. Rep. 20178 ("The Administrator . . . is vested with the power and authority provided under Rule 70 of the Federal Rules of Civil Procedure to perform all acts he deems necessary to achieve expeditious compliance . . . . "); *City of Detroit*, 476 F.Supp. at 516 (stating that the receiver was "vested with the power and authority as provided under Rule 70 of the Federal Rules of Civil Procedure to perform any act necessary to achieve expeditious compliance with the Consent Decree.").

Although neither party has moved for the appointment of a receiver, both parties have conceded this court's authority to appoint one. *See* Docket Nos. 147 and 152. At this court's request, both parties submitted the names of individuals and/or firms to serve as potential receiver. *See* Docket Nos. 204 and 206. The court advised the parties that it would interview these candidates, and subsequently met with seven out of the nine nominees.[5]/ These interviews were both educational and enlightening, and further bolsters the court's belief that nothing short of an appointment of a receiver will resolve this crisis.

**C. EVIDENCE IN THIS CASE SUPPORTS APPOINTMENT OF A RECEIVER**

The history of this case demonstrates that the Government of Guam is paralyzed by an institutional and systemic quagmire that has prevented it from effectively complying with the Consent Decree. The court acknowledges that the Government of Guam, and specifically DPW, has recently shown some advancement toward gaining some compliance with the Consent Decree. However, progress is limited and sporadic.

**1. HISTORY OF NONCOMPLIANCE WITH THE MANDATES OF THE CLEAN WATER ACT**

From the court's perspective, and in light of the record of this case, the Government of Guam should not be surprised by the court's resort to this drastic measure. The record reveals

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[5]/ The court attempted to interview all nine candidates. One declined to be interviewed, and the court was unable to make contact with the other.

that the Government of Guam has been on notice of its violation of the Clean Water Act for twenty-two years, when the U.S. EPA issued an Administrative Order in 1986 directing DPW to cease discharge of leachate by May 1, 1987. *See* Lee Decl. Docket No. 75. DPW failed to comply. *Id.* Another Administrative Order was issued in 1990, again requiring the cessation of discharges by June 30, 1992. *See* Complaint, Docket No. 1; Answer, Docket No. 7; Consent Decree, Docket No. 55. Although the U.S. EPA granted an extension until August 15, 1992, DPW again failed to meet this deadline. In 1997, the U.S. EPA amended the 1990 Administrative Order that required DPW to submit a proposed schedule for the design and construction of a cover system to eliminate the discharge of leachate from the Ordot Dump. *See* Complaint, Docket No.1; Lee Decl., Docket No. 75. Although DPW submitted a proposed schedule, it was rejected because it lacked the funding commitment to make the plan credible. *See* Complaint, Docket No.1; Lee Decl., Docket No. 75. Moreover, for two years prior to the filing of the Complaint, the United States and the Government of Guam engaged in intense negotiations, and the United States submitted a proposed consent decree, which was signed by the former governor, the Hon. Carl T.C. Gutierrez, in 2003 just before leaving office. *See* Report and Recommendations, p. 3 n.2, Docket No. 125. In light of the change in administration, further settlement negotiations began with new Government of Guam officials, *id.*, and ultimately, the parties entered into the Consent Decree on February 11, 2004. *See* Docket No. 55. The Consent Decree, herein at issue, was signed by the current governor, Hon. Felix P. Camacho. *See* Consent Decree, Docket No. 55. Yet, more than four years after entering the Consent Decree, compliance with its mandates are minimal: the Ordot Dump remains the island's only means of solid waste disposal; construction of the new landfill at Dandan cannot begin until award of the contract which is expected to occur in five months; the Government of Guam cannot, with any certainty, articulate the means of funding either the closure of the Ordot Dump or the construction of the new landfill; and the Government of Guam has not even decided on the procurement method for the closure of the Ordot Dump or construction of the new landfill.

There are several reasons which lead this court to conclude that the Government of Guam is unable to achieve true compliance with the mandates of the Consent Decree. These reasons

support the necessity of the appointment of a receiver in this case.

**2. LACK OF FINANCIAL COMMITMENT**

Most troubling to this court is the lack of financial commitment evinced by the Government of Guam toward funding Consent Decree projects. The Government of Guam has known it was in violation of the Clean Water Act since 1986, and was ordered, twenty-two years ago, to cease discharge of leachate. *See* Lee Decl. Docket No. 75.

Pursuant to ¶10(a) of the Consent Decree, the Government of Guam was required to submit a financial plan for funding the various Consent Decree projects, which included the funding source or sources and a schedule to secure funds for the capital and operating costs necessary to implement said actions. The Government of Guam's Revised Financial Plan indicated a preference for financing the initial sum of approximately $100 million through revenue bonds. *See* Motion to Enforce Consent Decree, Docket No. 69, at Attachment 14. These revenue bonds would then be re-paid through the steady collection of tipping fees and residential customer rates. Despite such a clear need to improve its collection rates in order to obtain these revenue bonds, Lawrence Perez, the director of DPW, testified that the agency has only increased its residential revenue collection rate from 30% to 50%.

This poor collection rate has been an ongoing problem. For example, back in April 2006, the Public Utilities Commission ("PUC") contracted with the Georgetown Consulting Group ("GCG") to examine whether DPW was capable of efficiently billing and collecting an increased rate revenue which would be required to fund the Government of Guam's obligations under a proposed revenue bond.[6]/ The GCG's August 2006 "Focused Audit Report and Recommendations" found that:

> (a) DPW's current billing and collection system is unable to competently handle even the current rate revenue levels much less the increased burden necessary to support the revenue bonds.

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[6]/ At that time, it was anticipated that the existing rates would have to be increased 400% over the next three years in order to pay for the revenue bonds. *See* Motion to Enforce Consent Decree, Docket No. 69, at Attach. 12.

(b) Substantial remedial action, including operational changes, legislation, regulatory action and rule-making must immediately occur to enable DPW to bill and collect the revenue necessary to fund revenue bond requirements.

(c) If this remedial action does not occur, DPW will not be able to bill and collect the revenues necessary to fund revenue bond obligations and this burden would fall, in part, on the General Fund. Regulatory principles could obstruct the PUC (i) from awarding rate increases to compensate for DPW billing and collection mismanagement; and (ii) from increasing SWM residential customer rates unless the quality of residential service is dramatically improved.

*See* Motion to Enforce Consent Decree, Docket No. 69, at Attach. 12.

Because of GCG's findings regarding DPW's poor residential service and billing and collection mismanagement, the PUC would not approve any increase in rates. Despite such findings by GCG, DPW has not made any concerted effort to improve its billing practices. A year later in August 2007, the Guam Public Auditor conducted a Public Auditor's Performance Audit and again problems concerning collection procedures were identified. The Public Auditor estimated that $4 million in government revenues were lost due to thousands of residential customers who may not have been billed or had not been provided services. Regardless of the findings by the GCG in 2006 and the Public Auditor in 2007, little has been done in terms of improving DPW's collections. It is disconcerting that DPW's collection rates have not improved at a more significant level, particularly when financial resources are so limited.

The lack of a consistent revenue stream from collections is further exacerbated by the Guam Legislature's failure to provide funding for any of the Consent Decree projects. At the status hearings last week, Mr. Perez testified that DPW prepares two budget proposals annually. The first is an operating budget and the second is a supplemental budget, which he represented was a "wish list" of "unfunded mandates" that included Consent Decree projects. No funding has been provided by the Guam Legislature for the Consent Decree projects. In fact, he stated that the only funding for Consent Decree projects are from grants received and monies the Governor reallocates using his transfer authority. Without a commitment to fund the necessary projects, there is little chance that the closing of the Ordot Dump and opening of the landfill at Dandan will ever occur.

### 3. Lack of Cooperation Between the Executive and Legislative Branches

The court finds that there has been an historical failure of the leadership of the Government of Guam to respond to the solid waste crisis. The past and current leaders have failed to take the bold measures necessary to protect the lives and welfare of the citizens of Guam. The record in this case reveals that the Executive and Legislative Branches, in several instances, have not been able to work cooperatively to ensure compliance with the Consent Decree.

The Legislature has not only failed to provide any funding for Consent Decree projects, but it has actively prohibited the expenditure of monies toward development of the landfill at the Dandan site. For example, the Legislature enacted Section 98 of Guam Public Law 29-19 ("Public Law 29-19"), which essentially prohibited the expenditures of funds for any landfill site that the Government of Guam did not yet own. Because the condemnation proceedings in Dandan had not begun, this public law prevented all expenditures that would have facilitated the opening of Dandan.[7]/ Therefore, the completion of a Hydrogeological Report on the Dandan site by Mr. Tor Gudmundsen was significantly delayed because of lack of payment. The actions of the Legislature left the court with no other alternative but to invoke the Supremacy Clause to strike down Section 98 of Public Law 29-19 as a means to enforce compliance with the mandates of the Consent Decree. *See* Docket No. 188.

Additionally, the court ordered the Government of Guam to pay $2.855 million in stipulated penalties by January 24, 2008.[8]/ The Governor used his transfer authority to take money from the budget of the Guam Public School System so that said funds could be deposited with the court. Thereafter, the Legislature, rather than collaborate with the Governor on how to

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[7]/ This court notes that the Government of Guam did not initiate condemnation proceedings until this court imposed a deadline of January 24, 2008. Counsel for the Government of Guam represented to this court that the condemnation complaint was filed that day in the Superior Court of Guam.

[8]/ *See supra,* note 3.

resolve the government's financial woes, chastised the Governor for using his transfer authority in such a manner.

The Governor's transfer authority is an insufficient means of funding the Consent Decree projects. Guam's solid waste crisis can only be resolved with the concerted efforts of both the executive and legislative branches. This court has repeatedly requested that both branches work together and speak with a united voice in finding a solution to this problem so that this court would not have to resort to appointing a receiver. It is clear, unfortunately, that the court's pleas for cooperation have fallen on deaf ears.

**4. Lack of Tangible Progress**

The lack of funding is only one of DPW's problems preventing it from completing the Consent Decree projects. There is a systemic inertia plaguing the Government of Guam. The Public Auditor made a number of recommendations in her August 2007 audit that do not necessarily require the expenditure of funds. For example, the Public Auditor recommended that the Government of Guam enter into service contract agreements with the commercial haulers. Despite having several months to draft these agreements, the Government of Guam is still working on them and is hoping to get them finished "soon."

Additionally, the road design work has been completed for over a year and half, there have been no requests for proposals or invitations to bid put out and no work done in this regard.[9/] Mr. Perez testified that because of the Government of Guam's financial constraints, it is DPW's preference to enter into a private public partnership where a private company would fund the project and provide a "Design, Build, Operate" bid as to the combined road work and the building and operation of the new landfill. However, this possibility has been offered in the past when the court has asked how the Government of Guam was going to meet the mandates under the Consent Decree. *See* Docket No. 67. Despite these representations, no bid has been

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[9/] In fact, during the hearing last week, Mr. Perez testified that DPW had not decided on a precise procurement process to be used, whether an invitation to bid or request for proposal. At this late juncture, it is troubling that DPW is undecided as how to best proceed.

forthcoming and according to the timeline set forth by TG Engineering, a bid will not be ready for several months. *See* Docket No. 230 Ex. B. The lack of progress in this regard is alarming in light of the fact that the Government of Guam's own experts have stated that the "opening of a new landfill should be expedited and be no later than the end of 2009." *See* Government of Guam's Reply to United States' Comments on Action Report, Docket No. 230, at 9. The court is seriously concerned that the Government of Guam will not be able to meet this deadline and the Ordot Dump will run out of airspace before the new landfill is opened.[10]/

The condemnation of property in Dandan has not been perfected. At the hearing last week, counsel for the Government of Guam represented that not all parties in interest have been served with the condemnation complaint. Furthermore, a new appraisal of the property will be necessary because of the lapse in time in initiating the condemnation proceeding.

Only recently has DPW transferred a civil engineer to the SWM division, yet it is unclear exactly what type of assistance he will be able to provide in furtherance of complying with the Consent Decree, especially since he is neither a professional engineer, nor does he have extensive experience in solid waste management.

These reasons, among many, highlight the failings of the Government of Guam in complying with the mandates of the Consent Decree. There is no single root cause for the solid waste crisis facing the island. As in any case dealing with the Government of Guam, circumstances are sometimes dictated by a combination of individual effort (or lack thereof) and bureaucratic and political forces. In this instance, it is clear that there has been an historical lack of leadership, planning and vision by the island's leaders.

## III. CONCLUSION

In light of all of the above, the court concludes that the relevant factors and considerations weigh heavily in favor of the appointment of a Receiver. While the court

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[10]/ The actual amount of remaining airspace is disputed. Testimony has been presented that the available airspace ranges anywhere from 0 days up to 720 days. The court is unsure of the actual figure, but notes that the Government of Guam bases its 720 day calculation on estimates and assumptions. *See* Docket No. 230. This kind of uncertainty needlessly creates public alarm.

recognizes the level of commitment shown by Governor Felix P. Camacho and appreciates the hard work and limited progress of DPW in the last few months, the Government of Guam lacks the resources, experienced personnel, and necessary support to comply with the Consent Decree on its own. Governor Camacho expressed his frustration when he compared the Government of Guam to a rocking horse: "There is much motion, but no progress." The court concurs with the Governor's characterization of the situation, but cannot accept the lack of forward movement.

Accordingly, the court hereby appoints as Receiver Gershman, Brickner & Bratton, Inc. ("GBB") of Fairfax, Virginia, a solid waste management consulting firm included in the Government of Guam's list of potential receivers. This appointment is, without a doubt, one of the most monumental decisions this court has ever made. It is not made lightly or with relish. Rather, this decision was reached after much deliberation and upon consideration of the complete record in this case.

Therefore, having conducted monthly hearings and site visits in the above-entitled matter to determine the progress made toward complying with the Consent Decree; having considered all the submissions heretofore filed by the parties; in light of the Government of Guam's lengthy history in failing to comply with the Consent Decree and violating the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; and because of the failure of less drastic remedies to secure compliance with the Clean Water Act:

**IT IS HEREBY ORDERED** that under the broad range of equitable powers available to this court to enforce and effectuate its orders and judgment and Rule 70 of the Federal Rules of Civil Procedure, GBB, acting by and through its Special Principal Associate David L. Manning, is appointed as the Receiver and is vested with the power and authority provided under Rule 70 to perform all acts it deems necessary to achieve expeditious compliance with the Consent Decree.

**A. RECEIVER'S AUTHORITY/DUTIES**

1. **IT IS ORDERED** that the Receiver shall have full power and authority to enforce the terms of the Consent Decree, and assume all of the responsibilities, functions, duties, powers and authority of the Solid Waste Management Division of the Department of Public Works, and any and all departments, or other divisions of the Department of Public Works insofar as they affect

the Government of Guam's compliance with the Consent Decree.

2. **IT IS FURTHER ORDERED** that the Receiver shall have the authority required or necessary for the complete management and control of the Consent Decree projects, including but not limited to:

(a) The supervision of all of Government of Guam's employees associated with the Consent Decree projects;

(b) The performance of existing contracts;

(c) The entering into future contracts deemed necessary. In awarding any future contracts, the Receiver shall follow the procedures required in Guam's statutes and regulations, unless, in the best judgment of the Receiver, such compliance would unreasonably delay the progress in meeting the mandates of the Consent Decree;

(d) The hiring of all such consultants, professionals, contractors, engineering firms or counsel which the Receiver deems necessary for the performance of administrative, financial advisory, legal, accounting, engineering, construction, and operations services;

(e) The facilitation of financing and/or borrowing of such funds necessary to carry out the duties relating to the Consent Decree as set forth in the Government of Guam's Revised Financial Plan. If, in the best judgment of the Receiver, the Revised Financial Plan fails to provide the means or methods of financing necessary or would unreasonably delay the progress in meeting the mandates of the Consent Decree, the Receiver is authorized to modify the Plan to provide for alternative means or methods of debt financing it deems appropriate;

(f) The application to the Consolidated Commission on Utilities for rate increases for residential waste collection services and/or tipping fees on a temporary or permanent basis, as appropriate, unless, in the best judgment of the Receiver, such action would unreasonably delay the progress in meeting the mandates of the Consent Decree;

(g) The full and complete access to the staff, documents, books, records, electronic databases and facilities of any and all Government of Guam departments or divisions of the Department of Public Works and to make such employees and items available to any consultants, accountants, attorneys or other such persons employed by the Receiver;

(h) The full and complete access to the documents, books, records, electronic databases held by any Government of Guam entity that has in its custody records deemed necessary by the Receiver to ensure compliance with the Consent Decree; and

(i) Consultation with the United States Environmental Protection Agency with respect to any aspect of complying with the Consent Decree, and to secure technical advice or assistance from such agency for the purpose of assuring compliance with the Clean Water Act and all other applicable laws and regulations.

**B. TERMS OF APPOINTMENT**

1. This appointment shall be for the period necessary to achieve compliance with the Consent Decree, unless:

(a) The Receiver recommends termination of this Order as no longer necessary, or modification thereof, and said termination or modification is accepted by this court;

(b) The Receiver requests to be relieved and such request is approved by this court;

(c) This Order is otherwise modified or terminated by this court.

2. The Receiver may, at any time, apply to this court for instructions and/or modification of this Order, and may seek instructions as to whether funds should be expended for a particular purpose.

3. The Receiver shall submit quarterly reports to this court regarding the progress made toward compliance with the Consent Decree.

4. The Receiver is responsible solely to this court. The Receiver shall not be personally liable for any act done in compliance with this Order. No suit shall be filed against the Receiver

without the consent of the court.

**C. REMUNERATION**

1. **IT IS HEREBY ORDERED** that the Receiver shall receive remuneration at the rates set forth in the attachment hereto and in the following manner:

(a) On or before the 7th day of each month, the Receiver shall file and serve the court, with a copy to the Government of Guam, a summary of time expended and expenses incurred during the month immediately preceding, along with a billing statement and request for compensation. The court shall review the request for compensation for reasonableness by the 20th of each month, and shall direct that payment be made to the Receiver for all compensation and expenses incurred and found by the court to be reasonable by the 25th of each month.

(b) Payments shall be limited to 90% percent of fees and 100% percent of all expenses deemed reasonable. Ten (10%) percent of fees shall be held in trust accruing interest at prevailing rates for trust accounts to the credit of the Receiver and shall be payable upon completion of the project.

2. The Receiver shall file an application for the payment of fees to any consultant and/or professional hired as authorized herein, such as accountants, legal counsel, and others hired to assist in the performance of administrative duties. Such professional fees shall be paid by the same procedures as set forth for the payment of the Receiver. However, with respect to 10% retainage held in trust, the Receiver may request its release to other consultants and/or professionals hired at the time their work is completed.

3. Defendant shall be responsible for compensation and expenses of the Receiver and of any and all persons or entities employed or contracted by the Receiver in carrying out the provisions of this Order.

**D. ORDERS AS REGARD TO OTHER PARTIES/ENTITIES**

1. **IT IS HEREBY ORDERED** that the parties, including but not limited to the United States Environmental Protection Agency, Department of Public Works and Guam Environmental Protection Agency, shall use their best efforts to assist the Receiver in the performance of its

duties. Furthermore, the parties shall cooperate with, and assist, the Receiver to the extent necessary and appropriate to permit the Receiver to carry out its responsibilities under this Order.

2. **IT IS FURTHER ORDERED** that the parties, including but not limited to the United States Environmental Protection Agency, Department of Public Works and Guam Environmental Protection Agency, are to immediately comply with this Order and are enjoined from interfering in any manner, or from failing to cooperate either directly or indirectly, with the Receiver in the performance of its functions and duties.

**E. CONTINUING JURISDICTION**

1. This court retains specific and continuing jurisdiction to enforce the provisions of this Order, and to enter such further orders to effectuate the purposes of the Receivership and compliance with the Consent Decree.

2. This court retains jurisdiction to enable any party, subject to this Order, to apply to this court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Order, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

In conclusion, the appointment of GBB as Receiver is a positive step in moving the Government of Guam forward. The Receiver has extensive experience in solid waste management operations and will ensure compliance with the Consent Decree and the Clean Water Act, thus, protecting the natural resources for future generations. It is the court's hope that the Governor and the new Speaker of the Guam Legislature, the Hon. Judith Won Pat, will cooperate with this court's order to see that the Ordot Dump crisis is resolved as expeditiously as possible.

**IT IS SO ORDERED.**

**/s/ Frances M. Tydingco-Gatewood**
**Chief Judge**
**Dated: Mar 17, 2008**

GBB
SOLID WASTE
MANAGEMENT
CONSULTANTS

March 15, 2008

Honorable Frances Tydingco-Gatewood
Chief Judge
District Court of Guam
520 West Soledad Avenue
Hagåtña, Guam 96910

Re: Letter of Engagement for Services Pursuant to Designation as Receiver

Dear Judge Tydingco-Gatewood:

The purpose of the letter is to confirm the designation of Gershman, Brickner & Bratton, Inc. (GBB) as Receiver pursuant to your Court Order that you have told us will be dated March 17, 2008.

GBB herein designates David L. Manning to be signatory for GBB as Receiver. He would sign correspondence as "David L. Manning, as Receiver Gershman, Brickner & Bratton, Inc. for the United States District Court Territory of Guam." I will be GBB's overall Officer-in-Charge of this engagement. Other GBB officers, staff, and associates will be utilized as the activities dictate. In particular, Chace Anderson, GBB Vice President, will play a significant role.

Approach to this Engagement

In undertaking this assignment, our initial approach will be along the following lines:

1. Review all information in this matter on file with the Court.

2. Make an initial determination of other information needed by the Receivership and prepare a request for the information to be sent to the Defendant.

3. Conduct a visit and associated meetings in Guam for the purpose of:

   a. Becoming familiar with the Solid Waste Management Division, its staff, management, infrastructure, operations, and current set of consultants and contractors;
   b. Establishing offices in facilities provided by the Court and meeting with Court officials who are involved in this matter;
   c. Meeting with Guam Government officials and other stakeholders, including the U.S.E.P.A. Regional office officials who have relevance to accomplishing the objectives in the Consent Decree; and
   d. Visiting the site of the Ordot Dump and the proposed site(s) for the new landfill.

Gershman, Brickner & Bratton, Inc.
8550 Arlington Boulevard, Suite 203
Fairfax, Virginia 22031-4620
(703) 573-5800 FAX (703) 698-1306
E-MAIL: gbb@gbbinc.com
Printed on recycled paper


Doc. No. 34GL-17-1356.*.

3/15/08

4. Prepare a draft Plan of Action and submit it to the Court and other parties as directed by the Court for review and comment.

5. Finalize the Plan of Action and submit it to the Court for approval.

6. Upon approval of the Court, distribute the Plan of Action throughout the Guam Government to appropriate parties and to other parties as necessary, conducting meetings with these individuals and groups as necessary to explain the Plan of Action.

7. Start implementation of the Plan of Action, reporting as necessary to the Court, and updating and issuing addenda to the Plan of Action as is necessary.

During the course of our work, GBB will plan, coordinate, and report on the activities among its staff and others who are involved from the Defendant and other parties as appropriate. GBB will keep the Court apprised of anticipated work activities, staffing, scheduling, and budgeting as they occur, including invoicing and activities reporting as outlined in the Court's Order. GBB will assess specific requirements and identify appropriate resources to be applied and update its work plan, schedule and budget estimates for the work required.

The effective commencement date of our services will be March 17, 2008.

Invoicing and Reporting

Attached to this letter is a compensation rate schedule that will be the basis for charges relevant to this matter. Because travel time to and from Guam will be significant, staff travelling to and from Guam will be allowed to charge up to one-half of their "gate-to-gate" travel time as billable time to this matter. Also, prior to our first trip to Guam, we will submit to the Court for review and approval our plan for our room and board arrangements when on Guam. In addition to our fees and the cost of our room and board arrangements, we will incur some other expenses in connection with our work for the Court in this matter. While these costs could be estimated and added to our fees, we are concerned that such an approach would add more cost to the Receivership than is necessary. Therefore, we prefer to exclude these expenses from our fees and develop a plan that will assure that we cover only our actual and reasonable expenses. We will also submit our plan for these expenses to the Court for review and approval prior to our first trip to Guam. We look forward to receiving guidance from you in this regard.

It is our understanding that the Court has available funds in the amount of approximately $2.8 million that can be used to cover the expenses of the Receivership and that the Court will assure that these funds are replenished from time to time as is necessary to assure that the Receivership is able to successfully achieve its purpose of full compliance with the Consent Decree in this matter.

Invoicing and activities reporting will be done formally on a monthly basis per the requirements of the Court Order. More frequent contact will be made with the Court either by phone, in person, or by e-mail as the situation requires.



3/14/08

We look forward to this assignment and in achieving the objectives of the Court to bring the Guam Government in compliance with the Consent Decree. If there are any questions, please do not hesitate to contact me.

Sincerely,

GERSHMAN, BRICKNER & BRATTON, INC.

Harvey W. Gershman
President

Attachment

cc: David Manning, GBB
Chace Anderson, GBB



3/15/08

## ATTACHMENT

## GERSHMAN, BRICKNER & BRATTON, INC.
## COMPENSATION RATE AND FEE SCHEDULE (1, 2)
## FOR RECEIVER ASSIGNMENT PER COURT ORDER DATED MARCH 17, 2008

| POSITION | ($ PER HOUR) |
|---|---|
| President (Gershman) | 250.00 |
| Special Principal Associate (Manning) | 250.00 |
| Executive Vice President (Brickner) | 225.00 |
| Sr. Vice President (Bratton) | 210.00 |
| Vice President (Anderson, Bernheisel) | 185.00 |
| Principal Associate/Principal Engineer | 165.00 |
| Sr. Project Manager/Sr. Project Engineer/ Sr. Associate Engineer | 160.00 |
| Project Manager/Sr. Associate | 140.00 |
| Project Engineer/Sr. Consultant/Support Director | 125.00 |
| Consultant II/Engineer II/Contract Administrator | 105.00 |
| Consultant I/Engineer I | 85.00 |
| Support Manager | 65.00 |
| Administrative Secretary/Word Processor/ Editor/Staff Accountant | 60.00 |
| Clerical/Support Staff/Research Assistant/Graphics Coordinator | 45.00 |

(1) Effective January 1, 2008, subject to 4 percent annual increase as of January 1, 2009.
(2) For payments not received within 30 days of invoicing date, interest charge of 1.00 % per month will be applied.

3/15/08

**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF GUAM**

| | |
|---|---|
| **UNITED STATES OF AMERICA,**<br>Plaintiff,<br>vs.<br>**GOVERNMENT OF GUAM,**<br>Defendant. | Civil Case No. 02-00022<br><br>**ORDER RE: QUARTERLY STATUS HEARING; OFFICIAL CLOSURE OF ORDOT DUMP; AND OFFICIAL OPENING OF LAYON LANDFILL** |

This matter came before the court on August 31, 2011, for a quarterly status hearing. At that time, the Receiver, Gershman, Brickner & Bratton, Inc. ("the Receiver") provided an update on the progress of Consent Decree projects and on the operations of the Solid Waste Management Division ("SWMD"). *See* Dkt. No. 794.

After approximately three years and five months since its appointment, the Receiver has effectively dealt with many challenges to reach two major milestones under the Consent Decree—the closing of the Ordot Dump and the opening of the Layon Landfill. The court commends the Receiver for its efforts and the tremendous progress it has made thus far. To illustrate how much progress has been made, the court provides a brief background of the case before reaching the substance of the Quarterly Report.

## I. BACKGROUND

### A. THE ORDOT DUMP

The starting date for the use of the Ordot site as a dump is not documented. However, it is known that the Ordot Dump was in use during World War II. After the liberation of Guam, the

United States Navy continued to use the site as a disposal area. The U.S. Navy transferred ownership of the Ordot Dump to the Government of Guam in 1950.

The Government of Guam has owned and operated the dump since the 1950 transfer. *See* Dkt. No. 218 at 1. When the dump was started, there were no environmental safeguards implemented to ensure against possible contamination; most notably, the dump is unlined at its bottom and uncapped at its top. *Id.* at 2. As a result of this, the dump acts like a sponge, absorbing rain water and releasing it after it has percolated through the dump and picked up contaminants. *Id.*

Although it reached capacity in 1986, the dump continued to receive virtually all of the industrial and municipal waste from the civilian population of Guam. *Id.* at 1. As a result, what was once a valley is now a 341-foot mountain of trash. *Id.*

**B. CLEAN WATER ACT VIOLATIONS**

The Ordot Dump has had a long history of operational and environmental problems. In 1982, the dump was declared a Superfund site by the U.S. EPA. *See* Dkt. No. 49 at 3. In 1986, the United States Environmental Protection Agency ("U.S. EPA") issued an administrative order under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, directing the Guam Department of Public Works ("DPW") to cease the discharge of leachate from the Ordot Dump by May 1, 1987; DPW failed to comply with this order. *See* Dkt. No. 55 at ¶ 4. U.S. EPA then made several more attempts to deal with the problem administratively, but these attempts also proved fruitless and leachate continued to be discharged from the dump. *See* Dkt. No. 218 at 2.

As a last resort, the United States initiated the instant action on August 7, 2002. *See* Dkt. No. 1. In the complaint, the United States sought an injunction that would require the Government of Guam to comply with the CWA, and prayed for over $50 million in civil penalties from the Government of Guam for the violations of the CWA. *See id* at 6. Ultimately, by filing the suit, the United States wanted to avoid further environmental degradation of Guam by forcing the Government of Guam to close the Ordot Dump and open a new municipal solid waste landfill ("MSWLF") that complied with federal environmental laws and regulations. Dkt.

No. 218 at 3.

## C. THE CONSENT DECREE

Beginning in November 2002, the parties participated in settlement conferences facilitated by the court. *Id.* In December 2003, after approximately one year of negotiating, the parties lodged the Consent Decree with the court. *Id.* On February 11, 2004, following publication on the Federal Register and a period of public comment, the court approved and entered the Consent Decree. *See* Dkt. No. 55.

Among other things, the Consent Decree established a schedule for the closure of the Ordot Dump and the construction and operation of a new, CWA-compliant MSWLF. *See id.* The Government of Guam, however, consistently failed to meet the deadlines set forth in the Consent Decree. *See* Dkt. No. 218 at 4. Most significantly, the Government of Guam did not meet the deadline for the closure of the Ordot Dump or the deadlines for submitting plans for the new Layon Landfill. *Id.*; Dkt. No. 56 at 7.

The lack of progress was partly attributable to Section 98 of Guam Public Law 29-19, which was passed by the Legislature in September 2007. *See* Dkt. No. 218 at 4. Essentially, Section 98 prohibited the expenditure of funds for any landfill site that the Government of Guam did not own. As a result, the Government of Guam could not purchase the Layon land for the new MSWLF or conduct the requisite studies for the new site. *See id.* The court held that Section 98 was unconstitutional and ordered the Government of Guam to allocate funds to condemn the Layon land and for necessary site preparation. *See id.* at 8.

However, despite the removal of the impeding legislation, the Government of Guam continued to make only minimal progress on the Consent Decree. *See* Dkt. No. 239 at 2–3.

## D. THE APPOINTMENT OF THE RECEIVER

In March 2008, the court found that "there [was] an historical . . . lack of commitment by the island's leaders in addressing [the] solid waste crisis," and that "[t]he problem of a highly dysfunctional, largely mismanaged, overly bureaucratic, and politically charged solid waste

system, . . . [was] beyond correction by conventional methods." Dkt. No. 239 at 1. Accordingly, after much deliberation and upon consideration of the complete record in this case, the court appointed the Receiver to manage SWMD and vested it with the power and authority to enforce the terms of the Consent Decree. *See id.* at 1, 15.

**E. THE INITIAL CONDITION OF SWMD AND OTHER CHALLENGES**

In April 2008, when the Receiver took over the reigns of SWMD, it was plagued by a host of operational and financial problems. *See* Dkt. No. 272 at 4. To illustrate, SWMD:

- had only one working trash truck to collect nine daily routes;
- rented two trash trucks from the private sector that often failed mechanically;
- operated a three-shift day during which the sole working trash truck operated nearly around the clock in order to collect customers' trash;
- had no reliable, accurate way to calculate the tonnage of trash disposed at the Ordot Dump;
- spent as much as $11,000 a day[—that is, approximately $4 million on an annualized basis—]to furnish rental equipment and contract operators because its equipment was broken,;
- was organizationally hamstrung by the poor credit management . . . ; and
- had exceptionally low employee morale, poor working conditions, and minimal accountability.

Dkt. No. 538-1 at 10. Additionally, SWMD's billing system was unreliable, and for years, SWMD collected the trash of over 4,000 nonpaying customers for free. *See* Dkt. No. 557-1 at 13.

Beyond administrative matters, the Receiver needed to obtain the requisite environmental permits and zoning approvals to begin the Layon Landfill construction and find a way to increase the life span of the Ordot Dump, which was on course to reach its maximum capacity by September 2009. *See* Dkt. No. 250-1 at 14–15.

The Receiver also faced many external obstacles. The court recalls the following challenges:

- The uncertainty of the Government of Guam's legal title to the Layon Landfill site and difficulty obtaining the requisite zoning approvals (*see* Dkt. Nos. 270 at 1; 272

at 5);

- The Government of Guam's prolonged inability to pass a workable funding plan, followed by its noncompliance with the court's order to make payments to fund the Consent Decree projects (*see e.g.*, Dkt. Nos. 312 at 3; 330; 340; 372; 388; 403);
- Efforts to interfere with Guam Environmental Protection Agency's compliance with the court-ordered permitting process for the Layon Landfill (*see* Dkt. Nos. 449, 450);
- The discovery of a colony of the Guam Tree Snail (*Partula radiolata*) at the Ylig Bridge project site and the accompanying measures needed to relocate the locally-listed endangered species (*see* Dkt. Nos. 461 at 3; 464 at 1);
- The discovery of ancient remains within the right-of-way of the Access Road (*see* Dkt. No. 715-1 at 9);[1]
- The discovery of an unexploded ordinance at the Ylig Bridge project site;
- The Treasurer of Guam's unauthorized withdrawal of approximately $4.7 million in excess of SWMD's expenditures from the SWMD bank account (*see* Dkt. No. 649 at 3-4); and
- The recent discovery of illegal dumpsites in the vicinity of the Ordot Dump that could complicate the final closure process (*see* Dkt. No. 740).

Despite these challenges, the Receiver has turned the formerly defunct SWMD into an efficient, reliable, and self-financing government entity. Under the Receiver's direction, SWMD has implemented new trash cart and billing systems, which have contributed to an increase in the number of paying customers from 12,589 to more than 17,000. *See* Dkt. No. 715-1 at 3. Furthermore, the Receiver reduced the number of SWMD employees by 45%, while providing more reliable services to customers, as illustrated by the on-time-trash-collection rate of 99.7%. *See* Dkt. No. 794-1 at 2, 14. The Receiver has also expanded services: a curbside recycling pilot program is

[1] Winzler & Kelly worked with the Guam Historic Preservation Office of the Department of Parks and Recreation and SWCA (an archaeological consultant) to prepare a mitigation plan and remove the remains pursuant to the plan. *See* Dkt. No. 715-1 at 10.

currently in place; a bulky and metallic item collection program slated to begin this month, and as required under the Consent Decree, a plan for a household hazardous waste facility is under works. *Id.* at 2, 17. All this, while operating at 46% below the SWMD budget and with funds derived solely from user fees. *Id.* at 19

In addition to the improvements at SWMD, the Receiver has made significant strides in fulfilling the requirements of the Consent Decree. Most recently, after almost two decades of CWA noncompliance, the Receiver closed the Ordot Dump and opened the Layon Landfill.[2] The long overdue closing of the dump and the opening of the landfill are monumental achievements for the Receiver, the employees of SWMD, and the entire island of Guam.

Based on the foregoing, the court hereby orders that the Ordot Dump stop receiving trash, *nunc pro tunc* to August 31, 2011, and that all trash be taken to the Layon Landfill, *nunc pro tunc* to September 1, 2011. The court notes that the new Layon Landfill is fully compliant with the CWA. Additionally, the Receiver shall continue to work on finalizing the closure of the Ordot Dump and fulfilling the remaining requirements of the Consent Decree.

## II. THE QUARTERLY REPORT

Pursuant to the concerns raised at the Hearing and in the Report, the following items are **ORDERED**:

***Fiscal Year 2012 Operating Budget***

At the hearing, the Receiver proposed a Fiscal Year 2012 ("FY 2012") operating budget to the court, noting that the budget needed to be significantly increased as it is the first year that the system will be fully operational with all of its new components.

The FY 2012 operating budget proposal is as follows:

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[2] The Receiver was able to achieve these milestones with the help of many others, including the employees of SWMD, the contractors and subcontractors involved with the Consent Decree projects, DPW, Guam Environmental Protection Agency, U.S. EPA, and the parties. The court commends the efforts of those listed and all of the others that contributed to closing the Ordot Dump and opening the Layon Landfill.

| | |
|---|---|
| Layon Landfill | $3,760,190 |
| GSWA Personnel | $2,602,805 |
| Commercial Transfer Station | $2,747,614 |
| Debt Service | $4,497,097 |
| Reserves | $3,729,546 |
| Other Expenses (including fuel, fleet maintenance, capital outlay, utilities, equipment, and the Receiver cost) | $4,211,764 |
| **TOTAL FY 2012 OPERATING BUDGET** | **$21,549,016** |

The court finds that the budget is reasonable and hereby approves the proposed FY 2012 operating budget. Furthermore, the court notes that there are some costs that the Receiver cannot estimate precisely at this time, and hereby authorizes the Receiver to modify the FY 2012 operating budget to address additional needs that may arise during the year.

***Delinquent Commercial Hauler Accounts***

The Receiver reported that collecting payments from commercial haulers continues to be problematic. Following the last quarterly hearing, the court approved an incentive approach to the delinquency problem. Under the incentive approach, commercial haulers were offered a ten percent discount if they: (1) paid electronically via ACH, (2) paid on time, and (3) refrained from relying on Public Law 25-93 to reduce the amount owed.

Of the five commercial haulers, Mr. Rubbishman was the only hauler to qualify for the incentive discount in July 2011, and is the only hauler that is current with its payments. The other four commercial haulers remain in arrears. The largest unpaid balance is $1,379,500, and the most delinquent account is 465 days behind.[3]

To deal with the delinquency problem the Receiver proposed the following policy:

> **Delinquent bills, discontinuance of service, service charges**: Any unpaid balance after sixty (60) days shall be considered delinquent and shall result

[3] That is 465 days in excess of the 60-day grace period provided by Guam law.

in a letter notifying the commercial hauler that service will be discontinued unless the account is paid in full within thirty (30) days of the date on the letter. If the account is not paid in full within thirty (30) days of the date of the letter, the account will enter a 30-day termination period. At the beginning of the 30-day termination period, a public announcement will be made of the pending termination to allow the customers of the terminating hauler to make other arrangements for the proper disposal of their trash. Termination will be accomplished by barring the delinquent commercial hauler from using the disposal facilities.

**Restoration of service following collection of the account**: Whenever any delinquent commercial hauler whose service has been terminated pays the account balance in full and posts a payment bond equivalent to the total billing to the account for the 12 months prior to the account's termination and a service fee of $1,000 to defer the cost of restoring their service, service shall be restored.

Liability of the commercial hauler for payment of all unpaid bills remains the responsibility of the commercial hauler even if service is not restored. Delinquent commercial haulers shall also be responsible for any reasonable collection costs incurred.

The court recognizes that this is a significant problem since over 60% of SWMD's revenue is derived from commercial billings. Accordingly, the court hereby approves the proposal on an interim basis, pending a full rate and policy review and approval by the Public Utilities Commission.

***Military Participation***

The Receiver reported that it is working on finalizing an agreement for the Military's participation as a customer of the Layon Landfill and the new commercial transfer station. The court hereby orders the Receiver and the Government of Guam, including the Governor and the Attorney General, to work together to finalize the agreement with the Military. Military participation shall be based on the rate of $156 per ton as previously approved by this court for other commercial customers. The $156 rate per ton shall remain in effect until such time as it is modified by this court or the Guam Public Utilities Commission adopts a schedule of rates for solid waste services.

Furthermore, the court finds that time is of the essence for this matter as the Military requires trash service by October 1, 2011. Accordingly, the Receiver and the Government of Guam shall make it a priority to finalize the agreement with the Military.

***Guam Solid Waste Authority Act***

On April 18, 2011, the Guam Legislature passed the Guam Solid Waste Authority Act ("the Act"). *See* 10 GUAM CODE ANN. Ch. 51A. The Act named the Guam Solid Waste Authority ("GSWA"), an autonomous agency, as the successor of SWMD. *See* 10 GUAM CODE ANN. § 51A103 ("The Solid Waste Management Division, a sub-entity of the Department of Public Works shall continue in existence as *an autonomous, public corporation* now referred to as the Guam Solid Waste Authority (GSWA).") (emphasis added). Accordingly, the court hereby vests the Receiver with full power and authority over GSWA, to the full extent of its previously granted authority over SWMD. *See* Dkt. No. 239.

Furthermore, the court notes that the Receiver raised some issues concerning the Act with the Office of the Attorney General. The Attorney General is hereby ordered to respond to the issues raised by the Receiver on or before October 15, 2011. If the Attorney General finds that this date is impractical, the Attorney General shall work with the Receiver to determine a reasonable date.

***Government of Guam's Motion for Order Authorizing Receiver to pay Capital Cost Expenses from Bond Proceeds***

Finally, the court acknowledges that the Government of Guam filed a Motion for an Order Authorizing Receiver to pay Capital Cost Expenses from Bond Proceeds. *See* Dkt. No. 790. The United States shall file its response to the motion by September 30, 2011, and the Government of Guam shall file its reply by October 14, 2011. The Receiver shall also file its position on the motion by September 30, 2011.

**SO ORDERED.**

**/s/ Frances M. Tydingco-Gatewood**
**Chief Judge**
**Dated: Sep 02, 2011**

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>GOVERNMENT OF GUAM,<br>Defendant. | CIVIL CASE NO. 02-00022<br><br>**ORDER**<br>re Revised Transition Timeline for the Termination of the Federal Receivership and Financing Plan for the Post-Closure Care of Ordot Dump |

This matter came before the court on March 29, 2016, for a hearing on the proposals submitted by the Receiver and the Government of Guam with regard to a revised transition timeline and a funding plan for the post-closure care of the Ordot Dump. Having considered the proposals and pertinent pleadings[1] and having heard argument from the parties, the court issues the following Order.

[1] The pertinent pleadings comprise of the following:
- Receiver's October 21, 2015 Quarterly Report, ECF No. 1634-1,
- Government of Guam and the Guam Solid Waste Authority Board's Response to Receiver's Oct. 21, 2015 Report (the "Government of Guam Alternative Plan") and attachments, ECF No. 1648,
- United States' Response to Government of Guam's Proposed Timeline and Financial Plan and attachment, ECF No. 1651,
- Receiver's Response to Government of Guam's Response to Receiver's Oct. 21, 2015 Report, ECF No. 1652,
- Government of Guam's Reply to Receiver's Response, ECF No. 1654,
- Declaration of Simon Sanchez II, ECF No. 1655,
- United States' Sur-Reply to Government of Guam's Reply, ECF No. 1661, and
- Receiver's Sur-Reply to Government of Guam's Reply, ECF No. 1662.

## BACKGROUND[2]

On February 11, 2004, the court approved the Consent Decree entered into by the parties. *See* Consent Decree, ECF No. 55. Among other things, the Consent Decree established a schedule for the closure of the Ordot Dump and the construction and operation of a new conforming municipal solid waste landfill. *Id.* at ¶¶8-9. The Consent Decree mandated operations at the new landfill to begin by September 23, 2007, with operations at the Ordot Dump to cease by October 23, 2007. *Id.* at ¶¶8(i) and 9(i).[3] Additionally, as part of the closure of the Ordot Dump, the Consent Decree required the Government of Guam to submit a post-closure care and monitoring plan. *Id.* at ¶8(b)(i).

The Government of Guam acknowledged in the Consent Decree that "the total amount of funding needed to complete the projects required under [the] Consent Decree [was] not currently available." *Id.* at ¶10(a). The Consent Decree thus required the Government of Guam, within 120 days after its entry, to submit a financial plan which identified "the funding source or sources and a schedule to secure funds for the capital and operating costs necessary" to pay for the various compliance measures required under the Consent Decree.[4] *Id.* The Government of Guam agreed to "use its best efforts to obtain sufficient funding to fully implement the projects required by [the] Consent Decree." *Id.*

The Government of Guam failed to meet critical Consent Decree deadlines and failed to raise the financial resources necessary to complete the Consent Decree projects. Thus, on January 31, 2007, the United States moved to enforce the Consent Decree. *See* ECF Nos. 68-69. After conducting numerous monthly status hearings and site visits and based on the lack of progress

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[2] Because the parties are familiar with the facts and procedural history of this action, the court will not recite them here in great detail except as necessary to explain its decision.

[3] The Government of Guam did not meet these deadlines. Instead, under the Receivership, the Ordot Dump stopped receiving trash for disposal on August 31, 2011, and the new landfill in Layon was promptly opened the next day. *See* Minutes (Sept. 1, 2011), ECF Nos. 795-96.

[4] The Government of Guam submitted its financial plan in June 2004 as required, and, after receiving the U.S. EPA's comments, revised its financial plan and resubmitted it in October 2004. *See* Machol Decl. at ¶3, ECF No. 74.

by the Government of Guam, the court appointed a Receiver[5] with "full power and authority to enforce the terms of the Consent Decree, and assume all of the responsibilities, functions, duties, powers and authority of the Solid Waste Management Division of the Department of Public Works, and any and all departments, or other divisions of the Department of Public Works[6] insofar as they affect the Government of Guam's compliance with the Consent Decree." Order Re: Appointment of Receiver (Mar. 17, 2008) at 15-16, ECF No. 239.

The Receiver initially estimated the capital needed to achieve compliance with the Consent Decree would be approximately $159.7 million, of which approximately $40 million would be required for the closure of the Ordot Dump. See Quarterly Report (Oct. 22, 2008) at 13, ECF No. 269-1. The Quarterly Report cautioned that the estimates were "subject to change as the competitive bidding process provide[d] the final measure of the cost for [the Consent Decree] projects." ECF No. 269-1 at 13. The Receiver further stated that the "estimates related to the Ordot Dump's closure" would "require a full reexamination" as the time for the project to actually begin drew near because there was "a significant amount of remedial investigation that remain[ed] to be accomplished . . . to determine the extent of environmental damage that ha[d] occurred [at the Ordot Dump] and devise acceptable plans to mitigate the damage identified." *Id.* at 14.

The Receiver also identified various financing options for the Government of Guam's consideration for funding the Consent Decree projects. *Id.* at 15-20. The Receiver recommended to the Government of Guam that the Consent Decree projects be funded through a revenue bond guaranteed by Section 30 funds received by the Government of Guam. *Id.* at 21. The Government

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[5] For a more thorough recitation of the background of this case, including the events that led to the appointment of a Receiver, the court incorporates by reference the following prior decisions: Order re Appointment of Receiver, ECF No. 239; Order re Motion for Reconsideration, ECF No. 1157; Order re Motion to Intervene, ECF No. 1164; Order re Emergency Motion for a Stay Pending Appellate Review, ECF No. 1230; and Order re Motion to Stay and for Further Relief, ECF No. 1243.

[6] Upon enactment of Guam Public Law 31-020, the Solid Waste Management Division ("SWMD") became the Guam Solid Waste Authority ("GSWA"), an autonomous, public corporation of the Government of Guam. 10 GUAM CODE ANN. § 51A103. The court thereafter vested the Receiver with "full power and authority over GSWA, to the full extent of its previously granted authority over SWMD." Order (Sept. 2, 2011) at 9, ECF No. 798.

of Guam, however, opted to finance the Consent Decree projects through the sale of approximately $202.4 million in Limited Obligation Bonds, which pledged Section 30 funds as the source of repayment. *See* ECF No. 455 at 3. Of this amount, approximately $139.7 million[7] was allocated for deposit to the Project Construction Fund. *See* ECF No. 455-1 at 16.

The cost for the Ordot Dump closure increased from the Receiver's original 2008 estimates, and on May 21, 2013, the Receiver informed the court and the parties that "it is likely that there will not be enough money from the [Limited Obligation] Bonds to cover all of the projects" related to the Consent Decree. *See* Quarterly Report (May 21, 2013) at 33, ECF No. 1067-1. These unfunded projects included: (1) upgrades to the residential transfer stations,[8] (2) Route 4 safety enhancements, (3) upgrades to Dero Road and (4) post-closure care for the Ordot Dump. The court directed the Receiver and the Government of Guam to meet and discuss the development of a plan for additional financing or funding to pay for the unfunded projects. The Receiver and the Government of Guam could not agree on whether all the additional projects were required under the Consent Decree, and if required, how to finance these projects.

Ultimately, after briefing and hearings, the court issued separate orders as to each of the unfunded projects. With regard to the upgrades to the residential transfer stations, the court found that although the upgrades to the residential transfer stations were not specifically required in the Consent Decree, the project became a mandatory requirement of the Consent Decree once GEPA required that the facilities be permitted as a condition of the Solid Waste Facility Permit for the

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[7] The Government of Guam deposited an initial amount of $20 million – obtained through a loan with the Bank of Guam – with a trustee designated by the Receiver and approved by the court.

[8] When the Layon Landfill began operating as Guam's new conforming municipal solid waste landfill, the Guam Environmental Protection Agency ("GEPA") required, as a condition to the permitting of the Layon Landfill, that the Receiver permit the residential transfer stations. The upgrades to these facilities were not included in the Receiver's initial estimates in 2008 since GEPA's requirement to permit each transfer station only materialized in 2011. Additionally, when GEPA renewed the Layon Landfill's permit on January 28, 2015, Special Condition II required GSWA to "obtain a permit to operate transfer stations that meets Guam's regulatory agencies requirements."

Layon Landfill.[9] *See* Order (Apr. 20, 2015), ECF No. 1571. While the court found the Route 4 safety enhancement project to be beyond the scope of the Consent Decree, *see* Order (June 29, 2015), ECF No. 1592, the court ordered the Receiver to complete the upgrades to Dero Road.[10] Order (May 1, 2015), ECF No. 1574. The court ordered the Government of Guam to fund the residential transfer station and Dero Road projects, which the Receiver would implement. *See* Order (Apr. 20, 2015) at 6, ECF No. 1571 and Order (May 1, 2015) at 9-10, ECF No. 1574. However, because the Government of Guam stated that it did not have the funds needed to pay for these projects, the court ordered the Receiver to utilize the monies the Receiver was holding in the special account[11] to fund the projects. Additionally, the court ordered the Receiver to include in its next quarterly report a revised transition timeline to take into account the time needed to permit the Agat and Malojloj facilities and complete the environmental closure of the Dededo transfer station. Order (Apr. 20, 2015) at 7, ECF No. 1571.

As for the post-closure care of the Ordot Dump, the court ordered the Receiver to fund these costs on an ongoing basis from the debt service reimbursements accumulating in the special account. *See* Order (May 27, 2015), ECF No. 1582. If, however, these funds were insufficient to meet the post-closure care funding obligations before the end of the Receivership, then the court ordered the

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[9] GSWA then had three residential transfer stations located in the villages of Dededo, Malojloj and Agat. The court accepted the Government of Guam's decision to close the Dededo Residential Transfer Station. The court thus ordered the Receiver to close the Dededo facility and to develop a plan for the proper environmental closure of the Dededo Residential Transfer Station. Order (Apr. 20, 2015) at 6, ECF No. 1571.

[10] These upgrades include stormwater mitigation and shoulder-to-shoulder paving along Dero Road beginning just before the new pump station to the westernmost boundary of the Ordot Dump property.

[11] The court approved the establishment of a separate account under the Trust Agreement with the Bank of Guam. *See* Order (Sept. 12, 2014) at 2, ECF No. 1405. The Receiver was authorized to deposit the debt service reimbursements it had been withholding (approximately $4.5 million annually) into this special account for purposes of paying legal expenses, future capital requirements and the post-closure care of the Ordot Dump. *Id.* This special account created is the Reserve for Unfunded Expense. *See* Receiver's Response to Government of Guam's Alternative Plan at 6, n.6, ECF No. 1652. At the end of Fiscal Year 2015, the funds available in this special account was $6,298,491.53. *Id.*

Receiver to develop a financing plan that included a dedicated funding mechanism which secured the funds necessary to fully implement all post-closure care and monitoring actions. *Id.* at 10.

In compliance with the court's orders, the Receiver's most recent Quarterly Report included a revised transition timeline and a plan for financing the post-closure care of the Ordot Dump that included a dedicated funding mechanism. *See* Quarterly Report (Oct. 21, 2015) at 49, ECF No. 1634-1. The court allowed the Government of Guam to submit its own proposed alternative financial plan and transition timeline and also gave the parties an opportunity to comment on each of the proposals. *See* Order (Oct. 26, 2015) at 7-8, ECF No. 1635.

## DISCUSSION

Transition Timeline

On July 1, 2013, the court formally adopted the Receiver's proposed timeline for GSWA's transition from Receivership to GSWA Board control.[12] *See* Order re Transition from Court-Appointed Receiver to the GSWA Board at 1, ECF No. 1132. Under said Transition Timeline, the Receivership was expected to end five months ago in December 2015, with the environmental closure of the Ordot Dump.[13] However, the Transition Timeline had to be amended because the court ordered the Receiver to complete the upgrades and permitting of the residential transfer stations and the Dero Road project.

The Receiver estimates it will need approximately $9,442,900 for the additional projects, and, taking into account various factors, the Receiver anticipates two dry seasons will be needed to

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[12] This timeline shall hereinafter be referred to as the "Transition Timeline."

[13] The law that established the GSWA as an autonomous public corporation also created a Board of Directors for GSWA (the "GSWA Board"). Although the GSWA Board sought an earlier transition, the court has stressed that the Receiver will "retain full administrative and operational control over GSWA to assure that the resources needed to achieve full compliance with the Consent Decree are provided." Order (July 3, 2014) at 5, ECF No. 1378. *See also* Order (July 1, 2013) at 2, ECF No. 1132 ("While the court is encouraged that the Board wishes to be actively involved in discussions and decisions concerning Ordot Dump and the Layon Landfill, the fact remains that matters concerning both the Dump and Landfill remain Consent Decree project matters, under the purview of the Receiver, by order this court. . . . [T]he Receiver has, and will retain, the same authority and control over such areas until such time as the court orders otherwise. In other words, complete turnover of control and authority of [GSWA], when the time is right, will occur at a date ordered by this court.")

complete this work.[14] *See* Quarterly Report (Oct. 21, 2015) at 53-54, ECF No. 1634-1. Given the remaining work it must accomplish, the Receiver's revised transition timeline anticipates an end to the receivership in December 2017, with the hiring process for a general manager and comptroller to begin in January 2017. *Id.* at 54, Fig. 42. With regard to transitioning the temporary contract employees to permanent positions, the Receiver states this conversion "will cause a significant increase in GSWA's cost,[15] [thus] it should be carefully planned out but not actually executed until near the end of the transition period." *Id.* at 54.

Not surprisingly, the Government of Guam envisions an earlier transition period. The Government of Guam proposes "that a Management Team consisting of a [General Manager] and Comptroller be hired and commence working with the Receiver as early as October 2016." Government of Guam Alternative Plan at 3, ECF No. 1648. The Government of Guam believes that a full transition from Receivership to GSWA Board control could occur as early as March 2017, which is only about ten months from now.[16]

Regarding the conversion of temporary positions at GSWA to permanent positions, the Government of Guam states that the "GSWA Board has not yet determined whether any or all [of the] unclassified/contract GSWA employees will be transitioned into government of Guam's merit system." *Id.* at 5. With the assistance of the Department of Administration, the Government of Guam anticipates "it would take approximately six (6) months to identify critically needed positions, advertise, have contract employees compete and to select qualified applicants." *Id.* at 6. The

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[14] The Receiver states the additional projects will be completed over calendar years 2016 and 2017.

[15] The Receiver estimates the cost of converting the contract employees to permanent employees will result in a 35.5% increase to GSWA. *See* Receiver's Sur-Reply at 7, ECF No. 1662.

[16] In their alternative proposal, the Government of Guam states it

> agree[s] with the Receiver's original proposal pursuant to the . . . Transition Timeline that there should be at least a six (6) month transition overlap. Assuming the [c]ourt permits the GSWA Board to hire a Management Team, the GSWA Board would like to complete the transition within six (6) months after new management is hired.

*Id.*

Government of Guam estimates the conversion "will add roughly thirty percent (30%) more to personnel costs." *Id.*

After careful consideration of the two proposals, the court hereby adopts the Receiver's revised transition timeline and finds that it is reasonable and no longer than necessary to accomplish the goals of the Consent Decree. First, the court notes that the Government of Guam "agrees with the Receiver that the final work on pending projects could run at least another two (2) years. *Id.* at 2. The upgrading of the Agat and Malojloj transfer stations and the environmental clean up of the Dededo transfer station involve technical work, and the Receiver has the specialized skill and knowledge to accomplish these projects. It is imperative that the Receiver has complete and uninterrupted control over all aspects of the projects to ensure their timely completion.

Second, the Government of Guam had stated that it did not have the funds needed to pay for these projects and the post-closure care costs, and so the Receiver must finance these projects using the $4.5 million in annual revenue that was previously used to reimburse the Government of Guam for debt service. The Government of Guam was put on notice over two years ago that funding this project through debt service reimbursement – the only source of funds available to the Receiver – would likely extend the Transition Timeline. *See* Order (Mar. 17, 2014) at 20 and 25, ECF No. 1319. *See also* Quarterly Report (Mar. 5, 2015) at 11, ECF No. 1531-1 ("It should be noted . . . that given the delay in [the] . . . decisions [of how to fund the additional projects], these projects cannot be completed within the transition timeline previously approved by the [c]ourt."). The Receiver's revised transition timeline will allow the Receiver to better manage GSWA's operating revenues and control GSWA's expenses by delaying the hiring process for a general manager and comptroller until 2017 and by postponing the conversion of the contract employees to permanent positions until near the end of the transition period. While the Government of Guam maintains that GSWA's operating costs would be significantly reduced at the end of the Receivership,[17] the actual

[17] The Government of Guam failed to provide any detailed financial analysis to support this claim. The only number cited by the Government of Guam is a statement unsupported by financial data that "the cost to transition the unclassified/contract positions to classified [positions] . . . will add roughly thirty percent (30%) more to personnel costs)." Government of Guam Alternative Plan at 6, ECF No. 1648.

calculations presented to the court reveal otherwise. As noted by the Receiver, operating expenses for GSWA will actually increase after the Receivership ends. *See* Ex. 1 and 2 to Receiver's Sur-Reply at 16-17, ECF No. 1662. The Receiver estimates that the new management positions and the conversion of the contract employees to permanent positions under the merit system will result in an increase of over $122,248 to GSWA's operating cost. *See* Table 2 to Receiver's Sur-Reply at 8, ECF No. 1662. Thus, the Receiver's proposal will conserve necessary funds by deferring these transition-related expenditures.

Financing Plan

The Ordot Dump has been environmentally closed. *See* Minutes (Mar. 28, 2016), ECF No. 1665. Nevertheless, pursuant to U.S. EPA regulations,[18] GSWA is required to continue monitoring and maintaining the landfill for a 30-year period to protect against the release of hazardous constituents to the environment. Specific post-closure care requirements consist of maintaining the integrity and effectiveness of the final cover system, the leachate collection system, the groundwater monitoring system, and the methane gas monitoring system. 40 C.F.R. § 258.61(a).

> Landfill closures are complex, costly, and unique civil engineering projects that leave waste in place and that necessitate post-closure monitoring and maintenance well into the future to ensure the continued protection of public health and the environment. Solid waste takes decades to centuries to decompose, and the resulting settlement from decomposing waste affects cover and drainage systems, and the generation of landfill gas and leachate. . . . Old dumpsites with historic non-compliant operations, such as the Ordot Dump, are more technically challenging during post-closure care because they lacked proper environmental monitoring and controls during operations. Later problems can occur with extreme events, such as typhoons or earthquakes. Ordot's unique design of vegetated exposed geomembrane on side slopes and impacts from the tropical environment will be especially crucial to evaluate and monitor during the post-closure period.

Walker Decl. at ¶4, ECF No. 1651-1.

The Receiver estimates that the net present value of the total 30-year cost is $15,670,893.97.[19]

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[18] *See* Title 40, Code of Federal Regulations, Part 258, Subpart F - Closure and Post-Closure Care.

[19] This estimate does not include the compensation of the trustee the Receiver proposes the court appoint when the Receivership ends to manage the funds in the Ordot Dump Post-Closure Care Reserve. Additionally, the estimate does not include the compensation for the independent engineer the trustee will have to retain to inspect and certify that the post-closure care operator is performing

*See* Quarterly Report (Oct. 21, 2015) at 48, ECF No. 1634-1. Because the balance in the special account was insufficient to fund the additional Consent Decree-related projects and the post-closure care costs, the court ordered the Receiver to prepare a financial plan that includes a dedicated funding mechanism to secure funds necessary to fully implement all post-closure care and monitoring actions.

Under the Receiver's financial plan, beginning in fiscal year ("FY") 2016 through approximately FY2023, the Receiver recommends setting aside $2 million annually and depositing said funds into the Ordot Dump Post-Closure Reserve. These funds would come from the approximately $4.5 million in annual revenue that was previously used to reimburse the Government of Guam for debt service. In FY2016 and 2017, the Receiver would be responsible for depositing said funds into the Ordot Dump Post-Closure Reserve, for a total of $4 million during the remaining Receivership period. *See* Quarterly Report (Oct. 21, 2015) at 49-50, ECF No. 1634-1. To assure the needed funds are set aside and remain available post-Receivership, the Receiver recommends that the court appoint a trustee when the Receivership ends to manage the funds in the Ordot Dump Post-Closure Reserve. *Id.* at 50. The Receiver also proposes that the court order all commercial haulers on Guam to make their payments through the trustee, and, upon receipt of said funds, the trustee will deduct what is needed to fully fund the Ordot Dump Post-Closure Reserve[20] and pass the balance through to GSWA for operations. The trustee will continue these monthly set asides into the Ordot Dump Post-Closure Reserve until the reserve is fully funded, which is anticipated to occur in FY2023. *Id.* at Table 17.

The Receiver's proposed financing plan takes into account other capital needs of GSWA. These include equipment needs and other projects, such as the closure of Cells 1 and 2 at Layon and the opening of a new cell. *Id.* at 48.[21] The Receiver asserts that although "[t]hese projects may occur

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all of the work necessary for the proper care of the environmental closure of the Ordot Dump.

[20] The Receiver recommends this amount not exceed $374,758.08 per month. *See* Quarterly Report (Oct. 21, 2015) at 51, Fig. 41, ECF No. 1634-1.

[21] The Receiver estimates that the construction of a new cell at the Layon Landfill will cost $10,590,642.09 and the closure cost for Cells 1 and 2 are estimated to be $5,273,975.41, for a

after the Receivership ends, . . . they must be completed and they must be fully funded; therefore, a responsible financial plan must include funding them." *Id.* at 48-49.

The Government of Guam's Alternative Plan does not dispute the amount of the Receiver's cost estimates and it proposes to only include funding for the Dero Road project, the transfer station upgrades and the post-closure care of the Ordot Dump.[22] The Government of Guam urges the court exclude from any court-approved financial plan the cost of funding the opening of a new cell at the Layon Landfill and the closure of Cells 1 and 2 because the Government contends that these projects "may arise sometime within the next 8-15 years depending on Layon's capacity and recycling efforts" and thus "[i]t is neither ripe nor financially prudent to incorporate [these costs] into the litigation as it presently stands." Government of Guam Alternative Plan at 9, ECF No. 1648. The Government of Guam objects to funding the Ordot Dump post-closure care costs over an eight-year span as recommended by the Receiver, and its Alternative Plan instead proposes to pay for these post-closure care costs over a 30-year period. *Id.* at 11-12. The Government of Guam recommends the creation of a separate account for this purpose, which would be funded with an initial deposit $1 million in FY2016[23] and thereafter funded for the next five years with a monthly deposit of $62,500 (or $750,000 annually) to be collected from GSWA's commercial tipping fees. *Id.* at 12. Thereafter, beginning in FY2022, the Government of Guam proposes that deposits to the special account be reduced to $41,667 monthly (or $500,000 annually), until the entire cost of post-closure is

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combined total of $15,864,617.50. *Id.* at 49, Table 16.

[22] The Government of Guam's Alternative Plan never discusses the possibility of closing one of the remaining transfer stations, however, in the Declaration of Eric Palacios that was submitted in support of the Government of Guam's proposal, the former GEPA Administrator states that the Government of Guam "has decided to close the Malojloj transfer station" but keep the Agat Transfer station open. Palacios Decl. at ¶3, ECF No. 1648-6. He further states that GEPA "believes it would be more advantageous to close the Maloloj facility and concentrate on getting the Agat facility permitted" especially because "the Malojloj transfer station is use less frequently than the Agat facility[.]" *Id.* at ¶¶3-4. If the Malojloj transfer station is closed as Mr. Palacios proposes, then this would reduce the estimated cost of the upgrades needed for the transfer stations, however, such a reduction was not reflected in the Government of Guam's Alternative Plan.

[23] The Government of Guam's Alternative Plan does not discuss the source of this $1 million deposit.

accumulated.[24] *Id.* at 13.

The Government of Guam claims its Alternative Plan is funded by multiple sources: (1) the monies held by the Receiver in the special account (the Reserve for Unfunded Expense), (2) GSWA's commercial revenues and (3) proceeds resulting from the refinancing of the 2009 Section 30 bonds. *Id.* at 14-16. The Government of Guam anticipates the refinancing and extension of the bonds by two years would result in proceeds of $42.7 million, of which it intends to commit setting aside up to $16,573,351.67 to fund the other landfill capital expenditures. *Id.* at 16. The Government of Guam's Alternative Plan assumes that the debt refinancing would occur as early as next month or as late as December 2016, eight months from now. *See* Miller Decl. at Ex. 2 (Dec. 7, 2015 Mem. from Tim Rattigan and Stephen Field at Citigroup to Mana Silva Taijeron, then acting Administrator of the Guam Economic Development Authority ("GEDA")), ECF No. 1648-4. The Government of Guam also states that "refinancing and refunding the bonds as proposed by the Government's plan . . . presents a unique opportunity to incorporate solid waste revenues into the bond security structure (in addition to the Section 30 revenues). Incorporating revenues allows for a transition from the current Section 30-backed bonds into a more formal revenue bond."[25]

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[24] The Government of Guam's apparent rationale for decreasing the deposits into the special account for post-closure care costs is based on its belief that "the cost to monitor Ordot Dump will decrease as the years go by due to the reduction of methane gas product and the inevitable and increasing growth of stormwater-reducing vegetation." *Id.* at 14. This rationale is called into question by the Declaration of Scott Walker. *See* Walker Decl. at ¶4, ECF No. 1651-1.

[25] The Government of Guam's written description of its plans to refinance the bonds *differs significantly* from the oral testimony provided by Lester Carlson, Jr., the Deputy Director of the Guam Bureau of Budge and Management Research and the former Public Finance Manager with GEDA. The Government of Guam's Alternative Plan proposed that the current 2009 Section 30 bonds be restructured to be more akin to the revenue bond that it claims the Receiver originally proposed in 2008. *See* Government of Guam Alternative Plan at 16, ECF No. 1648 ("Incorporating revenues allows for a transition from the current Section 30-backed bonds into a more formal revenue bond.") and Government of Guam Reply at 5, ECF No. 1654 ("The Receiver's opposition to refinancing the bonds as recommended by bond counsel and Citigroup is surprising given . . . the Receiver's previous recommendation and support of revenue bonds as a financing vehicle[.]"). However, Mr. Carlson contradicted this and stated that the Government of Guam's proposed plan does not contemplate using GSWA revenues since GSWA is currently not capable of putting together a revenue generating bond. Instead, he testified that the Government of Guam's plan contemplates refunding the Section 30 bonds and extending the amortization by two years but

Government of Guam Alternative Plan at 16, ECF No. 1648.

Between the two proposed financing plans, the United States supports the Receiver's proposal, and the court concurs for several reasons. First, the court continues to believe it is imperative that sufficient funds be set aside to monitor and maintain all of the infrastructure (*i.e.*, the final cover system, the landfill gas collection system, the groundwater monitoring system, and the leachate collection system) over the 30-year post-closure period. The Receiver's plan will fully fund the post-closure care costs, but the Government of Guam's plan does not provide sufficient funds to cover the post-closure care costs of the Ordot Dump. Under the Government of Guam pay-as-you-go proposal, at the end of 30 years GSWA's revenues would have provided a total of $15,670,900 towards post-closure care costs, but this is only equivalent to what the Receiver estimates is the net present value required. Under a pay-as-you-go scenario, the Receiver estimates that $20,367,699 will be needed for post-closure case costs, which means that the Government of Guam Alternative Plan is short by about $4.7 million.

Second, under the Receiver's proposal, the post-closure care costs for the Ordot Dump would be fully funded within eight years, but the Government of Guam's plan contemplates a 30-year payment period. According to the Declaration of Scott Walker,[26]

> under the federal regulations, the pay-in period for trust funds should be completed during the operating life of the facility, not during the post-closure period. Based on my experience, to the extent that unique circumstances require a pay-in period, *only the shortest pay-in period of a dedicated funding source should be allowed in order to protect public health and the environment*, and to reduce the risk that the federal or state government will ultimately bear the cost of post-closure care. The funding source to fund post-closure care must be dedicated for that purpose and cannot be subject to discretionary use by another government entity.

Walker Decl. at ¶8, ECF No. 1651-1 (emphasis added). The Government of Guam acknowledges that it had not been setting aside funds for Ordot Dump's post-closure care even though the law

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Section 30 funds will remain the source of repayment, not the GSWA revenues.

[26] Mr. Walker is a Licensed Professional Engineer with over 29 years of civil engineering and management experience on diverse solid waste projects. Walker Decl. at ¶1, ECF No. 1651-1. In addition to his employment with CH2M HILL, he is "an independent consultant specializing in solid waste landfills, in particular post-closure at landfills." *Id.*

mandating the 30-year monitoring period was effective in 1993 – 11 years before the parties entered into the Consent Decree and 15 years before the appointment of the Receiver. *See* Government of Guam Alternative Plan at 13, ECF No. 1648. Consistent with Mr. Walker's expertise, the court strongly agrees that the shortest pay-in period of a dedicated funding source is preferred in order to protect public health and the environment.

Third, the Receiver's financing plan is reasonable and financially prudent. Under the Receiver's proposal, the trustee retains discretion to periodically reassess the financial requirements of the Ordot Dump post-closure reserve and to adjust the amount set aside into the reserve if needed. The Government of Guam plan does not include a provision that allows for such adjustments. Additionally, the Receiver's proposal takes into consideration GSWA's other capital needs, most importantly the necessity to secure funding for the closure of Cells 1 and 2 and the opening of a new cell at the Layon Landfill. The Government of Guam, however, asserts that these matters should be excluded from consideration since they may not arise for the next 8-15 years. Mr. Walker disagrees with the Government of Guam's position and states that

> [a] financing plan for new cell construction, such as proposed by the Receiver, will help to ensure that a viable solid waste management system will be in place and not be interrupted, which is particularly important given that the Layon Landfill is the only commercial and permitted municipal solid waste landfill in Guam. Additionally, *the design development, including hydrogeologic and geotechnical investigations, and other technical studies, must be completed prior to permitting and public involvement*. Consequently, *the timeframe leading up to waste placement in the new cell is typically a multi-year process*. The Government of Guam requests deferral of the issue to allow the GSWA Board to determine resolution, but does not offer any specific alternative financing plan. Such an approach is not consistent with prudent and proper landfill operations.

Walker Decl. at ¶10, ECF No. 1651-1 (emphasis added).

It is anticipated that Cells 1 and 2 at the Layon Landfill will be filled by approximately the year 2020. *See* Quarterly Report (Nov. 20, 2013) at 32, ECF No. 1267-1. While complete closure of these cells would occur after the Receivership ends, initial work for the eventual closure of said cells and the opening of a new cell will begin this year. *See* Quarterly Report (Oct. 21, 2015) at Tab 24, ECF No. 1634-27. As explained by Mr. Walker, this is a multi-year process. Field studies must be performed, plans need to be designed, permits applied for, and gas collection lines must be installed. *Id.* It would not be responsible for the Receiver to simply exclude from the scope of a

financial plan the future needs of GSWA in funding these projects at the Layon Landfill.

Fourth, the Receiver's financing plan includes a dedicated funding mechanism that ensures payments into a trust fund. In comparison, the Government of Guam's Alternative Plan does not contemplate the use of a trust fund managed by an independent trustee dedicated to post-closure care. Rather, the Government of Guam proposes establishing a "special account" to accumulate funds over the next 30 years, but there are no controls in place to control how the funds in the "special account will be used. As noted by Mr. Walker,

> [the] *use of a trust fund for financing the post-closure period* is an acceptable, and often *preferred, financial assurance mechanism*. It is critically important that the monies in the trust fund are dedicated to post-closure care and managed by a third party trustee under strict guidelines for ensuring both adequate funding and proper disbursement for authorized postclosure expenses. The role, responsibilities, and authorities of the Trustee must be clear.

Walker Decl. at ¶9, ECF No. 1651-1 (emphasis added).

Finally, the Receiver's proposal requires no new borrowing while the Government of Guam's Alternative Plan envisions further borrowing by the Government of Guam and GSWA. While the Government of Guam asserts that investors have been very receptive to its past offerings which were considered "attractive," the Government of Guam's plan is speculative because market conditions are simply unknown at this time. If refinancing does not work as contemplated, it would put the post-closure care of the Ordot Dump at risk, which is something the court is not willing to gamble. If, however, the Government of Guam's refinancing plan materializes, it may then use any funds gained through the refinancing as it sees fit, including substituting them for the funds in the Receiver's plan.

## CONCLUSION

The court finds that the shortest pay-in period of a dedicated funding source is preferred in order to protect the public health of our residents and the environmental health of our island. The Government of Guam's pay-as-you-go proposal simply is not sufficient nor responsible. This court agrees with the Receiver and the United States that the Receiver's plan is clearly the more reasonable and financially prudent plan. The court further finds that the Receiver's plan is consistent with prudent and proper landfill operations, since the use of a trust fund post-Receivership is a "preferred,

financial insurance mechanism."

The court at this time adopts the Receiver's revised transition timeline and proposed financial plan.[27] Barring any unforeseen circumstances, the federal Receivership under the leadership of Gershman, Brickner & Bratton, Inc. will end in 2017. While the GSWA Board is eager to begin overseeing the operations of the Layon Landfill and the post-closure care of the Ordot Dump, much technical work remains and it is essential that the Receiver has uninterrupted control over all aspects of GSWA's operations and finances to ensure the timely completion of these projects. Accordingly, the parties and their departments and agencies are ordered to continue to cooperate with the Receiver's efforts to responsibly and expeditiously complete all Consent Decree-related projects.

IT IS SO ORDERED.

**/s/ Frances M. Tydingco-Gatewood**
**Chief Judge**
**Dated: May 02, 2016**

[27] The adoption of the Receiver's proposal in no way prevents the Government of Guam from refinancing the 2009 Section 30 bonds if the Government of Guam and its financial advisers believes it is in the best interest to do so.

DISTRICT COURT OF GUAM

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>GOVERNMENT OF GUAM,<br>Defendant. | CIVIL CASE NO. 02-00022<br><br>**ORDER**<br>re Extension of the<br>Federal Receivership |

This case came before the court for a hearing on November 28, 2017, at which time the court and the parties discussed issues related to the transition of control over the Guam Solid Waste Authority ("GSWA") from federal Receivership to the Board of Directors (the "Board"). This transition is scheduled to occur at the end of the year pursuant to the timeline approved by the court. *See* Order re Revised Transition Timeline for the Termination of the Federal Receivership and Financing Plan for the Post-Closure of Ordot Dump (the "May 2, 2016 Order") at 6-9, ECF No. 1668. The court, however, expressed uncertainty over whether the Receivership should terminate on December 31, 2017, or whether only a portion of GSWA's operations will be turned over to the Board for management.

As noted by the court in its previous Order, the Post-Closure Plan for the Ordot facility has still not been approved because the proposed plan needs to be updated to address the mitigation of residual methane gas in the soil. *See* Order re Transition and End of the Federal Receivership at 7, ECF No. 1771. At the hearing, the United States stated that the Receiver and its contractors are working diligently to determine the nature and extent of the problem so that an appropriate remedial plan can be implemented, but it will take several months for the Receiver to get the data it needs to

prepare the remediation plan. The United States reiterated its request that the Receiver remain on board to complete this project, stating that the Receiver is aware of the issues and is the most prepared to deal with this serious public health issue in the most efficient manner. Neither the Board nor the Government of Guam objected to this request, and the court concurs that it would be more efficient for the Receiver to remain to complete this matter. Accordingly, the court orders that the Receivership be extended until at least June 30, 2018, to complete the work associated with the methane gas mitigation plan and the Post-Closure Plan. Additionally, the Receiver is ordered to delay the selection of the trustee[1] and independent engineer to coincide with the schedule for completing the work to resolve the landfill gas migration problem.

The issue the court must determine is whether GSWA's operations and management will remain under the control of the Receiver or whether the Board will assume responsibility over these duties. If the court is inclined to keep the Receiver beyond the December 31st deadline, the Government of Guam and the Board request that the Receiver's purview be limited to issues related to the Post-Closure Plan approval but that control over all administrative, operational and managerial matters should be transferred to the GSWA management and Board. The United States expressed reservations about whether the Board and new GSWA management would be ready to resume control over the agency's operations by the end of the year. The Receiver stated it was prepared to implement whatever the court decided, but it, too, did not believe the Board was ready to assume full responsibility over GSWA's operations. The court agrees with the United States and the Receiver that a smooth transition cannot occur as originally contemplated.

Under the court approved transition timeline, the recruitment of a general manager and chief

[1] The appointment of a trustee to manage funds in the Ordot Dump Post-Closure Reserve was approved by the court last year. *See* May 2, 2016 Order at 10, ECF No. 1668. The Attorney General and the Board waited more than one year later to object to the financing plan approved by the court and to ask the court to reconsider the appointment of a trustee. A smooth and orderly transition can not reasonably occur when the Government of Guam and the Board wait until what essentially is the eve of transition to address or correct issues such as the transition of contract employees, the adoption of a rate structure and the GSWA budget. The court notes that the issue of the transition of contract employees has been resolved through emergency legislation. *See* Guam Pub. L. 34-58.

financial officer was to begin in January 2017.[2] *See* May 2, 2016 Order at 6-8, ECF No. 1668 and Status Report (Oct 21, 2015) at 54, Fig. 42, ECF No. 1634-1. In early January 2017, the Receiver began working with the Board to begin the recruitment for these positions. *See* Status Report (May 17, 2017) at 49, ECF No. 1739-1.

> In each step of this process[,] the Receiver . . . worked cooperatively with the Board following the Board's lead with respect to this process. The job announcements were widely advertised on behalf of the Board both on Guam and in industry circles where persons qualified for such a position would pursue such an opportunity. The Receiver . . . also assisted the Board further by evaluating the qualifications of the applicants and working with the Board to schedule interviews [to] advance the process further.

*Id.*

In August 2017, the Receiver reported that

> [t]he Board has made an offer to a qualified candidate for General Manger contingent on completion of an acceptable background check. With respect to the finance position, there was no interest from qualified individuals in the Chief Financial Officer position as initially advertised. To broaden its search, the Board has revised the job description to solicit applications for a financial [c]ontroller. [The Receiver] agree[s] with this change and are hopeful it will yield qualified candidates for the Board's consideration.[3]

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[2] The court acknowledges that the Board wanted to start this recruitment process earlier and proposed that the general manager and comptroller begin working with the Receiver as early as October 2016, with a termination of the Receivership by March 2017. *See* Government of Guam and the Guam Solid Waste Authority Board's Response to Receiver's Oct. 21, 2015 Report (the "Government of Guam Alternative Plan") at 3, ECF No. 1648. The court adopted the Receiver's proposal instead in order to allow the Receiver to minimize GSWA's expenses by delaying the hiring process for a general manager and comptroller until 2017. Additionally, the approved timeline would allow the Receiver to complete the remaining Consent Decree projects and provided a significant period of overlap for the Receiver to mentor and train the new management team.

[3] According to the Minutes of the Board's meeting held on July 19, 2017,

> [t]he Board agreed that they will change the job opening from the position of CFO (which requires a CPA license) to Controller. Board member, Joseph Duenas, suggested that the Board start the position as unclassified because it allows the Board flexibility with the candidate's salary. Chace Anderson suggested that the advertising for the Controller position should state that pay is negotiable.
>
> Jonathan Denight made a motion to have GSWA management advertise the Controller position and indicate that the position is unclassified and that the pay is negotiable. Joseph Duenas seconded the motion. Motion was passed.

Status Report (Aug. 23, 2017) at 59, ECF No. 1749-3.

The new General Manager Greg Martin was hired by the Board in September 2017, but the position of chief financial officer or comptroller still has not been filled. The Board represented that an offer had been made to a qualified individual and the selected candidate would begin working by December 11, 2017.[4] The court is troubled, however, that the person selected as the new comptroller will have only three weeks to orient himself and gain a thorough understanding of GSWA's finances such that he can properly assume his role and responsibilities. At the hearing, the Board stated that the three weeks would be sufficient for the selected candidate to transition into the new role, but the court finds this representation to be disingenuous and contrary to the Board's earlier position that "there should be at least a six (6) month transition overlap." Government of Guam Alternative Plan at 3, ECF No. 1648.[5] Regardless of his qualifications, the court finds that a three-week transition

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GSWA Board of Directors' Meeting (July 19, 2017), Minutes at IV.c.i. available at http://www.guamsolidwasteauthority.com/pdf/GSWA-BOD-Approved-Board-Meeting-Minutes-19JULY2017.pdf (last visited Nov. 30, 2017). A copy of these Meeting Minutes is also attached as Exhibit 3 to GSWA Board of Directors' Status Report in Response to Court's Order, ECF 1771 (the "Board's November 27, 2017 Status Report"), ECF No. 1772-3.

[4] At the hearing, the court was informed that the Board asked Senator Ada to amend Bill No. 209-34 (COR) – which originally only dealt with the appropriation of additional funds to GSWA for fiscal year 2018 – on the session floor to include provisions that would create a new unclassified comptroller position. This emergency legislation was needed after the Office of the Attorney General of Guam reviewed the proposed comptroller's contract at the Receiver's request and determined that the Board had no authority to hire a comptroller in an unclassified position. Senator Ada and Speaker Benjamin J.F. Cruz acted swiftly to pass the emergency legislation. Both Speaker Cruz and Senator Ada have consistently attended the numerous hearings held in this case. The Governor signed the amended bill into law on November 28, 2017. *See* Guam Pub. L. 34-68.

The Board had made a determination on July 19, 2017, to advertise the comptroller position as an unclassified position, yet it waited until late November to seek the emergency legislation to authorize the creation of this new position. If the Attorney General had not reviewed the comptroller's contract as requested by the Receiver, then the Board would have likely hired an individual for an unclassified position when it did not have the authority to do so.

[5] The Government of Guam and the Board stated, "**It is important that the new and current management teams have as much time working together as possible, so that the transition can be smooth and seamless**. . . . Assuming the [c]ourt permits the GSWA Board to hire a Management Team, the GSWA Board would like to complete the transition within six (6) months after new management is hired." *Id.* (emphasis added).

period is wholly inadequate for the new comptroller to familiarize himself with all the requirements of the job. Even Mr. Martin, who has been working with the Receiver and the GSWA staff for more than two months now, admits that he does not have a full understanding of GSWA's finances. He stated that he was focusing more on operations and was waiting for the new comptroller to come onboard to work with the Receiver on the specifics of GSWA's finances.

When the Receiver was first appointed, the finances of GSWA's predecessor – the Solid Waste Management Division ("SWMD") of the Department of Public Works – was in shambles. SWMD was spending as much as $11,000 each day[6] to furnish rental equipment and contract operators because SWMD's equipment was broken. Status Report (Jan. 14, 2009) at 5, ECF No. 328-1 and Status Report (Oct. 21, 2009) at 7, ECF No. 505-1. SWMD's ability to track the accounts of customers who had not paid or who cancelled service was so poor that approximately 4,000 customers – 25% of its customer base – were receiving free services. Status Report (Jan. 14, 2009) at 14, ECF No. 328-1. The Receiver devised a plan for customer tracking and revenue collection that assured both fairness and accountability for services provided, and today GSWA's finances remain strong because of the Receiver's management. GSWA's new management team will not have to deal with the challenges the Receiver faced when it was first appointed, but it is important for the new management team to understand this history in order to fully appreciate all the work the Receiver did to turn this agency into a paragon of efficiency.[7]

As the Receiver noted, a lot of work was done to put in place a complex but rational and manageable computerized system, and the person who assumes responsibility for GSWA's financial management system needs to fully understand it. If the new comptroller starts on December 11, 2017, he would not have gone through one month of closing on the accounts before the Receivership ends. The comptroller needs to thoroughly understand how all the banking arrangements work, how the cost studies have been performed, and these are rather unique to GSWA's operations. It is

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[6] At this rate, the Government of Guam was spending more than $4 million each year for rental equipment.

[7] "Those who cannot remember the past are condemned to repeat it." George Santayana, *Life of Reason, Reason in Common Sense* (1905).

unreasonable to believe that three weeks is sufficient for the new comptroller to gain all this knowledge. Furthermore, as pointed out by the United States, both the selected comptroller and Mr. Martin will have to wait until January 2018 to undertake mandatory procurement training. Thus, if the Receivership were to end on December 31st, no one at GSWA would be qualified to procure supplies and/or services until the comptroller and Mr. Martin finish the procurement training. This is not the ideal way to transfer control over this multi-million dollar agency, and the court will not allow even a partial transition over GSWA operations to occur in such a slipshod or careless manner.

In addition to the insufficient time to train the new comptroller, extension of the federal Receivership is necessary because the Board has not demonstrated that it is ready to assume control over GSWA's operations. As early as October 21, 2015, the Receiver advised the Board that it needs to focus on revising the rules and regulations:

> Another area the Board should address is the solid waste rules and regulations. The Board has now adopted rules governing its own deliberations and actions. There are, however, operational rules and regulations that should be updated to reflect the way the system operates today as compared to its operation prior to the Receivership. These rules are entitled "Solid Waste Collection, Disposal, Processing and Recycling" and are found in Title 29 of the Guam Administrative Rules and Regulations under the Department of Public Works.

Status Report (Oct 21, 2015) at 54, ECF No. 1634-1.

Under the approved transition timeline, review and upgrade of the solid waste rules and regulations was scheduled to begin in September 2016. *Id.,* Fig. 42. The Board, however, did not take any action to address the rules and regulations until six months ago.[8] According to the Board, "it enlisted the assistance of the Receiver in identifying which rules and regulations the Receiver has implemented conflict with existing solid waste statutes and rules and regulations." Board's November 27, 2017 Status Report at 3, ECF No. 1772. The Board then blames the Receiver for the delay in its own responsibility for updating the rules and regulations by stating that "[t]he Board and

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[8] The court recalls that it raised the issue about the status of GSWA's operational rules and regulations at the May 17, 2017 Status Hearing. Thereafter, the Board included the issue on the Agenda for its May 24, 2017 Board meeting. *See* GSWA Board of Directors' Meeting Agenda (May 24, 2017), available at http://www.guamsolidwasteauthority.com/pdf/GSWA-BOD-Agenda-2017-05-24.pdf (last visited Nov. 30, 2017). *See also* Board's November 27, 2017 Status Report at Ex. 1, ECF No. 1772-1.

its recently hired General Manger have been waiting on the Receiver for months to provide the rules and regulations in issue." *Id.* at 5. The Board stated it only received the Receiver's comments on the existing rules and regulations on November 27, 2017.

The Board argued that it sought the Receiver's assistance because the Board members had no experience with GSWA's operations[9] and the Receiver, who was in charge of management, would be in a better position to put these rules together. The court disagrees. The promulgation of rules and regulations to govern GSWA operations post-Receivership is primarily a legal matter that is better addressed by the Board and its attorney. The Board has been in place and meeting regularly for more than four years, and its sole responsibility has been to gain an understanding of GSWA's operations so that it would be prepared to take charge of operations at the end of the Receivership.[10] The Board has also had the assistance of legal counsel for most of the time it has been in existence. It is the Board and legal counsel's responsibility to review and update GSWA's rules and regulations. *See* 10 GUAM CODE ANN. §§ 51A104(i) ( "The Authority shall . . . adopt such rules and regulations as may be necessary for the exercise of the powers and performance of the duties conferred or imposed upon the Authority or the Board by th[e Guam Solid Waste Authority] Act.") and 51A105 ("All powers vested in the Authority . . . shall be exercised by a GSWA Board of Directors[.]"). The Board has not adequately explained why it did not start this review process in

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[9] While the Board is comprised of voluntary members from the public, having accepted the appointment, the Board had an obligation to diligently carry out its fiduciary duties. As noted by the court,

> a smooth and orderly transition of authority . . . can only be accomplished through a cooperative working relationship between the Board and the Receiver. The Receiver has lived up to the fiduciary duty entrusted to it by this court and the people of Guam. With time and experience, the court hopes the Board will become equally capable of managing Guam's solid waste system, exercising the high standard of care required by a fiduciary.

Order re Transition from Court-Appointed Receiver to the GSWA Board (July 1, 2013) at 2, ECF No. 1132.

[10] *See* Order (June 26, 2013) at 1, ECF No. 1123 ("The court appreciates the Board's desires to learn more about GSWA operations in preparation for the eventual transition from [R]eceivership.").

September 2016 as envisioned under the approved timeline.

Since the Board's creation and appointment, the court has always encouraged the Board members to utilize the time during the transition period wisely in order

> to become proficient in its knowledge about the system so there can be an orderly handoff when court orders it. The Board should read the Consent Decree (ECF No. 55), the Order appointing the Receiver (ECF 239), and all 16 Quarterly Reports prepared by the Receiver. Additionally, the court believes the Board should also be knowledgeable about the financial status of GSWA and the supplemental bond indenture in connection with the 2009 Section 30 bonds. Therefore, the Board should read all Orders related to how these bond monies were obtained and how they are to be disbursed, including all previous audit reports of the solid waste system since the Consent Decree was entered.

Order re Transition from Court-Appointed Receiver to the GSWA Board (July 1, 2013) at 2, ECF No. 1132. To date, the Receiver has filed a total of 25 status reports.[11] These status reports, in addition to the Receiver's special reports, describe in detail the various components of the solid waste system implemented by the Receiver. There is nothing new in the narrative report recently provided by the Receiver to the Board. All of the information contained in the narrative report were previously discussed in past status reports and special reports. *See e.g.,* Status Report (Jan. 14, 2009) at 13-20, ECF No. 328-1 (describing cart rollout plan); Status Report (July 15, 2009) at 10-15, ECF No. 463-1 (describing cart rollout plan and customer outreach); Status Report (Jan. 14, 2010) at 13-17, ECF No. 538-1 (discussing rollout of new cart system and new operating procedures used to clean-up customer records and accounts); Status Report (Apr. 8, 2010) at10-15, ECF No. 557-1 (continuing discussion of residential collections, new systems and billing); Status Report (Aug. 11, 2010) at 10-21, ECF No. 605-1 (detailed discussion of new residential services model, the new customer billing system, curbside recycling pilot program, bulky waste collection program and delinquent customer issues and police to address this); Status Report (Apr. 14, 2011) at 32-34, ECF No. 715-1 (commercial customers); Status Report (Dec. 7, 2011) at 18-19 and 26-29, ECF No. 859-1 (discussion of metallic and bulky waste collection program, introductory discussion of household hazardous waste, discussion of commercial account collection issues); Status Report (Apr. 11, 2012)

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[11] These status reports can be found at ECF Nos. 250-1, 269-1, 328-1, 427-1, 463-1, 505-1, 538-1, 557-1, 605-1, 646-1, 715-1, 794-1, 859-1, 931-1, 972-1, 1067-1, 1267-1, 1369-1, 1422-1, 1531-1, 1634-1, 1675-1, 1687-1, 1739-3 and 1749-3.

at 14-22, ECF No. 931-1 (discussing hauler only transfer station, Layon Landfill operations, curbside recycling program and Standard Operator Procedures ("SOPs")[12] as under development); Special Report re Islandwide Curbside Recycling, ECF No. 1158; and Status Report (Mar. 5, 2015) at 13, ECF No. 1531-1 (discussion of household hazardous waste facility and program).

If the Board and its counsel had read these reports as directed by the court, then it would have been clear from the start that the existing rules and regulations promulgated before the appointment of the Receiver are no longer applicable to the solid waste system currently in existence. While the Board has expressed its intent to adopt the rules implemented by the Receiver, the Board has not taken any concrete steps to draft these rules despite the fact that it has had the information it needed to begin the revision process. The Receiver has always cooperated in this process, and there is no reason why the relationship between the Receiver and the Board continues to be strained and antagonistic.[13] The Board needs to begin treating the Receiver as an ally and not an adversary in this transition process.[14] Everyone – the court, the Receiver and the United States included – wants the

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[12] The Receiver later reported that

> GSWA has been developing Standard Operating Procedures (SOPs) in order to provide direction, improve communication, reduce training time, and improve work consistency for GSWA personnel. SOPs are designed to enhance quality control by defining the work proce4ss, identifying records, and developing confidence in personnel that they are meeting the goals of the organization. The SOP development process includes workers in all areas of the organization, who are identifying and working through issues to come up with clear and pragmatic SOPs. During this quarter, 25 SOPs have been finished.

Status Report (July 18, 2012) at 16-17, ECF No. 972-1.

In addition to these SOPs, the court is aware that operations manuals have been developed and submitted to the Government of Guam for GSWA's facilities as part of the permitting process. Thus, the Government of Guam has had access to operating manuals for the following facilities: Layon Landfill, the Hauler-Only Transfer Station, the Residential Transfer Stations and the Household Hazardous Waste Facility.

[13] The court cautions that it will not tolerate unprofessional decorum in the courtroom.

[14] The court reminds the Government of Guam and the Board that it was the Government of Guam who included Gershman, Birckner & Bratton, Inc. on its list of qualified receivers. *See* Government of Guam List of Receivers, Ex. A, ECF No. 206.

Board to succeed once the transition occurs, but control over GSWA operations can not be transferred to the Board without the proper promulgation of the revised rules and regulations, a process which will take several months. Accordingly, the court orders the Board, its legal counsel and the new general manager to begin drafting and updating the operational rules and regulations. Until then, the court orders that the Receivership be extended until at least June 30, 2018,[15] and the Receiver shall continue to exercise full power and authority over all GSWA functions, duties and responsibilities.

IT IS SO ORDERED.

**/s/ Frances M. Tydingco-Gatewood**
**Chief Judge**
**Dated: Dec 01, 2017**

[15] The compensation and classification plan for GSWA being worked on by Maria Connelly of Pacific Human Resources, Inc. ("PHRS"), Mr. Martin and Alicia Fejeran should be completed before then, and the court looks forward to reviewing the updated classification plan.

GBB
SOLID WASTE
MANAGEMENT
CONSULTANTS
RECEIVER

November 26, 2017

MEMO

To: GSWA Board of Directors

From: Chace Anderson
David Manning

Subject: GSWA Operating Rules and Regulations

Cc: Greg Martin, Alicia Fejeran, Georgette Conception

Attached are the current GSWA operating rules with our comments (see Attachment I). The current rules are based on laws and business practices that are no longer applicable to the current solid waste system operated by GSWA. As a result, most of our comments are comments about why these rules are either no longer relevant or applicable to the system currently operated by GSWA. Accordingly, we believe the Board needs to start from scratch developing new rules for GSWA.

Guam Law defines the word rule as follows:

> The word rule means any rule, regulation, standard, classification, procedure or requirement of any agency designed to have or having the effect of law or interpreting, supplementing or implementing any law enforced or administered by it, including any regulation under which the agency makes charges for services it provides, or to govern its organization or procedure, but does not include regulations, resolutions or directions relating solely to internal policy, internal agency organization or internal procedure which do not directly affect the rights of or procedures available to the public and does not include administrative adjudication.

New rules need to be guided by this definition and an understanding about how the current system operates. In the balance of this memo we will provide a reasonably detailed description of the way the current system operates to assist the board and its staff and legal counsel in drafting new rules.

Government of Guam
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www.gbbinc.com

The current solid waste system operated by GSWA has several core components including: (1) Residential Trash Collection and Recycling; (2) Bulky Waste Collection; (3) Residential Transfer Stations; (4) the Household Hazardous Waste Program; (5) the Hauler-only Transfer Station; and (6) Disposal at the Layon Landfill. These programs are carried out by front-line crews who do the hard work of actually collecting the waste; customer service personnel who effectively manage customer accounts and serve as liaisons to the customers of GSWA; and administrative staff who manage GSWA's accounting, banking arrangements, procurement, scale houses, contracts and personnel.

GSWA's rules should reflect the functional reality of the current GSWA solid waste system. Below is an outline of the core functions and is presented as a basis for establishing appropriate rules for the operation of GSWA.

***Residential Trash Collection and Recycling:*** These services begin when a customer signs up for service by visiting the Customer Service Staff at the GSWA Building. Residents in single family homes and apartments of four (4) units or less may register for trash collection service with GSWA by submitting a completed GSWA registration form, paying in-full any balance from a previous account and providing proof of residency (examples include: Rental Lease, Title or Deed, Power/Water Bill) and a valid ID (examples include: Driver's License, Passport). Since Guam's address and road signage system is often an unreliable means of locating the specific residence, the customer is also required to draw as detailed map as they can to the location of their residence. Each new or returning customer is provided with written information on how to properly participate in the service and the Customer Service Representative (CSR) goes over all of the details verbally with each customer. The customer is also provided a large colored paper with a number on it to place in their window or on their door to help the delivery crew find the location and deliver the cart(s).

GSWA's customers must use the carts GSWA provides them and must have the carts out at the designated collection location twelve (12) hours before the day of collection and remove the cart from the collection site by the end of the collection day. No other container will be accepted by GSWA. If the customer has more trash than can fit in the cart, it must be placed in a trash bag and tagged with a GSWA excess trash tag. Upon registering for service, customers receive four (4) free excess trash tags. Additional excess trash tags may be purchased at the GSWA Office or at the Residential Transfer Stations for $4.00 for each tag. Customers must place a tag on each excess bag (bags outside of the GSWA cart) for GSWA crews to collect on collection day. Bagged trash without a trash tag will be left behind by the collection crew. The designated collection location must not be obstructed or blocked, and must be within four (4) feet from the public easement.

A customer who often has excess trash may find it more cost-effective to obtain a second GSWA cart. The additional monthly cost for a second cart is $15. These additional carts are

delivered during the early part of the month after they are ordered and added to the customer's account upon delivery.

During the first week of each month, GSWA bills for the most recent previous month of service. While some customers choose to pay in advance, Guam Law allows each customer sixty (60) days to pay the monthly invoice. If a customer reaches the 60-day mark without fully paying the balance due, GSWA's CSRs contact the customer with phone calls and a mailed letter to remind them that their bill is past-due. When a customer reaches the 90-day point of not paying, GSWA repossesses the customer's cart(s). Before service can resume, the customer will have to pay their balance in full, one month in advance, and a fifty-dollar ($50) restoration fee.

When Customer Service issues work orders for the repossession of carts, GSWA collection crews repossess the carts. All repossession crews have two members. The carts are returned to GSWA to be washed and cleaned and placed back into inventory. All completed work orders are handed back in to Customer Service so the individual accounts can be updated.

The formal policy on delinquency for residential accounts was approved by the District Court of Guam and is attached to this memo (see Attachment II). We urge the Board to adopt the necessary rules to continue this policy.

In certain circumstances customers may seek a reduction in the amount owed. Customers of GSWA trash collection who can show that they have had their service missed substantially throughout a month's time may request a meeting with the GM or the GM's designee to seek a reduction in charges.

A 501c3 organization seeking to perform community clean-up of MSW on public property on a non-regular basis may seek from the GM or the GM's designee, a reduction or elimination of the tip-fee for specified containers or trucks.

When a residential account is first established, GSWA must deliver cart(s) to the new residential customers. This occurs when a start date is assigned and the customer is assigned to a specific route. When delivering the cart(s) the GSWA crew will review the site for the proper location for cart placement and cart collection. The crew will designate that specific location and record the location using Global Positioning Satellite (GPS) coordinates. The customer is informed of the specific location the cart is to be placed for collection on their designated collection day. MSW residential collection service is performed Monday through Thursday and on every holiday except Christmas and New Year's Day. Customers are informed of the day each week their trash collection will occur when they first register for service.

The customer is also informed that the GSWA crew will not collect MSW that has been spilled or been displaced prior to the arrival of the GSWA crew. Cleaning up such litter is the

responsibility of the owner. Any spillage or displaced litter caused as a result of the duties of the GSWA shall, however, be GSWA's responsibility.

Residential Recycling is available to all GSWA Residential Customers[1]. Customers of GSWA's residential trash collection service also receive a Recycling Cart. GSWA has a single-stream recycling system which means that all of the recyclables are placed together in one recycling cart. These materials include all paper items that are not wax coated or soiled, plastics one and two drinking beverages, and aluminum and non-aluminum cans. The recycling cart is collected twice a month on the same day as the customers' trash cart is collected.

Solid waste and recycling material collected shall, upon being loaded into the GSWA transportation vehicle, become the property of the GSWA. GSWA crews shall not be required to reach into GSWA carts to remove contents. Customers of GSWA must not place banned items into the GSWA carts. If banned items are found, GSWA crews will tag the cart with a violation notice and inform Customer Service for proper notation into the customer's account. The cart contents will not be collected. After two violations, the customer will be contacted by a customer service representative. If a third violation is issued, the cart will be repossessed. To resume service, the customer must pay a fifty-dollar ($50) restoration fee. The customer is expected to maintain the cart in a clean condition while the GSWA carts are being used by the customer.

The account information of each customer is maintained by GSWA in the RAMS-Pro software provided by Alpine Technology Corporation based in Colorado Springs, Colorado. Online customer access to their accounts is provided through BMS Technologies based in Bend, Oregon. These are very cost-effective and stable services that must be maintained to ensure the financial stability of GSWA and the quality of its customer service. More than two-thirds of GSWA customers access their accounts online.

Payment for GSWA Residential Trash Collection may be made through the Bank of Guam, Bank Pacific or ANZ Bank through accounts maintained at these banks by GSWA. Payment may also be made online using PayPal. The arrangement with Paypal is also a very cost-effective relationship that is very popular with GSWA customers. It required no set-up cost and its fees are in line with other credit card services charging substantial set-up cost. More than half of GSWA's residential customers pay online using paypal.

***Residential Transfer Stations***

The Guam Solid Waste Authority (GSWA) currently operates three Residential Transfer Stations on the island. These facilities are restricted to residential customers only. No commercial or government waste is allowed.

[1] Residential customers served by what are known as "baby packer" trucks have not had access to curbside but with the delivery of new trucks scheduled for late December, recycling service to all residential routes will become a reality in early 2018.

Only household trash and certain bulky items are accepted at these facilities.

Price is based on volume which is estimated by the pay attendant in the following manner:

- The minimum charge is $7.50 from one item up to the top of the sidewalls of a regular 8-foot pick-up bed.
- If the amount is above the sidewalls and approximately half way to the top of the truck cab, the price will be $15.00.
- If slightly above the truck cab, the price will be $22.50. If significantly above the truck cab, the pay attendant will assess as needed.
- Sofas, Mattresses / Box springs $7.50 per item

Recycling is accepted without charge if placed in recycling containers. Materials accepted for recycling at the Residential Transfer Stations include:

Cardboard
Mixed Paper
Glass Bottles and Jars
Aluminum and Metal Cans
Plastic drinking containers #1 and 2

***Bulky Waste Collection:***

Residential customers with accounts in good standing may receive up to two free bulky waste collections each calendar year. Bulky waste collection is made by appointment. A customer calls the GSWA Customer Call Center and receives a date for the collection of their Bulky material. This includes appliances, mattresses, hot water heaters and other bulky and metallic waste furniture and appliances. These items must be at the curb in the same general vicinity where they put their trash and recycling carts out for collection. Customers are allowed to place up to five bulky items at the curb for each collection. If a customer should need additional bulky waste collections within the calendar year, the customer will have to pay a $25 fee for each additional collection within the year. Non-GSWA customers may also make an appointment for Bulky Waste collection as long as they are located in a residential unit and pay the $25 fee for collection.

***Household Hazardous Waste Program***

Many products used in the home, garden, garage and hobby shop have hazardous characteristics. These characteristics include being poisonous, combustible, flammable or corrosive. Disposal of these products require the special handling provided by the Household Hazardous Waste Program.

There is no charge for using the Household Hazardous Waste Program but customers are limited to 15 gallons or 100 pounds of household hazardous waste items per day. The program

is restricted to only serve households on Guam. Commercial or other entities wishing to dispose of such products will be referred to properly permitted private facilities on Guam who provide such services. A complete list of the products accepted by the Household Hazardous Waste Program is available to the public on the GSWA website.

***Commercial Customers:***
All commercial trash collection and recycling for commercial entities are handled by properly permitted private commercial haulers. An individual commercial entity may open an account for its own waste but it must be properly permitted through the Guam Environmental Protection Agency (GEPA) for this purpose. GSWA does not provide any curbside MSW collection or recycling service for commercial entities.

To open an account, commercial entities must come into the GSWA Office and sign up for a commercial account. Commercial accounts must be approved by GSWA management and are subject to the attached delinquency policy which was approved by the District Court (see Attachment III). Commercial entities are prohibited from disposing MSW at the Residential Transfer Stations or hazardous material at the HHWF. Unless approved by GSWA management to deliver waste to the Layon Landfill, commercial entities are required to use GSWA's Haulers'-only Transfer Station. Direct deliveries to the Layon Landfill are by appointment only approved by GSWA management. If the commercial entity goes directly to the Layon Landfill without first getting an appointment, it will be redirected to the Hauler-only Transfer Station and will not be allowed to deposit its material at the Layon Landfill.

Military waste is included in the commercial category since it is delivered to GSWA via a commercial hauler. The waste is delivered by a private commercial hauler delivering only the military's waste and the cost of the service is billed directly to NavFac and paid directly by NavFac. This is handled in this manner pursuant to a direct contract between GSWA and NavFac.

Commercial customers are afforded the same sixty-days to pay an invoice as residents. However, commercial haulers have an additional tool provided by Public Law 25-93. Under this law a commercial hauler may transfer the liability for unpaid bills from their commercial customers to GSWA making collection of the unpaid bills virtually impossible. This law became a serious barrier to collection of amounts owed to GSWA for commercial services.

The Receiver also encountered another problem in the use of credit cards to pay for solid waste services. While we have encouraged the use of credit cards to pay residential customer bills because these are small amounts and the electronic nature of the payment facilitates its integration into the GSWA account management system making it a cost-effective method of payment for residential customers. Commercial payments, however, unlike residential payments, are large dollar amounts averaging in the tens and hundreds of thousands of dollars.

Since credit card companies are compensated with a percentage of the payment (usually 2-2.5 percent), the cost for these transactions are not cost-effective since there are other much less expensive means of making large electronic payments.

Finally, failure to pay on a timely basis was also a major problem with some commercial haulers. At the beginning if the Receivership there was no delinquency policy and the result of not paying was an interest free loan to the commercial hauler. GSWA simply could not continue to operate this way.

To effectively address these problems, the Receiver implemented a fair but stringent delinquency policy and an incentive to encourage full and timely payment from commercial haulers. The delinquency policy was adopted by the Receiver after approval by the District Court of Guam and is included with this memo as Attachment III. We urge the GSWA Board to continue this policy.

The incentive for commercial haulers was accomplished by first instituting a 10 percent increase in the rates charged to commercial accounts. This was accompanied with a ten percent discount for qualifying commercial haulers meeting the following criteria:

1. Invoices are paid in-full within 60 days;
2. The hauler does not invoke Public Law 25-93 to reduce the amount paid;
3. All payments are made electronically through an Automated Clearing House (ACH) transaction to a designated GSWA bank account.

Military waste is not subject to this policy since payment is guaranteed by the United States Government. Per the GSWA contract with NavFac, the Military is billed at the discounted rate, pays electronically and does not have the ability to invoke Public Law 25-93.

***Hauler-only Transfer Station***

Commercial haulers and large generators who self-haul must contact the GSWA to set up a commercial account before entering the Hauler Transfer Station. The Hauler Transfer Station is open six full days a week, Monday through Saturday, opening at 4:30 A.M. each morning and closing at 2 P.M. Monday through Friday and at Noon on Saturday. It is also open for one hour on Sundays from 10 to 11 A.M.

GSWA employees operate the scales at the Hauler-only Transfer Station while a private operator owns and manages the facility. A customer will drive onto the scales, a GSWA employee will look up the customer's account, weigh the truck, and provide the customer with a dump ticket.

An initial tare weight shall be obtained on each vehicle disposing of Acceptable Waste at the Hauler Transfer Station for the first time. Such tare weights will be for specific vehicles and will

be provided to the company owning the vehicle. These tare weights will be used to determine the weight of each load. The GSWA shall have the right to determine a new tare weight for each vehicle at its discretion.

If scales are inoperable for any reason, GSWA will use its best efforts to quickly correct the problem and reinstate scale operations. During any such period when the scales are not operating, the Hauler shall accept reasonable estimated weight based on historical data.

After obtaining a dump ticket, the driver will move the vehicle to the transfer station where an employee of the private operator will ask for the dump ticket and then direct the driver to back into a designated bay and unload the contents onto the tip floor. The private operator will then do a quick search through the material to determine if any unauthorized material is in the load. If such unauthorized material is found, the material will be put back into the hauler's truck. After dumping, the hauler then takes his truck back down to the scales to be weighed a second time[2] so as to accurately quantify the amount of material dumped into the facility for disposal.

The only waste accepted at the Hauler-only Transfer Station are Non-Hazardous Solid Wastes. Specifically excluded are special waste. Special waste includes:

Treated Infectious Waste
Dead Animals and Offal
Sewage Sludge
Asbestos Waste (prior written approval of Guam EPA is required)
Treated Medical Waste

Special wastes may only be disposed in the Layon Landfill by appointment only and with the approval of the Landfill Operator. To schedule an appointment, commercial haulers should contact the Landfill Operator GGH at 671-828-5263.

***Government Customers*:**
Government customers consist of GovGuam agencies and mayors' offices. These customers are prohibited from disposing of trash at the Residential Transfer Stations or at the HHWF. They must use the Haulers'-only Transfer Station or be approved or directed by GSWA to deliver directly to the Layon Landfill by appointment. Government customers have to adhere to the same rules and laws as other customers such as their trailers filled with MSW must be covered and secured before being allowed into GSWA facilities. Government customers receive invoices for the material they bring in. This must be paid. Mayors, by law, receive one free load each day at GSWA facilities. Any additional tons brought in are charged to their account.

[2] Regular returning customers in equipment previously weighed empty are not required to visit the scale a second time when dumping since the system has already recorded the tare weight of the equipment.

**Disposal:**
The final disposal of MSW on Guam is GSWA's Layon Landfill. This is a sub-title D landfill, with its operations and management contracted out to a private firm. The contractor is responsible for all permits and monitoring of the site. The facility is not open to the general public.

The vast majority of the trash going into the Layon Landfill comes directly from GSWA's Haulers'-only Transfer Station located in Harmon Industrial Park. Commercial, institutional and government MSW is brought into the Haulers'-only Transfer Station. The purpose of this is to reduce truck traffic to the Layon Landfill.

Only waste deemed acceptable waste under the landfill's operating permit is allowed to be disposed at the Layon Landfill.

***Radioactive Waste Detection***
Both the Hauler-only Transfer Stations and the Layon Landfill are equipped with radiation detection sensors that are used to screen each load of waste delivered to these facilities. When these devices detect radiation in a load (usually the result of improperly disposed medical supplies utilized at home by a patient) the load is not allowed to dump. If the vehicle bringing in the load is a GSWA vehicle the material is located in the load using hand-held radiation detectors and placed in a secure container until the radiation subsides and the material can be properly disposed. If the vehicle is owned by a private or other governmental entity, the vehicle is not allowed to unload and the owner is given a choice. It can be handled in the same manner as GSWA vehicles are handled (for which a fee is charged by the private company that handles this work) or it may leave the premises without dumping. If it chooses to leave without dumping, GSWA notifies the Guam Environmental Protection Agency of the time, date, vehicle license plate number, and owner of the vehicle to allow them to follow-up to ensure that the material is properly handled.

In conclusion, each of the forgoing descriptions should be carefully reviewed by the board, its legal counsel and General Manager to determine where rules are needed, draft such rules and submit them for approval in accordance with the requirements of Guam Law.

Thank you.

Attachments

CHAPTER 2
SOLID WASTE MANAGEMENT

Article 1
Solid Waste Collection, Disposal, Processing and Recycling

§2100. Provisions.
§2101. Purpose.
§2102. Duty to Assure Removal of Solid Wastes.
§2103. Definitions.
§2104. Storage of Solid Wastes.
§2105. Collection of Solid Wastes.
§2106. Transportation of Solid Wastes.
§2107. Disposal of Solid Wastes.
§2108. Additional Prohibited Acts.
§2109. Contract for Collection and Disposal Service.
§2110. Enforcement and Penalties.
§2111. Rate Deviations; Disputes.
§2112. Development.
§2113. General Requirements.
§2114. Guidelines for All Development Projects.
§2115. Additional Guidelines for Single Tenant Development Projects.
§2116. Additional Guidelines for Multiple Tenant Development Projects.
§2117. Location.

§2100. Provision. Any provision of the adopted rules and regulations of this Act on "Solid Waste Collection, Disposal, Processing and Recycling" in conflict with Public Law Number 24-272, the provision of Public Law 24-272 shall prevail.

**Commented [DM1]:** The rules are apparently based on old law that pre-dates the Receivership. These should be reviewed by legal counsel to determine their continuing applicability and to assess how more recent law affects the rules needed for GSWA.

§2101. Purpose. The purpose of these rules and regulations ('Regulation') is to protect public health, safety and welfare by reducing or eliminating health hazards, fire hazards, offensive odors and unsightly litter attributable to accumulations of solid wastes, and provide for maximum recovery of useable materials of solid waste within the limits of economic feasibility.

The government of Guam must divert twenty five percent (25%) of all solid waste by January 1, 2001, through source reduction, recycling and composting activities. Diverting twenty five percent (25%) of all solid waste requires the collective participation of the residential,

**Commented [DM2]:** Legal counsel should review continuing applicability. GSWA, while a key player in recycling, is not in a position to effectively monitor or enforce such a provision.

commercial, industrial and public sectors. The government shall continuously seek community participation and technology to further reduce solid waste.

The lack of adequate areas for collecting and loading recyclable materials that are compatible with surrounding land uses is a significant impediment to diverting solid waste and constitutes an urgent need for the government of Guam to address access to solid waste for source reduction, recycling and composting activities. This Regulation has been developed to meet that need.

**§2102. Duty to Assure Removal of Solid Waste.** Every occupant who produces solid wastes has the duty to provide for the storage and removal of all such wastes produced on the occupied premises. Occu- pant shall segregate the same into solid wastes and into recyclables. When the solid waste is so segregated, the two (2) may be disposed of separately as hereinafter established.

**§2103. Definitions**. The words and phrases used throughout this Regulation are derived from §51102 of Chapter 51, Part 2, Division 2 of Title 10 of the Guam Code Annotated plus the following definitions:

(a) Collection Service means the collection of solid wastes at the point of storage on the premises of a single family residential property receiving service.

(b) Bulky Rubbish means non-rotting solid wastes from dwelling units, institutional, commercial, industrial or agricultural establishments which are either too large or too heavy to be safely and conveniently loaded in solid waste transportation vehicles by solid waste collectors.

(c) Department means the Department of Public Works, ('DPW') government of Guam.

(d) Director means the Director of Public Works or his delegate serving as director of the solid waste management pro- gram on Guam.

(e) Disposable Solid Waste Container means disposable plastic or paper sacks with a capacity of five (5) to thirty-five (35) gallons specifically designed for storage wastes.

**Commented [DM3]:** GSWA does provide locations for recycling in its Residential Transfer Stations, and through its curbside recycling program. It also refers residents to other permitted outlets for recycling of green waste and construction and demolition waste on Guam. GSWA's Bulky Waste collection recycles all of the waste it collects to the extent practicable.

**Commented [DM4]:** GSWA directly serves only those residential facilities with four or less units. Commercial haulers serve facilities with more than four units. GSWA has no capacity to enforce this provision.

**Commented [DM5]:** The definitions here refer to DPW and the old law. To the extent that definitions are needed they should be updated to reflect the current program, law and organization.

(f) Division means the Division of Solid Waste Management of the Department of Public Works, government of Guam.

(g) Dwelling Unit means one (1) or more rooms, and a single kitchen in a dwelling, designed as a unit for occupancy by one (1) family for living and sleeping purposes.

(h) Family means one (1) person living alone, two (2) or more persons related by blood, marriage or legal adoption, or a group not in excess of five (5) unrelated persons living together as a single housekeeping unit; and in addition thereto domestic employees.

(i) Grading, Demolition and Construction Wastes means waste materials from the grading of land or the construction, remodeling or destruction of structures.

(j) Government means the government of Guam.

(k) Multiple Dwelling means a building, or portion thereof, used and/or designed as a residence for two (2) of more families living independently of each other in dwelling units and doing their own cooking in said building.

(l) Occupant means any person whom, alone or jointly or severally with others, shall be in actual possession of any dwelling unit, or of any other improved real property, either as owner or as a ten- ant.

(m) Single Family Residence means a detached building designed for and/or occupied exclusively by one (1) family.

(n) Solid Wastes means unwanted or discarded waste materials in a solid or semi-solid state, other than those specifically intended for recycling. Such material includes, but is not limited to, garbage, wood, glass, paper, plastics, ashes, street refuse, rubbish, dead animals, animal and agricultural wastes, except manure, discarded furnishings and appliances, industrial wastes, and grading, demolition and construction wastes.

(o) Solid Waste Management means management of the entire solid waste system of storage, collection, transportation, processing and disposal.

(p) *Special Solid Waste or Special Collection or Special Fees* means solid waste that requires special handling and separate fees (for example tires, construction debris, batteries, air conditioners, cars, etc.) as designated by the Director of DPW and in compliance with all local, state, and Federal laws and regulations and established pursuant to Article 3, Chapter 9 of Title 10 of the Guam Code Annotated, Administrative Adjudication Law, Rule Making Procedures.

**Commented [DM6]:** Tires and construction debris are not allowed in the landfill. Batteries are acceptable at the HHW facility. Air conditioners can be accepted through the Bulky Waste program. Descriptions of special waste should not be based on limited examples but instead the permit requirements of the programs.

**§2104. Storage of Solid Wastes.** (a) **Contents Required.** The occupant of every dwelling unit and of every institutional, commercial, industrial or agricultural establishment producing solid waste within the corporate limits of Guam shall provide on the premises, without expense to the government, a sufficient number of adequate containers for the storage of all solid wastes, except bulky rubbish, grading, demolition and construction wastes, which would ordinarily accumulate at each such dwelling unit or establishment between the scheduled collections. Such containers shall be maintained at all times in good repair, and both containers and the area used for storage of containers at each dwelling or establishment shall be maintained at all times in a clean, neat and sanitary condition.

**Commented [DM7]:** GSWA does not collect waste from institutional, commercial, industrial or agricultural establishments. It has no capacity to enforce regulation of the containers used by these establishments.

(b) **Single Family Residential Containers.** Single family residential solid wastes shall be stored on the premises in containers of not more than thirty-five (35) gallons, and not less than five (5) gallons in nominal capacity. Containers shall be leak-proof, waterproof and fitted with a fly-tight lid, and shall be covered at all times except when depositing waste therein or removing the contents thereof. The containers shall have handles, bails or other suitable lifting devices or features. Containers shall be of a type originally manufactured for dwelling unit solid wastes, with tapered sides for easy emptying. They shall be of lightweight and sturdy construction. The weight of any individual container and contents when such container is filled to within four (4) inches of the top shall not exceed sixty (60) pounds. Rubber, fiberglass or plastic containers, which do not become brittle in hot/cold weather, may be used. Disposable solid waste containers may also be used by a dwelling unit for storage of solid wastes; provided such containers are leak-proof, waterproof, tightly covered, and less than ten (10) pounds.

**Commented [DM8]:** This is no longer applicable to the post-receiver Guam system. With the implementation of the cart system, GSWA provides carts to all residential customers. Customers are required to use the GSWA provided cart instead of providing their own containers. The only other acceptable containers are bagged with a tag sold by GSWA for residential customers with carts when they have trash in excess of the cart's capacity.

(b) **Other Containers**. Multi-family residential, institutional, commercial, industrial or agricultural solid wastes shall be stored in bulk containers of the type designed to be handled mechanically by refuse collection vehicles, as approved by the Director, taking into consideration the quantity of wastes generated at each establishment and the frequency and method of collection, but containers shall at least meet the standards as indicated in this Regulation. All containers shall be waterproof, leak-proof and shall be covered, *except* when depositing waste therein or removing the contents thereof. Containers shall be stored on private property, *unless* the owner shall have been granted written permission by the Director to use public property for such purposes. Cleaning of bulk containers shall be the responsibility of the private property owner, *unless* otherwise stipulated in a written contract for other persons to be responsible for the cleaning of bulk containers.

(c) **Yard Wastes.** Tree limbs, brush, and other yard wastes which cannot be placed in storage containers shall be securely tied in bundles not longer than forty-eight inches (48") in length and eighteen inches (18") in diameter. The weight of each individual bundle shall not exceed thirty (30) pounds.

(d) **Bulky Rubbish**. Bulky rubbish shall be confined to the property upon which it originates in such a manner so as not to permit it to create any health or safety hazard. No such items of bulky rubbish shall be stored in front of any dwelling, business or establishment so as to be unsightly.

(e) **Grading, Demolition and Construction Wastes**. Grading, demolition and construction wastes shall be confined to the property on which grading, demolition or construction is taking place, and shall be removed by the owner or his agents immediately after such grading, demolition or construction is completed.

(f) **Recyclables**. Material intended by the occupant to be recycled, shall be stored prior to recycling in such containers, or in such a manner so as to prevent it from creating any health or safety hazard, or from littering public or private property, including the property of the occupant. No material stored pursuant to this Section shall be stored in front of any dwelling, business or establishment so as to be unsightly.

**Commented [DM9]:** GSWA provides carts to multi-family residential customers of four or less units with carts but does not serve any of the other types. GSWA has no capacity to enforce this regulation with respect to most of those described.

**Commented [DM10]:** GSWA does not collect or accept yard waste of any kind. It is excluded from the landfill.

**Commented [DM11]:** This rule does not address proper disposal only how such waste should be stored on the site of the generator. New rules should outline the parameters of GSWA Bulky Waste program and describe its requirements for proper disposal. GSWA has no enforcement capacity in this area.

**Commented [DM12]:** Construction and demolition waste is not allowed in the landfill. Generators of this material have access to permitted facilities on Guam but GSWA's only role is to refer generators to the permitted facilities.

**Commented [DM13]:** Any rules on recycling should describe and facilitate GSWA's Curbside Program and the Residential Transfer Station's collection of recyclables.

The Director and the Administrator of the Guam Environmental Protection Agency shall submit comprehensive rules and regulations for the disposition of recyclable materials for the collection, separation, storage, recycling process and other needs for a comprehensive recycling municipal solid waste system to reduce the waste stream.

(g) **Unauthorized Containers.** Solid waste containers or bundles which are not in accordance with this Regulation shall be collected together with their contents, and disposed of after reasonable notice has been left on the container during a prior collection visit. Containers or bundles exceeding size or weight limitations, or containers filled in such a manner that contents are *not* easy to empty, shall *not* be collected and notice shall be left on each such container or bundle advising the owner of applicable provisions of this Regulation.

**§2105. Collection of Solid Wastes.** (a) **Response.** The government of Guam shall provide for the collection of solid wastes from individual dwelling units or single family residences; provided, however, that DPW may contract for collection services with a person, business or corporation, or a combination thereof, for such as deemed to be in the best interests of the Island.

(b) **Collection and Transport Assignments.** The government, its employees or solid waste collection contractors shall have, the exclusive right to collect or transport solid wastes for individual dwelling units or single family residences *not* covered by agreements through homeowner associations or other group agents for the collection of waste by a licensed, waste hauler. Solid waste collection for multi-family residential or multiple dwelling units, commercial, industrial or agricultural activities shall be based on a free enterprise or privatized system as regulated and permitted by the Guam Environmental Protection Agency. *However*, nothing in this Section shall operate so as to prevent, or cause any unnecessary hardship to, the occupant or entity of any premises producing solid wastes, from recycling or transporting to the extent allowed said solid wastes.

Further, nothing contained in this Section shall be construed so as to prevent any community-based recycling center from receiving solid waste segregated for recycling at its place of business, or at centrally-

**Commented [DM14]:** It is unclear why this is appropriate to GSWA rules.

**Commented [DM15]:** Waste is not collected by GSWA unless it is in a GSWA provided cart or appropriately bagged with a GSWA tag.

**Commented [DM16]:** GSWA does not collect from commercial, industrial or government or institutional generators. These are referred to the properly permitted commercial haulers.

**Commented [DM17]:** As a practical matter, GSWA is the exclusive collector for residential customers (other than those residing in facilities of more than four units. This rule does not accomplish anything.

located collection points as approved by the government of Guam, or from thereafter transporting such waste.

(c) **Right to Transport Own Wastes**. Any person may transport solid wastes generated on his own premises to an authorized processing or disposal site, providing the requirements of this Regulation are met.

(d) **Collection Intervals**. All single-family residential solid wastes, other than bulky rubbish and recyclables, shall be collected at least once weekly. Multi-family residential, institutional, commercial or agricultural solid wastes shall be collected by privately contracted and duly permitted solid waste collectors or transporter at least once weekly, and may be collected at such lesser intervals as may be relaxed by the Director, or requested by the establishment upon a determination that such lesser intervals will not harm the public health or safety.

(e) **Point of Collection – Single Family**. Single family residential solid wastes in containers or bundles authorized by this Regulation shall be placed at the curb or alley for collection as specified by the Director, taking into consideration the quantity of wastes generated at each establishment and the frequency and method of collection. Solid wastes storage sites shall be easily accessible to collection personnel and equipment.

(f) **Time Limit on Containers Placement on Curb**. Containers or bundles shall be placed at the curb for collection not earlier than twelve (12) hours *prior* to the collection date, and shall be removed no later than twelve (12) hours following the collection date.

(g) **Grading, Demolition and Construction Wastes**. Removal of grading, demolition and construction wastes from the property upon which grading, demolition or construction is taking place shall be the responsibility of the owner, and shall *not* be the responsibility of the government or authorized solid waste collection contractors under this Regulation. The government or authorized solid waste collection contractors may offer a removal service for such wastes and may charge a fee therefor.

(i) **Responsibilities at Point of Collection**. Authorized solid waste collectors shall be responsible for the collection of solid wastes from the point of collection to the transportation vehicle; *provided,* the

**Commented [DM18]:** Any such facility would need to be permitted by GEPA.

**Commented [DM19]:** Some multi-family with four or fewer units are collected by GSWA so any rule it this area needs to recognize this.

**Commented [DM20]:** GSWA now designates the collection point at the time the customer signs up for service. Points of collection are then marked using GIS coordinates which are then recorded in the billing system tying the collection point; the cart assigned and the billing address of the customer.

**Commented [DM21]:** GSWA has no capacity to enforce such a rule.

**Commented [DM22]:** GSWA has no capacity to offer the service nor is it allowed to take such waste at the Layon Landfill.

solid wastes were stored in compliance with this Regulation. Any spillage or displaced solid waste occurring prior to the arrival of the solid waste collectors at the point of collection shall be the responsibility of the owner. Any spillage or displaced litter caused as a result of the duties of the solid waste collectors shall be collected and placed in the transportation vehicle by the solid waste collectors. Any solid waste collected shall, upon being loaded into transportation equipment, become the property of the collection agency. Solid waste collectors shall not be required to reach into solid waste containers to remove contents. Authorized containers emptied by solid waste collectors shall be returned to the point of collection.

(j) **Collection Fees.** All tipping/user fees to be charged by the DPW for solid waste collection, disposal, recycling and processing services established by Public Law Numbers 24-139 and 24-272 and other special fees shall be billable every first (1st) of the month for the previous month service. All fees shall be paid within sixty (60) days from the date of billing.

*(k)* **Special Collections**. The Director may require special collections as he deems appropriate under the circumstances in accordance with Guam's procurement law or through a standard schedule of fees established in accordance with Article 3 of Chapter 9 of Title 5 of the Guam Code Annotated, *Administrative Adjudication Law, Rule Making Procedures.*

(l) **Bulk Containers**. Solid waste collection contractors shall make available sufficient numbers of bulk containers and meet all requirements for such containers under this Regulation and may charge a rental.

**§2106. Transportation of Solid Wastes.** (a) **Vehicle Standards**. All solid waste collection transportation vehicles used by DPW authorized solid waste collection contractors, shall be maintained in a safe, clean and sanitary condition, and shall be so constructed, maintained and operated as to prevent spillage of solid wastes, leakage of liquids or emission of offensive odors therefrom.

(b) **Transportation of Own Wastes**. Any person transporting solid wastes under the provision of this Regulation shall do so in a

**Commented [DM23]:** Fees are to be established by the Board with the approval of the PUC. The legal citations here will need updating and the Board should also adopt current GSWA policies on delinquency, fees and fees for reestablishing service.

**Commented [DM24]:** Special collections should not be undertaken. GSWA is not staffed for it.

**Commented [DM25]:** Regulation of the containers used by commercial haulers should be the responsibility of GEPA. GSWA has no capacity to enforce such a regulation.

**Commented [DM26]:** It is not feasible to "prevent" these things. Keeping the trucks clean and well maintained should always be a management responsibility.

manner as to prevent spillage of solid wastes, leakage of liquids or emission of offensive odors therefrom.

(c) **Grading, Demolition and Construction Wastes**. Any person transporting materials resulting from grading, demolition or construction activities shall do so in vehicles so constructed and maintained that none of the materials being transported shall spill onto the public roads and streets.

**§2107. Disposal of Solid Wastes.** (a) **Disposal at Authorized Sites Only**. Solid wastes shall be deposited at a processing facility or disposal area approved by DPW and complying with all relevant requirements of local, state, and Federal laws and regulations.

(b) **Hazardous Wastes**. The Director may direct certain solid wastes deemed as hazardous wastes which will require special handling, and shall be disposed of only in a manner acceptable to the Director and in compliance with Guam and Federal laws and regulations.

(c) **Unlawful Disposal**. It shall be unlawful for any person to throw or deposit any solid wastes, or to cause the same to be thrown or deposited, in or upon any street, alley, gutter, park, body of water or other public property, or to throw or deposit the same in or upon any private lot, yard or body of water.

**§2108. Additional Prohibited Acts.** (a) **Use of Other Than Own Container.** It shall be unlawful for any person to deposit solid wastes in any solid waste container other than his own without the written consent of the owner of such container or with the intent of avoiding payment of the service fees for solid waste collection.

(b) **Failure to Pay Fees.** It shall be unlawful for any person to fail to pay the service fees when a person is receiving such service. The government or any contractor collecting solid wastes under this Regulation may enforce compliance with any provision of this Regulation against such person or business. DPW may, in addition to whatever other rights and remedies it may have, seek enforcement of this Regulation under applicable laws of Guam.

(c) **Interference.** It shall be unlawful for any person to interfere in any manner with solid waste collection equipment or solid waste collectors in the lawful performance of their duties as such, whether

**Commented [DM27]:** GSWA has no capacity to enforce such a rule.

**Commented [DM28]:** GSWA has no capacity to enforce such a rule.

**Commented [DM29]:** These regulations mostly seek to regulate the actions of individuals generally. GSWA does not have the capacity to enforce such rules except as they relate to customers using GSWA services and facilities. With respect to hazardous waste, GSWA only handles household hazardous waste as described on the website. Other hazardous waste is prohibited.

**Commented [DM30]:** Any rule in this area should be a rule outlining GSWA policy on failure to pay. See our memo concerning these issues.

such equipment or collectors are those of the government or those of an authorized solid waste collection contractor.

(d) **Burning.** Only application to and approval of the Guam Fire Department prior to said burning may permit burning of solid wastes.

(e) **Scavenging.** It shall be unlawful for any person to molest, remove, handle or otherwise disturb the container or containers, contents thereof, or other materials which have been placed out for servicing by the collectors; *provided,* this Paragraph does not apply to the occupant of the residence, dwelling or business establishment from which the container and/or contents or materials are removed.

**§2109. Contracts for Collection and Disposal Service.** (a) **Contracts Authorized.** Contracts may be entered into by the government of Guam for the collection and disposal of solid wastes in accordance with the provisions of this Regulation. Such contracts shall be for a period *not* to exceed five (5) years, and shall be awarded in accordance with the Guam Procurement Law. The contracting of services shall be made only to meet service requirements which cannot be met by the Department. The full privatization of services shall occur only after a privatization plan has been approved by *I Liheslaturan Guahan.*

(b) **Exclusive Right.** Contracts for the collection and disposal of solid wastes shall grant the contractor the exclusive right to perform such services as are specified in the contract. However, nothing in this Section or Chapter shall be construed so as to take away from any occupant the right to recycle solid wastes produced on his premises provided no health or safety violation results therefrom.

(c) **Liability Insurance.** No contract for solid waste collection and disposal service shall be entered into by DPW until and *unless* the prospective contractor shall procure and maintain for the duration of the contract Workers Compensation insurance, and insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the contractor, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the Contractor's bid. The coverage, minimum limits of insurance, deductibles, and self-insured retention, as well as all other insurance provisions, shall be in form and in an amount satisfactory to the government. Under no



**Commented [DM31]:** Such a rule should be carefully reviewed by legal counsel. It is not clear to the Receiver that GSWA can create an illegal act.

**Commented [DM32]:** This rule would seem to be the responsibility of the Fire Department.

**Commented [DM33]:** This may be good public policy but does GSWA have the authority to make it illegal? GSWA has no capacity to enforce such a regulation.

circumstances shall the government be liable as a result of a contractor's activities.

§2110. **Enforcement and Penalties** . (a) **Inspection.** In order to ensure compliance with this Regulation, the Director, as well as duly assigned personnel from GEPA, the Department of Public Health and Social Services and the Guam Fire Department are authorized to inspect any and all phases of solid waste management within the oversight of the government. No inspection shall be made in any dwelling unit unless authorized by the occupant or in accordance with due process of law. In all cases where such inspections reveal violation of the provisions of this Regulation, the Director, or appropriate agency, shall issue notice for each such violation stating therein the violation or violations found, the applicable laws and regulations, and the time period within which corrective action shall be taken.

(b) **Penalties.** Any person violating the provisions of this Regulation shall be liable and may be fined not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for each offense; and a separate offense shall be deemed committed on each day during or on which a violation occurs or continues. The fact that solid wastes remains on any occupant's premises in a continuity is a violation of this Regulation and shall be *"prima facie"* evidence that the occupant or the property owner of such premises is responsible for the violation hereof.

(c) **Request for a Hearing.** Any person cited for violating the provisions of this Regulation shall be served by DPW with an administrative citation delineating the specific violation, and be notified of the right to request a hearing under the Administrative Adjudication Law, Article 2 of Chapter 9 of Title 5 of the Guam Code Annotated.

§2111. **Rate Deviations; Disputes.** (a) **Deviations.** The accumulation of solid wastes in certain instances may be so far above the normal or average that the rates relaxed by this Regulation may not be sufficient to fairly compensate the collector for collecting the same, or the accumulation of solid wastes in certain instances may be so far below the normal average that the rates fixed by this Regulation may not be fair and just to the occupant obligated to pay for the removal of such wastes. If either the collector or the occupant believes such to be the fact, he may make written application to the Director for relief, and

**Commented [DM34]:** This rule would appear to authorize GSWA to privatize itself. Legal authority seems questionable.

**Commented [DM35]:** GSWA does not do any of this. Failure to pay results in a termination of service and, for residential customers and withdrawal of the cart. To be reinstated, the customer must pay all overdue amounts plus fees for to compensate GSWA for its cost of retrieval of the cart and a reinstatement fee. These measures have proven to be very effective.

it shall be the duty of the Director to make an investigation and, *if necessary*, will recommend a rate.

(b) **Deviations: Filing.** All cases of deviations from the rates fixed by this Regulation shall be filed in writing with the Director.

(c) **Disputes.** The Director shall decide disputes over charges made by collectors, or as to the character performed, and his decision shall be final.

Commented [DM36]: GSWA has no formal method of handling such matters and generally speaking is not staffed to perform such work. GSWA does not get involved in fee disputes between a private hauler and its customers.

**§2112. Development. Development Project.** (a) **Development Project.** Means any of the following:

(1) A project for which a building permit is required for a commercial, industrial or institutional building, marina, or residential building having five (5) or more living units, where solid waste is dcollected and loaded and any residential project where solid waste is collected and loaded in a location serving five (5) or more units.

(2) Any new public facility where solid waste is collected and loaded, and any improvements for areas of a public facility used for collecting and loading solid waste.

(3) The definition of development project *only* includes subdivisions or tracts of single-family detached homes *if* within such subdivisions or tracts there is an area where solid waste is collected and loaded in a location which serves five (5) or more living units. In such instances, recycling areas as specified in this Regulation are only required to serve the needs of the living units, which utilize the solid waste collection and loading area.

(b) **Improvement.** An improvement adds to the value of a facility, prolongs its useful life, or adapts it to new uses. Improvements should be distinguished from repairs. Repairs keep facilities in good operating conditions, do not materially add to the value of the facility, and do *not* substantially extend the life of the facility.

(c) **Floor Area of a Marina.** The floor area of a marina shall be defined as the space dedicated to the docking or mooring of marine vessels.

(d) **Public Facility.** The definition of public facility includes, but is not limited to, buildings, structures, marinas and outdoor recreation

areas owned by a local agency.

(e) **Recycling Area (Areas for Recycling).** Space allocated for collecting and loading of recyclable materials. Such areas shall have the ability to accommodate receptacles for recyclable materials. Recycling areas shall be accessible and convenient for those who deposit as well as those who collect and load any recyclable materials placed therein.

**§2113. General Requirements.** (a) Any new development project for which an application for a building permit is submitted on or after the approval date of this Regulation, shall include adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste.

(b) Any improvements for areas of a public facility used for collecting and loading-solid waste shall include adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste.

(c) Any existing development project for which an application for a building permit is submitted on or after the approval date of this Regulation for a single alteration which is subsequently performed that adds thirty percent (30%) or more to the existing floor area of the development project shall provide adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste.

(d) Any existing development project for which an application for a building permit is submitted on or after the approval date of this Regulation for multiple alterations which are subsequently performed within a twelve (12) month period which collectively adds thirty percent (30%) or more to the existing floor area of the development project shall provide adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste.

(e) Any existing development project for which multiple applications for building permits are submitted within a twelve (12) month period beginning on or after the approval date of this Regulation for multiple alterations which are subsequently performed that collectively adds thirty percent (30%) or more to the existing floor area of the development project shall provide adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste.

(f) Any existing development project occupied by multiple tenants, one (1) of which submits on or after the approval date of this Regulation, an application for a building permit for a single alteration which is subsequently performed that adds thirty percent (30%) or more to the existing floor area of that portion of the development project which said tenant leases shall provide adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste. Such recycling areas shall, at a minimum be sufficient in capacity, number and distribution to service that portion of the development project which said tenant leases.

(g) Any existing development project occupied by multiple tenants, one (1) of which submits on or after the approval date of this Regulation an application for a building permit for multiple alterations which are subsequently performed within a twelve (12) month period which collectively adds thirty percent (30%) or more to the existing floor area of that portion of the development project which said tenant leases, shall provide adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste. Such recycling areas shall, at a minimum, be sufficient in capacity, number and distribution to serve that portion of the development project which said tenant leases.

(h) Any existing development project occupied by multiple tenants, one (1) of which submits within a twelve (12) month period beginning on or after the approval date of this Regulation multiple applications for building permits for multiple alterations which are subsequently performed that collectively adds thirty percent (30%) or more to the existing floor area of that portion of the development project which said tenant leases shall provide adequate, accessible and convenient areas for collecting and loading recyclable materials and solid waste. Such recycling areas shall, at a minimum, be sufficient in capacity, number, and distribution to serve that portion of the development project which said tenant leases.

(i) Any costs associated with adding recycling space to existing development projects shall be the responsibility of the party or parties who are responsible for financing the alterations.

**§2114. Guidelines for All Development Projects.** (a) Where local standards exist, recycling areas should be designed to be architecturally compatible with nearby structures and with the existing topography and vegetation, in accordance with such standards.

(b) The design and construction of recycling areas shall not prevent security of any recyclable materials placed therein.

(c) The design, construction and location of recycling areas shall not be in conflict with any applicable Federal, state or local laws relating to fire, building, access, transportation, circulation or safety.

(d) Recycling areas or the bins or containers placed therein must provide protection against adverse environmental conditions, such as rain, which might render the collected materials unmarketable.

(e) Driveways and/or travel aisles shall, at a minimum, conform to local building code requirements for garbage collection access and clearance. In the absence of such building-code requirements, driveways and/or travel aisles shall provide unobstructed access for collection vehicles and personnel.

(f) A sign clearly identifying all recycling and solid waste collection and loading areas, and the materials accepted therein, shall be posted adjacent to all points of direct access to the recycling areas.

(g) Developments and transportation corridors adjacent to recycling areas shall be adequately protected for any adverse impacts, such as noise, odor, vectors or glare through measures, including, but not limited to, maintaining adequate separation, fencing and landscaping.

**§2115. Additional Guidelines for Single Tenant Development Projects.** (a) Areas for recycling shall be adequate in capacity, number and distribution to serve the development project.

(b) Dimensions of the recycling area shall accommodate receptacles sufficient to meet the recycling needs of the development project.

(c) An adequate number of bins or containers to allow for the collection and loading of recyclable materials generated by the development project should be located within the recycling area.

**§2116. Additional Guidelines for Multiple Tenant Development Projects.** (a) Recycling areas shall, at a minimum be sufficient in

capacity, number and distribution to serve that portion of the development project leased by the tenant(s) who submitted an application or applications resulting in the need to provide recycling area(s) pursuant to §111 'Development' of this Regulation.

(b) Dimensions of recycling areas shall accommodate receptacles sufficient to meet the recycling needs of that portion of the development project leased by the tenant(s) who submitted an application or applications resulting in the need to provide recycling area(s) pursuant to §111 'Development' of this Regulation.

(c) An adequate number of bins or containers to allow for the collection and loading of recyclable materials generated by that portion of the development project leased by the tenant(s) who submitted an application or applications resulting in the need to provide recycling area pursuant to §111 of this Regulation should be located within the recycling area.

**§2117. Location.** (a) Recycling areas shall not be located in any area required to be constructed or maintained as unencumbered, according to any applicable Federal, state or local laws relating to fire, access, building, transportation, circulation or safety.

(b) Any and all recycling area(s) shall be located so they are at least as convenient for those persons who deposit, collect and load the recyclable materials placed therein as the locations where solid waste is collected and loaded. Whenever feasible, areas for collecting and loading recyclable materials shall be adjacent to the solid waste collection areas.

**Commented [DM37]:** While there may be some merit in having construction officials consult with solid waste officials, we are unaware of any authority for such regulations. In addition, GSWA has no capacity to manage or enforce such regulations.

Attachment II

## Guam Solid Waste Authority

## Residential Account Delinquency Policy

**Delinquent bills, discontinuance of service, service charges** - After thirty (30) days from the billing date, any unpaid balance shall be considered late and shall result in a reminder call to the customer from the Customer Service Section of the GSWA. Any unpaid balance after sixty (60) days shall be considered delinquent and shall result in a letter notifying the customer that service will be discontinued unless the account is paid in full within thirty (30) days of the date on the letter. If the account is not paid in full within thirty (30) days of the date of the letter, service shall be terminated. The customer's trash cart(s) shall be recovered from the customer.

**Restoration of service following collection of the account** - Whenever any delinquent customer, whose service has been discontinued, pays the sum due plus pre-payment of an additional month of service and a fee of $50 to defer the cost of restoring their service, service shall be restored.

**Restoration of service following collection of the account by a collection agency** - Whenever any delinquent customer, whose service has been discontinued and the account has been turned over to a collection agency, pays the total sum due plus service for an additional month and a fee of $100 to defer the cost of restoring their service, service shall be restored.

**Un-recovered or un-repairable carts** – If for any reason the cart of a delinquent customer is not recoverable or is damaged beyond repair, the customer shall be responsible for the cost of a new cart before service may be restored. This cost shall be in addition to the fees outlined above.

Liability of the customer for payment of all unpaid bills and for any lost or damaged carts remains the responsibility of the customer even if service is not restored. Delinquent customers shall also be responsible for any reasonable collection costs incurred by the GSWA.

Attachment III

**Guam Solid Waste Authority**
**Commercial Account Delinquency Policy**

**Delinquent bills, discontinuance of service, service charges** - Any unpaid balance after sixty (60) days shall be considered delinquent and shall result in a letter notifying the commercial hauler that service will be discontinued unless the account is paid in full within thirty (30) days of the date on the letter. If the account is not paid in full within thirty (30) days of the date of the letter, the account will enter a 30-day termination period. At the beginning of the 30-day termination period, a public announcement will be made of the pending termination to allow the customers of the terminating hauler to make other arrangements for the proper disposal of their trash. Termination will be accomplished by barring the delinquent commercial hauler from using the disposal facilities.

**Restoration of service following collection of the account** - Whenever any delinquent commercial hauler whose service has been terminated pays the account balance in full and posts a payment bond equivalent to the total billing to the account for the 12 months prior to the account's termination and a service fee of $1,000 to defer the cost of restoring their service, service shall be restored.

Liability of the commercial hauler for payment of all unpaid bills remains the responsibility of the commercial hauler even if service is not restored. Delinquent commercial haulers shall also be responsible for any reasonable collection costs incurred.

**GUAM SOLID WASTE AUTHORITY**
**BOARD OF DIRECTORS' MEETING**
**November 29, 2017 at 11 a.m.**
**Guam Solid Waste Authority**
**GSWA Conference Room, Tamuning**

I. **Call to Order**

The Guam Solid Waste Authority Board of Directors' meeting was called to order by Chairman, Andrew Gayle, at 11:03 am.

II. **Roll Call**

**Board Members:**

| | |
|---|---|
| Andrew Gayle | Chairman |
| Jonathan Denight | Vice Chairman |
| Minakshi Hemlani | Secretary |

**Management & Staff:**

| | |
|---|---|
| David Manning | Receiver Representative (via telephone) |
| Greg Martin | GSWA General Manager |
| Alicia Fejeran | GSWA Board Clerk |
| Keilani Mesa | GSWA Customer Service |
| Roman Perez | GSWA Operations |

**Guests:**

| | |
|---|---|
| Georgette Concepcion | Board Legal Counsel |
| Promilla Sullivan | Court Reporter |
| Ron White | Green Group Holdings |

III. **Approval of Minutes**

Board Members reviewed draft minutes from the November 14, 2017 Board Meeting. Board Vice Chairman, Jonathan Denight, moved to approve the minutes subject to the following changes: Spelling correction of Kathy Kakigi's name on page three under the Adoption of DOA personnel Rules and spelling correction of Attorney Georgette Concepcion's name on page four under the FY-2018 Budget, and remove section that reads, "and have it set to the minimum" on page three under updates to GSWA Rules. Board Secretary, Minakshi Hemlani, seconded the motion. The motion passed unanimously.

IV. **Reports**

a. **Management/Receiver's Report**

i. **Monthly Tonnages and Collections**
Tabled.

ii. **Operating Budget**
Tabled.

iii. **GM Transition Report**
General Manager, Greg Martin, reported to the Board that the Department of Administration (DOA) had submitted a draft Memorandum of Understanding (MOU) and it is currently being reviewed by himself and staff. Board Vice Chairman, Jonathan Denight, requested that the Board start receiving a printed timeline from Mr. Martin that indicates dates and updates regarding transition.
Board Chairman, Andrew Gayle, suggested that management stock up on necessary supplies to ensure that operations can continue post Receivership without any issues. Board clerk, Alicia Fejeran,

advised the Board that there is a new requirement for procurement staff to be certified and that GSWA does not yet have a certified procurement officer. Board Secretary, Minakshi Hemlani, stated that she does not foresee any issues with Alicia Fejeran and Greg Martin certifying any future procurement post Receivership, and legal counsel would do actual procurement bids. Legal Counsel, Georgette Concepcion, reminded the Board that Bill-200 allows for GSWA to handle its own procurement and that she is also familiar with procurement laws.

**b. Remaining Court Ordered Tasks**

**i. Residential Transfer Station Upgrades**

Tabled.

**ii. Environmental Closure of Dededo Transfer Station**

Tabled.

**iii. Ordot Post-Closure Operator**

Receiver Representative, David Manning, reported that the negotiating process is still ongoing with two proposers. He hopes to have it completed by the end of the year to transition out of the temporary post closure maintenance services.

**iv. Independent Engineer for Ordot Post-Closure Maintenance**

Mr. Manning reported that the Receiver has not proceeded on any further steps on the procurement, and it will be rescheduled to coincide with the resolution of the methane issues at Ordot; sometimes in Spring of 2018.

**v. Trustee**

Mr. Manning reported that the Receiver has not proceeded on any further steps on the procurement and it will be rescheduled to coincide with the resolution of the methane issues at Ordot; sometime in Spring of 2018.

**c. Committee Reports**

**i. Management Team Search**

**a. Comptroller**

Chairman Gayle reported that negotiations have been ongoing with the candidate, Mr. Vinas. Bill-200 was passed into law and enables the Board to hire Mr. Vinas as the Comptroller. The Board members discussed Mr. Vinas' draft employment agreement and made changes. The Board informed Mr. Martin that he will be the one to continue the negotiation process with Mr. Vinas. When the negotiating process is completed the final agreement will be prepared and sent to the Attorney General (AG) for her review. If the AG has no issues with the agreement, it will be sent to the Board for their signature and then to Mr. Manning to certify funding. Mr. Manning stated he will sign the agreement as long as the AG has no issues with the terms in the agreement.

**ii. Personnel Transition**

**a. Status of Proposed Legislation**

With the passing of Public Law 34-58, all contracts will be extended for three (3) years after the transition. Attorney Concepcion informed the Board that Attorney General recommended that the Board discuss and votes on the continuation of the Pacific Human Resources' Contract and Alicia Fejeran's contract post Receivership. Board Chairman Gayle directed Mr. Martin to look into the contracts and make sure that the contracts will continue after the transition date.

**b. Transition of Current Gov. Guam workers**

No discussion.

**c. Recommendation from AG to novate PHRS agreement**

No discussion.

**V. Unfinished Business**

**a. Updates to GSWA Rules**

Board Chairman Gayle discussed the narrative that the Receivers had provided to the Board describing the

current operational rules under Receivership. Chairman Gayle stated that he would like to adopt the current operational rules that the Receiver has put in place. Mr. Martin stated that he would draft the Rules and submit it by the next Board meeting.
Board Secretary, Minakshi Hemlani, made a motion to authorize Mr. Martin to lead a team or subcommittee to bring the operational rules and regulations up to date, prepare and revise the rules and regulations based on the narrative provided by the Receiver, and work with Attorney Concepcion to format the rules so that the Board could properly transmit them to the Legislature. The motion was seconded by Board Vice Chairman, Jonathan Denight. The motion passed unanimously. The draft should be completed by the next Board meeting on December 13, 2017.

b. **Adoption of DOA Personnel Rules and Regulations**
Attorney Concepcion recommended that the Board adopt and continue with DOA personnel rules and regulations and adopt them as a default. Board Clerk, Alicia Fejeran, informed the Board that she would review DOA Personnel Rules and Regulations to see if she has any recommended changes or suggestions. Board Secretary Hemlani made a motion to adopt DOA Personnel Rules and Regulations subject to any changes that might come up in the discussion with Alicia and Greg. The motion was seconded by Vice Chairman Denight. The motion passed unanimously.

c. **MOU with DOA**
Mr. Martin informed the Board that he would like for the Comptroller to come aboard to review the MOU that was drafted by DOA before approving the agreement. Board Chairman Gayle suggested that the MOU be completed before the end of year 2017.

d. **GM Transition Plan**
Removed from Unfinished Business

e. **Legal Transition Issues Update**
Board Secretary Minakshi Hemlani made a motion to provide a supplemental update to inform the court of the status of the Governor signing the Bill No. 209 into law and further accomplishments that took place at today's Board meeting. The motion was seconded by Vice Chairman Denight. The motion was passed unanimously.

f. **FY18 Budget**
Public Law 34-68 was signed and with its passing, the Budget was also passed.

VI. **New Business**
Mr. Martin informed the Board that GSWA had placed two new trucks out for recycle. Martin plans to work with the Comptroller to see what trucks cost the most and see what can be done with the older trucks. He also reported that the Green Group Holdings' replacement for Ron White will be on Guam next week Monday, and he will be meeting with them and talking to them about the landfill and the methane collection programs.

VII. **Open Discussion**
None.

VIII. **Public Forum**
None.

IX. **Next Meeting**
The Board scheduled its next meeting for Wednesday, December 13, 2017, at 11am at the Guam Solid Waste Authority conference room.

X. **Adjourn**
Board Secretary, Minakshi Hemlani, moved to adjourn the meeting at 12:07 p.m. Board Vice Chairman, Jonathan Denight, seconded the motion, and the motion passed unanimously.

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*Counsel for Guam Solid Waste Authority Board of Directors*

**UNITED STATES DISTRICT COURT**

**DISTRICT COURT OF GUAM**

| | |
|---|---|
| **UNITED STATES OF AMERICA,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**GOVERNMENT OF GUAM,**<br><br>**Defendant.** | **Civil Case No.** 02-00022<br><br>**GSWA BOARD OF DIRECTORS' MOTION FOR RECONSIDERATION RE. COURT'S ORDER, ECF NO. 1776 AND MEOMRANDUM OF POINTS OF AUTHORITIES IN SUPPORT OF MOTION** |

## TABLE OF CONTENTS

Motion ..... 3

Memorandum of Points and Authorities ..... 3

I. The Board Acted Diligently in its Recruitment Efforts ..... 4

II. Comptroller ..... 8

III. GWSA Rules and Regulations ..... 10

IV. Complete Versus Partial Transition ..... 13

V. Procurement "Concerns" ..... 15

Conclusion ..... 16

## TABLE OF AUTHORITIES

**Cases**

Motorola, Inc. v. J.B. Rodgers Mech. Contractors, 215 F.R.D. 581 (D. Ariz. 2003) ..... 3

United States v. Gov't of Guam, No. CV 02-00022, 2013 WL 4309814 (D. Guam Aug. 13, 2013) ..... 3

**Statutes**

5 GCA § 9305 ..... 12

Public Law 34-58 (codified as 10 GCA § 51A118(c)) ..... 15

Public Law 34-58 (codified as 10 GCA § 51A118(c)) ..... 15

**Other Authorities**

Civil Rule of Practice CVLR 7(p) ..... 3

## MOTION

COMES NOW, the GUAM SOLID WASTE AUTHORITY BOARD OF DIRECTORS ("Board"), by and through its counsel of record, Brooks Concepcion Law, P.C., and brings this Motion for Reconsideration of the Court's Order re. Extension of the Federal Receivership dated December 1, 2017, ECF No. 1776, pursuant to Civil Rule of Practice CVLR 7(p). The Board moves this Honorable Court to reconsider its Order extending Federal Receivership to June 30, 2018, and instead transition GSWA operations to its management on March 31, 2018.

## MEMORANDUM OF POINTS AND AUTHORITIES

A motion for reconsideration may be made on the following grounds:

> (1) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or, (2) the emergence of new material facts or a change of law occurring after the time of such decision, or, (3) a manifest showing of a failure to consider material facts presented to the Court before such decision.

United States v. Gov't of Guam, No. CV 02-00022, 2013 WL 4309814, at *5 (D. Guam Aug. 13, 2013) citing Rule LR 7.1(i) of the Local Rules of Practice for the District Court of Guam. "It is more common, however, to allow reconsideration solely when the court has failed to consider factual, as opposed to legal, arguments." Motorola, Inc. v. J.B. Rodgers Mech. Contractors, 215 F.R.D. 581, 586 (D. Ariz. 2003) citing Cent. Dist. Cal. L.R. 7–18(c); Dist. Guam L.R. 7.1(i)(3).

On December 1, 2017, at approximately 6 p.m., the Court issued its Order re Extension of the Federal Receivership ("Dec. 1, 2017 Order"), ECF No. 1776, which

ordered that the Receiver shall to continue to exercise full power and authority over all GSWA functions, duties and responsibilities until at least June 30, 2018. Reconsideration is warranted because it appears the Court did not take into consideration the Board's Supplemental Status Report, ECF No. 1175, which was filed on the same date, at approximately 5:30 p.m., before issuing its Order.

For the reasons stated herein, the Board moves this Honorable Court to reconsider its Dec. 1, 2017 Order extending Federal Receivership to June 30, 2018, and instead transition GSWA operations to its management on **March 31, 2018**.

## I. The Board Acted Diligently in its Recruitment Efforts.

As acknowledged by the Court, "the Board wanted to start this recruitment process earlier and proposed that the general manager and comptroller begin working with the Receiver as early as October 2016, with a termination of the Receivership by March 2017." Dec. 2, 2017 Order at 3, n. 2, ECF 1776. The "court adopted the Receiver's proposal instead in order to allow the Receiver to minimize GSWA expenses by delaying the hiring process for general manager and comptroller until 2017." Id.

The Court is mistaken in stating that the delay in hiring a Comptroller was due to the Board's inaction; the record supports the Board's position that it acted diligently. The Board initiated efforts to recruit a new management team as early as October 2015, when the Receivership was scheduled to terminate at the end of 2016.

> The Board discussed the need to have a management team such as a GM and Controller in place to run GSWA operations sooner than the proposed timeline. The management team would handle the transitioning of the agency's current staff into Government of Guam employees and getting the agency to be more autonomous instead of running off of Department of Administration like a line agency.

GSWA Board of Directors' Meeting Minutes, Oct. 28, 2015, attached hereto as Exhibit 4.

In fact, the Receiver refused to allow monies to be expended towards recruitment and the Board was forced to find other ways to finance the cost of advertising for new management.

> Board member, Joseph Duenas, advised the Board that the Lieutenant Governor's Office would be able to pay for the GM and Controller announcements to be advertised. Chairman, Andrew Gayle, suggested that the Board wait for the Court to approve the timeline before proceeding with the search. However, Joseph Duenas and Vice Chairman, Jonathan Denight, felt that the Board should move forward in hiring a GM and Controller to assist in the Government of Guam's response to the Receiver's timeline and were concerned about the length of time it might take to find candidates. Board Member, Alexandra Taitano, asked Bob Perron of Guahan Waste Control for his opinion. Mr. Perron responded that in his experience, a solid waste professional could be hired within a year's time…

GSWA Board of Directors' Meeting Minutes, Nov. 18, 2015, attached hereto as Exhibit 5.

> Board member, Joseph Duenas, informed the Board that he has been working with Lorrie Crisostomo from the Governor's Office in regards to the management search. Lorrie Crisostomo reported that she had sent out requests for the search to a few organizations. Committee will move forward on the management search once vendor record forms are completed and submitted to Department of Administration for those organizations to be able to receive payment. Joseph Duenas asked Chace Anderson what the Receiver's objections are in finding a pool of candidates. Chace responded that the Receiver will follow the timeline that the court adopts and that the court is currently considering the issue.

GSWA Board of Directors' Meeting Minutes, Jan. 25, 2016, attached hereto as Exhibit 6.

> Board member, Joseph Duenas, informed the board that an announcement was placed on the SWANA website to establish a list of potential candidates for the GM Position. He stated that Eric Palacios, the Governor's special assistant for environment and natural resources, is now handling the management search. Joseph Duenas stated that the board will be vetting 13 interested candidates. They also plan to put out a local ad for interested local candidates.

GSWA Board of Directors' Meeting Minutes, March 23, 2016, attached hereto as Exhibit 7.

Because the Court adopted the Receiver's new transition date of December 31, 2017, the Board had no choice but to delay the hiring of its management team.

> The court has adopted the Receiver's recommended timeline and financing plan...The Board Chairman, Andrew Gayle, stated that the search will be suspended. Joe Duenas will be responsible to inform the thirteen candidates that the search has been postponed until further notice.

GSWA Board of Directors' Meeting Minutes, May 5, 2016, attached hereto as Exhibit 8.

In consideration of the new transition date of December 31, 2017, the Board restarted the recruitment and hiring process for a new management team in January of 2017 – as recommended by the Receiver in its Jan. 15, 2016 Quarterly Report.

> Joseph Duenas requested that the job announcement also be posted at Department of Administration. Chace informed the Board that it will be publicized at Pacific Daily News as well. Jonathan Denight motioned to publish and make public the job announcements for General Manager and CFO to solicit for applicants. Joseph Duenas seconded the motion. Motion was passed.

GSWA Board of Directors' Meeting Minutes, Jan. 19, 2017, attached hereto as Exhibit 9.

> Board Clerk, Alicia Fejeran, provided the Board members with a breakdown of candidates who applied for the GM and CFO positions. The board requested that the ads for the positions be run for another month. Jonathan Denight stated he will look into placing an ad at the Board of Government of Guam Accountancy. The board requested that the subcommittee be emailed the documents for all qualified candidates.

GSWA Board of Directors' Meeting Minutes, Feb. 23, 2017, attached hereto as Exhibit 10.

The Chief Financial Officer (CFO) position was advertised at the earliest time possible but there was no interest by qualified individuals. At the recommendation of the Receiver in May 2017, the Board revised the job description for a financial Comptroller. At the June 21, 2017 Board meeting, Alicia Fejeran informed the Board that she would

prepare the job announcement and circulate it to the Board for its approval. GSWA BOD Status Report in Response to Court's Order ECF 1771, Exh. 3 at 2, ECF No. 1772-2.

The Receiver was aware that the Board was having difficulty finding qualified candidates for the Comptroller position and reported the same to this Court. In its August 23, 2017 Quarterly Report the Receiver states:

> o **Current Status** – In early January 2017, the Receiver began working with the Board to recruit the General Manager and Chief Financial Officer. The Receiver continues to assist the GSWA Board in its efforts to hire a General Manager and Financial Officer. The job announcements were widely advertised on behalf of the Board both on Guam and in industry circles where persons qualified for such positions would pursue such an opportunity. The Receiver has also assisted the Board further by evaluating the qualifications of the applicants and working with the Board to schedule interviews which will advance the process further. The Board has made an offer to a qualified candidate for General Manager contingent on completion of an acceptable background check. With respect to the finance position, there was no interest from qualified individuals in the Chief Financial Officer position as initially advertised. To broaden its search, the Board has revised the job description to solicit applications for a financial Controller. We agree with this change and are hopeful it will yield qualified candidates for the Board's consideration.

In its Order the Court states the "Board had made a determination on July 29, 2017 to advertise the comptroller position as an unclassified position, yet it waited until late November to seek the emergency legislation to authorize the creation of this new position." Dec. 2, 2017 Order at 4, n. 4, ECF No. 1776. The Court further states "if the Attorney General had not yet reviewed the comptroller's contract as requested by the Receiver, then the Board would have likely hired an individual for an unclassified position when it did not have the authority to do so." Id.

As a matter of public record, the Board's legal counsel recommended the Board consider hiring an Assistant General Manager of Administration as allowed under GSWA's

enabling act as there was no comptroller position authorized in the act. http://opaguam.org/reports-audits/board-and-commission-meetings, GSWA, June 21, 2017). However, the Board made the decision to advertise the position as a Comptroller based on the Receiver's confidence that it could open up the Comptroller position.

> Board discussed the lack of applicants for the CFO position. The board and receiver also discussed hiring a comptroller. Chace Anderson informed the board that he is confident that the Receiver would be able to open up the Comptroller position. Board member, Alexandra Taitano, motioned to open a Controller position that will also act as an Assistant General Manager and publish a job announcement. Board Member, Minakshi Hemlani, seconded the motion. Motion passed. Alicia Fejeran will prepare the job announcement and circulate it to the board for their approval.

GSWA Board of Directors' Meeting Minutes, June 21, 2017, attached hereto as Exhibit 11; *see also* http://opaguam.org/reports-audits/board-and-commission-meetings, GSWA June 21, 2017) (Per the Receiver a position for comptroller can be created in-house.).

Based in large part on the Receiver's assurances, the Board proceeded to advertise the comptroller position at the earliest time possible.

## II. Comptroller.

In its Order the Court expressed concern that three weeks would not be sufficient time for a new comptroller to transition into his role, and "contrary to the Board's earlier position that 'there should be at least a six-month transition overlap.'" Dec. 1, 2017 Order at 4, ECF No. 1776.

As acknowledged by the Court "the Board wanted to start this recruitment process earlier and proposed that the general manager and comptroller begin working with the Receiver as early as October 2016, with a termination of the Receivership by March 2017." Dec. 2, 2017 Order at 3, n. 2, ECF 1776. The "court adopted the Receiver's proposal

instead in order to allow the Receiver to minimize GSWA expenses by delaying the hiring process for general manager and comptroller until 2017." Id.

Significantly, the Receiver did not believe a six-month transition was necessary. Instead, the Receiver anticipated the new general manager and comptroller "being in place and working with the Receiver to complete transition" "Mid-October to early November."

In its Jan. 15, 2016 Quarterly Report, the Receiver's recommendation regarding GSWA transitional management was for "the process of hiring to begin in January 2017, with a goal to have the positions filled in time to allow these individuals to work with the receiver for approximately ninety days prior to the end of the Receivership." GSWA's new General Manager Greg Martin began in early September, and has been working closely with David Manning and Chace Anderson. As per the Receiver's recommendation, there has, and will be until March 31, 2018, more than ample time for transition.

Further, at the Board's December 16, 2016 meeting Mr. Anderson made a slide presentation regarding the "Hiring Process for GSWA's General Manager and Comptroller" wherein the Receiver presented an approximate timeline within which the GM and Comptroller would be hired. The Receiver recommended "[m]id-October to early November: GM & Comptroller in place and working with Receiver to complete the transition." *See* true and correct copy of slides presented at the GSWA December 14, 2016 Board meeting attached hereto as Exhibit 1. *See also* GSWA Board of Directors' Meeting Minutes, December 14, 2016, attached hereto as Exhibit 2.

While the Court expressed concern for GSWA General Manager Martin's admission that he "does not have a full understanding of GSWA's finances," the Court

must recall that Mr. Martin was hired as General Manager – not Comptroller – he was correct to prioritize his focus to GSWA operations.

As of December 1, 2017, the Attorney General reviewed the Comptroller Employment Agreement and informed the Receiver via email that it is in accordance with Guam law. *See* true and correct copy of email dated December 1, 2017 attached hereto as Exhibit 3. The Comptroller Employment Agreement has been signed by the Employee, the GSWA General Manager and the GSWA Chairperson. The Agreement was forwarded to the Receiver on December 13, 2017 who should certify the availability of funds. GSWA's new Comptroller will arrive in Guam on January 2, 2018 providing ample time for transition by March 31, 2017.

**III. GSWA Rules and Regulations.**

In its Order, the Court criticized the Board for waiting to take any action to address the rules and regulations until six months ago, and for blaming "the Receiver for the delay in its own responsibility for updating the rules and regulations…[as] the promulgation of rules and regulations to govern GSWA operations post-receivership is primarily a legal matter that is better addressed by the Board and its attorney." Dec. 1, 2017 Order at 6-7, ECF No. 1776. However, neither the Board nor its legal counsel are experts in solid waste management.

The Court has repeatedly reminded parties at numerous hearings that the Receiver is the expert in solid waste management, and that such expertise should be tapped upon. Therefore, it was not unreasonable for the Board to seek the Receiver's operational expertise in reviewing GSWA operational rules and regulations. Nor was it unreasonable to seek such assistance eight (8) months prior to the expected December 31, 2017 transition

date. As the Court is aware, the Receiver and GSWA, as an agency, have separate legal representation; undersigned counsel represents only the GSWA Board.

In its Status Report dated November 27, 2017, ECF No. 1772, and Supplemental Status Report filed December 1, 2017, ECF No. 1175, the Board detailed monthly responses received from Mr. Anderson regarding his and Mr. Manning's review of the GSWA Rules & Regulations. The Board was repeatedly advised that the rules and regulations were under review; that Mr. Anderson sent suggested changes to Mr. Manning; that suggested changes would be forthcoming, etc. *See* GSWA BOD Status Report in Response to Court's Order ECF No. 1771, Exh. 1 at 3, ECF No. 1772-1 ("Chairman requested that current management and the receiver identify current operations and make suggestions to the board so that the rules and regulations could be amended. Chace Anderson stated that he will work on it when he returns to Guam after June 10th."); GSWA BOD Status Report in Response to Court's Order ECF No. 1771, Exh. 2 at 3, ECF No. 1772-3 ("Chace Anderson reported to the Board that he went through the rules and regulations and put together a draft that he sent to David Manning for input. The draft needs to be refined a little more and then it will be sent to the Board for further review."); GSWA BOD Status Report in Response to Court's Order ECF 1771, Exh. 4 at 3, ECF No. 1772-4 ("Receiver Operations Manager Anderson reported that he will provide the information on the rules to the Board, after presentation of the Quarterly Report in District Court on August 23, 2017."); GSWA BOD Status Report in Response to Court's Order ECF No. 1771, Exh. 5, ECF No. 1772-5 ("Receiver Operations Manager Anderson reported that updates to the GSWA Operation Rules and Regulations remain unfinished."); GSWA BOD Status Report in Response to Court's Order ECF No. 1771, Exh. 6 at 3, ECF

No. 1772-6 ("Mr. Manning is currently reviewing the GSWA Rules and Regulations. He informed that he will provide comments on the current rules and guidance concerning new rules.").

To its detriment, the Board relied upon these representations and was surprised to receive the Receiver's "narrative" via email at 4:43 p.m. on Nov. 27, 2017, the day before the scheduled Court hearing, stating the rules would need to be completely reworked. The "narrative" was just that – it did not contain any of the promised suggested revisions or draft rules and regulations. *See* true and correct copy of Memo dated November 26, 2017 attached hereto as Exhibit 12.

As previously stated, the Board does not act as management of GSWA and neither the Board nor its counsel are in the position to revise the rules and regulations based on the operations the Receiver revised and implemented in the eight or so years it has managed GSWA. That information must necessarily be obtained from the Receiver, and the Board was under the false impression that it would be forthcoming.

Notwithstanding, at its November 29, 2017 meeting, the Board adopted all policies, rules and regulations put in place by the Receiver since the Receivership commenced regarding commercial haulers, residential customers, banned materials, the collection of bulky items and metallic goods and penalties imposed for late payments. The Board instructed GSWA's General Manager to work with staff and the Board's legal counsel to put these policies, rules and regulations in a format acceptable to the Legislative Secretary pursuant to 5 GCA § 9305. The Board's legal counsel will then file the "interim" rules and regulations with the Legislative Secretary no later than December 31, 2017 at which time they will become effective. The Board's legal counsel in conjunction with management

will begin the process of promulgating the permanent rules and regulations February 1, 2018.

## IV. Complete Versus Partial Transition.

It was the Receiver's recommendation for the Board and GSWA management to take over operations on January 1, 2018, and for a Trustee and Independent Engineer to oversee Post-Closure monitoring of the Ordot Dump. It is disingenuous for the Receiver to now say "You're either in charge or you're not" in response to the Board's suggestion for partial Receivership. The Board's proposal for partial Receivership mirrors the Receiver's original recommendation: new management will take over operations, and the Receiver can continue in the position that it originally suggested for a Trustee - to oversee Ordot post-closure monitoring.

In fact, it appears the Receiver has forced the Court into this position by choosing to not actively pursue RFP's for a Trustee and an Independent Engineer. At the Board meetings held on November 14 and 29, 2017, the Receiver informed the Board that it was not pursuing the RFPs and would await the Court's decision. The Receiver takes this position despite that the Court's November 24, 2017 Order, ECF No. 1771, which stated that that a Trustee, Independent Engineer, and Post-Closure Operator shall be in place post-Receivership

In the Receiver's November 28, 2017 Special Report, ECF No. 1773, it states "we believe the schedule for selecting the Trustee and Independent Engineer should coincide with [*sic*] schedule for completing the work to resolve the landfill gas migration problem and will adjust the procurement schedule accordingly.

The Receiver's position is contrary to its representations to the Court in its August 23, 2017 Quarterly Report, at 12, wherein it states "[t]he problem of the exceedances is important but, in the Receiver's judgement, not so vital as to ask the Court to extend the Receivership to address." The Receiver further states:

> Given the time constraints on the Receiver at this point, the Receiver's time is better spent working to provide an orderly hand-off of our responsibilities than rushing to complete this one item. While important to resolve, it is unlikely that this problem will be resolved by December 31, 2017, and we believe it can be addressed by the operator of the facility who will be in place after the Receivership.

Receiver's August 23, 2017 Quarterly Report at 12-13.

At the November 28, 2017 hearing, the U.S.A. opined that the Receiver should remain in place until after the methane gas issue was addressed. The U.S.A. made this representation despite its statement in its August 2017 report to the Court, ECF No. 1753 at 4, that "to the extent that the requirements of 40 CFR Section 258.23 cannot be met by December 31, 2017, the U.S.A. urges the court to require the Receiver to complete this task before its responsibilities are fully terminated." The Board interpreted this statement to mean the U.S.A. was not opposed to a partial turnover of operations to the GSWA management.

The Board is not responsible for the delay in the approval of the Post-Closure plan. It has no role in the formulation and/or approval of the Post-Closure plan; the transition of GSWA operations to its management should not be delayed due to factors beyond the Board's control.

## V. Procurement "Concerns".

At the eleventh hour, the Receiver, who has received this Court's blessing to bypass local procurement laws, and the U.S.A., argued at the November 28, 2017 hearing that the transition of operations to GSWA management should not occur on December 31, 2017 because the General Manager and Comptroller will have to wait until January 2018 to undertake mandatory procurement training. The Receiver does not mention this red herring in its November 28, 2017 Special Report, ECF No. 177, or in any of its Quarterly Reports.

The Receiver falsely represented at the November hearing that after Receivership no one at GSWA would be qualified to procure supplies and/or services until the Comptroller and Mr. Martin finish the procurement training. At the Board's meeting held the following day, on November 29, 2017, Alicia Fejeran stated that she acts at GSWA's procurement officer. Pursuant to Public Law 34-58 (codified as 10 GCA § 51A118(c)), Ms. Fejeran's employment will continue post-Receivership and she will continue to manage GSWA's procurement activities.

Moreover, Public Law 34-58 (codified as 10 GCA § 51A118(c)) authorizes the GSWA to continue all procurement contracts in place at the termination of Receivership for up to three (3) years from the date of transition. Therefore, there will be no lapse in the provision of supplies and/or services for up to three (3) years.

The Receiver's and the U.S.A.'s eleventh hour "concerns" are an attempt to distract this Court from its intended goal: to end the Receivership in a timely fashion.

## CONCLUSION

As the Receiver has admitted, it has a clear conflict of interest. The Board respectfully requests this Court reconsider its Dec. 1, 2017 Order re. Extension of the Federal Receivership dated December 1, 2017, ECF No. 1776, in light of the facts presented and without prejudice to the Authority's past history. The Board moves this Court to reconsider its extension of Receivership to June 30, 2018, and instead transition GSWA operations to its management on March 31, 2018.

Dated this 15th day of December 2017.

**Brooks Concepcion Law, P.C.**

/s/
**Georgette Bello Concepcion, Esq.**
Counsel for GSWA Board
of Directors