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8 *As Federal Receiver for the Guam Solid Waste Authority*

9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE TERRITORY OF GUAM**

11 UNITED STATES OF AMERICA,  
12  
13 Plaintiff,

14 v.

15 GOVERNMENT OF GUAM,  
16  
17 Defendant.

Civil Case No. 02-00022

**NOTICE OF FILING OF SPECIAL  
REPORT OF THE RECEIVER TO THE  
BOARD OF THE GUAM SOLID WASTE  
AUTHORITY**

18 Gershman, Brickner & Bratton, inc. (“GBB” or “Receiver”), the Receiver, hereby notifies  
19 the Court of the *Specific Report of the Receiver to the Board of Directors of the Guam Solid Waste*  
20 *Authority* concerning the Ordot Dump Post Closure dated October 23, 2023. A copy of this Report  
21 is attached as Exhibit A.

22 Dated: October 26, 2023

Respectfully submitted,

23 **CIVILLE & TANG, PLLC**

24 **By: /s/ Joyce C.H. Tang**  
25 **JOYCE C.H. TANG**

26 *Attorneys for Gershman, Brickner & Bratton, Inc.*  
27 *As Federal Receiver for the Guam Solid Waste Authority*  
28

# EXHIBIT A

**Special Report of the Receiver  
to the Board of Directors of the Government of Guam  
Guam Solid Waste Authority**

**Ordot Dump Post Closure Operations Information  
*United States of America v. Government of Guam* (Civil Case No. 02-00022)**

Prepared for:



Submitted by:



Gershman, Brickner & Bratton, Inc.  
8300 Boone Boulevard, Suite 500  
Vienna, VA 22182

For the U.S. District Court of Guam



October 23, 2023

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**Special Report of the Receiver  
to the Board of Directors of the Guam Solid Waste Authority**

**Ordot Dump Post Closure Operations Information  
in Connection with the Consent Decree in  
*United States of America v. Government of Guam* in Civil Case No. 02-00022**

**A. The Reason for this Special Report**

During the recent months, the Receiver, at the direction of the Court, has been working with the Parties (GovGuam, GSWA, GEPA, USEPA, and DOJ) to address and resolve open issues regarding the Consent Decree and to develop a plan to terminate the Receivership. This special report is intended to respond to questions that have arisen at meetings of the Board of Directors of the Guam Solid Waste Authority (“GSWA”) and to clarify the record regarding certain matters discussed at previous Board meetings.

The Receiver continues to work diligently and skillfully in the interests of the people of Guam regarding the Guam solid waste management system. The remaining tasks of the Receiver include: the completion of ongoing investigations into changed conditions at the closed Ordot Dump (“Dump”) and submitting or causing the submittal of other Party’s administrative and legal filings, ultimately leading to the transfer of the Dump and its operations and maintenance to GSWA.

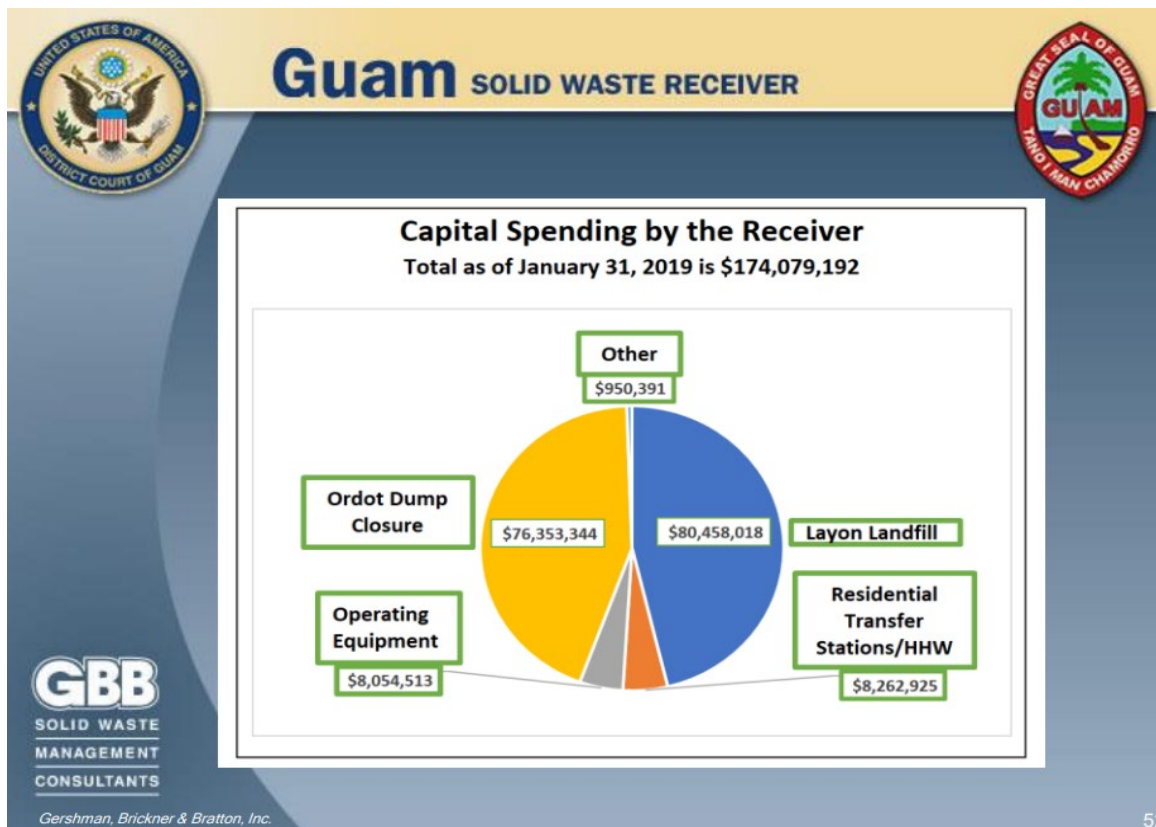
By way of background, the Receiver caused the Dump to be closed for receiving municipal solid waste on August 31, 2011. After the new fully compliant Layon landfill was completed under the direction of Receiver. For over 50 years (and possibly longer), the Dump, which had no controls to prevent the spread of leachate, was operating without regard for its environmental impacts (some of which violated environmental laws). The mitigation of those adverse impacts began and has continued since the Receiver took over its operations in 2008. The Dump stopped receiving solid waste in 2011, at which time the Receiver proceeded with design/permitting and construction of the facilities needed to close the Dump so that it would comply with current laws and regulations. Construction of the closure facilities was completed in March 2016, and the construction management contractor then began operating and maintaining the Dump until a contractor for operations and maintenance was engaged through a public procurement and began the initial seven-year term of the contract on June 1, 2018.

To date, under the Receivership, over \$174 million in capital expenditures have been devoted to various projects to fix, upgrade, and develop new facilities and processes for the Guam solid waste management system. The following slide from the Receiver’s presentation to the Court on March 6, 2019,<sup>1</sup> summarizes those capital expenditures.<sup>2</sup>

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<sup>1</sup> <https://www.guamsolidwastereceiver.org/pdf/1865.pdf> at slide 52.

<sup>2</sup> The Receiver maintains a web page ([www.guamsolidwastereceiver.org](http://www.guamsolidwastereceiver.org)) that explains the Receivership and includes all the reports that the Receiver has presented to the Court.



## B. Responses to Questions Raised

### 1. *Why did the Receiver structure the procurement of the Ordot Dump Closure Facility operations and maintenance contract with one party and not split it up into parts?*

Procuring the operations and maintenance contract scope of services as one contract provides for the opportunity of economies of scale in shared labor and equipment resources for efficiency and greater opportunity for lower cost. However, the RFP was structured to give the Receiver the flexibility to have opted to select different proposers for different portions of the work instead of awarding it to one proposer. It was clear from the proposals received that the bidders' proposal structures relied on getting the entire work in the RFP and not splitting the work with another contractor.

### 2. *How many proposals were submitted to the Receiver in response to the Ordot Dump Closure Facility operations RFP when issued in June 2017?*

The RFP was initially issued in June 2017. After no responses were received to the initial solicitation, the Receiver conducted a competitive negotiation process in September 2017, and invited six (6) entities to participate in the competition for the work. Those entities were:

- Brown and Caldwell
- EA Engineering, Science and Technology, Inc. PBC.
- GGH Corp.
- Guahan Waste
- Galaide Professional Services, Inc.
- LMS (Landscape Management Systems)

Only two (2) of the above entities submitted proposals.

**3. *How have the Ordot Dump Closure Facility operator's (Brown and Caldwell) base contract costs changed from the beginning of its contract and why?***

Initially, it was expected that there would be a decrease in monitoring costs following the quarterly monitoring needed to establish baseline groundwater standards for the site. In 2018, USEPA replaced its technical consultant following a dispute between USEPA and GEPA. The new USEPA technical consultant advised that more monitoring be performed, which increased the expenses of the project. The changes to the sampling included:

- Requiring all quarterly groundwater sampling to be performed for at least an additional eight (8) quarters, *i.e.*, two (2) years;
- Increasing the analyte list that was to be sampled and analyzed at the laboratory;
- Increasing the number of groundwater wells to be sampled by 40% (an additional four (4) wells); and
- Requiring additional quality assurance protocol levels not previously required by the prior consultant.

Costs also increased significantly during and since the COVID-19 pandemic for shipping samples as the result of significant logistics delays, requiring in some cases resampling efforts. Typhoon events and other heavy weather events, or conditions unplanned for in normal operations, also increased costs. The addition of the Soil Vapor Extraction (SVE) program also increased costs. There have also been some decreases in costs resulting from: the early completion (by two (2) years) of the wetland monitoring program required by the Army Corps of Engineers for the successful establishment of wetland vegetation. Also, in 2023, the quarterly groundwater well monitoring was reduced in frequency to semi-annual monitoring. These additional costs and others to the scope of services for the contractor resulted in change orders which amounted to a total of approximately \$1,928,719.42 over the initial five (5) years of the contract.<sup>3</sup>

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<sup>3</sup> The additional work and services required included, but were not limited to: hardening of leachate collection and secondary containment; biological assessment; emergency Services required before, during and after typhoons; heavy weather response support; Pond 1 embankment repair; tree removal; enhanced LCRS monitoring; non-scope water sampling; additional maintenance allowance; facility topographic survey; perimeter access road repair; stormwater swale repair; gate valve replacement in WLIT; environmental monitoring; leachate flow study; leachate surface discharge study; and seep monitoring.

The Receiver has been diligent in tracking and managing expenses and costs resulting in annual savings. Also, the Receiver incorporated a segmented annual inflation escalation methodology in the Brown and Caldwell contract using blended indices that resulted in savings of over \$1 million over the past five (5) years. The table below compares actual adjusted base contract values to what the base contract costs would have been if a 100% CPI adjustment were applied.

Contract Year		Base Contract Value	Annual Inflation Escalation (based on blended Indices)	Contract Costs if Annual CPI Applied	Actual Annual Inflation Adjustment Difference
2018-2019	Year 1 (Adjusted Price)	\$ 800,732		\$ 800,732	
2019-2020	Year 2	\$1,270,536	2.35%	\$1,263,122	2.95%
2020-2021	Year 3	\$1,122,067	1.41%	\$1,280,932	-11.69%
2021-2022	Year 4	\$1,137,452	2.77%	\$1,316,414	1.37%
2022-2023	Year 5	\$1,169,360	7.75%	\$1,418,436	2.81%
2023-2024	Year 6	\$1,053,258	4.78%	\$1,486,237	-9.93%
Total		\$6,553,405		\$7,565,873	

**4. *What are the inflation adjustments in the Ordot Dump Closure Facility operator contract based on and why?***

The inflation adjustments required in the Ordot Dump Closure Facility operator contract apply to the following expenses (collectively referred to as the “LEF Expenses”):

- Labor expense
- Equipment expense; and
- Fuel expense.

The LEF Expenses are adjusted based on the Employment Cost Index (ECI) for Labor (Category: Production, Transportation, and Moving Material)<sup>4</sup>, the Construction Machinery & Equipment category of the Producer Price Index (PPI),<sup>5</sup> and the Gasoline Fuel Series PPI from the U.S. Bureau of Labor Statistics.<sup>6</sup> The contract adjustment methodology was used to reflect the cost drivers more accurately for post closure care operations than would a holistic and generalized cost index for the everyday consumer.

<sup>4</sup> <https://fred.stlouisfed.org/series/CIS2020000500000>

<sup>5</sup> <https://fred.stlouisfed.org/series/WPU112>

<sup>6</sup> <https://fred.stlouisfed.org/series/WPU0571>



**5. *When leachate quantities at the Ordot Dump Closure Facility were increasing after 2018, what was the Receiver doing about it?***

In 2017, even before the leachate quantities began increasing in 2018, the Receiver initiated a root-cause analysis to be developed in response to an isolated overflow event. The analysis included an evaluation to confirm leachate system design capacity. Also in 2017, USEPA noted that leachate volumes appeared to be exceeding the closure design established for the leachate collection and removal system ("LCRS") and requested a re-evaluation of design in a root-cause analysis. From late 2017 through June 2018, the Receiver worked to put in place additional measures to minimize the potential for releases from the LCRS system, such as procuring a Supervisory Control and Data Acquisition system ("SCADA"). Also, the Receiver continued to gather data to report on LCRS Capacity through late 2018, to comply with USEPA's November 2017 request. The first draft of the root cause analysis was completed in November 2017. Thereafter, the report was expanded to include an LCRS Capacity Evaluation.

The first draft of the expanded analysis was completed in November 2018. Following comments received from USEPA and ongoing consultation, a second draft of LCRS Capacity Evaluation report was submitted in February 2019. USEPA, having maintained close consultation with the Receiver, which was providing leachate generation data for discussion, issued comments to the February 2019, Draft of the LCRS Capacity Evaluation. USEPA's comments were addressed in a March 22, 2019, revised version of the LCRS Capacity Evaluation report in which the data gathered and evaluated to date indicated the facility design capacity was adequate to manage the anticipated design flows, which included anticipated clean groundwater entering the system. Additionally, the report identified possible recommendations for reducing the groundwater entering the system. The USEPA directed that further data be collected on the leachate system.

Additional data continued to be collected from mid-2019 through early 2022, on leachate flow and precipitation as part of routine facility operations to further understand trends. In May 2022, USEPA began to engage the Receiver to discuss the apparent increasing trend in leachate volumes and approaches to further the investigation, which continued until October 2022, and led to the November 2022 joint site investigation. During this entire time, from September 2018 through October 2022, there were no documented releases of leachate or leachate-contaminated groundwater from the facility. From November 2022 through present, the Receiver conducted an investigation into the increasing trend of leachate through December 2022 and then the subsequent correlation of a significant decrease in average monthly leachate flows since the GWA water main repairs in late December 2022. Since then, the Receiver continues to gather data and is reporting this data regularly to GSWA, GEPA and US EPA.

**6. *How significant are the leachate releases that have occurred at the Ordot Dump Closure Facility?***

Relative to the leachate that has been collected and treated from the Ordot Facility, the leachate releases were insignificant as to amount. There were four (4) separate leachate release events since the Dump closure. The table below summarizes the leachate releases in comparison to the total volume of leachate



collected and treated during the year of the release. The two largest releases resulting from Typhoon Mawar and Typhoon Manghut represented at most 0.1% and 0.3%, respectively.<sup>7</sup>

Release Event Date	Estimated Release (Gallons)	Total Yearly Flow (Gallons)	Percentage of Release relative to total Monthly flow
Sept. 13, 2017	6,000	8,500,000	<0.1%
Oct. 18, 2017	7,300	8,500,000	<0.1%
Sep. 11, 2018 (Typhoon Manghut)	40,000 – 50,000	18,400,000	0.2 – 0.3%
May 25, 2023 (Typhoon Mawar)	9,000 – 43,000	32,000,000*	0.03 – 0.1%

\* This total is one year from June 2022 – May 2023.

The Sept. 2017 release was caused by a pipe break at the pump station resulting from a contractor's maintenance work and the release was immediately secured. The Oct. 2017 release was the result of a combination of a power outage and the backup generator running out of fuel, with no one being able to reach the facility in time due to a workforce shortage. These issues have been mitigated through additional staff redundancy and the installation of controls to remotely monitor and manage the system. In Sept. 2018, the system was overwhelmed by the high flows from Typhoon Manghut, well beyond the design capacity of the system. There was also a pipe mechanical joint failure that contributed to the issue which has been corrected. In May 2023, the system again came under extreme conditions during Typhoon Mawar, which tripped off the power to the pumps. We are in the process of hardening the system so that this type of event does not occur again. The goal is to have zero releases, and the Receiver's team has reduced the chance for combinations of events to cause releases and will continue to look for added changes to the system to increase its resilience to extreme adverse conditions.

## **7. *Why do leachate flows temporarily increase when rainfalls occur?***

It is normal for groundwater levels to rise in response to precipitation events. The Dump is an unlined landfill with municipal solid waste materials resting on the bedrock surface. As the water table rises in response to precipitation, this groundwater potentially contacts the waste and leachate, picking up contaminants. The leachate collection trenches included in the design of the closure took this into account and were properly sized to collect this leachate. The design expected that leachate volumes would increase as a response to seasonal precipitation changes, and storm events, and would have to be collected and treated as leachate.

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<sup>7</sup> It should be noted that "0.3%" is equal to .003, which is three (3) thousandths of the total yearly flow, a very small portion of the total.

**8. What were the historical Brown and Caldwell costs for operating the Ordot Dump Closure Facility in the post-closure period? What major changes did USEPA/GEPA require to be made? What were the additional costs for complying with those changes?**

The chart below lists the Brown and Caldwell operations costs for the first six (6) contract years. Note that although the costs increased significantly between years one and two, since then the costs remained relatively flat or slightly decreased and they always remained below the year two (2) level, as shown below.

Year 1*	Year 2	Year 3	Year 4	Year 5	Year 6
2018-2019	2019-2020	2020-2021	2021-2022	2022-2023	2023-2024
\$800,732	\$1,270,536	\$1,088,336	\$1,097,742	\$1,169,360	\$1,053,259

\*The Ordot Dump Post-Closure Care operating year is June 1 to May 31.

The major additions that USEPA required are addressed in the response to question No. 3. The cost for complying with the additional requirements and changes, which are primarily related to additional data gathering for the purposes of complying with the Consent Decree as interpreted by USEPA, differ from year to year depending on the myriad of requirements and direction given year to year to the Receiver by the USEPA to gather more information. For example, when USEPA's new consultant came on board in 2018, new monitoring requirements increased the cost of operation by about \$400,000 between Years 1 and 2. While some initial requirements dropped off, it was not until Year 6 operations that groundwater monitoring is now aligned with most landfills for monitoring frequency with semi-annual events.

**9. Why did the Receiver have additional Ordot Dump post-closure cost estimates prepared in 2022 that range from \$56 million to \$87 million?**

During 2021 and 2022, the costs for operating the Ordot Dump Post-Closure Facility had significantly increased and the post-closure account fund balance was declining much faster than the deposits account increased. The increased costs were primarily driven by the increased quantities of leachate collected and pumped to GWA for treatment. The large quantities combined with the high treatment rate were the primary reasons the projections were so much greater than earlier estimates. The projections estimated the post-closure operating cost through 2046, the end of the post-closure 30-year period, using escalation rates based on recent experience. Separate escalation rates were used based on current experience for inflation, power purchases, and leachate treatment. The escalation rate for leachate treatment was over 6%, based on recent GWA rate experience. As required by regulation, if significant changes in costs are experienced, the cost estimate should be updated in advance of the five-year update requirement. In 2021, the official post-closure cost in the Ordot Dump Facility operating permit prepared by the Receiver was approximately \$28 million (2021\$). The updated projections shared with the parties in June 2022 had revised cost estimates ranging from \$56 million to as high as \$87 million. These projections were prepared with the assistance of PFM Financial Advisors LLC (PFM). The primary reasons these estimates were so much greater than the 2021 estimate was:



- i. Increasing leachate quantities year over year since 2018;
- ii. The then high rate charged for leachate treatment;
- iii. The high escalation rate assumption on future rate increases for leachate treatment; and
- iv. The need for additional groundwater monitoring requirements as directed by USEPA.

Since the time the GWA leaks have been fixed (late December 2022), leachate treatment volumes have continued to decline. Additionally, in August 2023, the Guam Public Utilities Commission approved a reduced specific rate for leachate treatment which is significantly lower than the previous rate, effective August 1, 2023. With this new information and reduction in leachate treatment rate, the Receiver estimates that Ordot Facility costs for calendar year 2023 will be approximately \$1.15 million, rather than over \$2 million per year previously experienced, and results in the cost of post-closure (through 2046) to be closer to the Receiver's 2021 estimate of approximately \$28 million.

These projections were also used to calculate alternative monthly payments that would fully fund these higher post-closure cost projections. At that time, the Receiver was presenting alternative approaches for funding and financial assurance to the Parties.

**10. *What is the Receiver's current estimate for 2023 costs to operate the Ordot Dump Closure Facility? 2024?***

For Operational Year 2023-2024, the estimated costs to operate the Ordot Dump Closure Facility is \$1,053,258.95. The Operational year for Ordot is June 1 through May 31.

**11. *For Operational Year 2024-2025, the estimated costs to operate the Ordot Dump Closure Facility have not been developed at this time but active ongoing discussions are proceeding apace to have a budget developed in April of 2024. What is the Receiver's estimate of:***

***i. The inflation payments that GSWA will be required to make for 2023, 2024, and 2025?***

The USEPA has directed the Receiver during the Meet & Confer discussions that at the time the current monthly payments by GSWA to the Ordot Dump Post-Closure fund ends, in August 2026, as ordered by the Court, GSWA would be required to make a balloon payment of the then calculated Ordot Dump Post Closure amount to fully fund the Trust Fund. And, in calculating that amount, the 2019 Post Closure Cost estimate (\$27,740,327) would continue to be increased by the escalation rate required in RCRA regulations, *i.e.*, the Gross National Product Deflator Index, and that an annual inflation payment be made to the Ordot Dump Post-Closure Trust Fund. The Receiver has prepared the following calculations which present the actual values of the inflation payments for 2022 and 2023 which USEPA and GEPA directed be made and the Court has ordered be made.<sup>8</sup> (It is, of course, not possible to accurately predict future inflation rates.) The table also includes PFM's estimate of future inflation payments GSWA would be

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<sup>8</sup> ECF 1992 (Order Post-May 10, 2023 Status Hearing) at pp. 2 & 3.

required to make based on multiplying the estimated GNP Deflator value to the most recent escalated Post Closure Cost. USEPA's method uses the increasing values for the Post Closure Cost as the years of the post-closure period move forward. (Note: The Receiver has asked that the Post Closure Cost be adjusted based on current experience and the number of years left in the post-closure cost period, *i.e.*, a decreasing number of years. USEPA has stated that it is premature to use this approach until more data and time goes by to observe the effect of the GWA leak fixes and the results of the seeps and leachate analysis.)

Year	Post Closure Cost Estimate As Inflated	GNP Deflator	Inflation Payment
2021	\$27,740,327		
2022	\$29,436,343	6.114%	\$1,696,016*
2023	\$31,322,256	6.407%	\$1,885,913*
2024	\$33,044,980	5.500%**	\$1,722,724**
2025	\$34,532,004	4.500%**	\$1,487,024**
2026	\$35,913,284	4.000%**	\$1,381,280**

\* Payments already made by GSWA.

\*\* Estimated by PFM.

***ii. The balloon payment GSWA would be required to make to fully fund the Ordot Dump Closure Facility post closure Trust Fund when the current monthly payments end in August 2026?***

With PFM's assistance, the Receiver has also estimated the balloon payment amount using USEPA's methodology for calculating the inflation payment and estimating interest income and updated increasing post-closure cost estimate, as inflated. The table below presents those calculations and shows that the balloon payment, if made in 2026, following the end of the currently court-ordered monthly payments in August 2026, to be \$19,562,242.

**Ordot Dump Trust Fund Status Projection Model (As of September 28, 2023)**

	2023	2024	2025	2026
Trust Fund Beginning Balance	\$ 4,118,900	\$ 8,608,133	\$ 11,622,253	\$ 14,443,369
<b>Credits</b>				
GSWA Monthly Payments through August 2026	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 1,333,333
GSWA Inflation Payments**	\$ 3,561,734	\$ 1,722,724	\$ 1,487,024	\$ 1,381,280
GWA Credit Payment(s)***		\$ -		
Interest Income (estimated)	\$ 85,229	\$ 338,512	\$ 420,681	\$ 320,609
<b>Total, Credits</b>	<b>\$ 5,646,963</b>	<b>\$ 4,061,236</b>	<b>\$ 3,907,705</b>	<b>\$ 3,035,222</b>
<b>Debits</b>				
Annual Post Closure Costs (Updated Receiver Estimate, inflated*)	\$ 1,157,730	\$ 1,047,117	\$ 1,086,589	\$ 1,127,548
<b>Trust Fund Ending Balance</b>	<b>\$ 8,608,133</b>	<b>\$ 11,622,253</b>	<b>\$ 14,443,369</b>	<b>\$ 16,351,042</b>
Post Closure Cost (2021 value increased by annual GNP Price Deflator)	\$31,322,256	\$ 33,044,980	\$ 34,532,004	\$ 35,913,284
<b>GSWA Balloon Payment</b>	<b>\$ 22,714,122</b>	<b>\$ 21,422,727</b>	<b>\$ 20,088,635</b>	<b>\$ 19,562,242</b>

Key: Real Values Estimates

	2023	2024	2025	2026
*Inflation Applied to Annual Post Closure Costs	3.77%	Based on the average Guam CPI Annual Percent Change (2001-Q1 2023)		
**GNP Price Deflator Assumption (per year)		5.50%	4.50%	4.00%
*** No credit has been included for additional amounts the Receiver has claimed are owed by GWA, currently estimated at \$2,650,222. Such GWA payments would result in lowering the balloon payment.				

**12. Why can't the Receivership end sooner rather than later?**

The requirements for full termination of the Receivership are complex, and certain tasks must be completed and disagreements among the Parties resolved before the process can be completed. The Court order establishing the Receivership stated the following regarding the termination of the Receivership:

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.<sup>9</sup>

Ultimately, it is the Court's decision to order the full termination of the Receivership. The Court has stated that the Receiver is best suited to deal with the tasks associated with the post-closure care plan for the Ordot Dump, which has a remaining significant requirement to be fulfilled in order to achieve compliance with the Consent Decree. Therefore, the Receivership will need to continue in the meantime.

Among the items that must be addressed are:

- i. There are two (2) Technical Memos that the Receiver submitted to the USEPA in 2021 to be part of the post-closure permit application that USEPA has not commented on to date, and needs to do so in order for the application to be complete.
- ii. A trust agreement approved by USEPA and GEPA regarding funds for post-closure care costs needs to be finalized and executed;
- iii. RCRA-compliant post-closure care financial assurance must be provided, which will necessitate certain contracts to be in place before the termination of the Receivership;
- iv. Funds must be transferred from the Ordot Dump Post-Closure Care Reserve Account (managed by the Receiver) to a post-closure cost trust fund for which a bank is trustee and GSWA is the manager;
- v. The Receiver must determine that GSWA is able and prepared to take over responsibility for the monitoring and supervision of the operator performing post-closure work at the Dump, and complete the technical work relating to the Ordot Dump Post-Closure Care Plan, both of which are currently performed by the Receiver;
- vi. Any services required from consultants and contractors to complete the work must be paid from the Ordot Dump Post-Closure Care Reserve Account managed by the Receiver;
- vii. All remaining contracts to which the Receiver is a party, *i.e.* the Independent Engineer Contract and the Ordot Dump Operator Contract must be assigned to an appropriate successor;
- viii. The ongoing investigation of seeps at the site, the increase in leachate generation that occurred in 2018-2022, and the identification of possible remedies if needed must be completed; and
- ix. The issues regarding the requirements of the Consent Decree including that all discharges from the Ordot Dump cease and that such cessation be certified must be resolved.

Efforts to resolve these and other issues continue to the present, and the Parties have frequently been meeting and conferring about them as ordered by the Court. The Parties have worked to accomplish tasks and resolve disagreements, although none of the remaining issues is easy to resolve. The Receiver believes that the Parties have generally worked cooperatively and in good faith to resolve them. The Receiver understands that GovGuam/GSWA's interests may not be fully aligned with USEPA, GEPA, and DOJ

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<sup>9</sup> ECF No. 239 (Order Re Appointment of Receivership) at p. 17.



because of their roles in interpreting and enforcing the Consent Decree. Based on progress to date, Receiver believes that the remaining issue should be resolved without significant delay.

In March 2023, GovGuam requested the Receiver sign a tolling agreement regarding possible claims against the Receiver.<sup>10</sup> The Receiver refused to sign the tolling agreement and denied any liability for the alleged claims. See ECF No. 1982 at 2. Furthermore, the Receiver has immunity from liability for the alleged claims pursuant to the Order appointing the Receiver. *Id.* The request and the threatened lawsuit created an obstacle to the Court-ordered Meet and Confer process which is intended to enable the Parties to resolve all issues and the Receivership to perform its work. Because a request that a party sign a tolling agreement is a clear signal that a lawsuit is intended, GovGuam ignored the obvious intent of Section III(B)(4) of the Court Order Appointing the Receiver, before asking the Receiver to sign it, as that provision states:

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.

ECF No. 239 at pp. 17-18.

There are two major issues posed by GovGuam's request. First, as noted above, the request for a tolling agreement ignores the requirement that GovGuam obtain the Court's permission before filing a claim against the Receiver, especially given that the order so strictly limits any party's right to sue the Receiver.<sup>11</sup>

Second, given that the Court's order requires the Court's permission to file suit against the Receiver, it would have been appropriate and prudent for GovGuam to seek the Court's permission before taking an action that indicated that a suit against Receiver was likely. If for no other reason, asking the Court's position might have provided GovGuam with an indication of whether it could file such a suit before engaging in the additional effort it claims is necessary.

Perhaps most important, GovGuam's threat to sue the Receiver, which it has not withdrawn, undermines the trust and confidence necessary to share information and work together transparently and cooperatively, which is what is needed to enable the Receiver to finish its remaining tasks expeditiously.

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<sup>10</sup> A tolling agreement extends the time after which it is too late to file suit, known as the statute of limitations. As a practical matter, a tolling agreement enables a party that believes it may have a claim against another party but is not yet have sufficient information to do so to delay filing without having a suit foreclosed by the statute of limitations. Thus, a tolling agreement is strong evidence of a party's intent to sue the party being asked to sign the agreement.

<sup>11</sup> It should be noted that GovGuam, in trying to justify the request for a tolling agreement indicated that the Receiver may have engaged in an act that was not "done in compliance with [the] Order" merely because the actual expenses of implementing the closure and post closure operations of the Ordot Dump were higher than the Receiver's initial estimates. If that argument were valid, it would render the Court's grant of immunity essentially meaningless. Even after the Receiver raised this issue, GovGuam refused to ask the Court's permission to file suit and refused to withdraw its request that the Receiver sign the tolling agreement.



**13. What is the Receiver doing now to prepare GSWA for transition of Ordot Dump Closure Facility responsibilities?**

In September 2023, the GSWA Board of Director Chair Andrew Gayle and members of the Receiver team met and agreed that GSWA and the Receiver find ways to work more closely now to help prepare GSWA for the eventual ending of the Receivership and transfer of those duties, as follows:

- i. The Receiver would attend all future GSWA Board meetings and report on the status of the Ordot Dump Post-Closure matters.
- ii. Chris Lund, Receiver Representative in charge of the Ordot Dump Post-Closure Facility, would work with GSWA.
- iii. Irv Slike, GSWA's General Manager, will review the operating costs of the Ordot Dump Post-Closure Facility and explore areas where costs reductions can be implemented under the Brown & Caldwell Operations Contract for this coming year and the next, the last two (2) years of the initial seven (7) year term contract.
- iv. If GSWA would like the Operations Contract re-procured and not extend the Brown & Caldwell contract, the Receiver, working closely with GSWA, will initiate the procurement process to select a contractor for future years.
- v. The Receiver will work with the GSWA Controller, Kathy Kakigi, in setting up the new Bank of Guam account that would allow for the earning of higher levels of interest income from the Ordot Dump Post Closure funds. Ms. Kakigi's involvement will make transitioning this account to GSWA easier as well as provide the Receivership with the benefit of her financial experience in selecting the investments for the fund.

The above efforts were initiated in September 2023.

**14. What was the financial condition of GSWA when the administration and operations (except for the Ordot Dump Closure Facility) were turned over?**

At the GSWA March 23, 2023, Board Meeting, there was discussion regarding the financial condition in which the Receiver left GSWA., when it turned over responsibilities not related to the closure of the Dump.<sup>12</sup>

At the time the Receiver turned over the administration and operations of the Guam solid waste management system to GSWA on April 29, 2019, in connection with the partial termination of the Receivership by the Court, there were significant funds left in various accounts, including reserve accounts, that the Receiver had set up during its administration of the system. As reported in the Receiver's Special Report regarding the transition,<sup>13</sup> the following table lists the bank accounts then

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<sup>12</sup> See link to video at 1:04 time stamp: [GSWA Board Meeting - March 23, 2023, 1:00 PM - GovGuam.tv | Live Stream + Videos Broadcasts for the Government of Guam organizations](https://www.govguam.tv/live-stream/gswa-board-meeting-march-23-2023-1-00-pm).

<sup>13</sup> <https://www.guamsolidwastereceiver.org/pdf/1851.pdf> at p. 7.

controlled by the Receiver, their balances as of January 31, 2019, and the Receiver's recommendation to the Court as to the control of these accounts post-Receivership to the GSWA:

<b>Bank Accounts Currently Controlled by the Receiver</b>			
<b>Account Name</b>	<b>Bank or Other Financial Entity</b>	<b>Balance January 31, 2019</b>	<b>Recommended Post-Receivership Control</b>
GSWA Utility Account Sweep Account	Bank of Guam	\$ 354,108.66	GSWA
GSWA Utility Account <sup>10</sup>	Bank of Guam	\$ -	GSWA
GBB, Receiver for the Guam Solid Waste Authority	Bank of Guam	\$ 323,870.00	GSWA
Construction Subaccount	Bank of Guam	\$ 13,356.56	GSWA
System Operations and Maintenance Account	Bank of Guam	\$ 1,757,690.65	GSWA
System Surplus Account	Bank of Guam	\$ 1,314,568.11	GSWA
Reserve for Unfunded Expense	Bank of Guam	\$ 413,424.52	GSWA
Host Community Premium Surcharge Account	Bank of Guam	\$ 95.38	GSWA
New Cell Dev Account	Bank of Guam	\$ 360,808.94	GSWA
Cell Closure Account	Bank of Guam	\$ 360,808.94	GSWA
Layon Post-Closure Care Account <sup>11</sup>	Bank of Guam	\$ 721,617.11	GSWA
Equipment Replacement Account	Bank of Guam	\$ 1,398,345.71	GSWA
ANZ Bank Tipping Fee Account	ANZ Bank - Guam	\$ 995,325.50	GSWA
Bank Pacific Tipping Fee Account	Bank Pacific	\$ 123,781.06	GSWA
PayPal <sup>12</sup>	PayPal	\$ 31,560.09	GSWA
Ordot Dump Post-Closure Care Reserve	Bank of Guam	\$ 6,129,490.19	Trustee

<sup>10</sup> The GSWA Utility Account is the Tipping Fee Account at the Bank of Guam. The GSWA Utility Sweep Account is an interest-bearing account into which the tipping fees, almost all of which are residential fees, are transferred each day.

<sup>11</sup> The name of this account is Post-Closure Care Account. The word Layon is added to distinguish this account from the Ordot Post-Closure Care Reserve account.

<sup>12</sup> The Receiver is the Administrator of the PayPal Account. This will need to be changed to the person designated by GSWA. The funds deposited to this account are automatically transferred to the System Operations and Maintenance Account on a weekly basis.

The table above confirms there were numerous accounts set up by the Receiver that totaled approximately \$14.2 million. In particular, it should be noted that the following reserve funds were in the listed accounts:

- New Cell Dev(elopment) Account (for Layon Landfill) - \$360,808.94;
- Cell Closure Account (for Layon Landfill) - \$360,808.94;
- Layon Post-Closure Care Account - \$721,617.11;
- Equipment Replacement Account - \$1,398,345.71; and
- Ordot Dump Post-Closure Care Reserve - \$6,129,490.19.

When the Receivership started, none of these accounts and funds existed.<sup>14</sup> Any implication that it was the duty of the Receiver to fund the GSWA with substantially more than necessary to continue operations

<sup>14</sup> <https://www.guamsolidwastereceiver.org/pdf/1851.pdf> at pp. 6 & 7.

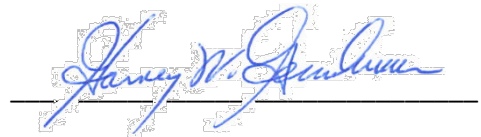
and to establish funds intended to cover future costs is baseless. In fact, the financial structure established by the Receiver more than adequately funded both current operations and reserve funds, although the amount required to be in the Post-Closure Care Reserve was and is the subject of ongoing discussions. After the partial transition from the Receiver to GSWA, it became GSWA's responsibility to continue to evaluate future needs and to develop mechanisms to obtain the necessary funding for future costs.

\* \* \* \* \*

We thank the GSWA Board for its consideration of our views in this matter.

I declare under penalty of perjury under the laws of Guam and the United States that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of October 2023.



Harvey W. Gershman  
Receiver Representative