

1 **JOYCE C.H. TANG**

2 **CIVILLE & TANG, PLLC**

3 330 Hernan Cortez Avenue, Suite 200

4 Hagåtña, Guam 96910

5 Telephone: (671) 472-8868/9

6 *Attorneys for Gershman, Brickner & Bratton, Inc.*

7 *as Federal Receiver for the Guam Solid Waste Authority*

8 **SHANNON TAITANO**

9 **OFFICE OF THE ATTORNEY GENERAL**

10 **LEEVIN T. CAMACHO**

11 Attorney General Of Guam

12 Civil Litigation Division

13 590 South Marine Corps Drive

14 ITC Building, Suite 706

15 Tamuning, Guam 96913

16 Telephone: (671) 475-3324

17 *Attorneys for Government of Guam*

18 **TODD KIM**

19 Assistant Attorney General

20 Environment & Natural Resources Division

21 **VALERIE K. MANN**

22 Environmental Enforcement Section

23 United States Department of Justice

24 150 M Street NE

25 Washington, DC 20002

26 Telephone: (202) 616-8756

27 *Attorneys for United States of America*

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29  
30 **IN THE UNITED STATES DISTRICT COURT**  
31 **FOR THE TERRITORY OF GUAM**

32 UNITED STATES OF AMERICA, )

CIVIL CASE NO. 02-00022

33 )  
34 Plaintiff, )

35 v. )

**THIRD JOINT REPORT REGARDING  
RECEIVER'S REMAINING WORK  
AND THE FINANCING PLAN**

36 GOVERNMENT OF GUAM, )

37 )  
38 Defendant. )

1 This Joint Report is submitted pursuant to the June 29, 2022 Court Order requiring the  
2 parties to address (i) what work remains before the Receivership can be terminated and  
3 (ii) whether the financing plan approved by the Court in May 2016 will be sufficient to fund the  
4 cost estimate for post-closure care of the Ordot Dump, and if insufficient, what alternative  
5 financing plan is acceptable. See ECF 1943, 1947. This Joint Report is filed by the Receiver,  
6 the United States, the Government of Guam, and the Guam Solid Waste Authority (“GSWA”).

7 In June 2021, the U.S. EPA in consultation with the Receiver, prepared the “*Further*  
8 *Revised Technical Path to Ordot PCCP Approval and Issuance of Post-Closure Target*  
9 *Completion Dates Flowchart*” (“PC Completion Dates Flowchart”) which was filed with the  
10 *Second Joint Supplemental Report Regarding Receiver’s Remaining Tasks* on June 18, 2021.  
11 See ECF 1929. This report and the PC Completion Dates Flowchart were presented and  
12 discussed at the June 23, 2021 Status Hearing. The PC Completion Dates Flowchart established  
13 a PC Target Completion Date of January 14, 2022 for the Guam Environmental Protection  
14 Agency (“GEPA”) to approve the Post-Closure Care Plan (“PCCP”) and issue the Solid Waste  
15 Post-Closure Permit (“PC Permit”). *Id.* GEPA concluded the permit application process,  
16 approved the PCCP, and issued the PC Permit on January 14, 2022.

17 As discussed below, the leachate volume from the Ordot Dump has been steadily rising,  
18 and that brings new challenges to its post closure care as well as increased treatment costs to the  
19 Ordot Dump Post Closure Care Cost estimate (“PCC Cost Estimate”). The financing plan  
20 approved by the Court in May 2016 will not be sufficient to fund the now much larger cost  
21 estimate for post-closure care of the Ordot Dump.

22 With the issuance of the PC Permit, the owner-operator is obligated to comply with the  
23 PC Permit. The PC Permit provides GEPA with a means to enforce compliance with its permit  
24 conditions. The Receiver has been meeting with GEPA regularly to discuss the implementation  
25 of the PC Permit and to prepare for the transfer of the operational and reporting responsibilities  
26 of the Ordot Dump operations to the GSWA. Additionally, the Receiver has met with GSWA to  
27 discuss the execution of the Ordot Dump Post-Closure Trust Agreement (“Trust Agreement”) for  
28 Ordot Dump Post Closure funding.

1           **1.       Remaining Work of the Receiver**

2           The work that remains before the Receivership can be terminated includes the Receiver’s  
3 provision of an updated Ordot Dump PCC Cost Estimate, the execution of the Trust Agreement,  
4 the transfer of funds from the current Ordot Dump Post-Closure Account to the new Post-  
5 Closure Trust Fund (“Trust Fund”), and the submission of a Supplemental Environmental Project  
6 (“SEP”) Completion Report.

7           Remaining certifications required by the Consent Decree before the Consent Decree can  
8 be terminated include certifications that: (a) the Ordot Dump no longer receives municipal solid  
9 waste for disposal (ECF 55 at ¶8.h); (b) discharges to waters of the United States from the Ordot  
10 Dump have ceased (ECF 55 at ¶8.i); and (c) that the Supplemental Environmental Project (SEP)  
11 has been completed pursuant to the provisions of the Consent Decree (ECF 55 at ¶21.d).

12           The PCC Cost Estimate, Trust Agreement, required certifications, and SEP Completion  
13 Report are discussed below in this Joint Report

14                   A. Post-Closure Care Trust Agreement and Financing Plan

15           The execution of the Trust Agreement requires the Receiver to provide an updated Ordot  
16 PCC Cost Estimate and the basis for such estimate. The Receiver will stay on until the execution  
17 of the Trust Agreement by GSWA and the Ordot Post-Closure Trustee, and the funds are  
18 transferred from the Ordot Dump Post-Closure Care Reserve Account managed by the Receiver  
19 to the Trust Fund pursuant to a Court order. *See* Joint Report (May 7, 2019), ECF 1881 at 1. *See*  
20 *also* Joint Status Report (Jan. 8, 2020), ECF 1908 at 1-2.

21           The 2019 PCC Cost Estimate was needed by the Government of Guam for the purpose of  
22 a possible bond option to finance Ordot post-closure and Layon Cell 3. It was subsequently used  
23 to set up the financing plan with the concurrence of the parties and provided to the Court. *See*  
24 ECF 1668 at 9-16; 1879 at 3-5, 1880 at 2, and 1898 at 9. The parties understood and agreed that  
25 the PCC Cost Estimate would be updated to “include updated costs for the independent engineer,  
26 the independent trustee, the operation of the SVE system, any revisions to the leachate control  
27 system, and the revised groundwater monitoring program.” ECF 1898 at 9. The understanding  
28 that a future update of the PCC Cost Estimate would be required was also confirmed in the First

1 Joint Report (ECF 1881 at 2) and the Second Joint Report (ECF 1929 at 4). Specifically, the  
2 Second Joint Report states that the “plan developed for financing the post-closure care cost had  
3 some inherent uncertainty at the time of its development in April 2019. With the PCCP nearing  
4 completion, there is more certainty in these costs and the cost estimate will be finalized over the  
5 course of the remaining schedule which may require adjustments to the GovGuam funding plan  
6 as needed to meet the needs of Post-Closure Care funding.” ECF 1929 at 3:18-23. Following  
7 the issuance of the PC Permit on January 14, 2022, in June 2022, the Receiver prepared an  
8 update of its PCCP Cost Estimate so that adjustments to the financing plan may be made.

9 A detailed written cost estimate in current dollars, as required by 22 G.A.R.R. §23702 of  
10 the Rules and Regulations for the GEPA Solid Waste Disposal<sup>1</sup> in the amount of \$27,740,327  
11 was included in the approved January 2022 PCCP (Section 10, Post-Closure Cost Estimate). In  
12 June 2022, the Receiver provided to the United States and the Government of Guam its draft  
13 revised updated PCC Cost Estimate of approximately \$56 million (“Draft June 2022 Estimate”).  
14 The \$56 million estimate provides the projected post closure costs through May 2047 (the  
15 projected end of the Post-Closure period). The Draft June 2022 Estimate used an average of  
16 leachate treatment unit cost, an average of leachate flows, and the most recent actual costs of  
17 post closure care during the post closure care period.<sup>2</sup>

18 One of the major cost items of the PCC Cost Estimate is the management of leachate.  
19 The total volume of leachate and the rate charged by the Guam Waterworks Authority (“GWA”)  
20 for leachate disposal both affect that cost greatly. Based on historical leachate data from the  
21 Receiver, the volume of leachate from the Ordot Dump has been steadily rising since 2015. In  
22 FY2017, the average monthly flowrate reported over a 12-month period from November 2015 to  
23 October 2016 was approximately 615,000 gallons per month. By FY2022, the average monthly  
24 flowrate reported over a 12-month period from May 2021 to April 2022 was 2,656,000 gallons  
25 per month (more than quadrupled volume). The source of the increase of leachate volume needs

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27 <sup>1</sup> Guam has an approved RCRA Subtitle D Program for issuing solid waste permits. Relevant Guam regulations at  
28 22 G.A.R.R. § 23101 *et seq.*

<sup>2</sup> See 22 G.A.R.R. § 23703(1) (the estimate must be based on the most expensive costs of post-closure care).

1 to be thoroughly investigated before mitigation can be appropriately addressed. Additionally,  
2 GSWA has indicated it is in discussion with GWA to adjust the rate charged for leachate  
3 treatment from a commercial rate to a rate for Guam public agencies.

4 In addition to costs, increasing volumes of leachate can also impact the adequacy of  
5 current leachate management facilities. The parties contemplate that an investigation of the  
6 source of the increasing leachate will require, at a minimum, data from both a dry season and a  
7 wet season. The investigation and identification of the source of increasing leachate volumes  
8 also are necessary to develop, evaluate, and implement options to mitigate the steadily increasing  
9 volume of leachate.

10 What investigative efforts and possibly mitigation efforts should be undertaken by the  
11 Receiver, and how much should be undertaken by GSWA, is a technical and financial question.  
12 Relevant considerations include which party is better suited to perform the tasks and what  
13 information is needed to adequately update the cost estimate to inform the financing plan.

14 **B. Work Related to Certifications Required by Consent Decree**

15 The Consent Decree requires certain certifications be made to Plaintiff, including a  
16 certification that discharges to waters of the United States from the Ordot Dump have ceased.  
17 *See* Consent Decree (Feb. 11, 2004) **ECF 55 at ¶¶8.i, 42**. The U.S. EPA, in consultation with the  
18 Receiver, determined that the best method to demonstrate the cessation of leachate point source  
19 discharges is through a submission of a technical memorandum. *See* Joint Supp. Report (June  
20 23, 2020), **ECF 1913 at 2**. The Receiver submitted to U.S. EPA for review a draft Technical  
21 Memorandum (“TM”) on the cessation of leachate point source discharges to the Lonfit River.  
22 This TM is not considered a part of the PCCP<sup>3</sup>; rather, it is a supporting document and a  
23 submittal to the U.S. EPA. *See* Second Joint Supp. Report (June 18, 2021) **ECF 1929 at 3**. This  
24 TM is under review by U.S. EPA. *See* Consent Decree, **ECF 55 at ¶7**.

25 The United States also clarified that U.S. EPA required, in response to two uncontrolled

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27 <sup>3</sup> This TM was considered by the Receiver and GEPA a substantial supporting document and was submitted as  
28 Receiver’s final version with the PC permit application and PCCP to GEPA for review and public comment during  
the PC Permit process executed by GEPA.

1 leachate releases in 2017 and one in 2018, a technical memorandum to demonstrate the adequacy  
2 of the as-built leachate collection and removal system (“LCRS”)<sup>4</sup>. This is because the LCRS is  
3 critical to demonstrating the cessation of discharges. The recent heavy rainfall in October 2021  
4 did not result in any overflows but did require extensive use of Detry pumper trucks to manage  
5 the leachate volumes.<sup>5</sup> In April 2022, U.S. EPA also requested the Receiver provide operational  
6 data on the actual recorded daily volume of leachate and on the use of Detry trucks. On May 27,  
7 2022, U.S. EPA requested seep reconnaissance be performed to help support the cessation of  
8 discharges to waters of the U.S. The leachate daily volume data and Detry truck information  
9 were recently provided to U.S. EPA.

10 Under the Consent Decree, the Receiver is required to submit a SEP Completion Report  
11 to U.S. EPA for approval, with a certification that the SEP has been completed pursuant to the  
12 provisions of the Consent Decree, and evidence of eligible SEP costs are to be signed by an  
13 official with knowledge of the SEP. *See id.* ¶¶21, 22, 42. The SEP requirements include  
14 construction and operation of a household hazardous waste receiving facility, spending no less  
15 than the present value, as of the 2004 Consent Decree entry, of \$1 million. *See id.* ¶18. The new  
16 Harmon Residential Transfer Station began operations in January 2015 including the SEP, a  
17 household hazardous waste receiving facility. The Receiver is preparing the SEP Completion  
18 Report for U.S. EPA approval and anticipates submitting it in September 2022.

19 The Consent Decree calls for certification of cessation of waste acceptance at Ordot  
20 Dump. *See id.* ¶¶ 8.h, 42. The Receiver will be providing this certification shortly.

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23 <sup>4</sup> This TM was considered by the Receiver and GEPA as a substantial supporting document and was submitted as  
24 the Receiver’s final version with the PC permit application and PCCP to GEPA for review and public comment  
during the PC Permit process executed by GEPA.

25 <sup>5</sup> (1) The site recorded 54.85” of rain for the 3-month period starting August 1 and ending October 31, 2021. Mean  
26 rainfall for this period since 1945 as recorded at the airport is 41.15”, so rainfall was 33% above normal for the  
period. No overflows occurred.

27 (2) The site rainfall in October 2021 alone was 24.65”. October 2021 was a record setting month for Guam (as  
recorded at the airport). It was highest since 1953. No overflows occurred.

28 (3) The maximum daily flow for 2021 was 181,627 gpd on Oct 5, 2021. This is the second highest flow recorded  
at the Facility. (The highest was 189,991 gpd on October 9, 2019.) No overflows occurred.

1           **2.       Financing Plan to Fund the Cost Estimate for Post-Closure Care.**

2           In May 2016, the Court approved a financing plan to fund the post-closure care of the  
3           Ordot Dump that included the use of a trust fund managed by an independent trustee. *See* Order  
4           (May 2, 2016), **ECF No. 1668 at 13-16**. That financing plan required monthly installment  
5           deposits which totaled approximately \$2 million annually from GSWA funds collected from all  
6           commercial haulers. *Id.* at 10. The parties agreed to a trust fund mechanism and for that trust  
7           fund to be consistent with the form of the trust agreement in **40 C.F.R. § 264.151(a)(1)**. *See*  
8           Joint Report (May 7, 2019), **ECF 1881 at 2**.

9           GSWA has been depositing the required monthly amount of \$166,667 into the Ordot  
10          Dump Post-Closure Care account administered by the Receiver with the Bank of Guam to be set  
11          aside for Post-Closure Costs in accordance with the April 19, 2019 meeting of the Financing  
12          Plan Collaborative Team (**ECF Doc. 1879**). The Receiver continues to process appropriate  
13          payments for post-closure care as they are submitted, reviewed, and approved for payment. The  
14          available balance in the account on April 1, 2019 was \$6,275,139.34, and on June 30, 2022 was  
15          \$4,237,478.17. The reason the balance has decreased over the 39-month period is because the  
16          monthly post closure cost expenses have consistently been greater than the monthly deposits,  
17          causing a gradual decrease in the end of month statement balances. Since April 2019 (when the  
18          Financing Plan developed by the Collaborative Team was set) through June 30, 2022, the Ordot  
19          Dump Post Closure Care account deposits and interest income have totaled \$6,512,412.48 while  
20          expenditures (including banking fees) have totaled \$8,550,073.65. The post closure cost  
21          expenses exceed the deposits and income by approximately \$2 million during this 39-month  
22          period.

23          The draft Trust Agreement provides for a pay-in amount and period based on the PCC  
24          Cost Estimate as of 2019, which was approximately \$21.69 million. *See* Gov't Guam Am.  
25          Status Rep. (April 25, 2019), **ECF No. 1879 at 4**. The parties agreed in principle to a pay-in  
26          period through August 2026. *See id.*, and draft Schedule C of the Trust Agreement. *See*  
27          *generally* Order re Partial End of Receivership (April 29, 2019) **ECF 1880**. As discussed above,  
28          the \$21.69 million cost estimate was included in response to the Government of Guam's



1 exploration of a possible bond option to finance Ordot post-closure and Layon Cell 3. It was  
2 subsequently used to set up the financing plan with the concurrence of the parties and provided  
3 to the Court. *See* ECF 1668 at 9-16; 1879 at 3-5, 1880 at 2, and 1898 at 9. This estimate was  
4 based on a very preliminary 2015 cost estimate which, notwithstanding a 30% contingency,  
5 could not take into account certain unknown costs, at the time, such as “costs for the independent  
6 engineer, the independent trustee, the operation of the SVE system, any revisions to the leachate  
7 control system, and the revised groundwater monitoring program.” ECF 1898 at 9. Leachate  
8 collection and treatment commenced only in 2015, and consequently, historical operating cost  
9 data was not yet available.

10 The Receiver’s most recent Draft June 2022 Estimate, which is currently under joint  
11 review by the parties, is more than double the previous cost estimate in the approved PCCP. In  
12 order for the monthly payment amount requirement from GSWA to be affordable, the Receiver,  
13 in consultation with GSWA, has proposed a pay-in period to the Trust Fund that increases the  
14 initial agreed on pay-in period ending in August 2026, to one that would continue throughout the  
15 remaining 24-year post-closure period, ending in May 2047. This payment arrangement shifts  
16 the burden of risk to the regulator beneficiary of the Trust Fund, GEPA, and is not compliant  
17 with either GEPA’s regulations or the federal counterpart upon which it is based. As Scott  
18 Walker, a former solid waste regulator at the California Department of Resources Recycling and  
19 Recovery with extensive financial assurance experience, previously stated in his declaration in  
20 2016 in support of the United States’ Response to Government of Guam’s Proposed Timeline  
21 and Financial Plan:

22 under the federal regulations, the pay-in period for trust funds should be completed  
23 during the operating life of the facility, not during the post-closure period. Based on  
24 my experience, *to the extent that unique circumstances require a pay-in period, only*  
25 *the shortest pay-in period of a dedicated funding source should be allowed in order*  
26 *to protect public health and the environment*, and to reduce the risk that the federal  
27 or state government will ultimately bear the cost of post-closure care. The funding  
28 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).



1 The funding of the financing plan approved by the Court in May 2016 will not be  
2 sufficient in light of the anticipated actual costs of the recent draft cost estimate provided by the  
3 Receiver in June 2022. Given the draft status of the latest cost estimate, it is incumbent upon the  
4 parties to continue to work collectively and take time to review and discuss the estimate and  
5 financing plan and reach agreement on an acceptable path forward. To this end, the Receiver has  
6 asked GSWA to develop financial assurance approaches to provide security that the monthly  
7 payments would continue to be made. Separately, the Receiver has retained PFM Financial  
8 Advisors to review and develop security structures for the Ordot Dump Post-Closure funding as  
9 well as review the methodology of the Receiver's updated cost estimate. Moreover, the Guam  
10 Economic Development Authority will have to be engaged as it serves as the central financial  
11 manager and consultant for the Government and those agencies or instrumentalities of the  
12 Government requiring financial guidance and assistance.<sup>6</sup> Also, the parties encourage  
13 investigation into the possibility of grants.

14 **U.S. DEPARTMENT OF JUSTICE**

15 Dated: 07/27/2022

16 By: /s/ Valerie K. Mann

**VALERIE K. MANN**

*Environmental Enforcement Section*

18 **CIVILLE & TANG, PLLC**

19 Dated: 07/27/2022

20 By: /s/ Joyce C.H. Tang

**JOYCE C.H. TANG**

*Attorneys for Gershman, Brickner & Bratton, Inc.  
as Federal Receiver for the Guam Solid Waste Authority*

22 **OFFICE OF THE ATTORNEY GENERAL**  
23 **Chief Deputy Attorney General**

24 Dated: 07/27/2022

25 By: /s/ Shannon Taitano

**SHANNON TAITANO**

*Attorneys for Government of Guam*

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28 <sup>6</sup> See 12 G.C.A. §50103(k).