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28 **IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM**

29 UNITED STATES OF AMERICA,)

CIVIL CASE NO. 02-00022

30)

31 Plaintiff,)

FOURTH JOINT REPORT

32)

33 v.)

34)

35 GOVERNMENT OF GUAM,)

36)

37 Defendant.)

38 _____)

1 This Joint Report is submitted pursuant to the September 7, 2022 Court Order requiring
2 the parties to meet and confer on (1) a plan of action to identify the cause of the increased
3 leachate volume at the Ordot Dump and possible remedies; (2) whether the Consent Decree
4 requirement of a certification by Department of Public Works that discharges to waters of the
5 United States from the Ordot Dump have ceased is separate from or part of post-closure
6 operations and whether the Receiver is required to revise the certification it previously
7 submitted; and (3) the cost estimate for post-closure care and options to reduce the post-closure
8 cost estimate, identification of funding sources for increased costs, and alternative payment plans
9 that may or may not involve financial assurances from the Government of Guam or Guam Solid
10 Waste Authority (GSWA). *See* ECF 1952. The Court ordered the parties to meet and confer
11 regarding these issues following the August 3, 2022 status hearing. There were a total of eleven
12 (11) meet and confer meetings between August 11, 2022 and December 1, 2022. The
13 parties/agencies who participated in the meet and confers included: GSWA, Guam Economic
14 Development Authority (GEDA), Guam Environmental Protection Agency (GEPA), U.S.
15 Environmental Protection Agency (USEPA), the Receiver, counsel for the Receiver, counsel for
16 the Government of Guam, counsel for the Office of the Governor, counsel for GEPA, and U.S.
17 Department of Justice. This Fourth Joint Report provides an update to the Court and is filed by
18 the Receiver, the United States on behalf of USEPA, and the Government of Guam.

19 **1. Plan of Action to Address Increased Leachate Volume**

20 During Ordot Dump's post-closure period, the amount of leachate generated and the use
21 of Detry trucks to transport the excess leachate have increased significantly. The increasing
22 leachate volume will foreseeably impact the leachate collection and removal system (LCRS). If
23 the LCRS does not have sufficient capacity, leachate discharges to waters of the U.S. that occur
24 may violate the Clean Water Act and Consent Decree. A plan of action is required to investigate
25 the source of and address the increasing leachate volume. The plan contemplates the work will
26 be conducted in three (3) phases that may overlap: 1) data collection and analysis to identify the
27 source of the increasing leachate, 2) potential remedies to mitigate the source, and selection of
28 the remedy, and 3) design, construction, and operation of the remedy. The Receiver with input

1 from technical representatives of the parties have jointly developed the initial scope of the first
2 phase, and implementation has commenced. Based on data collected and analyzed, the scope of
3 Phase 1 may need to be updated and supplemented. The parties have currently identified three
4 possible sources of the increasing leachate: precipitation, surface water, and/or groundwater. It
5 was agreed that potential source(s) of increased leachate will be narrowed using an investigative
6 data-supported process of confirmation and/or elimination.

7 From November 14, 2022 to November 17, 2022, as part of the first steps in the Phase 1
8 work, the Receiver's team members conducted field work including a reconnaissance for
9 locating seeps,¹ a visual inspection of the cover and drainage systems, an inspection of
10 stormwater and leachate manholes along the east and the west perimeter roads, and a perimeter
11 reconnaissance along Dero Road. USEPA's technical contractors (tasked to observe the
12 activities for USEPA), and representatives of GEPA and GSWA were present during the field
13 work. Two new seep locations, confirmed during the field work, in addition to two known seep
14 locations, were sampled for off-island laboratory analysis for leachate impacts. Results are
15 expected in late January 2023. In addition, a wet area between the Ordot Dump and Dero Road
16 was also discovered that could be impacting Ordot leachate volumes and the soil vapor
17 extraction system and could be related to a possible leak in the nearby Guam Waterworks
18 Authority (GWA) water supply pipeline. Government of Guam representatives have been in
19 contact with GWA on this matter. In addition, the Receiver will continue its separate evaluation
20 of the entire area between the Ordot Dump and Dero Road as a potential source of excess
21 groundwater. Phase 1 will also include continued manual weekly collection of groundwater
22 level data and the installation of transducers (currently on order) that will automatically and
23 continuously collect groundwater level data during the wet and dry seasons. Within the first
24 quarter of calendar year 2023, data will be analyzed for completeness and a decision will be

25
26 ¹ A seep is a surface expression of groundwater. Upon surfacing, groundwater becomes surface water. If an
27 uncontrolled seep at Ordot is impacted by leachate, it could, consequently, become an unpermitted discharge into
28 waters of the U.S.

1 made as to whether additional data will need to be collected through the 2023 wet season.

2 Phase 2 of the plan of action can begin to be developed as data is gathered in Phase 1.
3 After the source(s) of the increasing leachate has been identified, potential mitigation remedies
4 that are proposed and assessed can be confirmed. At this time, the Parties estimate that if the
5 collection of additional wet season data is not necessary, Phase 1 could be completed on or
6 before August 1, 2023, at which time, a status report can be presented to the Court. If, however,
7 additional wet season data is needed, the completion of Phase 1 would need to await data
8 collection and analysis and could be completed in early-to-mid 2024. The Phase 2 scope
9 includes developing potential remedies for mitigation, cost estimates, and a timeline for
10 implementation of potential mitigation remedies. The Phase 3 scope is anticipated to consist of,
11 as appropriate, the design, construction, and operation of the selected remedies.

12 **2. Cessation Certification**

13 As instructed by the Court in its September 7, 2022 Order regarding “Next Steps Post-
14 Hearing,” the parties have discussed the requirement in Paragraph 8.i. of the Consent Decree
15 requiring a certification that all discharges to waters of the United States have ceased and
16 whether the Receiver is required to revise its previously submitted certification.² After meeting
17 and conferring on this issue, the Receiver believes it submitted a cessation certification, however
18 it was not accepted by the United States, and the Receiver and the United States agree that such
19 certification should be revised to meet the requirements of the Consent Decree and submitted at
20 an appropriate time in the future by the Receiver or GSWA. The parties also agree it would be
21 more appropriate to further discuss the timing and requirements of such certification after a plan
22 of action addressing leachate and seeps is agreed upon and more information is available

23 ² Paragraph 8 h and 8.i of the Consent Decree provide:

24 h. Within 1,350 days (approximately 45 months), [Defendant] shall complete closure of Ordot
25 Dump, begin implementation of the post-closure plan in accordance with Government of Guam
26 requirements, and submit a certification to U.S. EPA that the Ordot Dump no longer receives municipal
solid waste for disposal.

27 i. Within 1,350 days (approximately 45 months), [Defendant] shall cease all discharges to waters
of the United States and submit a certification to U.S. EPA that discharges to waters of the United States
from the Ordot Dump have ceased.

28 Consent Decree at §IV. ¶ 8, ECF No. 55.

1 regarding the sources of the increased leachate volume and how this can be mitigated.³

2 As required by the Court, in its September 7, 2022 Order, the parties also discussed
3 “whether this certification is separate from or part of post-closure operations.” This certification,
4 made for the purpose of demonstrating Clean Water Act compliance and as required by the
5 Consent Decree, will occur during the Resource Conservation and Recovery Act (RCRA) post-
6 closure care operations period but is not required by the post-closure permit or RCRA.

7 **3. Update Regarding the Post-Closure Care Cost Estimate and Possible**
8 **Funding Sources**

9 A. Receiver’s Cost Estimate for Ordot Dump Post-Closure Care

10 An update to the Receiver’s draft June 8, 2022 cost estimate for the Ordot Dump Post-
11 Closure Care through FY2046 (\$56 million) has been reviewed by PFM Financial Advisors LLC
12 (“PFM”), and GSWA. The PFM review focused on the inflation/escalation rates and not on any
13 individual amounts. As a result of PFM’s review of the cost estimate, the Receiver made the
14 following modifications:

- 15 • General inflation rates adjusted from 3% per year to 3.5% per year over the entire
16 post-closure term beginning in FY2024 through FY2046;⁴ and
- 17 • Guam Waterworks Authority (GWA) rate adjustments increased from 1% per
18 year to 6.5% per year beginning in FY2024 through FY2046.

19 The result of the above modifications resulted in the Receiver’s revised cost estimate of
20 approximately \$87 million. The parties recognize it is a revision to an underlying draft estimate
21 that has not been approved or accepted by the parties and agree that the estimate will need to be
22 reworked, once informed by the results of the investigation and mitigation of the source of the
23 increasing leachate, referenced above.

24
25
26 ³ If a dispute arises, the Consent Decree provides a dispute resolution mechanism at Section X to resolve disputes
27 arising under or with respect to the Consent Decree. ECF 55 at 20.

28 ⁴ Guam Power Authority (GPA) rate adjustments increasing at 3% per year beginning in 2024 through 2046 were
not changed.

1 B. Effect of GWA Rate on Cost Estimate

2 As noted in the August 2022 Status Hearing, GSWA was to pursue lowering the rate
3 GWA charges for leachate treatment. GSWA engaged a consultant to review the leachate
4 quality and compare it to other effluents GWA treats from commercial sources and the rates
5 charged. As a result of that review, GSWA's consultant concluded that the quality of the
6 leachate was most similar to effluents generated by GWA Commercial 1 rate (\$8.11 per 1,000
7 gallons) customers as compared to GWA Commercial 3 rate (\$27.42 per 1,000 gallons) currently
8 charged for the Ordot Dump leachate disposal. If this change in rate can be accomplished and
9 assuming it starts in FY2024 through FY2046, the post-closure cost estimate would be lowered
10 to \$55 million. If GWA were to lower its rate, that would result in an immediate cost saving to
11 GSWA.

12 C. Revision Needed to GSWA Payment to Ordot Dump Post-Closure
13 Account

14 Since there was no fund established for Ordot Dump post-closure costs when it was
15 operating as a non-compliant landfill, the Receiver started one during the time it was responsible
16 for GSWA administration and operations. At the time of the Ordot Dump closure completion in
17 March 2016, the Receiver had built up a fund amounting to approximately \$6.4 million, making
18 deposits at the rate of \$2 million per year and paying for expenses to operate the Ordot Dump
19 post-closure from this dedicated fund. In April 2019, when the Receivership for administering
20 GSWA ended, leaving the Receiver with responsibility only for the Ordot Dump post-closure,
21 the Court ordered that GSWA continue making the \$2 million per year deposits (on a monthly
22 basis) through August 2026 in efforts to continue to build up the Trust Fund within an agreed
23 upon period for the estimated \$21.7 million then current estimate for post-closure costs.
24 However, that plan did not anticipate the increased post-closure costs associated with the steadily
25 increasing volume of leachate and a steeply increasing per unit cost of disposal. Although
26 monthly deposits by the GSWA continued regularly, expenses have outpaced deposits. As of
27 November 30, 2022, the fund stands at approximately \$4.3 million, a \$2 million reduction in the
28 fund balance since the April 2019 financing plan started.

1 At this time, expenses are estimated to continue to outpace the GSWA deposits and there
2 are yet to be defined fixes for reducing leachate amounts or costs. Therefore, the Receiver
3 proposes that the GSWA monthly deposit increase to \$3.6 million annually (\$300,000 per
4 month) starting January 1, 2023 and continuing until the leachate and any seep fixes are more
5 defined and the cost estimate for the remaining years of operating the Ordot Dump Post-Closure
6 care is updated and included in a Trust Agreement amongst the Receiver/GSWA, GEPA and the
7 Bank of Guam (the selected bank for the new Trust Agreement). When a lower GWA rate is
8 implemented, an adjustment of the monthly payment amount being currently made by GSWA
9 could be adjusted by the Court.

10 The Government of Guam/GSWA would prefer that the Court order the parties to meet
11 and confer beginning in January 2023 to address any near-term increase in the GSWA monthly
12 deposit. This seems reasonable to the United States.

13 **4. Funding Mechanisms**

14 PFM provided the parties with a presentation dated November 18, 2022 that identified
15 potential funding mechanisms to provide assurance for the monthly payment by GSWA into an
16 escrow account to fund the costs of managing the Ordot Dump Facility's post-closure care
17 ("Post-Closure Payment"). PFM identified four (4) funding mechanisms:

18 Option 1. Prioritization of the Post-Closure Payment in current GSWA flow of funds
19 (Pay-Go Method)

20 As background, the Government of Guam has two (2) series of bonds where some or all
21 of the proceeds were to the benefit of GSWA:

22 a. Limited Obligation (Section 30) Bonds, Series 2016A (the "2016A Ltd Tax
23 Bonds") are secured and paid for by Section 30 Revenues.

24 b. General Obligation Bonds Series 2019 (the "2019 GO Bonds") in which a
25 Continuing Covenant Agreement exists between GSWA and Government of Guam for GSWA to
26 pay the debt service on the 2019 GO Bonds.

27 This approach would require that the Post-Closure Payment always be made after GSWA
28 pays its monthly operating expenses and prior to paying the debt service for the 2019 GO Bonds.

1 Such an option would require a legal review of the 2019 GO Bonds' governing documents to
2 ensure this does not violate bondholder rights.

3 Option 2. “Interested Party” Guarantee (Pay-Go Method)

4 This funding mechanism would rely on a guarantee from an interested party, such as the
5 Government of Guam. Types of guarantees may include any specific revenue stream(s) or
6 pledge of revenues that are intercepted in the case of a deficiency on the Post-Closure Payment.
7 Such guarantees could include a General Obligation pledge, non-ad valorem pledge,
8 appropriations pledge, Section 30 Revenues, or revenues owed to GSWA by Government of
9 Guam or other major ratepayer.

10 Section 30 Revenues are currently used to secure GSWA's 2016A Ltd. Tax Bonds so any
11 Post-Closure Payment would be subordinate to existing bond trust indenture. This could involve
12 a trustee to fund Post-Closure Payment from Section 30 Revenues, in the case of a deficiency,
13 after the payment of debt service, but before remitting any excess to Government of Guam.
14 However, it is PFM's understanding that the remaining Section 30 Revenues (after debt service)
15 have been historically appropriated for other uses by the Government of Guam.

16 Similarly, other revenue streams could “secure” Post-Closure Payment and be funneled
17 through a trustee who would hold those revenues until the Post-Closure Payment was satisfied,
18 then release to GSWA.

19 Option 3. Third-Party Guarantee (Pay-Go Method)

20 Another funding mechanism method is a third-party guarantor to secure the Post-Closure
21 Payment, such as a third-party insurer, or letter of credit provider. The guarantor would be
22 drawn upon in the case of a deficiency of the Post-Closure Payment.

23 Option 4. Pre-Fund Closure Expenses Through Leveraging (Pre-Funded Method)

24 Another funding mechanism is the issuance of long-term bonds to pre-fund the estimated
25 total post-closure care costs.

26 **5. Summary of Funding Mechanisms**

27 Options 1 and 2 are considered internal security features and may be easier to execute
28 and at a lower cost. Options 3 and 4 will include additional costs payable to either a third-party

1 guarantor (Option 3) or interest to bondholders (Option 4). If a deficiency were to occur, it
2 would require the Government of Guam to pay the third-party guarantor or the bondholders.
3 Consideration should be given to establish guidelines by which GSWA will make the budgetary
4 adjustments necessary to ensure payments to the third-party guarantor or the bondholders,
5 respectively, to ensure its ability to make future Post-Closure Payments. Under Options 3 and 4,
6 third parties/investors may require rate covenant provisions that that would mandate rate
7 increases and the term of a guarantee would not cover the entire post-closure period as well as be
8 at a higher cost.

9 The Receiver plans to continue to focus on Options 1 and 2⁵, and gather more complete
10 information to evaluate these funding mechanisms, including from a legal perspective. Other
11 interested parties will need to be included in discussions (e.g., GEDA) as well.

12 Submitted this 12th day of December 2022.

13 **UNITED STATES DEPARTMENT**
14 **OF JUSTICE**

15 Dated: 12/12/2022

15 By: Valerie K. Mann
16 **VALERIE K. MANN**
17 *Environmental Enforcement Section*

18 **CIVILLE & TANG, PLLC**

19 Dated: 12/12/2022

19 By: Joyce C.H. Tang
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23 *Authority*

24 **OFFICE OF THE ATTORNEY GENERAL**
25 **Chief Deputy Attorney General**

26 Dated: 12/12/2022

26 By: Shannon Taitano
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28 ⁵ The Government of Guam and the United States will continue to explore other funding options.